

No. 49526-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

In re Personal Restraint Petition of
MARTIN STANLEY IVIE,
Petitioner

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

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A. AUTHORITY FOR PETITIONER'S RESTRAINT

The Petitioner, Martin Ivie, is restrained pursuant to a Judgment and Sentence in Mason County Superior Court No. 12-1-00064-6. Appendix A.

B. STATE'S REQUEST FOR TRANSFER OF RECORD

Some, or all, of the evidence supporting the State's factual allegations is contained in the files of the appellate court from the direct appeal of this case in case number 44258-2-II. Other evidence, particularly exhibits that were not transmitted to the Court of Appeals for direct review, are contained in the files of the trial court, in Mason County Superior Court case number 12-1-00064-6. Therefore, pursuant to RAP 16.7(a)(3), the State requests that the following evidence be transmitted to this court for consideration in the instant personal restraint petition:

Verbatim Report of Proceedings, volumes 1-5, contained in file number 44258-2-II; and,

Trial Exhibits 20, 30, 31, 34, 35, 39, 47, 48, 49, 50, 49, 50, and 51, contained in the trial court file of Mason County Case No. 12-1-00064-6.

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**C. RESPONSES TO IVIE'S CLAIMED GROUNDS
FOR RELIEF**

A) Ivie has failed to meet his burden of proof for his claim of ineffective assistance of counsel.

B) Ivie has failed to meet of his burden of proof for his claim of prosecutorial misconduct.

C) Ivie has failed to brief his claim that he is entitled to a new trial based on newly discovered evidence, but in any event his claim should fail because he has not met the five-part test for granting a new trial based on newly discovered evidence.

D. STATEMENT OF FACTS

Throughout his petition, Ivie makes many allegations of fact that are unsupported by any citation to supporting evidence. Some of Ivie's factual allegations are essentially argument or editorialized assertions, rather than fact, and these arguments and editorialized factual assertions are scattered throughout Ivie's petition. The scattered, repetitive, and sometimes inconsistent nature of these allegations makes it difficult to organize a response.

The instant court summarized the background facts of this case in its unpublished opinion from the direct appeal, in case number 44258-2-II.

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The State respectfully refers to and incorporates this court's unpublished opinion for the factual background of this case. To organize a response to Ivie's instant personal restraint petition, the State will attempt to follow the outline provided by Ivie and will supply additional facts, or responses to Ivie's assertions of fact or argument, where necessary or as needed to develop the State's responsive arguments, below.

At the outset it is important to address one fact in particular. Throughout Ivie's petition, he relies upon a factual assertion that, at trial, SGT Adams asserted that he shot Ivie as Ivie was driving straight toward him. But SGT Adams's actual testimony was that he did not fire the first volley of four shots until after the front of Ivie's truck, which Ivie had been driving straight toward him, had missed him, and that the first volley of four shots were directed to Ivie's truck from the side of the truck as it passed SGT Adams. RP 320. SGT Adams testified as follows:

I was surprised that I was able to move across the bank fast enough to not get hit by the front of the truck. I didn't bother firing any rounds at that point because I would have hit nothing but grille. I wouldn't have slowed the truck down one little bit.

When I moved out of the way of the – the bumper – the front bumper, I knew I wasn't going to get hit directly, but there – there was – I mean with the acceleration of the vehicle coming right at me, I had a split second – split second to decide if that truck was going to come off that bank

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and squish me. And I really thought that that was still a very, very good possibility.

I fired those rounds to stop the driver from accelerating in the truck and to keep that truck from going sideways off the bank.

Id. at 320-21. Other evidence offered by the State was consistent with this testimony. *See, e.g.*, Trial Exhibits 49, 50, and 51. (Appendix B).

SGT Adams testified that after he fired the initial volley of four shots (which, as described by the above testimony, was from the side of Ivie's truck), he then fired a second volley of four additional shots into the back of Ivie's truck as Ivie drove away. RP 319.

Ivie misreports or understates other facts as well. At page 4 of his brief, he asserts that "[Deputy] Reed claimed that Ivie drove right at him and that he had to jump out of the road to avoid being hit" and that "[t]his formed the basis for count 3, Assault First Degree." But this fact was much more than a mere claim, as the jury's verdict of guilty and as Deputy Reed's testimony show. Deputy Reed testified that while he was standing in the middle of the road with a lit flashlight, Ivie drove his pickup truck toward him and accelerated with his high beam headlights on, and that Deputy Reed then leapt to the right in the dark of night to avoid being hit by Ivie's truck. RP 89-91.

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Ivie then characterizes his act of ramming SGT Adams's patrol car as a de minimis coincidence, explaining that "the two vehicles made contact[.]" Br. of Appellant at 5. SGT Adams's testimony, however, described Ivie's backup lights coming on when Ivie put his truck into reverse and smashed it into SGT Adams's patrol car. RP 303-04. Ivie then put his pickup truck into gear and took off again. RP 304.

At page 7 of his brief, Ivie asserts that "[t]he State... introduced computer-generated diagrams depicting the bullet trajectory to demonstrate that Adams had fired from in front of Ivie's truck." To support this assertion, Ivie cites only to "Trial Exhibits 47-51; App. 123-128 (superior court List of Exhibits)." Br. of Petitioner at 7. But the material cited by Ivie contributes no information from which it could be presumed that the State intended "to demonstrate that Adams had fired from in front of Ivie's truck." *Id.* Still more, the cited exhibits clearly show the shots originating from the side of the truck, not the front of it, and this is most clearly demonstrated by Trial Exhibit 51, which is a two-dimensional, top view sketch.

At the conclusion of his section entitled "Statement of the Case" and its three-part summary of alleged facts and argument, Ivie then

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enumerates ten subheadings with more allegations of fact and argument. To answer Ivie's brief, the State will attempt to follow Ivie's outline and will answer each of Ivie's ten subheadings in order. Where relevant to a particular subheading, below, the State will also address factual allegations from Ivie's "Statement of the Case" where those facts have not already been addressed.

1) STATE'S RESPONSE TO IVIE'S CLAIM THAT: Trial counsel failed to investigate expert witnesses who would have corroborated Mr. Ivie's testimony and refuted the State's allegations and trial counsel's failure prejudiced Mr. Ivie's defense.

Ivie has not, and cannot, show any prejudice in relation to this allegation. Here, Ivie contends that testimony from his after-acquired defense expert "would have corroborated [his] testimony that he never drove at Deputy Adams, but attempted to drive his truck around the back end of Adams' car down the road." Br. of Petitioner at 11. Ivie bases this contention on his further contention that his after-acquired expert's testimony would have shown that "Deputy Adams was not in the direct line of travel by Mr. Ivie's truck at the time that any of the eight shots were fired." *Id.* at 12, quoting Ivie's Appendix at 4. But Ivie's statement does not identify anything new or different, because SGT Adams's

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testimony was that he did not fire the first volley of four shots until after Ivie had passed him (and was, thus, out of the direct line of travel) and that he fired the additional volley of four shots as Ivie drove away. RP 319-21. Neither the State's exhibits nor the materials provided by Ivie's newly acquired expert, Mr. Sweeny, contradict this testimony.

Ivie questions the qualifications of the State's and his own witnesses and criticizes his trial counsel for not objecting to the State's use of the Total Station. Br. of Petitioner at 7-10. But Mr. Sweeny's declaration states only that Mr. Sweeny is "familiar with the Total Station" and not that he has any expertise in regards to it. Br. of Petitioner, App. at 2 (para. 2).

Ivie argues that "[e]vidence of Mr. Sweeney's conclusions, had he or a similarly qualified expert been consulted by Mr. Ivie's trial counsel, would have provided exculpatory evidence in several respects." Br. of Petitioner at 14. But Ivie has not provided any evidence to show that any qualified expert anywhere would agree with Mr. Sweeney's "conclusions" in this case; nor has he identified any conclusions that can fairly be characterized as exculpatory. Mr. Sweeney bases his conclusions on his belief of what he can conclude from the location of the spent shell casings

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after the shooting. Br. of Petitioner, App. at 1-10 (“Post Conviction Laboratory Report”). Mr. Sweeney contends that he can pinpoint the location of the shooter based on these spent shell casings. *Id.* at App. p. 15.

To reach this conclusion, Mr. Sweeney relies on the following source: “Information provided by a witness present during test firing of Sgt. Adams’ firearm indicates that the rifle ejected fired cartridge cases to the right to a distance of approximately twelve feet from the firearm.” *Id.* But Mr. Sweeney doesn’t account for the fact that there is no consideration of the conditions under which this test firing occurred. When SGT Adams fired the first four shots, he was running laterally along the incline of a small bank, while holding the rifle over his head. RP 315-18. Mr. Sweeney does not account for variances that would occur based on whether or how much the rifle was twisted, or canted, in the shooter’s grip, the inclined or declined elevation from the front to rear (whether the rifle barrel was held higher or lower than the stock), how high the rifle was held as compared to the test firing, and the strength and condition of the wind on each occasion. *See, e.g.*, RP 257-58.

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As his final point, Mr. Sweeney then states: "It is therefore reasonable to conclude that the shooter was not in the line of travel by Mr. Ivie's pickup at the time any of the apparent eight shots were fired." *Id.* But only five of the shots were accounted for. RP 228. Still more, Mr. Sweeney's conclusion doesn't state anything new, as it was already clear that the first four shots came from the side of the truck after the bumper had cleared SGT Adams, and the final four shots came from the rear as the truck sped away. RP 319-21. And Ivie's own testimony corroborates SGT Adams's testimony, where Ivie testified that when the shooting occurred "there wasn't anybody – didn't look like in the cop car, or anywhere around the cop car." RP 592. Instead, in contradiction of Mr. Sweeney's pinpoint conclusion about the location of the shooter, Ivie testified that SGT Adams was to the side of Ivie's truck when he began shooting. RP 594, 648.

2) STATE'S RESPONSE TO IVIE'S CLAIM THAT: Trial counsel failed to introduce veterinary records or testimony from the veterinarians who determined that his dog suffered gunshot wounds in order to corroborate Ivie's testimony and this failure prejudiced his defense.

Ivie contends that he had his dog with him when the events in this case occurred. Br. of Petitioner at 15-20. The only apparent point in

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asserting the dog's existence is to prove Ivie's assertion that his motive for resisting arrest, leading the police on a dangerous chase, and assaulting officers was that he wanted to take his dog home before police arrested him. *Id.* The presence of a dog is neither an element of, nor a defense of, any of Ivie's crimes in this case.

Deputy Reed testified that he surveilled Ivie at the sight of the woodcutting for 25 minutes before Ivie saw him and fled, and during that time Deputy Reed did not see or hear a dog with Ivie. RP 119, 125. Other than to simply fulfill his obligation to tell the truth, Deputy Reed had no reason to deny that he had observed any sign that a dog was there, because the existence or non-existence of a dog at the scene has no relevance to any element of any of the charged offenses.

Deputy Reed conceded that – rather than to confirm whether there was a dog – his focus was on scene safety and Ivie's behavior. RP 126. SGT Adams testified that he heard something rustling in the bushes after Ivie crashed his truck in the woods. RP 322, 351. The trial court permitted Ivie to provide witness testimony stating that his dog had been with him that day and that the dog had suffered a gunshot wound. RP 407-08, 484-86. Ivie himself also testified that he had his dog with him.

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RP 580-83, 585, 596, 603, 605, 646, 651. There was absolutely no effort whatsoever to impeach Ivie about his dog. Maybe there was a dog. But the presence of a dog has nothing to do with any fact of consequence in the case, and why Ivie chose to focus on the dog rather than the elements of the crimes at issue is unclear.

Apparently, the only point of the dog was to impeach Deputy Reed on his testimony that he did not see or hear a dog. Whether Ivie had a dog with him, however, was a collateral matter. *State v. Fankhouser*, 133 Wn. App. 689, 693, 138 P.3d 140 (2006) (“An issue is collateral if it is not admissible independently of the impeachment purpose”). “A witness cannot be impeached on an issue collateral to the issues being tried.” *Id.* Additionally, extrinsic evidence of collateral matters may not be offered to impeach a witness. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); *State v. Carlson*, 61 Wn. App. 865, 876, 812 P.2d 536 (1991).

3) STATE’S RESPONSE TO IVIE’S CLAIM THAT: Trial counsel’s failure to obtain testimony from Ivie’s medical doctor, who would have provided evidence about Ivie’s inability to voluntarily waive his constitutional rights following anesthesia, surgery, and ingestion of opioid medication prejudiced his ability to challenge the admissibility of his hospital statement and prejudiced him during his jury trial.

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This issue is an issue that was raised and decided on direct review in case number 44258-2-II. A petitioner may not renew an issue “raised and rejected on direct appeal unless the interests of justice require relitigation of the issue.” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004) at 671. Reexamination of an issue serves the interests of justice if there was “an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application.” *Id.* at 671 n. 15. A petitioner may not avoid this requirement “merely by supporting a previous ground for relief with different factual allegations or with different legal arguments.” *Id.* “For example, ‘[a] defendant may not recast the same issue as an ineffective assistance claim; simply recasting an argument in that manner does not create a new ground for relief or constitute good cause for reconsidering the previous rejected claim.’” *In re Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004), quoting *In re Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001). Here, Ivie has not shown any basis for renewing or revisiting this issue on collateral review.

Still more, Ivie claims that his trial attorney never interviewed his doctor, but he provides no citation to evidence to support this assertion.

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Br. of Petitioner at 22. Ivie then states that his “primary surgeon at TGH was Thomas Ferrer, M.D.” *Id.* Ivie provides a declaration from Dr. Ferrer. *Id.* at 22-23, citing Ivie’s Appendix at 51-70. But Dr. Ferrer’s declaration does not say that defense counsel never interviewed him. *Id.* Ivie states that Dr. Ferrer said that Ivie had “gunshot wounds in his chest” and “mid-abdomen....” *Id.* at 23. If this choice of words were accurate, it would tend to suggest that Ivie received one or two gunshots from the front. Counsel may have decided that Dr. Ferrer’s testimony was potentially more harmful than helpful to Ivie’s defense.

Ivie argues that Dr. Ferrer would have testified that “it is frequently difficult to obtain information from a patient who is experiencing extreme pain and receiving morphine.” *Id.* at 24. But, even if it were assumed that Ivie was experiencing extreme pain and receiving morphine, Dr. Ferrer nevertheless says nothing about whether it would be, or was, difficult to receive information from Ivie. And, still more, even assuming that it was difficult to receive information from Ivie, difficulty in receiving information does not mean that any information that Ivie provided was unreliable.

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In summary, Ivie should not be permitted to renew this claim on collateral review by recasting it as an ineffective assistance of counsel claim, and in any event the claim should fail because Ivie has not shown that his counsel's performance was deficient; nor has he shown that there is a reasonable probability that the outcome of his trial would have been different had his trial counsel called Dr. Ferrer to testify. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984); *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

4) STATE'S RESPONSE TO IVIE'S CLAIM THAT: Trial counsel's failure to present testimony from Ivie's doctor, who would have provided evidence about the location of and mechanism of Ivie's bullet wounds, prejudiced his ability during his jury trial to challenge Deputy Adams's version of how the shooting took place.

Ivie asserts that "[SGT] Adams testified that Mr. Ivie was driving his truck straight at him when he, fearing for his life, fired his assault rifle at Ivie." Br. of Petitioner at 24. But Ivie provides no citation to the record or other evidence to support his assertion, and Ivie's understanding of SGT Adams's testimony is clearly erroneous, as demonstrated by SGT Adams's actual testimony. *See, e.g.*, RP 319-21.

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Ivie argues that, had his trial counsel presented his doctor as a witness, the jury might have concluded that “Deputy Adams was not, as he testified, standing directly in front of the truck as Mr. Ivie began accelerating forward, but that Adams was standing on the driver’s side of the truck and *fired* after the truck had passed him.” Br. of Petitioner at 25 (emphasis supplied by Ivie). However, as pointed out *supra* by the State, SGT Adams’s actual testimony was that he did not fire the first volley of four shots until he was standing beside the truck, after the front bumper of Ivie’s truck had cleared him, and that he then fired four additional shots into the rear of the truck while it sped away. RP 315-21.

Ivie’s own testimony corroborates SGT Adams’s testimony. RP 593-94, 647-48. Ivie and SGT Adams disagree about whether Ivie accelerated toward SGT Adams, but they appear to agree about where SGT Adams was located when he fired the shots. *Id.* Dr. Ferrer’s testimony would have corroborated the issue that was not in dispute but would have done nothing to resolve the disputed issue – i.e., whether Ivie accelerated toward SGT Adams – and Ivie, therefore, cannot show that his counsel performed deficiently by not calling Dr. Ferrer as a witness; nor can Ivie show that that there is a reasonable probability that the outcome

of his trial would have been different had his trial counsel called Dr. Ferrer to testify. Therefore, Ivie's claim of ineffective assistance of counsel must fail. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984); *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

5) STATE'S RESPONSE TO IVIE'S CLAIM THAT: Trial counsel's failure to obtain testimony from Ivie's doctor, who would have provided evidence about his physical and mental condition at the time he was interrogated at the hospital by the police, prejudiced his ability to explain and to challenge the impeachment of his direct testimony with his hospital statement.

Here, Ivie has provided no corroboration or citation to evidence to support his suggestion that the statements that he made in the hospital were unreliable. There is nothing in Dr. Ferrer's declaration, or elsewhere, to suggest that pain or medication or anything else that was affecting Ivie would have caused him to make untruthful or unreliable statements when detectives interviewed him at the hospital. At most, it would have been "difficult to obtain information from" him. Ivie's Appendix at 53.

Ivie argues that:

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Totally apart from any legal issue about the voluntariness of his statements, medical testimony would have helped the jury understand why Mr. Ivie's memory of some events was different at trial from when he had been extensively medically evaluated, had his multiple wounds treated, was in pain and was under the influence of narcotic pain medications in the hospital.

Br. of Petitioner at 26. Ivie further asserts that medical testimony would have shown that Ivie "was a person who understandably had memory lapses" and so on. *Id.* However, Ivie cites to no evidence to corroborate this claim or that he had memory lapses and that his memory at trial was different from his memory while in the hospital. Instead, Ivie provides a declaration from Dr. Ferrer, whose only statement on this subject is that "frequently" when dealing with "a patient who is experiencing severe pain and receiving narcotics" it is "difficult to obtain information[.]" Br. of Petitioner, App. at p. 53.

Ivie's claim on this point is closely related to his similar claim at item 3, above. Therefore, the State respectfully refers the Court to the State's argument in response at item 3, above. In summary, however, the State contends (again) that because Ivie pursued issues related to his hospital statement on direct review, he should not be permitted to renew this claim on collateral review by recasting it with a new theory. *In re*

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Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004). And, Ivie's claim of ineffective assistance of counsel should also fail because, given the nature of Dr. Ferrer's declaration, Ivie has not shown that his counsel was deficient for failing to call Dr. Ferrer as a witness; nor has Ivie shown that the outcome of his trial would have been different had Dr. Ferrer been called as witness. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984); *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

6) STATE'S RESPONSE TO IVIE'S CLAIM THAT: Ivie's trial counsel's failure to introduce photographs of Ivie's gunshot injuries prejudiced his ability to challenge Deputy Adams' version of how the shooting took place.

As stated elsewhere in the State's response, Ivie apparently misunderstands SGT Adams's testimony. SGT Adams testified that he did not shoot the first volley of gunshots until after the front of Ivie's truck had passed him. RP 319-21. At that time, he was firing sideways into the truck. *Id.* He fired the next volley of four shots as Ivie was driving away. *Id.* The photographs to which Ivie refers not only do not contradict SGT Adams's testimony, they corroborate it.

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Therefore, Ivie has not shown, and cannot show, that his trial counsel was deficient for not presenting these photographs to the jury. Nor can Ivie show that the outcome of the trial would have been different if his attorney had attempted to show these photographs to the jury. In summary, because Ivie must meet both parts of the two part *Strickland* test for ineffective assistance of counsel claims but has failed to meet either part, his claim must fail. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

7) STATE'S RESPONSE TO IVIE'S CLAIM THAT: Trial counsel's failure to prepare Ivie to testify prejudiced his defense.

Ivie contends that his trial attorney did not give him a chance to review his prior statement before he testified. Br. of Petitioner at 28-29. But Ivie's only citation to evidence to support this assertion is his own self-serving declaration. And it seems unlikely that Ivie would have been unaware of the prior statement when he testified at trial, because before Ivie testified at trial his prior statement was the subject of a motion to exclude the statement. RP 500-569. During this hearing, an audio recording Ivie's statement was played in open court. RP 536-38. Ivie conceded that he had listened to the audio recording of his statement. RP 544.

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To support his claim of error here, Ivie cites only one case, *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1988). Br. of Petitioner at 29. But the facts of *Turner* are egregious in comparison to the instant case. In *Turner*, the court wrote that although the defendant was charged with a murder, “his lawyer delivered one of the most minimal efforts we have seen in a case of this magnitude” and that “Turner's attorney failed to take even the most basic steps to investigate and prepare Turner's defense....” *Id.* at 451.

Still more, counsel’s “failure to adequately consult with and prepare his client to testify” was only one of several of defense counsel’s deficiencies identified by the court in *Turner*. *Id.* at 457. In regards to the *Turner* court’s view of counsel’s failure to adequately consult with the defendant, the primary authority relied upon by the court was a pre-*Strickland* case, *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983). *Id.* Although *Tucker* a was complex case that involved over 13,000 pages of discovery, including 3,000 pages of sworn statements, the record showed that defense counsel spent 20 hours with the defendant but could not recall any detail of what was discussed between them. *Id.* at 582-84.

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Here, although the charges are serious, the case is not complex to the degree of *Tucker*. Additionally, the record here does not clearly show that counsel failed to prepare Ivie for cross examination; instead, the only evidence of this point is Ivie's post-conviction, self-serving declaration. Br. of Petitioner at 28. Most importantly, however, Ivie does not meet his burden of showing prejudice. *See Strickland*, 466 U.S. at 693 (petitioner must affirmatively prove that he was prejudiced by counsel's performance).

Ivie claims prejudice, but doesn't demonstrate any. Instead, he makes a generic claim that because "counsel never showed him a transcript or played him the recording of the statement he made while in the [hospital]...[,] he was unprepared to respond to questions about discrepancies between his trial testimony and his hospital statement." Br. of Petitioner at 28. Ivie has made no showing that any amount of preparation would have, or could have, erased those discrepancies.

8) STATE'S RESPONSE TO IVIE'S CLAIM THAT: Trial counsel's closing argument failed to address basic exculpatory facts.

Here, Ivie alleges fault with his trial counsel because during closing argument counsel "never mentioned, even in passing, that all of

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Mr. Ivie's wounds were to the back of his body." Br. of Petitioner at 29. But the location of Ivie's wounds really had absolutely nothing to do with any of the crimes the jury was considering, because all the crimes had already occurred before SGT Adams shot Ivie. Still more, given SGT Adams's testimony, the location of the gunshot wounds was not at issue. RP 319-21.

Additionally, Ivie asserts that his trial counsel was ineffective because "counsel never explained to the jurors Mr. Ivie's exhausted, traumatized and medicated physical and mental condition at the time he gave the hospital statement to blunt the impact of the cross-examination." Br. of Petitioner at 29. But none of the circumstances that Ivie asserts here would necessarily provide any plausible explanation for why his hospital statement should be deemed unreliable (the statement might be regrettable, in hindsight, but not unreliable). Instead, highlighting the hospital statement with an implausible explanation would sharpen the jury's focus upon it and would provide ample opportunity for the prosecutor on rebuttal. Trial counsel chose instead to direct the jury's focus to Ivie's trial testimony and to give him the benefit of the doubt, based on his trial testimony, that he did not see Deputy Reed and that he did not see Deputy

Adams, and that he, therefore, did not intend to assault either of them.

See, e.g., RP 770-71.

“Judicial review of an attorney’s performance is highly deferential, *Strickland*, 466 U.S. at 689, and such performance is not deficient if it can be considered a legitimate trial tactic, *State v. Hendrickson*, 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996).” *State v. Humphries*, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014).

9) STATE’S RESPONSE TO IVIE’S CLAIM THAT: Trial counsel’s failure to object to and to challenge the testimony of Detective Simper regarding the computer-based crime scene reconstruction analysis and exhibits where this witness had no part in the operation of the equipment or the taking of measurements was unreasonable and prejudiced Ivie’s defense.

“Counsel’s decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions.” *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007), citing *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Here, trial counsel had no reason to object to the State’s total station exhibits. If anything, these exhibits benefited Ivie because, although the exhibits do not conclusively resolve the issue of whether Ivie was driving toward SGT Adams immediately before the shooting, the exhibits nevertheless

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demonstrated that Ivie was not driving directly toward SGT Adams when the shooting occurred. *See, e.g.*, Ex. 51.

Counsel could have objected to admission of the total station exhibits for technical reasons and possibly could have forced the State to call an additional witness in order to have the exhibits admitted. But these exhibits were not central to the State's case, because Ivie had already completed the crime of assault in the first degree against SGT Adams when SGT Adams fired the gunshots depicted in the total station exhibits. RP 319-21. "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007), quoting *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

Legitimate trial tactics are not deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Still more, the two-part test for claims of ineffective assistance counsel requires Ivie to show prejudice in order to sustain his claim. *Id.* Ivie has not shown that the outcome of his trial would probably have been different had his attorney

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objected to the total station exhibits; therefore, his claim of ineffective assistance of counsel on this point should fail. *Id.*

10) STATE'S RESPONSE TO IVIE'S CLAIM THAT: Trial counsel's failure to locate and interview a lay witness to corroborate Ivie's testimony prejudiced his defense.

Here, Ivie asserts that prior to trial he told his trial counsel about his past contacts with Deputy Reed and asserts that he asked his trial counsel to investigate Deputy Reed's alleged propensity to fabricate evidence against him. *Br. of Appellant* at 30. Ivie asserts that his attorney conducted no such investigation. *Id.* at 31. In the body of his brief, Ivie does not cite to any evidence to support his contentions, but in his declaration that he attaches as an appendix to his petition, Ivie alleges supporting facts. *Id.* at App. p. 117-18.

In his declaration, Ivie asserts that he asked both his attorney and his investigator to interview Aaron Churchill. *Id.* at 118. But rather than to submit a declaration for his attorney or the investigator, or both, the only evidence Ivie provides to support his assertion that he asked his attorney and his investigator to interview Churchill is Ivie's own post-conviction, self-serving declaration.

To support his claim that Churchill was an exculpatory witness, however, Ivie also provides a declaration from Churchill. Br. of Petitioner, App. p. 120-22. The date on Churchill's declaration is August 1, 2016. *Id.* at 122. In his declaration, Churchill states that "something in 2012 before [Ivie's] trial," a period that would have been four and a half years earlier than the date on his declaration, Deputy Reed approached him and asked him to testify falsely. *Id.* at 120-22. Churchill also stated that "[a]t around that time [he (Churchill)] had been doing meth[.]" *Id.* at 121.

Churchill's allegations are at best fantastical. The story that Churchill asserts that Deputy Reed asked him to tell would have added nothing of any substance to the case. For example, Churchill asserts that Deputy Reed asked him to say that he had helped Ivie cut up maple wood and take it to a mill (*id.* at 121), but that detail would have added nothing of substance to the prosecution of Ivie for the multiple offenses at issue in his jury trial. Accordingly, it would have been beyond irrational for Deputy Reed to ask Churchill to say such a thing. Presumably, Deputy Reed was not doing meth, and accordingly it is reasonable to expect that

Deputy Reed would not engage in such an extraordinarily irrational act for absolutely no benefit.

Nevertheless, to complete the record, Deputy Reed denies the allegation. See, Appendix C (Declaration of Corporal William Reed).

Generally, the decision to call witnesses is a matter of trial tactics that will not support an ineffective assistance claim. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). Here, risking impeachment of Churchill's fantastical testimony would have outweighed any possible benefit to Ivie, and prudent counsel might choose to avoid the risk. But in any event, because Ivie must meet both parts of the two part *Strickland* test for ineffective assistance of counsel claims but has failed to meet either part, his claim should fail. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

E. ARGUMENT

A) Ivie has failed to meet his burden of proof for his claim of ineffective assistance of counsel.

1) Standard of review on collateral review for claims of ineffective assistance of counsel.

Ineffective assistance of counsel is a two-pronged test that requires

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the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011).

To demonstrate prejudice, Ivie must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33.

A personal restraint petition may be based on ineffective assistance of appellate counsel. *See In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012). If the petitioner shows prejudice in the context of an ineffective assistance of counsel claim, he or she necessarily meets the burden of showing actual and substantial prejudice for a PRP, but petitioner nevertheless must show actual prejudice. *Crace*, 174 Wn.2d at 846-47; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

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2) Trial counsel's performance was not deficient.

Here, Ivie basically repeats the arguments that he made in his introduction and the ten enumerated facts sections of his brief. Rather than to repeat the State's arguments in response, the State respectfully refers to its responses in the enumerated sections 1-10 above. In summary, however, because Ivie has failed to show that his attorney was ineffective, his claim of ineffective assistance of counsel must fail. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011).

3) Ivie has failed to show that there is a reasonable probability that but for his attorney's performance, the outcome of his trial would have been different.

Each of Ivie's arguments on this point were addressed by the State in the State's responses to Ivie's introduction and ten enumerated assignments of error, above. Therefore, rather than to repeat the State's arguments here, the State respectfully refers the court to the State's arguments above.

In summary, however, the State contends that not only has Ivie failed to show that his trial counsel was ineffective, but he also has not shown that, but for the ineffective assistance that he alleges, there is a reasonable probability that the results of his trial would have been different. Accordingly, Ivie's claim on this point should fail. *In re Pers.*

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Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

B) Ivie has failed to meet of his burden of proof for his claim of prosecutorial misconduct.

1) Standard of review for claims of prosecutorial misconduct.

“To make a successful claim of prosecutor misconduct, the defense must establish that the prosecuting attorney's conduct was both improper and prejudicial.” *State v. Davis*, 175 Wn.2d 287, 330, 290 P.3d 43, 62 (2012). Prejudice exists where there is a substantial likelihood that misconduct affected the verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

2) Contrary to Ivie’s assertions, the prosecutor did not disparage the role of defense counsel.

Each of the four of the prosecutor’s comments that Ivie points to as alleged instances of prosecutorial misconduct occurred during the prosecutor’s rebuttal closing argument. Br. of Petitioner at 40, citing RP 775, 780, 781. These comments by the prosecutor came after Ivie’s closing argument, for which defense counsel’s closing words were as follows:

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You know, there's a saying in the law, or an expression we use in the law that says a philosopher is a blind man at midnight in a cellar looking for a black cat that isn't there. He's distinguished from the theologian in that the theologian finds the cat. He is further distinguished from the prosecutor who smuggles the black cat into the cellar under his coat and emerges to try and produce it. That is what is going on here, ladies and gentlemen of the jury.

Martin Ivie was shot. And whether it was excessive or not is not your issue. Martin Ivie was shot. And now the State wants you to believe oh, he was shot because he was assaulting officers. Not stealing wood, he was assaulting officers. That is a black cat in a cellar at midnight that isn't there.

You go back and you read all of the jury instructions carefully, and you look at all the evidence, and you weigh all the testimony you've heard, and return verdicts of not guilty on all of the assault counts and the eluding. Thank you very much.

RP 773-74. It was then in the State's rebuttal closing argument that the defense wanted the jury to ignore evidence that contradicted the defense theory of innocence. RP 775, 780, 781. Reviewing courts "review allegedly improper comments in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given." *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998).

Here, although the prosecutor mentioned defense counsel by name, the prosecutor was actually addressing the defense closing argument rather than commenting on defense counsel. It is not misconduct for the

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prosecutor to argue that evidence (or in this case, evidence that the defense omitted from the defense closing argument), refutes the defense theory of innocence. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). Nor is it misconduct for the prosecutor to respond to defense counsel's argument. *Id.*

Here, rather than mention defense counsel by name, it would have been better for the prosecutor to clarify that he was rebutting the defense theory of innocence based upon the fact that the validity of the defense theory required the jury to ignore contrary evidence. But the prosecutor did not accuse the defense attorney of deceiving the jury; instead, the prosecutor merely commented that the defense theory was unreasonable based on the evidence, and he did so in response to defense accusations that the prosecutor had attempted to deceive the jury. RP 775, 780, 781; RP 773-74 (where Ivie during closing argument compared the prosecutor to a "prosecutor who smuggles the black cat into the cellar under his coat and emerges to try and produce it" and then told the jury: "And now the State wants you to believe oh, he was shot because he was assaulting officers. Not stealing wood, he was assaulting officers. That is a black cat in a cellar at midnight that isn't there.").

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Even where the comments are improper, the remarks by the prosecutor are not grounds for reversal “if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *State v. Gauthier*, 189 Wn. App. 30, 38, 354 P.3d 900, 905 (2015), *review denied*, 185 Wn.2d 1010, 368 P.3d 171 (2016), quoting *Russell*, 125 Wn.2d at 86, 882 P.2d 747. In summary, when viewed in the context of the entire argument and the evidence in the case, the prosecutor’s comments were not misconduct. *State v. Brown*, 132 Wn.2d 529, 566, 940 P.2d 546 (1997).

3) Ivie has not shown that any undue prejudice occurred as a result of the prosecutor’s comments.

Ivie asserts error based upon his contention that the prosecutor committed misconduct in closing argument. Br. of Petitioner at 40. But Ivie also contends that his trial counsel was ineffective for failing to object to what Ivie now contends was misconduct during closing argument. Br. of Petitioner at 41.

To prevail on his claim of prosecutorial misconduct, Ivie must show that the prosecutor’s comments to which he assigns error prejudiced

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his trial. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Prejudice exists only where there is a substantial likelihood that an argument that is improper affected the jury. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Reviewing courts consider the prosecutor's arguments during closing argument in the context of the total argument, issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Applying this standard to the instant case, the State contends that Ivie has not shown any prejudice resulting from the prosecutor's comments to which he now takes exception.

In conclusion, because Ivie has not shown that the prosecutor's comments were improper and has not shown any prejudice from the prosecutor's comments, his claim of ineffective assistance of counsel based on his attorney's failure to object to the prosecutor's comments must fail. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

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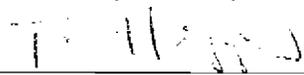
F. CONCLUSION

In his personal restraint petition, Ivie added a third issue, but Ivie did not address this issue in his brief to the court. As his third issue, Ivie asserts that he is entitled to a new trial because of newly discovered evidence. The State contends that Ivie has not identified any newly discovered evidence that would entitle him to a new trial, and that none of the evidence that he discusses in his brief would satisfy the test for whether evidence is newly discovered, and if so, whether it merits a new trial. See, e.g., *In re Faircloth*, 177 Wn. App. 161, 165-68, 311 P.3d 47 (2013).

For the reasons argued above and argued throughout the State's response brief, the State asks this court to deny Ivie's personal restraint petition.

DATED: February 21, 2017.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

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Appendix A

Judgment and Sentence
State v. Ivie
Mason County Case No. 12-1-00064-6

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Ginger Brooks, Clerk of the
Superior Court of Mason Co. Wash.

Superior Court of Washington
County of Mason

State of Washington, Plaintiff,

vs.

MARTIN S. IVIE,
Defendant.
DOB: 12/04/61
PCN: 941085083
SID: WA19986031

No. 12-1-00064-6

Amended Felony Judgment and Sentence

(Resentencing After Mandate)
(FJS)

Prison Sex Offense / Kidnapping of Minor
 Clerk's Action Required, 2.1, 3.2, 4.1, 4.3, 5.2,
5.3, 5.5 and 5.7
 Defendant Used Motor Vehicle
 Juvenile Decline Mandatory Discretionary

I. Hearing

12-9-985-5

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon
 jury-verdict (date) JULY 5, 2012:

| Count | Crime | RCW (w/subsection) | Class | Date of Crime |
|-------|---|-----------------------|-------|------------------|
| II | ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE | 46.61.024 | FC | 02/09/12 |
| III | ASSAULT IN THE FIRST DEGREE (VICTIM: MCSO DEPUTY WILLIAM REED) | 9A.36.011(1)(a) | FA | 02/09/12 |
| V | ASSAULT IN THE THIRD DEGREE (VICTIM: MCSO DEPUTY TRAVIS ADAMS) | 9A.36.031(1)(a), (g) | FC | 02/09/12 |
| VI | ASSAULT IN THE FIRST DEGREE (VICTIM: MCSO DEPUTY TRAVIS ADAMS) (SEPARATE & DISTINCT FROM COUNT V) | 9A.36.011(1)(a) | FA | 02/09/12 |

Class: FA (Felony-A), PB (Felony-B), FC (Felony-C)

(If the crime is a drug offense, include the type of drug in the second column.)

The jury returned a special verdict or the court made a special finding with regard to the following:

- The defendant used a **firearm** in the commission of the offense in Count _____, RCW 9.94A.602, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____, RCW 9.94A.602, 9.94A.533.
- Counts II, III, V, and VI are felonies in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- In Count _____ the defendant has been convicted of assaulting a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault,

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as provided under RCW 9A.36.031, and the defendant intentionally committed the assault with what appeared to be a firearm. RCW 9.94A.831, 9.94A.533.

In Counts III and VI, assault in the 1st degree (RCW 9A.36.011) or assault of a child in the 1st degree (RCW 9A.36.120), the offender used force or means likely to result in death or intended to kill the victim and shall be subject to a mandatory minimum term of 5 years (RCW 9.94A.540).

Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

| Crime | Cause Number | Court (county & state) | DV* Yes |
|-------|--------------|------------------------|------------|
| | | | |
| | | | |

*DV: Domestic Violence was pled and proved.

Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

| Crime | Date of Crime | Date of Sentence | Sentencing Court (County & State) | A or J Adult, Juv. | Type of Crime | DV* Yes |
|--------------------------------------|---------------|------------------|-----------------------------------|--------------------|---------------|------------|
| 1 DISORDERLY CONDUCT | 04/29/04 | 02/11/05 | MASON COUNTY WASHINGTON | A | M | |
| 2 MALICIOUS MISCHIEF 2 | 06/23/04 | 04/11/05 | MASON COUNTY WASHINGTON | A | FC | YES |
| 3 UNLAWFUL USE OF DRUG PARAPHERNALIA | 07/30/05 | 06/11/07 | MASON COUNTY WASHINGTON | A | GM | |
| 4 DRIVING WHILE LICENSE SUSPENDED 3 | 03/01/10 | 03/02/10 | MASON COUNTY WASHINGTON | A | M | |
| 5 DRIVING WHILE LICENSE SUSPENDED 3 | 10/07/10 | 10/12/10 | MASON COUNTY WASHINGTON | A | M | |

*DV: Domestic Violence was pled and proved.

Additional criminal history is attached in Appendix 2.2.

The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

The prior convictions listed as numbers(s) _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)

The prior convictions listed as numbers(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520

2.3 Sentencing Data:

| Count No. | Offender Score | Seriousness Level | Standard Range (not including enhancements) | Plus Enhancements* | Total Standard Range (including enhancements) | Maximum Term |
|-----------|----------------|-------------------|---|--------------------|---|---------------------|
| II | 4 | I | 3 - 8 Months | N/A | 3 - 8 Months | 5 Years \$10,000 |
| III | 3** | XII | 120 - 160 Months | N/A | 120 - 160 Months | LIFE \$50,000 |
| V | 4 | III | 15 - 20 Months | N/A | 15 - 20 Months | 5 Years \$10,000 |
| VI | 0** | XII | 93 - 123 Months | N/A | 93 - 123 Months | LIFE \$50,000 |

* (V) VUCSA in a protected zone, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.

** Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection. RCW 9.94A.589(1)(b).

Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are attached as follows: _____.

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

below the standard range for Count(s) _____.

above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.

within the standard range for Count(s) _____, but served consecutively to Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

Persistent Offender. The court finds that the defendant is a persistent offender. RCW 9.94A.030.

Count _____ is a most serious offense and the defendant has been convicted on at least two separate occasions of most serious offense felonies, at least one of which occurred before the commission of the other most serious offense for which the defendant was previously convicted.

Count _____ is a crime listed in RCW 9.94A.030(37)(b)(i) e.g., rape in the first degree, rape of a child in the first degree (when the offender was 16 years of age or older when the offender committed the offense), child molestation in the first degree, rape in the second degree, rape of a child in the second degree (when the offender was 18 years of age or older when the offender committed the offense), or indecent liberties by forcible compulsion; or any of the following offenses with a finding of sexual motivation: murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second

degree, or burglary in the first degree; or an attempt to commit any crime listed in RCW 9.94A.030(37)(b)(i)), and that the defendant has been convicted on at least one separate occasion, whether in this state or elsewhere, of a crime listed in RCW 9.94A.030(37)(b)(i) or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in RCW 9.94A.030(37)(b)(i).

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is **guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 The court **vacates** Count IV in the charging document, as it was charged in the alternative to Count III for which the defendant is sentenced herein.

The court **vacates** Count VII in the charging document, as it was charged in the alternative to Count VI for which the defendant is sentenced herein.

The court **vacates** Count I in the charging document, as it was reversed by the Court of Appeals per Mandate filed herein.

IV. Sentence and Order (Prison)

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

| | |
|---|-------------------------------|
| <u> </u> months on Count I | <u>20</u> months on Count V |
| <u>8</u> months on Count II | <u>93</u> months on Count VI* |
| <u>120</u> months on Count III* | |

* Counts III and VI are to be served consecutively, pursuant to RCW 9.94A.589(1)(b).

The confinement time on Counts III & VI contain a mandatory minimum term of 60 Months.

The confinement time on Count _____ includes _____ months as enhancement for firearm deadly weapon VUCSA in a protected zone manufacture of methamphetamine with juvenile present.

Actual number of months of total confinement ordered is: 213 months*

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: Counts III and VI are to be served consecutively, pursuant to RCW 9.94A.589(1)(b).

The sentence herein shall run consecutively with the sentence in cause number(s) _____ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

- (b) **Credit for Time Served.** The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.
- (c) **Work Ethic Program.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for the longer of:

- (1) the period of early release. RCW 9.94A.728(1)(2); or
(2) the period imposed by the court, as follows:

Count(s) III, VI: 36 months for Serious Violent Offenses

Count(s) _____ 18 months for Violent Offenses

Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall;

consume no alcohol. have no contact with: _____

remain within outside of a specified geographical boundary, to wit: _____

not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.

participate in the following crime-related treatment or counseling services: _____

undergo an evaluation for treatment for domestic violence substance abuse

mental health anger management, and fully comply with all recommended treatment. _____

comply with the following crime-related prohibitions: _____

Other conditions: **SEE CONDITIONS OF COMMUNITY CUSTODY FILED HEREWITH**

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$25.00 per month commencing within sixty (60) days of release from total confinement. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760. (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.)

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

Electronic Monitoring Reimbursement. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754.

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

The defendant shall not have contact with _____ (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until _____ (which does not exceed the maximum statutory sentence).

The defendant is excluded or prohibited from coming within _____ (distance) of:
 _____ (name of protected person(s))'s home/
residence work place school (other location(s)) _____, or
 other location _____, or
until _____ (which does not exceed the maximum statutory sentence).

A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 Firearms.

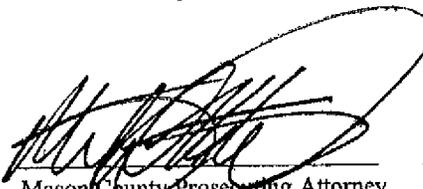
You may not own, use or possess any firearm, and under federal law any firearm or ammunition, unless your right to do so is restored by the court in which you are convicted or the superior court of Washington State where you live, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicaid, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

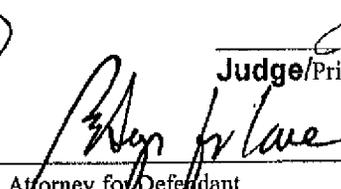
5.6 [] Sex and Kidnapping Offender Registration. RCW 9A.44.128, 9A.44.130, 10.01.200.

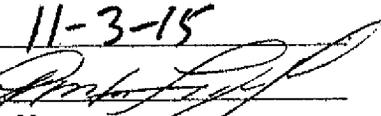
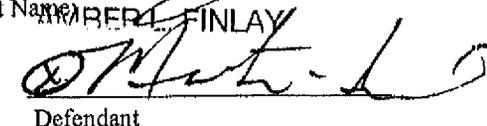
5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other: _____

Done in Open Court and in the presence of the defendant this date: 11-3-15


Mason County Prosecuting Attorney
WSBA No. 31968
Print Name: Michael K. Dorcy


Attorney for Defendant
WSBA No. 25022
Print Name: Charles W. Lane, IV

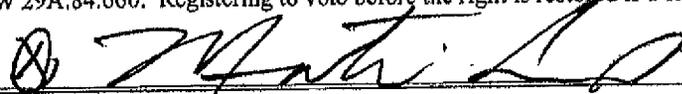

Judge (Print Name) AMBERL FINLAY

Defendant
Print Name: Martin S. Ivie

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature:



I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) _____, (state) _____, on (date) _____.

Interpreter

Print Name

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk

VI. Identification of the Defendant

SID No. WA19986031
(If no SID complete a separate Applicant card
(form FD-258) for State Patrol)

Date of Birth 12/04/61

FBI No. _____

Local ID No. _____

PCN No. 941085083

DOC No. 307402

Alias name, DOB: _____

Race:

Asian/Pacific Islander Black/African-American Caucasian
 Native American Other: _____

Ethnicity:

Hispanic Non-Hispanic
 Male Female

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk, Cathy Dalloghe

Dated: 11/3/15

The defendant's signature: [Signature]

Left four fingers taken simultaneously

Left
(Thumb)

Right
Thumb

Right four fingers taken simultaneously



**Superior Court of Washington
County of Mason**

| | | |
|----------------------|---|--------------------------------|
| STATE OF WASHINGTON, |) | Case No. 12-1-00064-6 |
| |) | |
| Plaintiff, |) | CONDITIONS OF |
| |) | [X] COMMUNITY CUSTODY |
| vs. |) | [] COMMUNITY PROBATION |
| |) | [] BENCH PROBATION |
| MARTIN S. IVIE, |) | |
| Defendant. |) | |

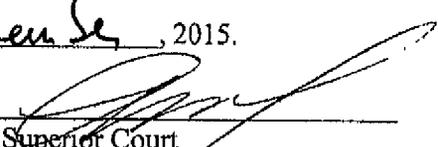
Upon release from total confinement, the defendant shall be on Community Custody / Probation or Bench Probation, as marked above, for the period specified in the Judgment and Sentence, upon the following conditions:

- The defendant shall report to and be available for contact with the assigned Community Corrections Officer as directed;
- The defendant shall reside at a location and under living arrangements that have been approved in advance by the CCO, and shall not change such arrangements/location without prior approval;
- The defendant shall consent to allow home visits by the DOC/CCO to monitor compliance with supervision. Home visits include access for purposes of visual inspection of all areas of the residence in which the defendant lives and/or has exclusive or joint control or access.
- The defendant shall remain within, or outside of, geographic boundaries specified by the CCO;
- The defendant shall work at a Department of Corrections-approved education, employment and/or community service program;
- The defendant shall not own, use, possess, transport, or receive firearms or ammunition;
- The defendant shall not possess or consume any mind or mood-altering substances, to include the drug alcohol, or any controlled substances, except pursuant to lawfully issued prescriptions;

- The defendant shall not go into bars, taverns, lounges, or other places whose primary business is the sale of liquor;
- The defendant shall have a chemical dependency mental health evaluation within 30 days of release from custody, provide a copy of the evaluation to the CCO, successfully participate in and complete all recommended treatment, and sign all releases necessary to ensure that the CCO can consult with the treatment provider to monitor progress and compliance;
- The defendant shall, at his/her own expense, submit to urinalysis and/or breathalyzer testing at the request of the CCO or treatment provider to verify compliance;
- The defendant shall not associate with any known drug users or sellers, except in the context of a chemical dependency treatment program approved by the CCO;
- Defendant shall pay a community placement fee as determined by the Department of Corrections;
- A notice of payroll deduction may be issued or other income withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed;
- Legal financial obligation payments are to be made on a schedule established by the Court to begin as directed by the Court.
- The defendant shall participate in the MRT &/or GIR &/or Victim Awareness Education Program approved by the CCO.
- The defendant shall participate in and successfully complete a certified Domestic Violence/Anger Management counseling program.
- The defendant shall have no contact, either direct or indirect, with the victim, _____, or members of the victim's immediate family, including but not limited to contact in person, by mail, telephonically or through third parties.
- Any such contact may be reinitiated only upon the joint recommendation of the defendant's Domestic Violence counselor and PO/CCO and upon the written approval of this court.
- The defendant shall enroll in and successfully complete a high school Equivalency Diploma Program (GED).
- The defendant shall obey all laws.

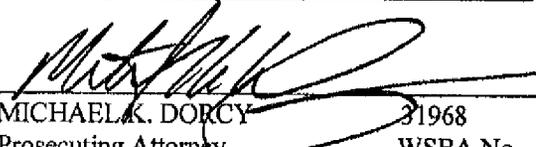
- [] The defendant shall participate in mental health counseling or treatment at the direction of the CCO.
- [] The defendant shall not operate a motor vehicle without a valid license to drive and proof of financial responsibility for the future.

DONE IN OPEN COURT THIS 3 DAY OF November, 2015.



Judge of the Superior Court

Dated: 3 November 2015

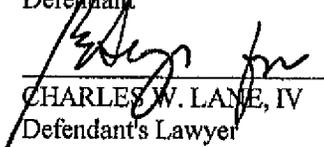


MICHAEL K. DORCY
Prosecuting Attorney

31968
WSBA No.



Defendant



CHARLES W. LANE, IV
Defendant's Lawyer

19670
25022
WSBA No.

**Superior Court of Washington
County of Mason**

STATE OF WASHINGTON,)
Plaintiff,) NO. 12-1-00064-6
vs.) WARRANT OF COMMITMENT
MARTIN S. IVIE,) (WC)
Defendant.)

THE STATE OF WASHINGTON

TO: The Sheriff of Mason County.

The defendant: Martin S. Ivie has been convicted in the Superior Court of the State of Washington of the crime(s) of:

COUNT II: ATTEMPT TO ELUDE A PURSUING POLICE VEHICLE
COUNT III: ASSAULT IN THE FIRST DEGREE
COUNT V: ASSAULT IN THE THIRD DEGREE
COUNT IV: ASSAULT IN THE FIRST DEGREE

and the Court has ordered that the defendant be punished by serving the determined sentence of:

8 (Days) (~~Months~~) ~~JAIL PRISON~~ on Count No. II
 120 (Days) (~~Months~~) ~~JAIL PRISON~~ on Count No. III*
 20 (Days) (~~Months~~) ~~JAIL PRISON~~ on Count No. V
 93 (Days) (~~Months~~) ~~JAIL PRISON~~ on Count No. VI*

* Counts III and VI are to be served consecutively, pursuant to RCW 9.94A.589(1)(b). (213 mo)

PARTIAL CONFINEMENT. Defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions:

work crew home detention
 work release day reporting

- _____ (Days) (Months) of partial confinement in the County JAIL
 _____ (Days) (Months) of total confinement in the county JAIL
 _____ Days confinement converted to _____ hours community service

[XX] DEFENDANT shall receive credit for time served prior to this date:

[XX] To be calculated by the staff of the Mason County Jail

[] In the amount of _____ Days.

[XX] YOU, THE COUNTY SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence

Dated this 3 Day of November, 2015.

cc: Prosecuting Attorney
Defendant's Attorney
Defendant
County Jail
Institutions (3)

AMBER L. FINLAY

Judge of the Superior Court

GINGER BROOKS

Clerk of the Superior Court

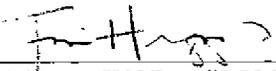
By: Cathy Dally
Deputy Clerk

Appendix B

Photocopies of Actual Trial Exhibits, Obtained from the Trial Court File
State v. Ivie
Mason County Case No. 12-1-00064-6
Court of Appeals No. 44258-2-II

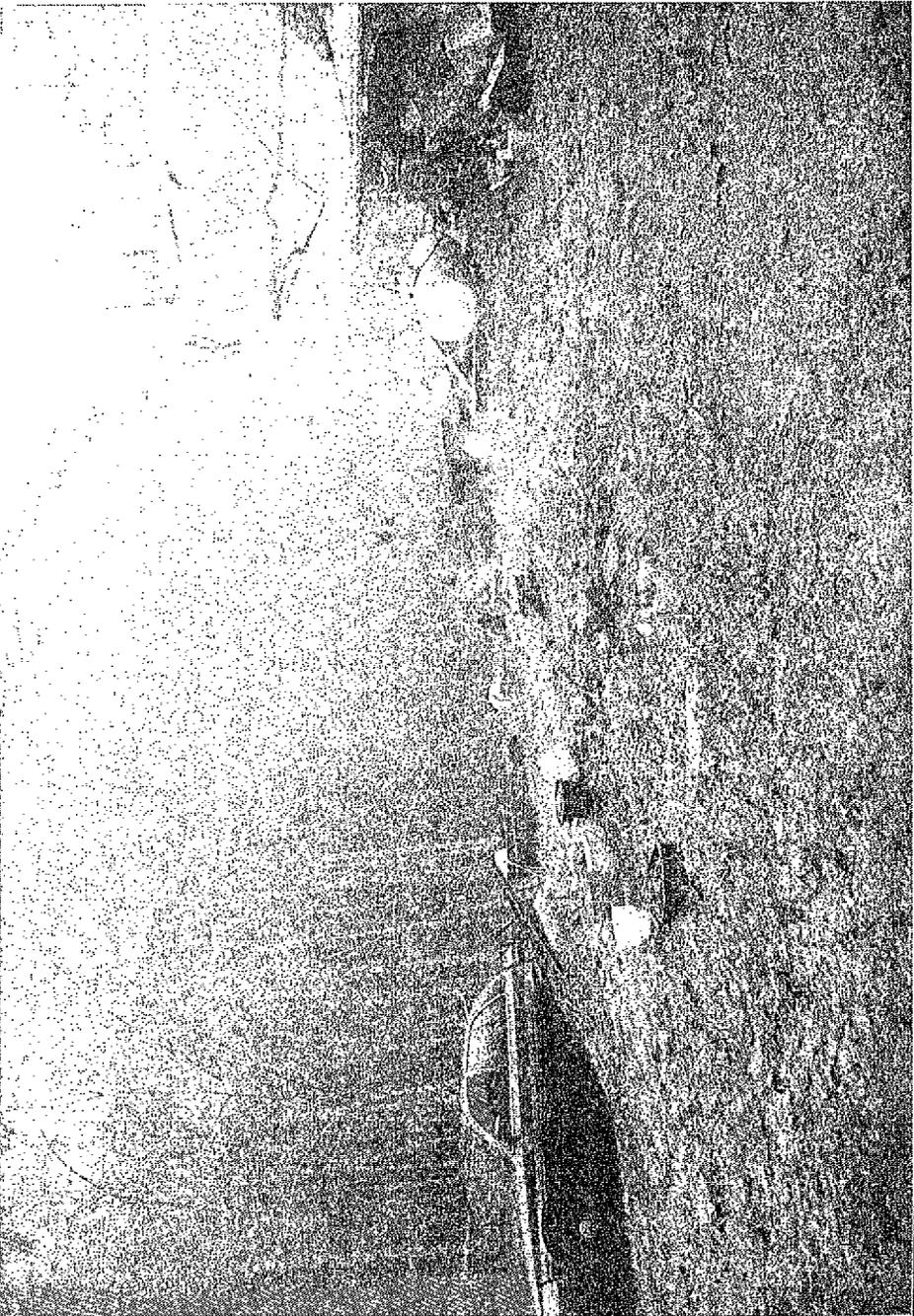
I, Tim Higgs, Deputy Prosecuting Attorney for Mason County, declare under penalty of perjury under the laws of the State of Washington that the attached photocopies of trial court exhibits are true and accurate photocopies of the original trial exhibits that are contained in the file of the trial court in the above-captioned case.

Signed this 21st day of February, 2017, in Shelton, Washington, by:



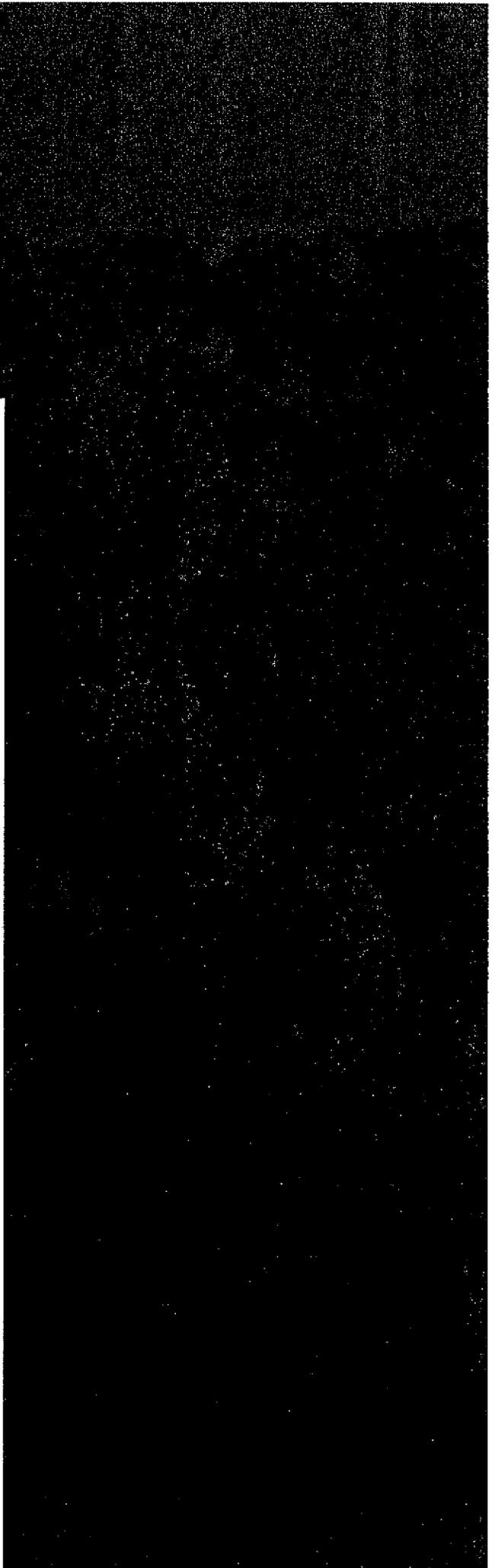
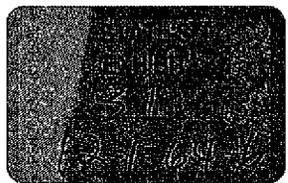
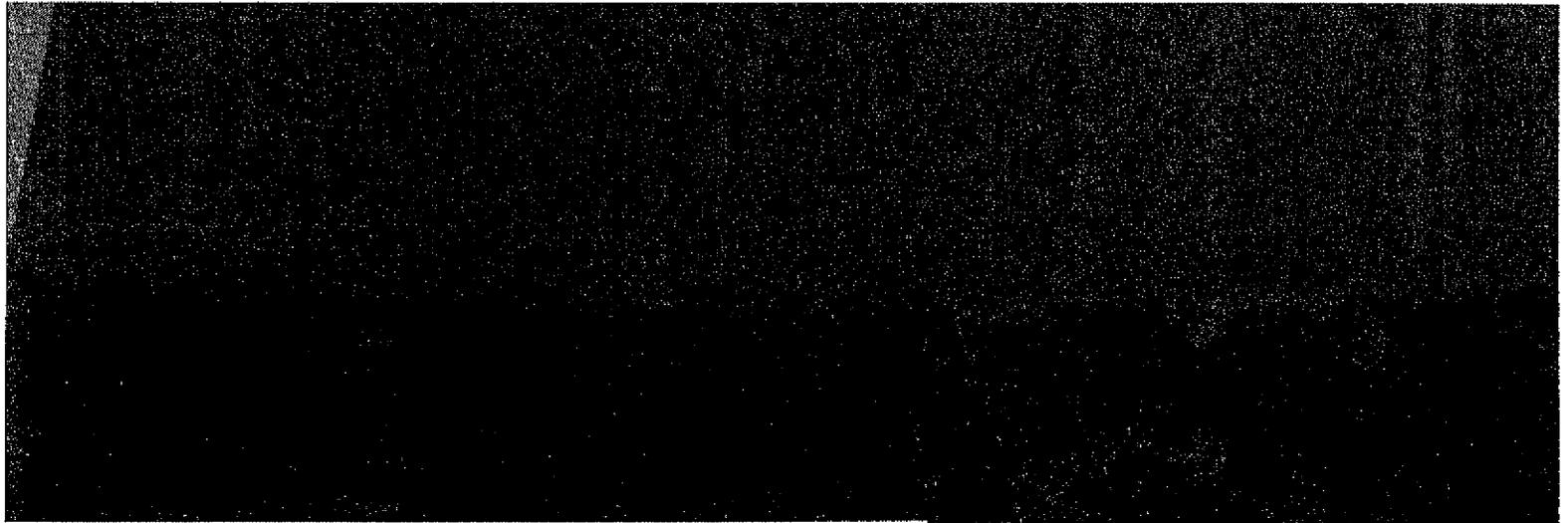
Tim Higgs (WSBA #25919)

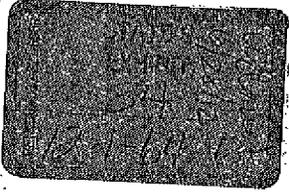
22
1/20/44

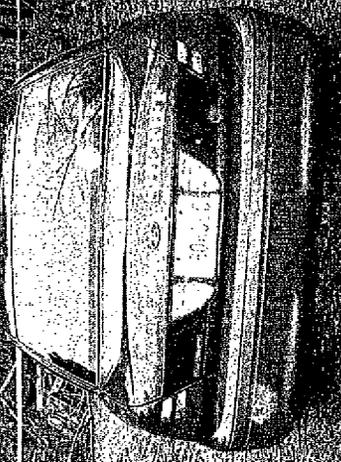
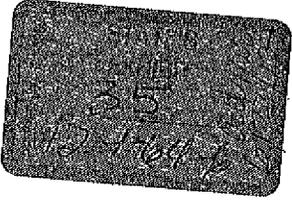


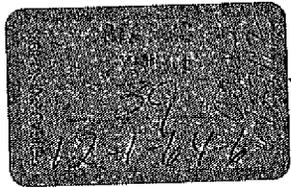
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12-1-84-2





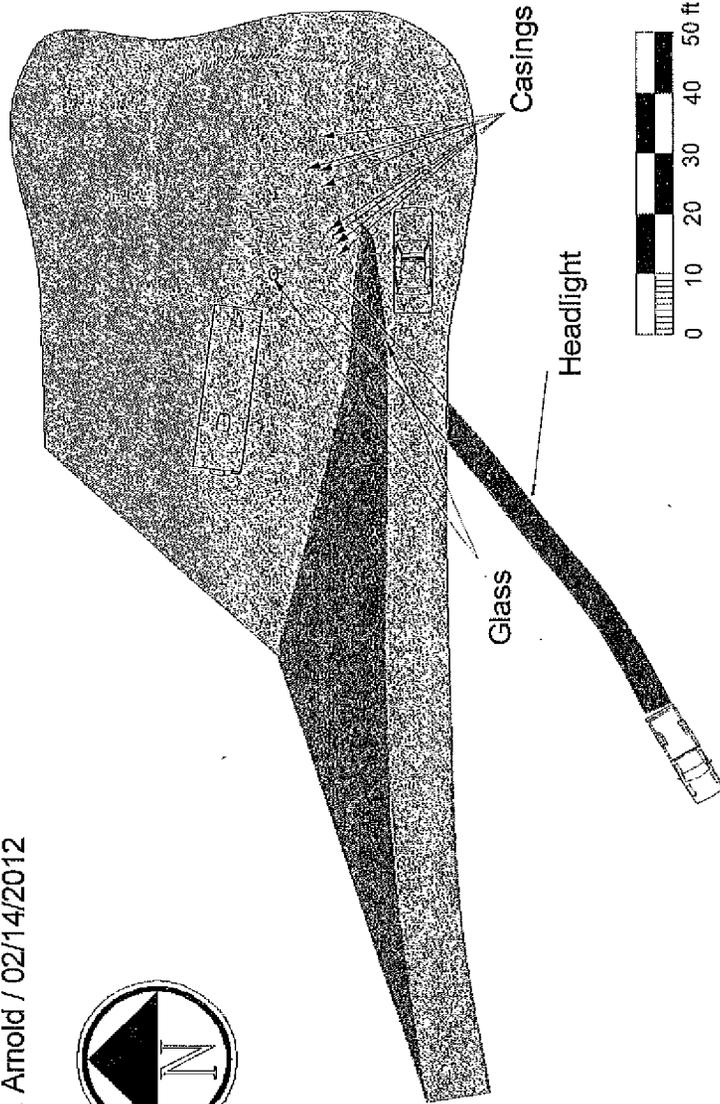






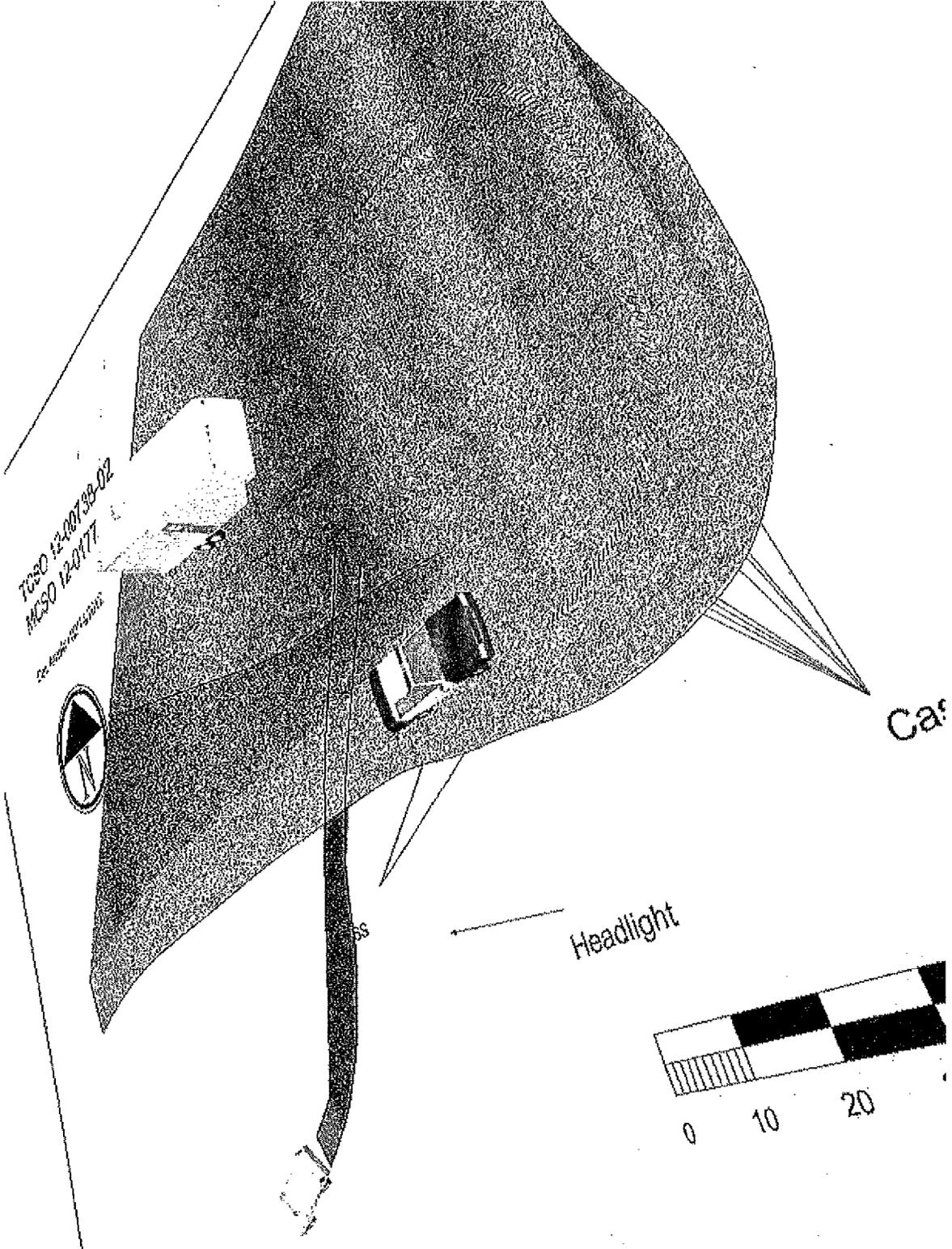
TCSO 12-00738-02
MCSO 12-01779

Det. Arnold / 02/14/2012



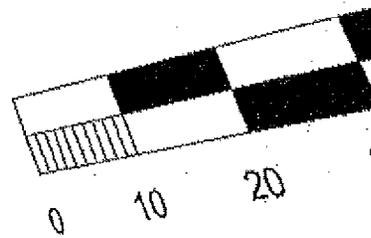
7650 12-00738-02
MCSO 12-0177

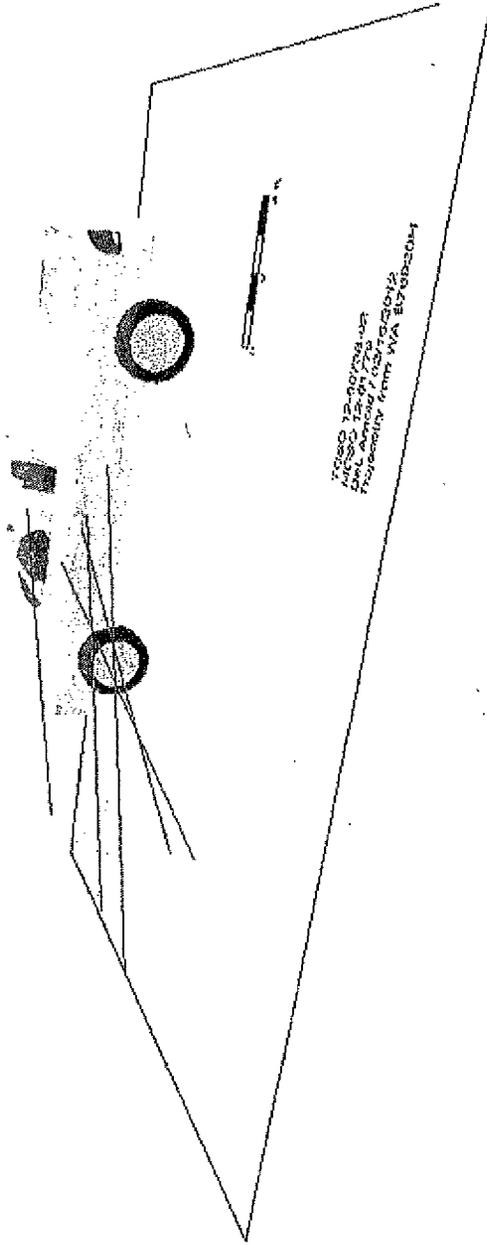
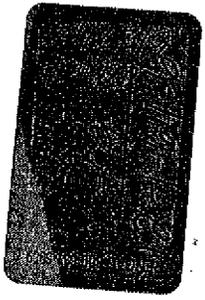
See Model 1074-2-2003

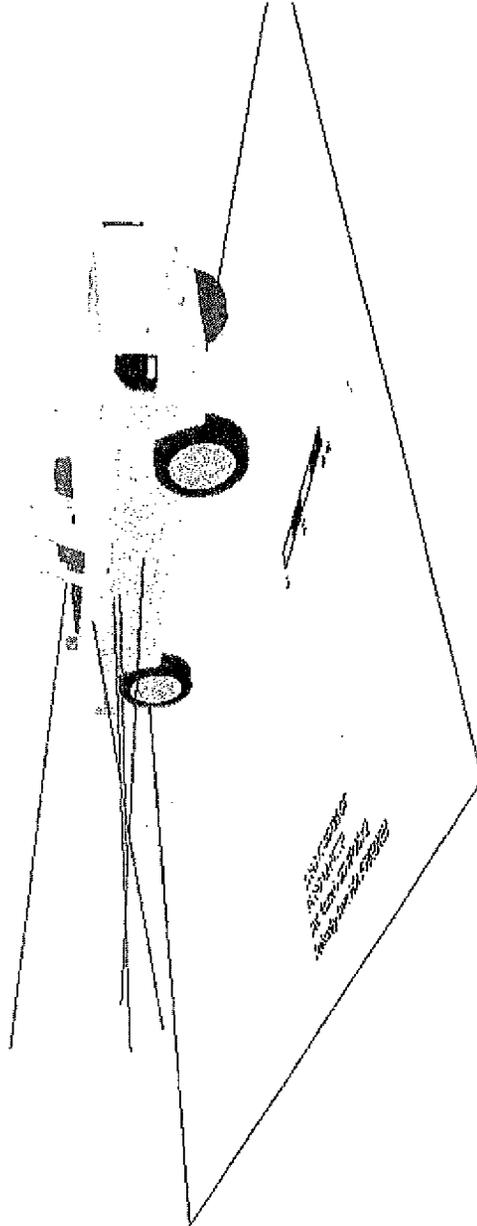
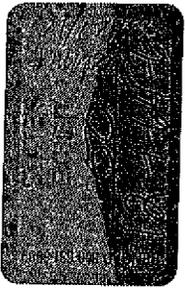


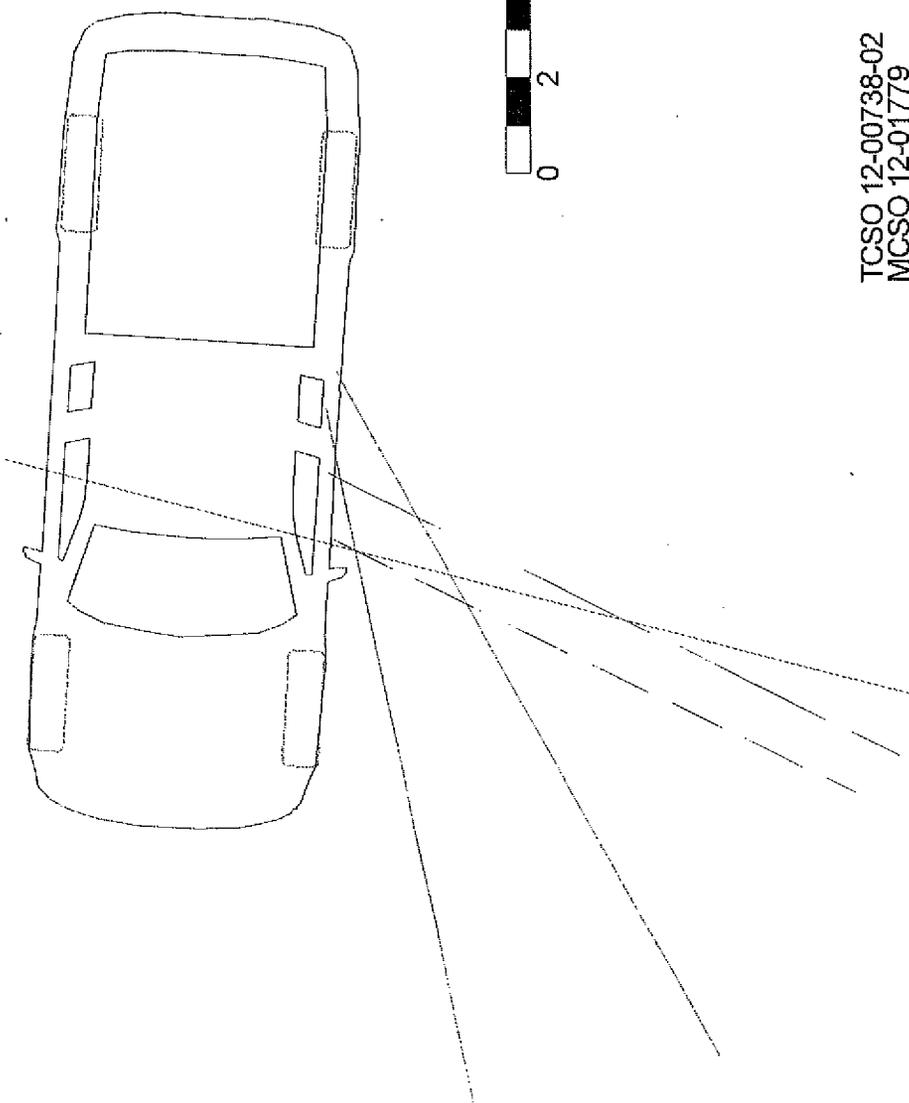
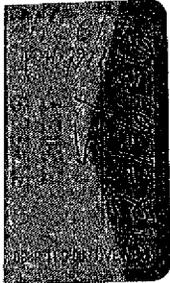
Headlight

Car









TCSO 12-00738-02
MCSO 12-01779
Det. Arnold / 02/16/2012
Trajectory from WA B76920H

Appendix C

Declaration of Corporal William Reed

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION TWO

| | | |
|-----------------------|---|----------------|
| IN RE THE PERSONAL |) | NO. 49526-1-II |
| RESTRAINT PETITION OF |) | |
| MARTIN STANLEY IVIE, |) | DECLARATION |
| |) | OF CORPORAL |
| Petitioner, |) | WILLIAM REED |
| _____ |) | |

I am William Reed. I am 53 years old. I am a deputy sheriff at the rank of corporal with the Mason County Sheriff's Office. I am writing this declaration with the assistance of the prosecutor in rebuttal of Aaron Churchill's declaration dated August 1, 2016.

I have contacted Aaron Churchill many times in my capacity as a sheriff's deputy in Mason County. Although I have no specific memory of it, it is likely that I would have had contact with and/or observation of Aaron in the Hoodsport area due that being my primary zone of assignment, Lake Cushman and Hoodsport, during 2012. I do not recall requesting Aaron to meet with me or follow me anywhere, specifically for anything relating to Martin Ivie, because it was an open case and I was one of the listed victims. As one of the victims, I was not investigating the case.

I have never in my 20 years as a law enforcement officer requested anyone to fabricate, alter or lie, in any investigation and/or case. As far as I know to this date Martin Ivie is the only person involved in the crime for which he is currently serving time. To my knowledge, to date, neither Aaron Churchill nor or anyone else, other than Ivie, had any involvement in the case. From my standpoint, I cannot see any reason or benefit to including Aaron in the case.

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

DATED this 13th day of January, 2017, at Shelton, Washington.


Corporal William Reed
Mason County Sheriff's Office

MASON COUNTY PROSECUTOR

February 21, 2017 - 4:43 PM

Transmittal Letter

Document Uploaded: 4-prp2-495261-Respondent's Brief.pdf

Case Name: In re Ivie

Court of Appeals Case Number: 49526-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Tim J Higgs - Email: timh@co.mason.wa.us

A copy of this document has been emailed to the following addresses:

catherine@camielchaney.com

petercamiel@yahoo.com