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DIVISION II

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STATE OF WASHINGTON

NO. _____
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DEPUTY

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

In re the Personal Restraint of

MARTIN A. JONES,

Petitioner

PERSONAL RESTRAINT PETITION

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A. STATUS OF PETITIONER

Petitioner Martin A. Jones is in custody in the Washington State Penitentiary, Walla Walla, Washington. He is held under a Judgment and Sentence entered March 9, 2011, by Pierce County Superior Court to serve a determinate sentence of 600 months (50 years) on conviction of Count I, attempted murder in the first degree. *State v. Jones*, Pierce County Superior Court No. 10-1-03735-9. His trial lawyers were David Allen and Todd Maybrown of Allen Hansen & Maybrown.

B. PROCEDURAL HISTORY

This Court reversed his conviction in a partially published opinion issued June 4, 2013. *State v. Jones*, 175 Wn. App. 87, 303 P.3d 1084 (2013); Court of Appeals No. 41902-5-II. The Washington Supreme Court granted review and reversed, reinstating the conviction. *State v. Jones*, 185 Wn.2d 412, 372 P.3d 755 (4/21/2016). The Mandate issued May 13, 2016.

C. GROUNDS FOR RELIEF

1. MATERIAL FACTS EXIST WHICH HAVE NOT BEEN PREVIOUSLY PRESENTED AND HEARD, WHICH IN THE INTEREST OF JUSTICE REQUIRE VACATION OF THE CONVICTION AND RETRIAL AT WHICH PETITIONER MAY PRESENT EVIDENCE OF ANOTHER SUSPECT WHO LIKELY COMMITTED THIS CRIME. RAP 16.4(b)(3).
2. PETITIONER WAS DENIED DUE PROCESS WHEN THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE TO WHICH HE WAS ENTITLED UNDER *BRADY v. MARYLAND* AND *KYLES v. WHITLEY*. U.S. CONSTITUTION, AMEND. 14; CONSTITUTION, ARTICLE I, § 3.
3. PETITIONER WAS DENIED DUE PROCESS BY A STATE AGENT KNOWINGLY PRESENTING FALSE EVIDENCE TO OBTAIN THIS CONVICTION. U.S. CONSTITUTION, AMEND. 14; CONSTITUTION, ARTICLE I, § 3.
4. THERE ARE NEW MATERIAL FACTS TO WARRANT RELIEF BASED ON SCIENTIFIC DEVELOPMENTS DEBUNKING THE "SCIENCE" CLAIMED TO SUPPORT BUNTER MARK EVIDENCE IN THIS CASE. THE ANALYSIS PRESENTED AT TRIAL IS NO LONGER GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY, IS FALSE AND VIOLATES DUE PROCESS TO ALLOW A CONVICTION BASED ON IT. U.S. CONSTITUTION, AMEND. 14; CONSTITUTION, ARTICLE I, § 3.

D. FACTS UPON WHICH THE CLAIMS OF UNLAWFUL RESTRAINT ARE BASED AND EVIDENCE IN SUPPORT

This Petition is based on the trial record from the direct appeal, the Brief in Support of Personal Restraint Petition, and the following additional Declarations:

Declaration of Peter W. Boer (Aug. 18, 2014);

Declaration of Peter w. Boer (Aug. 25, 2014);
Investigation Examination Under Oath of Peter
W. Boer (Aug. 29, 2014);
Declaration of Gregory Michael McLeod (Apr. 9,
2017);
Declaration of Gregory D. McLeod (Apr. 8,
2017);
Declaration of Edward C. Davis (April 14,
2017);
Declaration of Winthrop Taylor (Apr. 18,
2017);
Declaration of Lenell Nussbaum (Apr. 18,
2017);
Declaration of William A. Tobin (Apr. 19,
2017);
Declaration of Clifford Spiegelman (Apr. 16,
2017);
Declaration of Jason A. Hall ((Mar. 28, 2017);
and
Declaration of Jessica Thomas (Mar. 22, 2017).

E. REQUEST FOR RELIEF

Petitioner requests that this Court vacate his conviction and remand for a new trial at which the defense may: (1) present the newly discovered evidence of another suspect who committed this crime, (2) cross-examine the victim and other witnesses about the material withheld evidence and false evidence presented at this trial, and (3)

have a *Frye* hearing at which the court reconsiders the admissibility of "bunter mark" evidence given the newly recognized lack of any scientific basis for it and its rejection in the relevant scientific community.

Petitioner also requests the right to an evidentiary hearing, if the pleadings alone do not warrant a new trial, and the right to discovery to compel questioning of witnesses unwilling to talk voluntarily and production of evidence the State has withheld.

F. OATH

After being first duly sworn, on oath, I depose and say: I am the attorney for the petitioner, I have read the Petition and the Brief in Support, know their contents, and I believe the petition is true.

April 19, 2017
Seattle, WA


LENELL NUSSBAUM, No. 11140
Attorney for Petitioner Jones

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DIVISION TWO

In re the Personal Restraint of

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BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION

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I. STATEMENT OF THE CASE

A. INTRODUCTION

Martin Jones, a grandfather with no criminal history, was convicted of attempted first degree murder for shooting Trooper Scott Johnson point-blank in the head February 13, 2010. Johnson survived and identified Jones as the shooter.

Newly discovered evidence establishes Jones is innocent. Johnson in fact was shot by Nicolas Boer, a local drug dealer with a long felony history. Boer shot Johnson because Johnson was taking payments from Boer and other dealers in lieu of arresting them. Johnson falsely identified Jones as the shooter to conceal his own corruption.

This Petition also identifies exculpatory evidence the State withheld; and presents newly discovered evidence that the forensic bunter mark evidence is no longer accepted as science and cannot be a basis for this conviction.

"It is necessary to relate a large portion of the facts in this case to fully analyze the issues related" to the newly discovered evidence. *State v. Hawkins*, 181 Wn.2d 170, 172, 332 P.3d 408 (2014).

B. BACKGROUND

Martin and Susan Jones were sweethearts from high school in Kennewick. By 2010, married 27 years, they had two grown sons and two grandchildren. RP 3191-94. From 1989 to 1998, they lived in Vancouver, Washington, where Marty operated heavy equipment. He became a tower crane operator in 1996. They returned to the Tri-Cities 1998-2004 to help care for Susan's three sisters who had muscular dystrophy. Among other enterprises, they bought and managed rental properties. RP 3197-3200, 3657-60.

In 2004, Susan and Marty moved to Seaview, Washington, on the Long Beach peninsula. Susan cared for one of her sisters in their home for two years. Marty worked cranes, often in Portland or Vancouver. By 2010, they were financially comfortable. Marty could afford to work a union construction project for intense periods with time off between jobs when he wanted. They owned a home on the beach, a 2000 Chrysler van, a 2000 Buick Century, and a 1994 Nissan pickup. RP 3204-08.

Friday, February 12, 2010, Susan met Marty and their granddaughter at Chico's Pizza Parlor for

lunch. Susan drove their van, Marty their Buick. Their friend Charlotte Wanke and her son joined them. RP 3215-17. After lunch, Susan rode with Marty in the Buick. They took their granddaughter home, then went to Astoria to shop. They left the van at Chico's. They had a light dinner in Astoria. Home about 6:30, Marty lay down for a nap. RP 3218-19.

Susan went to Castaways Seafood Grille.¹ She left a note and texted Marty to join her when he woke up, or call and she'd come home. She also texted Charlotte to join her if she wanted. RP 3220-21. Charlotte met her there. Marty joined them later. The Joneses left just after 11:00 p.m. Charlotte stayed until about midnight. RP 3224, 1613-14.

Susan habitually grabs keys. She often forgets she has them and ends up with multiple sets of keys. Susan drove the Nissan pickup to Castaways; the van was still at Chico's. Marty

¹ The Joneses' son Corey was the manager; Susan waited tables there, but she wasn't working this night. RP 3191-93. Ex. 496, a video, shows them each arriving. Marty wore his usual blue jeans, some white shoes and a green jacket. RP 2736-39, 3417; Ex. 473 (receipts).

came later in the Buick. They each drove home. Marty went to bed, but Susan wasn't tired. After watching some television, she phoned Corey. He said the waitress Hanna needed a ride home. Susan offered to take her home. She popped her head into the bedroom to tell Marty she was going to take Hanna home. Marty was in bed wearing a dark blue t-shirt and pajama pants. RP 3224-28.

Susan grabbed the Buick keys. As she drove towards town, she saw their van at Chico's. She decided its seat warmers were more comfortable. She left the Buick there and drove on in the van. She tossed the Buick keys on the van's floor. RP 3234-35.

C. THE SHOOTING

On Friday night, February 12, 2010, just before midnight, Washington State Patrol (WSP) Trooper Jesse Greene stopped Susan Jones driving northbound on State Road 103, between 12th and 13th Streets S.E. in Long Beach, Washington. The stop for speeding developed into an arrest for DUI. The van was registered to Martin Jones at 915 35th Lane in Seaview. RP 873-882, 2820-21; Exs. 2, 18, 434.

Susan texted her husband's phone to let him know she'd been stopped. "Got myself pulled over. Pray. Will check in som." [sic] RP 2627, 3237. It was 2359:07.² RP 3238-39.

Trooper Scott Johnson was called to the scene about midnight. He parked behind Greene's vehicle. RP 886, 2788-90; Ex. 185. Johnson asked if anyone could come get the van. Susan said "Marty" and gave his phone number. Johnson wrote the name and number on his hand. RP 2795, 887-88; Ex. 4. Nonetheless, Greene decided to impound the van because Ms. Jones was "kind of belligerent." He radioed for a tow and took Ms. Jones to the Long Beach Police Department (LBPD), two minutes north at 212 Pacific Ave. S., arriving at 0018 hrs. RP 888-89, 2796-97, 3243-45. Susan's wallet and cell phone remained in the van. RP 3251.

Marty awoke hearing a text message arrive on his phone in the kitchen. After a minute, he got up and read it. Susan said she would call soon, so he went back to bed. RP 3683-85. When he hadn't heard from her in a while, he phoned her cell. No

² The law enforcement witnesses testified primarily using the 24-hour clock. For clarity, this brief will do the same.

answer. He then called their son, then Charlotte, who he thought would be with Susan. At 0022, Charlotte had just arrived home in Ocean Park, north of Long Beach. She said she'd go look for Susan. Marty said don't worry about it, but Charlotte wanted to go. RP 1619-21, 3685-89.³

Charlotte found Susan's van on SR 103 with Johnson's vehicle. Johnson told her Susan was at LBPD. RP 2799-2804. From LBPD's back door she saw Susan. Susan winked at her, mouthed "It's OK," and smiled. Greene told Charlotte she could wait in the parking lot until Susan was finished. Charlotte called Marty and told him Susan was fine. She didn't mention where the van was. Marty said he was going back to bed. He didn't sound angry. RP 1630-32, 3246-47.

George Hill arrived with his tow truck. He pulled in ahead of the van. As he lowered his deck to the front of the van, he saw a man standing on the northwest corner of SR 103 at 12th Street S., under the streetlight. The man crossed the highway. He came within 15-20 feet of Hill. He

³ Marty said nothing suggesting he was walking to find the van. RP 1623.

asked what he was doing. Hill said a DUI impound. The man did not appear angry; he showed no emotion. He just walked away. RP 1301-12; Ex. 68.

Johnson came forward from his vehicle to inventory the van. He stood on the sidewalk leaning over the van's hood to count the money in Susan Jones's wallet. RP 1313-15.

Hill suddenly saw the man behind Johnson reach his left arm around Johnson's chest and strike the back of Johnson's head. Almost in the same motion, Johnson pushed backwards and turned aside. Hill heard a "popping" sound -- not a bang, but a sound more like a child's cap gun. He thought it was a prank. RP 1315-16.

Johnson knew he was shot. He had his back to the shooter. He ran to the other side of the tow truck to take cover. He didn't know where Hill or the shooter was. RP 2825-29.

The shooter ran north. Hill chased him the length of the tow truck, about 20 feet, then the shooter spun around, running backwards. Hill heard a second popping noise. Johnson was yelling. RP 1316-18.

Hill ran back to where Johnson was standing in the middle of the road, his gun drawn. Johnson fired his gun twice,⁴ one shot striking the window of the van's open passenger door, the other his own vehicle's passenger-side headlight. RP 1319, 2096; Exs. 7, 174, 214.

At 0041 Hill phoned WSP dispatch that an officer was shot. RP 998, 1005. Hill described the shooter "in grey clothes and two-tone." He said he could identify him. RP 1004-06.

D. POLICE RESPONSE

Long Beach Police Officer Casey Meling heard the call over the radio at the station. As Officers Meling and Martin left LBPD, they ordered Charlotte Wanke out of the parking lot. Charlotte drove around the area, waiting for Susan to call to say she was released. RP 1636-39.

Officers Martin and Meling arrived at the same time in separate cars from LBPD. Meling was at the shooting scene in less than a minute. He put Johnson in his car at 0046, arriving at the Ocean Beach hospital at 0048. RP 1035-41.

⁴ Johnson thought he only fired once, as he reported to the dispatcher on Hill's phone. Ex. 61 ("flip video").

Hill described the shooter to Officer Martin at 0047 as a white male, 35-45, 5'10"-5'11", 185-200 lbs, 1-2 days growth of facial hair, dark stocking cap, light tan complexion. Officer Martin quickly drove around the area looking for someone fitting that description. RP 2153-64.

Greene released Susan Jones. He told her there was an officer-involved shooting, she should walk home. It was about two miles from LBPD. RP 978, 3249-51.

WSP dispatch, Long Beach Police Department, and Pacific County Sheriff all called for help from police agencies from Thurston to Clark Counties. RP 1007. The recent murders of four officers in Lakewood, November 29, 2009, and one officer in Seattle October 31, 2009, were fresh in everyone's minds.⁵

The usual practice when a law enforcement officer is shot is to bring in a team from outside the jurisdiction to investigate. This procedure keeps everyone honest and draws on outside resources and ideas. The Interagency Shooting

⁵ These events made Johnson particularly alert to his surroundings. RP 2790-81.

Team, created for this purpose, responded to Long Beach. RP 1872-73, 1903-04. By the end of the day February 13, Washington State Patrol took over the investigation and released the team. RP 1905-06.

Thurston County Detective Steve Hamilton was part of the Interagency Shooting Team. He spoke with Hill at Command Center while the local police were still getting organized. Hill described a "stocky male," about 40, with "Mediterranean features," a "white male" with "olive skin" and "really flared nostrils." He was confident he could identify him if he saw him again. RP 1875-76, 1907-08.

Police set up roadblocks. Stationed at the corner of Pacific Ave. (SR 103) and 12th St. S., Greene saw Susan Jones walking south on 103. She thought she could at least retrieve her wallet, keys and cell phone. He told her she could not return to her van, she should walk home via California Ave. She did so. RP 912-15, 3251-52.

Susan walked from LBPD south on Pacific to Sid Snyder Drive.⁶ She cut diagonally across a field to 11th St. S. and California, then back to the highway toward the van at 12th. When Greene turned her away, she went down California Ave. (which becomes L Place in Seaview) to 41st St., then back to the highway to the Shell station. She used a pay phone there with her calling card number to call Charlotte. She was worried Charlotte was out looking for her. She left a message that she was fine, was walking home, Charlotte should go home and they'd figure it all out in the morning. Susan then went back west on 39th past Rod's Lamplighter, south on L to 35th and home. RP 1460-67, 3249-55.

After not hearing back from Susan, Marty considered going to look for her. He couldn't find keys for the Nissan truck, the only vehicle at home, which Susan had driven earlier. He vaguely remembered hearing something about giving Hanna a ride home. He knew she lived north of Castaways, too far for him to walk. He talked to Charlotte a

⁶ Exhibit 2 is an oversized exhibit, a mounted map of Long Beach showing the streets and key landmarks. On it, witnesses traced Susan Jones's route home in red, the dog track in blue. This picture is worth 1,000 words.

couple of times, and learned she had found Susan. She said she'd give her a ride home. Marty went back to bed. Sometime later, Charlotte called again, saying now she was looking for Susan. As they talked, Marty heard Susan come in the front door. RP 3689-94.

As she got in the door, the house was dark. She heard Marty upstairs on the phone say, "I think she's here." He called her name. Susan went up, spoke briefly with Charlotte on the phone, said she was fine, they'd talk later. Marty was still wearing the pajamas he wore when she left. RP 3255-57, 3480.

WSP Sgt. Jody Metz requested the registration of the van at the scene. It was registered to Martin Jones. RP 2976-79. At 0236, per Metz's request, law enforcement printed the DOL photo of Martin Jones. RP 2853; Ex. 435.

E. DOG TRACKING

Deputy Crawford arrived with his tracking dog Gizmo at 0205. RP 1120. After Crawford talked to George Hill, Gizmo tracked from the scene south to 13th to Washington, through a breezeway and parking lot of Peninsula Church, to N Place by Sid's

Supermarket. The dog circled to the east side of N Place, around Sid's on 44th Place, back north on SR 103 to 45th Place, west to L Place, then south to Rod's Lamplighter at the corner of L and 39th. The officers checked inside Rod's. They went back to SR 103, south to 35th St., then west on 35th. Meling got Jones's address to know when they were getting close. They terminated the track at 35th St. in the 900 block because they were close to the residence. RP 1050-55, 1121, 1137-38; Ex. 2.

Tracker Crawford said, "It's a very weak scent if anything." The track was "poor at best." RP 1082, 1133, 1145-52. Ideal weather for tracking is cool temperature with no wind or rain. The weather was changing that night every few minutes, with hard rain and wind. RP 1173-76.⁷

⁷ Witnesses described it as raining hard, blowing and raining sideways. RP 2203-04, 2215. Another K-9 officer confided the rain and wind make it harder to track. "And dogs have a tendency if they can they will cheat." RP 2569-70.

Crawford did not know until later that morning that Susan Jones had walked home that night after the shooting. RP 1176-80.⁸

F. JONES RESIDENCE

Before dawn, police surrounded the Jones home at 915 35th Lane in Seaview. The house was the last one on 35th, after which were only the dunes, the beach and the ocean. RP 1272. Police phoned Susan. They asked her to come out to talk about her arrest. She agreed, saying she needed to dress first. Susan came out the front door and walked to where officers were waiting. RP 3259-61.

Marty Jones then walked out the back door onto the dunes for his usual morning walk. Police immediately ordered him to halt, drop to his knees and put up his hands. He seemed confused at first, then complied. He asked, "What's going on?" He said he was going for his morning beach walk. RP 1278-85. Officers offered no explanation. Jones had no weapons and no money on him. He wore blue jeans, a thin thermal shirt, and a thin water

⁸ Chico's Pizza Parlor, where Susan parked the Buick and got into the van shortly before being stopped, is very near Sid's Market where the dog circled. From there, the dog tracked very closely to Susan's path home. Ex. 2.

resistant jacket. He carried no money, ID, or keys. RP 3697-98.

Police asked Marty if he would agree to a drive-by show-up identification by a witness to the shooting. Marty said absolutely. He wanted to help any way he could. RP 3702-03.

**G. THE SHOW-UP: "THAT'S NOT THE GUY."
"THAT'S MARTY."**

WSP Det. Matthew Hughes and Thurston County Det. Haller took Hill to the Jones residence. They told him they wanted him to look at somebody, see if he recognized them as being involved in the shooting. Hill was willing to do it. In fact, he was pretty "amped up" about it. RP 3138-40.

Police took Hill in an unmarked car to the Jones residence. They had Marty stand outside with Det. Hamilton as the car drove past. They drove slowly and stopped 30 seconds in front of Jones and Hamilton.⁹ On the first pass, Hill *immediately* said it was not him. Just to be thorough, the officers drove to the cul de sac, turned around,

⁹ During the show-up, Hill was ten to fifteen feet from Jones. Jones was the only civilian. Two obvious officers stood behind him a few feet. There was no one else in the area that could have been misunderstood to be the subject of the show-up. RP 2411-12, 3141-44, 3703-05.

and returned. They told Hill they would go by one more time, very slowly, so he could take another look and be sure. They drove even more slowly the second time, and stopped 10-15 seconds in front of Jones. Hill said, "No, that's not the guy." "That's Marty." He spoke confidently and almost immediately after the second pass. Det. Hughes reported back to command that Jones was not the shooter. RP 1325-26, 1374-75, 1914-22, 1947, 3145-46, 3155.

Hamilton told Marty he was free to leave. Police asked permission to search the home, explaining he was free to refuse. Marty and Susan consented without hesitation. RP 1924-25, 3267-68, 3711-13. Marty, Susan and Charlotte provided a recorded interview to the detectives. RP 1930-31, 3269-70.

Hill met with a sketch artist, Thurston County Sheriff's Deputy Mitchell King, Saturday afternoon. RP 1734-41.¹⁰ Hill described the shooter the best he could to produce a sketch. RP 1328. The police

¹⁰ King attached his police report to the sketch, including careful notes of his interviews and the witness's descriptions. He turned the report over to WSP detectives with the sketch, but never saw the report again. RP 1761-62, 1768.

distributed the resulting sketch to news media and the community. Ex. 59.¹¹

Hamilton prepared a group of 8-12 photos to show Hill, including a photo of Martin Jones. There were no names on any of the photos -- names would prejudice the identification process. Hill told him the photo of Jones was not the shooter. RP 1900-02, 1947-48.

Saturday night, Hill again described the shooter as an "olive-complected male," in his 40s, with a Greek or Mediterranean appearance. He was adamant about the Greek or Mediterranean appearance. He was confident he could identify the shooter. RP 3163-65.

H. NICOLAS DEAN BOER¹²

Several people called the police tip line to report the sketch was Nicolas "Nick" Boer. Dec. of L. Nussbaum Apps. A-B. Late Saturday night, the police contacted Nick Boer at his mother's home, Land's End RV Park, at the north end of Long Beach.

¹¹ A copy of Ex. 59, the sketch, is attached as Appendix A to this brief.

¹² Nicolas Boer's mugshot from the Florida Department of Corrections is attached as Appendix B to this brief.

They arrested his brother Peter Boer on a warrant. Nick Boer agreed to go with them and give an interview. Dec. of L. Nussbaum Apps. E, H.

Nick told police he had been at his mother's trailer "sleeping mostly," from 1600 Friday through all day Saturday. He said his mother, brother, sister-in-law and niece were with him and would corroborate his alibi. He claimed it had been 9-10 days since he used his drug of choice - meth. Dec. of L. Nussbaum App. H 1-4. He acknowledged he was "out there dealing dope" and like other dealers, would only have guns "that people rob out of houses or whatever, you know. People's kitchen doors or under their seats or something, you know." He claimed he stopped carrying a gun 3-4 months earlier, when he also "stopped dealing dope and just kept using it." *Id.* 5-7.

Nick told the police the sketch really looked like Jason Pearson, another drug dealer. Jason had "blondish orange hair" and just happened to have robbed Nick a few months earlier. *Id.* 3-6.

"Based on the interview, Detective McMillen determined that it was unlikely that Nicholas BOER was involved in the shooting." He drove Nick home.

Id. App. E. The police did not follow up on any of the other tips identifying Nick Boer as the sketch, marking them "interviewed & cleared," "No follow up further needed." *Id.* Apps. A-B.

I. JOHNSON AFTER THE SHOOTING

At the Ocean Beach Hospital emergency room in Ilwaco Saturday at 0100, Johnson was fully alert. The injury to the lower back of his head had no depressed skull fractures, no burning or singed hair near the wound as one would expect from a contact gun shot. The CT scan showed metallic pellets or fragments in the soft tissue of his neck near the base of his skull.¹³ There was no brain swelling, intercranial hemorrhage or fracture. He was given Dilaudid at 0300 before being transported to Oregon Health Sciences University Hospital (OHSUH) in Portland. RP 928-42, 948-51, 2257-60, 2488-89.

In the ambulance from Ocean Beach to OHSUH, Johnson was excited. He rode with paramedic Matt Beaulaurier, an old family friend, who reported: "He said he did not get a good look at the

¹³ The OHSUH surgeon could not determine whether the scans show bullet fragments or pellets. RP 1801-06.

shooter," he was busy trying to take cover while things happened quickly. RP 2695.

Later that morning, Johnson also told Portland Detective Slater he did not get a good look at the shooter's face. He mostly saw him in profile. RP 1266. Slater showed Johnson a photo he received by email Saturday about 1045-1050. Johnson said the photo was similar to the shooter, but the shooter's hair was much shorter and he had a few days of facial hair. RP 1257-62; Ex. 55.¹⁴ He thought he must be associated with the van. RP 1267.

Trooper Hodel arrived at 1224 on Saturday, February 13 and set up a Command Center in a separate room at OHSUH. Hodel showed Johnson photos of two people Johnson rejected. About 1630, Johnson asked Hodel to see the DOL photo of Susan Jones's husband. He "had a feeling he needed to see his face." He said Trooper Greene made Susan very angry and maybe she called her husband.¹⁵ Johnson also told Hodel to keep his request secret. RP 1578-83.

¹⁴ The image bears no resemblance to Martin Jones. Compare: Ex. 55 with Exs. 53-54, 92.

¹⁵ Susan didn't have her phone. RP 3251.

Hodel did not keep the request secret. He told WSP CID Sgt. Brusseau about it. Brusseau said he would work on getting a photo and meanwhile send a composite sketch. RP 1574-80.

Hodel showed Johnson the sketch King drew with Hill at 1720 Saturday. Johnson said the lower portion of the nose was all wrong, it looked Hispanic, the shooter was definitely Caucasian. RP 1575-77, 1584; Ex. 59.

Johnson again told Hodel he only got a side view of the shooter, so he really needed to see a profile angle of Jones. He said the shooter had a very distinctive nose. Johnson explained Pacific County's booking photos are always of full face and profile. The distinctive nose would be most apparent on a profile photo. RP 1585-88.

Trooper Layman was at OHSUH Saturday 1558 until Sunday 0109. Johnson slept much of that time. Layman showed Johnson a few photos Johnson rejected. RP 1681-86.¹⁶ All the images were front

¹⁶ Layman carefully put these photos in a folder at Command Center. He showed Tr. Thompson the folder when he came on duty 0100 on Sunday. The photos and folder, however, disappeared before trial. RP 1691. Tr. Robley did not see it when he was there Monday. RP 1701-02.

facial shots. Johnson again requested profile shots as more useful to him. RP 1689-90.

Johnson also told Trooper Robley he only had a side view of the shooter. RP 1698-99.

Jeff Frice, a DOC Community Corrections Supervisor, was at OHSUH on Sunday from about 1000-1630. He brought his laptop so officers in Long Beach could send photos electronically. Frice had never done witness identification work before; he had no training or instruction. He did not document anything he did. There was no record of the six to ten photos he showed that Johnson rejected. RP 1540-47, 1555-58, 1686.

When Frice first arrived, Johnson again asked to see a photo of Marty Jones, the name on his hand. A higher ranking trooper responded that Jones had been cleared. Johnson insisted he wanted to see him. Frice passed the request along. Command sent the DOL photo with Martin Jones's name on it. RP 1548-53.

Johnson said the DOL photo of Martin Jones was the shooter. The shooter was "scruffier" than the photo, but that was him. RP 1551-52; Ex. 92.¹⁷

That afternoon, WSP flew sketch artist King to work with Johnson. King spent nearly two hours alone with Johnson Sunday evening. He showed him Hill's sketch. Now Johnson agreed with the nose, jaw and chin in the sketch. He didn't like the eyes or forehead. He described a faded widow's peak and spiked hair. King went into another room to draw, then learned Johnson had identified a photograph of Jones. RP 1744-47. Johnson did not tell King he already had identified a photograph of Jones. There was no reason to do a sketch if Johnson already identified a photograph as the shooter. RP 1773-79.

Sunday evening, Clark County Sheriff's Deputy Kevin Harper was directed to take a photo of a possible suspect to Johnson at OHSUH. Harper is an experienced detective, part of a regional major crimes investigation team. He would not agree to show a single photograph to a crime victim because

¹⁷ A copy of the DOL photo of Martin Jones is attached as Appendix C to this brief. Dec. of L. Nussbaum ¶ 2.

it could taint the identification. A montage also should not include any names on the photos. He asked if he shouldn't take a montage, a better way for identification. Another officer assembled a montage. The montage included Marty Jones's DOL photo but without the identifying information on it. Harper showed the montage to Johnson Sunday at 2258. He went through the formal presentation of the montage. Johnson looked at the montage 10-12 seconds and said Number 3 looked very similar to the man he saw. RP 1703-25; Exs. 92, 114.

Johnson did not mention that he already had identified this same photo of Jones 6-7 hours earlier. If Harper had known that, he would not have presented the montage. After selecting Jones from the montage, Johnson declined to talk any further without a lawyer. RP 1726-29, 2924-25.

Meanwhile, Sunday evening George Hill was "re-interviewed" in Long Beach by three detectives. Referring to Susan Jones's husband, he told the detectives: "I can guarantee it's not him." He didn't remember his first name just then, but he'd seen it on the van's registration. He knew him; he'd given him estimates a few months earlier.

Jones has "blondish colored hair and a totally different facial structure." He again described the shooter with a distinctive nose with broad flaring nostrils, maybe like a Greek or Ukrainian. RP 1385-94; Exs. 76, 77 at 10-14.¹⁸

J. ARREST OF MARTY JONES

Sunday afternoon the Joneses contacted their Roadside Assistance program to get help unlocking the Buick. They needed the owner's manual to replace the key. Roadside Assistance sent George Hill to unlock the Buick at Chico's. Hill charged \$50, but waived the \$35 Sunday overtime charge for Susan because he "knew" them. RP 3272-75.

With the Buick keys in the impounded van, the Joneses were left with only the Nissan pick-up to drive. Susan worked at Castaways Saturday and Sunday nights. Charlotte Wanke and her husband Mike joined Marty for dinner there Sunday, then went to the Joneses' home. The Wankes left their truck for Marty to use until he could replace the Buick key. RP 3272-76.

¹⁸ Ex. 77 is a transcript of the recorded interview, Ex. 76.

After Susan came home and the Wankes left, Susan and Marty were still restless from the weekend's events. Police and the media were still very active in town. They decided to go for a drive and stay the night at a friend's vacation home in Oysterville. They left home about midnight. RP 3277-78.

Unbeknownst to the Joneses, officers were tailing them but lost them in the fog. RP 2656-61, 2703-05, 3409-11, 3721. They had just settled in their friends' home when the Wankes called: the police were at their home and wanted to talk to Marty and Susan. The Joneses immediately went to the Wankes', where the police arrested Marty. RP 3411-13, 3721-23.

Monday morning, George Hill learned from the news they arrested Marty Jones. He had known WSP Captain Freddie Williams for years. Hill phoned Williams and asked if Marty Jones was "for sure the shooter." RP 1406, 3190. Williams, who was close friends with Scott Johnson, acknowledged they'd arrested Jones. Hill told him about the show up. Now he thought maybe he'd looked at the wrong

person. But he said later that day, "I remember seeing Marty there." RP 3180-81.

Scott Johnson worked his entire career in the Long Beach area. Many witnesses had known him nearly 30 years and considered him a friend. RP 1269-71, 1332-33, 1409-10, 2166-68, 2369-71. By trial in January, 2011, Scott Johnson had been elected Pacific County Sheriff. RP 2762-65. Some of the witnesses who testified now worked for him, RP 1220-21, 1990-91, or had become close friends, RP 1066. Hill Towing now had the exclusive contract for county impoundments. RP 1332-33.

A few weeks after the shooting, Meling and another trooper went with Johnson and his son to George Hill's to view Hill's "flip video" taken right after the shooting. RP 1067-69, 1334-35, 2856-57. They talked about the incident after watching the video. Johnson said he didn't remember shooting twice. Hill said, "I guarantee you, you shot two times." RP 1335-36. They all did a lot of hugging that night after watching the video. RP 1337.

Hill never identified Marty Jones as the shooter.

K. TRIAL AND PROCEDURE

1. ADDITIONAL EVIDENCE AT TRIAL

Scott Johnson pointed at Marty Jones and identified him as the man who shot him. RP 2812.

No gun was ever found or identified. RP 1452-53, 2196-2200.

None of Jones's DNA or blood was found on Johnson's clothes. None of Johnson's blood or DNA was found on Jones's clothes. RP 3508-24. The trace DNA found on Johnson's shirt excluded Jones as the contributor. RP 3548, 3555. No one asked the lab to compare the trace with any other known sample. RP 3549-50.

Johnson said the shooter wore a grey long-sleeved jacket, smooth like nylon. The pants were a similar fabric, styled like sweatpants. They had sewn on the thighs a black or charcoal design, wider toward the top and narrower to the knee. RP 2816-17, 2891; Ex. 439. No clothes matching that description were found or connected with Jones.

Phone records showed Marty's cell phone was in use February 13 at 0024:43, 0038:50, 0040, and 0041. RP 1845-50; Exs. 119-126.

After Sue's text to Marty when she was stopped, her phone indicated she missed calls from him at 0002, 0006, 0013, and 0023. She missed calls from Charlotte at 0022, 0027, 0028, and 0802. RP 2627-31.

Marty's phone showed he missed calls from Charlotte at 0021, 0039, 0041, and 0801. He connected to calls from Charlotte at 0017, 0020, and 0038. RP 2627-31. No one testified seeing the shooter using a cell phone.

2. EXCLUSION OF EVIDENCE OF OTHER SUSPECT

The State moved to exclude any evidence suggesting any other suspect could have committed this crime. Trooper Greene saw a white man walk past while Susan Jones was doing field sobriety tests. The defense did not have any particular individual to identify as a suspect; but Greene saw the man 15-20 minutes before the shooting, and his description was very similar to George Hill's of the shooter. Police relied on Greene's description of the man he saw to clear people stopped at the roadblocks that night. The court granted the motion, excluding any mention of the man Greene

saw. CP 527-36, 1046-60, 1218-28, 1243-43; RP 396-410, 927-28.¹⁹

3. BUNTER MARK EVIDENCE

A crime lab analyst recovered a .22 caliber short shell casing from the pavement near the scene. As she put it in an envelope, the wind blew it from her hands. She stepped on it, crushing its mouth. RP 2207-09, 2234-35; Exs. 32, 327.²⁰

The .22 caliber casing from the scene did not provide DNA. Police conducted DNA tests on cigarette butts from the scene. One contained male DNA, but it did not match Johnson or Jones. Two had female DNA. Three had mixed DNA with no match. And four had trace DNA but not enough for a profile. No evidence from the scene contained any DNA of Marty Jones. RP 3506-08.

¹⁹ The defense twice sought the court's reconsideration of this issue without success. RP 1525-28, 3845-47.

²⁰ In addition, police found two .40 caliber casings and one .40 caliber bullet, fired from Johnson's gun. RP 2274-76.

Search warrants of the Jones residence produced a box containing 100²¹ cartridges of .22 caliber "short" cartridges made by CCI. Yet when firearm/toolmark analyst Johan Schoeman received the box at the crime lab, it contained only 97 cartridges. RP 2459-60; Ex. 400, 352.

Schoeman was instructed this case was "top priority." "We are looking to make a match any way possible." RP 2499-2500. A detective had the idea to compare bunter marks. RP 2486.

A "bunter" is the die used to stamp a manufacturer's mark on the face of a shell casing.

Schoeman looked through a microscope at the bunter marks on the head of the .22 shell casing found at the scene of the shooting, and the marks on the box of cartridges found in Marty Jones's dresser drawer. He concluded the found casing was stamped by the same bunter as stamped 48 of the 97 casings in the box. The defense moved for a *Frye*²²

²¹ ATF Special Agent Matt Olson testified there were 100 .22 shells in the box he took from Jones's dresser drawer. RP 2330, 2334-35. Karen Burress received the box of 100 rounds, noting it was "open and viewed." RP 2347, 2359-60; Ex. 365.

²² *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir. 1923).

hearing on the grounds there was no scientific basis for a statistical measure of matching these marks. The defense cited the 2009 National Academy of Sciences study questioning whether there was any scientific basis for this sort of analysis and conclusion. CP 369-92, 1074-1109.

The court denied the motion. It concluded this was not new or novel evidence, it was long accepted by courts, and so there was no basis for a *Frye* hearing. It further held there were no limits on Schoeman expressing his opinion and conclusions. CP 1234-35; RP 446-68.

Schoeman testified that toolmark analysis, such as for bunter marks, is "based on scientific principles." He said studies conducted over more than 100 years make toolmark analysis "scientific" so it can be presented in court. RP 2419-20, 2518.

Schoeman testified that each bunter is "individual and unique."²³

²³ Prior to this case, Schoeman had never analyzed bunter marks. He wrote his report March 9, 2010. As of January 7, 2011, just before the trial, he stopped defense counsel's pretrial interview to say he knew nothing about bunter marks or how they were made; he needed to prepare before continuing. RP 2479-81.

(continued...)

[N]o two bunters, even if they were manufactured consecutively will have exactly 100 percent the same microscopic markings that is only visible through a comparison microscope.

Each stamp erodes the bunter to some degree. Those "individual and unique characteristics" are then transferred onto the casing. RP 2463.

Schoeman projected photographs of the bunter marks he compared through the microscope onto a screen for the jury. He explained his view in the microscope was much clearer than what he was able to show them. RP 2465-66.

He saw there were "more similarities than dissimilarities." While no two cartridges will be 100% the same, he testified there are always microscopic differences you can observe.

But the similarities is more, is sufficient for me to determine that this would form an identification. In other words, that these two were made by the same bunter.

RP 2467-69.

²³(...continued)

He reviewed an article in the journal of the Association of Firearm and Toolmark Examiners (AFTE) from 2000 about bunter marks. That article discussed a single bunter stamping up to 500,000 pieces. He was not aware that CCI had changed its production and a single bunter now stamps up to 25 million pieces. RP 2481-84, 2311-23.

He acknowledged finding similarities "sufficient" for an "identification" had

no set number of markings that we look for. ... When we talk about the theory of identification, we talk about sufficient agreement of the markings present on a cartridge case or a bullet.

...

Due to that uniqueness, we could say that the markings that, for example, we see there is sufficient.

RP 2469-72.

There is sufficient agreement on that for me to say due to my experience and training, that that would be a positive identification.

RP 2472.

He concluded from his comparisons that the 97 shells were stamped by three different bunters: 48 by one, 48 by a second, and one cartridge by yet a third bunter. He also concluded the .22 casing from the scene "matched" 48 of the cartridges in the box. RP 2475; Ex. 400.

Bret Olin, a development engineer for CCI Speer, the manufacturer of the shell casings, explained they make four kinds of .22 caliber ammunition. One bunter will last six or more months, stamping millions of cartridges. RP 2290-2301. The box of cartridges bore a lot number, indicating it was manufactured July 21, 1999. On

that date, CCI manufactured 138,700 cartridges of .22 short CB. RP 2302-04. In that year, CCI may have stamped 25 million rounds with the same bunter. It would be very unlikely to get three different bunters used in the same box of 100 shells. RP 2318-24.

CCI is the leading manufacturer of .22 ammunition, available in big box stores such as KMart, WalMart, and Ace Hardware. RP 2309-10.

The bunter mark evidence was the only forensic evidence suggesting a connection between Marty Jones and this shooting.

4. MARTY JONES'S TESTIMONY

Marty Jones testified he was home the entire night of February 12-13, from when he returned from Castaways until he walked outside in the morning headed for the beach. He did not shoot Trooper Johnson. He did not know who shot Trooper Johnson. Until Trooper Johnson testified at trial, Marty Jones had never seen him. RP 3724, 3731-32.

5. CLOSING ARGUMENTS

In closing, the State urged the jury to consider Trooper Johnson's identification and the bunter mark evidence. Schoeman established that

the shell casings came from "the exact same source." RP 3943-44. Schoeman was not biased, he was "just a scientist." RP 4055.

6. VERDICT AND SENTENCING

The jury found Jones guilty of attempted first degree murder. CP 1283.

At sentencing, Marty Jones again told the court he did not commit this crime. RP 4133. The Court sentenced him to 600 months -- 50 years -- an exceptional sentence. RP 4134-35; CP 1350-63.

II. NEW EVIDENCE DISCOVERED SINCE TRIAL

A. NICOLAS DEAN BOER SHOT TROOPER JOHNSON.

Since the trial, Peter Boer came forward to report that his brother, Nicolas Boer, confessed he shot Trooper Johnson.²⁴ In fact, Nick Boer was not at his mother's all night. He left before midnight. He phoned Peter shortly after the shooting to tell him a cop was shot, to lie low and wait until he returned. He phoned from near the shooting. He and Peter then picked up a delivery of drugs. They drove to Seaview on the beach, avoiding the police on the town's streets, to the

²⁴ The Declarations and the transcript of the Investigation Examination Under Oath of Peter W. Boer, noted below, are filed with this Petition.

home of Ken Parks -- just two blocks from Martin Jones's home.

There Nick admitted he shot Trooper Johnson. He did it because Johnson was extorting money from the local drug dealers, and they wanted it to stop.

Nick had access to an unusual gun that shot only .22 shorts and often misfired, and access to some old .22 short shells that were damaged and didn't fire right. At Nick's insistence, Peter dumped guns or gun parts into the ocean that night.

1. FIRST DECLARATION OF PETER WILLIAM BOER

In a handwritten Declaration of Peter W. Boer, sworn and notarized, Peter wrote:

I Peter Boer on the night of February 14 [sic] left the place where I was stayin and went to Seaview Washington with my brother Nick Boer we went to Ken Parks house and visited with Ken he stated that he had heard my brother and I had shot Scott Johnson. I then stated that I was at home and did not know what he was talkin about. My brother smiled and laughed and stated yep, I shot that guy, I am the one that does all the bad shit in this town. I left just after that by myself and went over to Mike Mclouds house to see if he wanted to get high with me and if he could help me get rid of some guns I had. He stated he wanted to get high but could not help me with the guns. I said to him they were not my guns anyway so I didn't care but we could still get high. So we did some drugs and I went back over to Kens house and left

the back pack with my brother and went home. I got picked up by the cops the next day.

2. SECOND DECLARATION OF PETER WILLIAM BOER

In a second handwritten Declaration of Peter W. Boer, he wrote:

A couple days before the cop got shot my pal Eddie Davis told me that a gun had been stolen from his house and that my brother had stolen it. For the fact that it was a certain type of gun and had alot of family value or cintamental [sic] value is the reason I should confront my brother and return it to him. The night of the shooting my brother came to my mom's house and stated that a cop had been shot. When I asked him if he did it he did not make any statement. I then asked if he brought the gun to the house that's is when my mother started in on me about defending my brother's innocents. [sic] Not long after that me and my brother went to Ken's house in the some sort of SUV we took the beach to get there. When we got to Ken's my brother boasted that he had shot the cop.

He had asked me to get rid of some gun pieces and parts for him. I had stated to him that I was going over to my pal Mikes house and then I would go get rid of the gun pieces. I went over to Mikes and we went for a walk down to Red River. It was late at night so I had not payed specially close attention to what pieces were in the back pack. But me and Mike went for a walk and I tossed the gun pieces into Red River on the way to the beach. The trip did not take long and me a [sic] Mike split ways after we got high on some drugs I returned to Ken's house but I think my brother was gone by then

and the next night I was picked up by the cops.

3. INVESTIGATION EXAMINATION UNDER OATH
OF PETER W. BOER

Peter Boer then gave an interview under oath with a court reporter, relating events in more detail. Investigation Examination Under Oath of Peter W. Boer (8/29/2014) ("PBoer Exam").

In February, 2010, Peter, his wife and daughter lived with his mother at Lands End trailer park in north Long Beach. The night of the shooting, February 12-13, 2010, "there was a bunch of people calling. Everybody was waiting for ... the dope guy to come back in town." People were calling about getting drugs. PBoer Exam 6. Peter's brother, Nick, called him first, then a couple of others, "telling me to lay low, the cops were on the warpath because one of them got shot."

Id. Nick

was all sketched out. He just told me that a cop got shot and I should stay at the house -- wait for him to get there. ... I stayed in the house. My brother come in a little after -- little after midnight maybe. ...

[H]e came in, and I asked him if he shot the cop, and he didn't answer me. And I asked him if he brought the gun with him, and he didn't say nothing. He said he'd already got rid of everything that he

had. And my mom jumped on my case about interrogating my brother, always blaming him for everything. ... Yeah, you know, she was defending my brother because he's the favorite one.

Id. 7. When Peter asked Nick if he shot the cop, he didn't respond.

He just eyes down, just don't ask, don't tell type of thing. ... [H]e had some guns before that; we had a pile of them. I asked him if he'd got rid of any of them, because I knew a couple people that wanted them, you know, that had, you know, an interest in -- because my buddy Eddie had come to me saying that one was stolen from him. And I was pretty pissed off about it because it was his grandfather's gun and ... the pistol that was stolen was a special kind of weapon.

And then I was also missing a canister of some shells, old .22 shells, and I was telling him that they weren't no good because they had -- it was old -- old .22 shorts that I had got from an abandoned house or -- I had found them. And I warned him about not -- some of them -- because we had fired some earlier that day. ... -- and some of them had -- the shells had come -- some of them didn't fire at all, but some of them blasted off, pow, and then some of them didn't make no noise at all but the bullet came out the end of the gun; it was weird.

Id. 8-9. Eddie Davis, Peter's good friend from childhood, called Peter earlier that week saying he thought Nick Boer had stolen a World War II era .22 semiautomatic pistol.

It only shot .22 shells. And what was unique about it was you had to clean it

every -- every clip. It had a five-round clip. It looks -- it resembles the German-made nine millimeter, or 45. It was a -- but you had to crack it open and clean the barrel out and the firing mechanism or it would jam and not fire.

Id. 11-12. This gun fired "only .22 shorts." *Id.* 12.

Nick told Peter he'd already sold the gun. Peter "beat him up a little bit, not very much." Then he sent him next door for the drugs that had just come in, "to take care of business." *Id.* 18-20.²⁵ Peter and Nick's drug customers were waiting for this supply. Then they got into the SUV. Nick drove. Peter asked if this vehicle was stolen.

Because we were running a lot of dope. I was like, is this vehicle stolen? He says, no, the vehicle was clean.

...
We jumped on the beach and we went down to Seaview to see Ken Parks. There was some people waiting there, needed some dope -- ... and I went over to see Mike.

Id. 22-23. The cops were on the main road, so they drove down the beach. They stopped and did some drugs, then continued to Ken Parks's house. *Id.* 24. Peter talked to some of the people who were there waiting for drugs. He dealt some pills and

²⁵ Peter was dealing drugs in the Seaview/Long Beach/Pacific County area 2009-2012. He stopped dealing when his mother died. *Id.* 83.

psychedelic mushrooms. *Id.* 27. Then he went back into Ken's master bedroom, where Ken was talking to Nick. *Id.* 29.

Something about the cop being dirty, and he can't believe that it actually happened. And Nick just sat there and smiled. And I looked at Ken. I was like, look, man, I was down at the other end of the coastline. He said, it ain't got nothing to do with you; this guy right here. I was like, uh. I looked at my brother, and he just looked down. He was still smiling.

And Ken says, yeah, your brother here took it upon himself to rid us of some trouble that we had around here. And I was like, I don't want to know about it. I don't want to know about it. I says, Nick, man, did you really shoot that cop, dude?

... I said, did you really shoot that cop? And he's like, yeah, I do all the bad shit around here.

And we got -- he asked me to go out to the car and grab a backpack and go dump off some gun parts that he had that -- they were just pieces.

Id. 29-30. Peter warned Nick that Eddie's gun better not be in those pieces. Nick was confident they weren't. *Id.* 30, 34.

Peter later learned the "cop" was Washington State Patrol Trooper Scott Johnson. *Id.* 31.

Peter took the backpack from the car. Nick told him to take the gun pieces and dump them in the ditch where the tide comes in. Peter went over to Mike McLeod's, a friend who lived a couple of

blocks from Parks. Peter announced, "I've got some drugs, some guns, the two best things in the world; what do you want to do?" *Id.* 34-35. Peter mentioned the pieces in the backpack; Mike told him to leave them outside. They used some drugs. *Id.* 36. Then Peter suggested they go for a walk so he could dump the gun pieces in the Red River. *Id.* 37-38. "I just dumped them off in the canal, pieces." *Id.* 39.

Mike had heard the cop got shot.

He's like, they're saying your brother did it. And I says, man, I said, I was at the other end of town, and I said I'm going to say that Nick was there with me. That's -- that's what -- I says, Mom is involved in it and everything. ...

Q But Nick wasn't there with you?

A No. My mother was -- was alive then. But she's dead now, so ...²⁶

Nick wasn't there with me, no, huh-uh. He -- he left --

Id. 41. The investigator asked more questions.

Q ... Mike told me when I interviewed him, when you guys went back to his house after you dropped off the guns in the Red River --

A Yeah.

Q -- that you shared with him that you thought Nick had shot that cop.

A That cop had come around, yeah.

²⁶ Peter and Nick Boer's mother, Carol May, died March 23, 2012, at the home of Ken Parks, 1107 37th St., Seaview. See Dec. of W. Taylor, App. D.

Q Do you remember telling Mike that?
A Yeah.
Q You did tell him that?
A Yeah, because Nick had told me over at Ken's that he did it. I said, I think he probably did it, man, especially if they were in bed together.

Id. 42-43.

Q ... So now when you say that you believed your brother Nick was in bed with Trooper Johnson and then you mentioned taxes, what do you mean by that?
A He was paying him money to leave him alone. Or if they picked him up, they'd give him information to let him go. You know what I'm saying? I won't bust you this time if you tell me what's going on. ...

Id. 43. Peter explained he and Nick were dealing a lot of drugs and "making a lot of money." *Id.* 44-45.

Q ... Now, you said a minute ago that you believe that Trooper Johnson and your brother Nick had some type of a business arrangement; is that true?
A Yes.
Q How do you know that?
A Because there was -- well, not just because of Scott's brother, but because of what my brother had said, and the cop came around with us standing around and -- and would ask for them guy -- Nick or somebody else. Personally Nick would go with them and come right back 20 minutes later. ...

Id. 45.

Q And he -- your brother Nick would go off with Trooper Johnson?

A Yeah. Yeah, like they'd come and pick him up on something, he'd be going down to the police station to have -- be questioned about something. I mean, when they take me to the police station I'm in cuffs. I end up in jail. I don't -- I mean, I'm at the police station 30 minutes and I'm in the car going to the jail --

...

-- you know. But my brother, he had this gift, because he would go to the -- he would get his backpack and everything -- and I'd know for a fact he'd have a big bag of drugs and money and -- a big barrel of money in his backpack. I'm like, oop, there goes all the dope and the cash. And he would come back. Minus some cash and some drugs, but he would come right back an hour later.

I mean, either come back in a different vehicle or come back walking. Call me from downtown, hey, come get me. I'm like, where are you at, the police station? No, I'm down here at the -- the park. A couple of times he ended up at the park, or the go-cart track or down at Grant Childers, where he had the car -- a car lot.

Id. 46-47.

Q When you say "he's paying taxes," who came up with the phrase "taxes"?

A ... My brother.

Q Nick said he had to pay his taxes?

A Yeah, that's what -- how it originally went down. The cop showed up, and he said, oh, it must be time to pay my taxes. He jumped in the car and they left.

I was like, did he just -- the cop came, opened up, he jumped in the back willingly, with his backpack too. And I was like, did he have a gun on him? Yeah. Did he have the drugs? Yeah. Did he have the money? Yeah. While my other brother is standing there, I was like, oh, there goes everything. Calls us up an hour later from downtown somewhere.

And Johnson wasn't the only one that would pick him up. ...

Id. 49.

Q ... Mike [McLeod] told me that you and he have discussed several times over the course of the last four years ... and I just want you to tell me if this is true or not, that you've discussed the shooting of Scott Johnson with him a number of times and your brother's involvement in that shooting. Is that true?

A Yes.

Q Mike told me that you and he have probably discussed the shooting of Scott Johnson at least 20 times. Is that probably true?

A Yeah, through and through.

Q ...
Is it your belief today that your brother Nick Boer is the person who shot Scott Johnson?

A Yeah, most like it is Nick that did it. ...

Q ...
Okay. But he did admit it in front of Ken Parks?

A Yeah, and he did always -- he always sweated me about an alibi for that night. ... He was like, you know -- well, he said straight up, either you're going to give me an alibi or I'm going to have -- you know, or I'm going to -- you know who I work with and what I do. I'm going to

have your family took from you. I'm going to have Mom, and your wife and your kids are going to be gone. Well, which they did to me anyway.

Q So your brother Nick coerced you into --

A Threatened me.

Q -- coerced you --

A Threatened me into it.

Q -- or threatened you to give him an alibi --

A Him and my mother.

Q -- for the night Scott Johnson was shot?

A Yep. Him and my mother. ...

Id. 55-57. Peter acknowledged he had nothing to gain from speaking out. Like others, he was just sick of certain factions of town controlling things with their corruption. *Id.* 79-82, 86-87.

In March, 2017, Peter Boer was again in prison at Stafford Creek Corrections Center. Nick Boer was released from prison and living in Aberdeen, Washington. In a follow-up interview, Peter Boer confirmed that Nick left the house the night of the shooting; now he thought it was closer to midnight than 10:30 p.m., "about an hour before it all happened." He confirmed that Nick called to tell him a cop had been shot and he should lie low. He added Nick called him from "Shroomy Joe's," who dealt psilocybin mushrooms. Peter said Shroomy Joe lived on 13th St. He indicated on a map that

Shroomy Joe lived in an apartment on the east side of Idaho Ave. S., just south of 15th St. S.E. -- four blocks from the shooting.²⁷ Dec. of W. Taylor ¶¶ 3-10.

Peter Boer also confirmed Nick was at Ken Parks's house and the conversation about the dirty cop who got shot. Peter now characterized that conversation as "just joking," because they had heard that Jason Hall had identified Nick to police as the shooter, but Jason was drunk.²⁸ Dec. of W. Taylor ¶ 12.

4. DECLARATION OF GREGORY MICHAEL
"MIKE" McLEOD

The night Trooper Johnson was shot, Peter Boer told Mike McLeod that Nick confessed he shot him. Peter repeated this conversation to Mike about 20 times over the following couple of years. Mike told his father, Greg McLeod, about this conversation in 2012. Dec. of Gregory Michael

²⁷ The map labeled 14th St., but not 13th or 15th. It is not clear if Peter intended to indicate the apartment one block away from 14th in the other direction, on 13th -- which would have been 2 blocks from the shooting.

²⁸ However, Jason did not identify Nick until Saturday night, after Hill produced the sketch. Dec. of Jason Hall and *infra*.

McLeod ¶ 15. Greg McLeod knew Martin Jones was in prison for this crime. He contacted Jones's lawyers. Dec. of Gregory D. McLeod.

Mike McLeod gave a video interview August 3, 2014.²⁹ On April 9, 2017, he reaffirmed the substance of his statements in that interview. Dec. of Gregory Michael McLeod.

Mike had known Peter for 20 years. They grew up together. They are friends. *Id.* ¶ 2.

Mike McLeod was home alone at 3908 L Place³⁰ in Seaview the night the trooper was shot. Sometime between midnight and 2:00 a.m., Peter Boer came over. Peter wanted Mike to hold on to or help him get rid of some guns he had in a backpack. Mike did not see the guns that night. Peter talked about the guns: a single shot .22 pistol Mike had seen before. Mike believed he also had a .22 revolver and a .410 sawed off shotgun. Peter got the guns from Nick. Mike refused to hold the guns

²⁹ A transcript of that interview is Appendix F to Dec. of Win Taylor. Greg McLeod was present through his son's interview. Dec. of Gregory D. McLeod.

³⁰ This home is behind the Shell station where Susan Jones used the pay phone on her way home. McLeod Int. at 2; RP 3249-55.

or help Peter get rid of them. Peter then left with his backpack. *Id.* ¶¶ 3-5.

Peter returned a couple hours later, about 4:00 a.m. He said he took the guns down to the Red Lake and got rid of them there. Red Lake is a drainage field on 30th where the drainage meets the beach. The tides change the landscape regularly. Things just disappear in the sand or ocean there. *McLeod Int.* 21.

Peter told Mike that morning that he'd come from Ken Parks's house. Ken Parks lived just a couple of blocks from Mike at 1107 37th Street in Seaview on a corner. Nick was also at Ken's house. Nick was talking to Ken in a bedroom. Peter heard Nick say something like "hey man you got to help me, I was high and I fucked up and I just I shot a cop." "I'm high and am coming down whatever I need to know what to do. I just shot a cop." *McLeod Int.* 8, 19; *Dec. of G.M. McLeod* ¶ 7.

Mike heard later that morning about the shooting from other sources. He hadn't heard about it before Peter came over. *Id.* ¶ 8.

Peter obviously believed Nick. He was getting rid of the guns because of it. *Id.* ¶ 9.

Mike believes Peter was telling the truth when he said Nick confessed he shot the cop. Peter talked about Nick's statement that he shot the cop many times over the following months and years. Peter probably told him about Nick's confession twenty times. Peter was always consistent that Nick said he did it. Peter himself was consistently certain his brother did it. *Id.* ¶ 10.

Peter also said the police dogs tracked to Ken Parks's yard that night, then stopped. At the time, he and Nick were in the house. *Id.* ¶ 11.

Mike knew Nick committed burglaries. He supported himself by "breaking and entering and doing violent crimes." Mike knew Nick carried a gun. Mike caught him once trying to break into Mike's parents' home. Nick carried a sawed-off shotgun on a sling, a small one like cops often carry. Mike met him at the door himself wielding a machete. Nick backed off and left. Mike told his parents about it, but they did not report it to the police. *Id.* ¶ 12.

Mike was using drugs in 2010. He knew the Boers dealt drugs. Mike understood they were giving the police information about crimes other

people were committing. By cooperating with the police, they were getting away with their own crimes. *Id.* ¶ 13-14.

Mike McLeod didn't know Martin Jones. McLeod Int. 14. He heard there was a trial, but the police never interviewed Mike about the case. McLeod Int. 15; Dec. of G.M. McLeod ¶ 16.

After this interview, Mike McLeod took investigator Gilbertson to the Red River area where Peter disposed of the guns or gun parts. Gilbertson videotaped the area as Mike described it. Dec. of G.M. McLeod ¶ 15.

5. DECLARATION OF EDWARD C. DAVIS

Edward C. Davis now lives outside Washington state. In 2010, he lived in Long Beach, where he grew up. He'd been friends with Peter Boer since they were young; he knew Nick Boer less well. His family was missing a gun from their home around the time the state trooper was shot. The gun had belonged to his grandfather, was originally from Germany, and had been passed down through the family. Peter Boer told him he thought Nick had stolen the gun. Edward Davis's father warned Peter he'd be in trouble if the gun was not returned.

They never saw the gun again. Dec. of Edward C. Davis.

6. OTHER EVIDENCE FROM THE TIME OF THE SHOOTING IMPLICATED NICOLAS BOER AND CORROBORATES THE NEW EVIDENCE.

Saturday afternoon, February 13, 2010, the police distributed the sketch from George Hill's identification around the community and on television news.

a. *Declaration of Jason A. Hall*³¹

Tresha Childers dated and lived with Nick Boer in 2009 when he first returned to Washington after spending time in a Florida prison. Tresha saw the sketch on television from outside Long Beach. Her sister, Dawnielle Childers, called the tip line. She left a message identifying the sketch as Nick Boer. Tresha then called her brother, Jason Hall, in Long Beach. She had not been able to talk to anyone on the tip line. She told Jason to go directly to the police station to be sure they knew who it was. Dec. of J. Hall ¶ 4.

³¹ Much of Jason's testimony was corroborated in interviews with his sisters, Dawnielle Childers and Tresha Childers. Dec. of W. Taylor ¶¶ 18-19.

Jason went to the police station Saturday evening, February 13. He told police his sisters recognized the sketch as Nick Boer. He saw the sketch at the station. He also recognized it as Nick Boer.³² He told them Nick was a crackhead and had stolen guns in the past. He said Nick wears a hat like in the sketch, and carries a gun and knives. Jason provided Nick's birthdate and said he'd been in prison in Florida. While he was making this report and looking at the sketch, Long Beach Police Chief Flint Wright walked up behind him and said, "That does look like Nick. He does wear the same hat." *Id.* ¶¶ 6-9.

Jason experienced repercussions for making this report:

10. At the time I was living with a friend. Within 24 hours of when I gave this statement, Nick Boer came to that house and beat the door down with a club. He yelled at my friend, saying I had snitched on him. He told my friend he was going to track me down. When I heard this, I called 911 and reported it. I told them it was inappropriate for them to have given my name to Nick Boer. I reported the threat to the Washington State Patrol, who was handling the

³² Jason himself knew Nick. Nick had inked a tattoo on his chest when Jason was 22. They spent more than three hours face to face. Jason would never forget that face. *Id.* ¶ 3.

investigation. I told the officer who took the call that if Nick Boer came onto my property, I would shoot him.

11. No officer contacted me in person to take a report of this threat.

Dec. of Jason A. Hall ¶¶ 10-11.

b. *Declaration of Jessica Thomas*

Police took the sketch to Fisherman's Cove RV Park Saturday evening. Jessica Thomas identified it as Nick Boer. She knew Nick since he was 15 years old, as well as his brother Peter and their parents. Two other people at the Park also identified the sketch as Nick Boer.

c. *Interview of Nina Colette Neva*

On March 2, 2017, investigator Win Taylor spoke with Nina Colette Neva. She was identified in the discovery as having identified the sketch as Nicolas Boer. She recalled when the trooper was shot in Long Beach. She was staying in Ocean Park in a trailer. The police came around showing a sketch of the person they thought shot the trooper. She told them the sketch appeared to be Nick Boer. At the time, she was involved in the drug scene, and knew Nick. Dec. of W. Taylor ¶ 18.

d. *Vancouver Police Department
Report No. 10-3085*³³

Sunday afternoon, February 14, 2010, Vancouver Police Officer Spencer Harris stopped Nicolas Boer on the street in Long Beach. Harris recognized "Boer matched the physicals of the suspect." Harris seized baggies of crystal meth and a pipe from Boer's pockets.

Boer later stated he was willing to provide information on local methamphetamine dealers in the Longbeach [sic] area after I stated I would be forwarding charges for PCS-methamphetamine and drug paraphernalia.

VPD No. 10-3085. The drugs field tested positive for meth. Harris forwarded the seized drugs to the crime lab, and the report to Long Beach Police Department and the Pacific County Prosecutor March 3, 2010. There is no record of Pacific County prosecuting Nick Boer for this offense. Dec. of W. Taylor ¶ 20; Dec. of L. Nussbaum ¶ 5.

e. *Interview of Nicolas Boer*³⁴

Nicolas Boer's statement to the police the night after the shooting also corroborates his

³³ Dec. of W. Taylor, App. E.

³⁴ The transcript of this interview is attached to Dec. of L. Nussbaum, App. H.

confession. He acknowledged he was a drug dealer, that he and others in his profession only had inexpensive guns they stole, like .22s, and he redirected suspicion to someone who didn't fit the description: a man with "blondish orange" hair.

In 2017, Nicolas Boer declined to offer any assistance to Mr. Jones. Dec. of W. Taylor ¶ 14.

7. NICOLAS BOER'S OTHER CRIMINAL ACTIVITY AND POLICE CONTACTS³⁵

Before this conviction, Martin Jones had no criminal history. CP 1356.

Before this shooting, Nicolas Dean Boer had been prosecuted in eleven separate cases in Florida. After the shooting, his criminal conduct continued, with at least another nine prosecutions.

On April 28, 2010, two months after Johnson was shot, Nicolas Boer was arrested in Centralia for possession of methamphetamine. He carried a "starter pistol," which the police seized.³⁶

³⁵ Documentation of these prosecutions are attached to Dec. of L. Nussbaum, App. J.

³⁶ *State v. Nicholas D. Boer*, Lewis County Superior Court No. 10-1-00598-1; Dec. of L. Nussbaum, App. J-1.

August 14, 2010, a break-in in a Cowlitz County home provided a blood sample later matched to Nicolas Boer's DNA.³⁷

September 2, 2010, he pled guilty to fourth degree assault in Pacific County.³⁸

September 13, 2010, he committed second degree theft, for which he was charged and convicted the following year.³⁹

And the following day, September 14, 2010, he was found in Astoria, Oregon, possessing methamphetamine and a forged instrument.⁴⁰

His October 22, 2010, activities led to a Pacific County charge of possession of a stolen motor vehicle.⁴¹

By June 30, 2011, Nick Boer's mother told his CCO he was in Florida and would not return for

³⁷ Cowlitz County Sheriff's Office No. A-10-10495; *State v. Nicholas D Boer*, Cowlitz County Superior Court No. 11-1-00386-5. Dec. of L. Nussbaum, App. J-2.

³⁸ South Pacific County Dist. Ct. No. 9394.

³⁹ Pacific County Superior Court No. 11-1-00018-2.

⁴⁰ Clatsop County (OR) Circuit Court No. 101294. Dec. of L. Nussbaum, App. J-4.

⁴¹ Pacific County Superior Court No. 10-1-00208-0. Dec. of L. Nussbaum, App. J-5.

several months. He was again arrested in Pacific County October 3, 2011, then transferred for warrants to Cowlitz County and Clatsop County.⁴²

By March 30, 2012, Nick Boer was in Florida. The Washington DOC directed him to return and issued a warrant for absconding.⁴³

By October 8, 2013, Nicolas Boer was in custody in Florida for aggravated battery for assaulting his pregnant girlfriend. He was sentenced to 40.5 months in prison there, with release anticipated in 2016.⁴⁴

Nicolas Boer returned to Washington upon release from Florida's prison. May 3, 2016, Clatsop County (OR) extradited him to Lewis County (WA), where he was charged with escape from community custody.⁴⁵

⁴² Affidavit Regarding Probable Cause, Lewis County No. 16-1-00265-2; Cowlitz County No. 11-1-00386-5; Dec. of L. Nussbaum, App. J-7.

⁴³ Affidavit of Probable Cause, Lewis County No. 16-1-00265-2; Dec. of L. Nussbaum, App. J-7.

⁴⁴ Hernando County (FL) No. 1300876; Aff. of Probable Cause, Lewis County No. 16-1-00265-2; Dec. of L. Nussbaum, Apps. J-6, J-7.

⁴⁵ Lewis County No. 16-1-00265-2; Dec. of L. Nussbaum, App. J-7.

None of these crimes or arrests were provided to the defense in the prosecution of Martin Jones.

Notably, despite his prosecutions for drugs in other jurisdictions, and his admission the night after the shooting that he was a drug dealer, he was not prosecuted for drugs in Pacific County.

B. OTHER WITHHELD BRADY EVIDENCE

In response to a Public Records Act request, the Washington State Patrol provided the employment file of Trooper Scott Johnson -- nearly half redacted. Of 173 pages, 83 pages were completely black. The Exemption Log explained these pages included performance evaluations "to the extent that production would violate [Johnson's] right to privacy (information regarding misconduct is not exempt)." Dec. of L. Nussbaum, App. I.

The new evidence of corruption and a careful review of the discovery establishes there is relevant and exculpatory information in the blackened pages that the State should have provided under *Brady v. Maryland*, and should provide now.

1. WSP RECORDS AND JOHNSON'S PRETRIAL INTERVIEW⁴⁶

Johnson worked his entire career, 26 years, in Pacific and Wahkiakum Counties. In a pretrial interview with defense counsel November 4, 2010,⁴⁷ he said he did not work a day for WSP after the shooting. He was on temporary disability until mid-August, 2010. By November, he said he had not been cleared to return to duty, and was on leave without pay. Dec. of L. Nussbaum, App. G.

His personnel file does not reflect either the disability or the leave without pay. Page 4 of the WSP file suggests he was paid for the period of 12/14/2010. Johnson retired from WSP effective December 31, 2010. Dec. of L. Nussbaum, App. I at 1-2.

Yet in June and again in September, 2010, WSP notified Johnson that his transfer to Spokane had been "bypassed" by approval of a hardship transfer. "Your status on the list will remain the same." *Id.* at 18-19.

⁴⁶ Dec. of L. Nussbaum, Apps. G and I.

⁴⁷ Assistant Attorneys General John Hillman and Melanie Tratnik were present for this interview.

Given his 26-year career in the same community in which he had grown up, a decision to transfer a trooper to the opposite side of the state is a serious action done only for extremely good reason. Such a reason could be as discipline; or it could be to remove him from problematic situations, such as accepting payments from drug dealers in the area. Dec. of W. Taylor, ¶¶ 22-25.

Mr. Taylor, an expert witness on police procedures and use of force, learned during his tenure as Chief of Police that the Washington State Patrol has a practice of allowing a trooper who has reached eligibility for retirement to retire in lieu of facing disciplinary action, including termination. When the trooper chooses retirement, WSP concludes no discipline has occurred, and so no disciplinary misconduct has been determined. Dec. of W. Taylor, ¶ 24.

2. TROOPER JOHNSON'S UNREGISTERED WEAPON

At trial, Johnson testified he carried a Smith & Wesson .40, an AR15 rifle, and a 12-gauge shotgun. RP 2784. No other weapon was mentioned.

WSP Sgt. Metz responded directly to Ocean Beach Hospital at 0058 on February 13, within

minutes of Johnson's arrival. Johnson was in the ER. RP 1850-55.

When a law enforcement officer discharges his weapon, WSP regulations require an investigation. The officer typically will surrender his weapons only to his supervisor. Sgt. Metz was Johnson's supervising officer. She met and talked with Johnson privately at the hospital. RP 2983-85. She reported having two conversations with him, but reported the substance of only one of those two conversations. Dec. of W. Taylor, ¶¶ 26-32; Dec. of L. Nussbaum, App. F (003231).

At 0551, Metz

transferred to her care, all evidence from last night. She is transferring all the items to the WSP Naselle detachment office. Items include, 22 caliber [sic] handgun, 9mm handgun, 22 caliber [sic] ammunition, and all of Trooper Johnson's clothing, weapon belt and weapons.

Dec. of L. Nussbaum, App. C (001904). No .22 caliber weapon was ever produced in evidence.

On April 22, 2010, Sgt. Metz emailed WSP Det. Sgt. John Huntington, one of the detectives investigating Johnson's shooting. She reported the previous day she gave Trooper Slempp

the H&K serial number 22-083654, which he purchased from Trooper Johnson prior to

the incident. Trooper Slempp confirmed the serial number and stated it will remain in his possession until Johnson's case is adjudicated.

Dec. of L. Nussbaum, App. D (006216). This email was included in the Investigation Log Report of this case. Dec. of W. Taylor ¶ 26.

"H&K serial number" refers to a Heckler & Koch gun with the given serial number. No such gun was entered into evidence in this case. It must be related to Johnson's shooting or Sgt. Metz would not have emailed Det. Sgt. Huntington about it and it would not have turned up in the "Investigation Log Report" for this case. There would be no reason for Metz to have Johnson's weapon, or for her to report about it, unless he had it at the hospital. Dec. of W. Taylor, ¶¶ 26-32.

Among police officers, a "case" being "adjudicated" indicates an internal investigation. When an officer discharges a weapon on duty, there is an internal review of that action. This email indicates Metz considered this weapon significant to that internal review or some other internal investigation -- significant enough that Trooper Slempp agreed to keep the weapon until that review was adjudicated. Dec. of W. Taylor, ¶¶ 26-32.

III. SUMMARY OF ARGUMENT

New witnesses have come forward to report Nicolas Boer confessed to this crime the same night it occurred, and to destroy his alibi. The new evidence provides a motive -- to end police extortion of drug dealers; a weapon -- a .22 caliber handgun stolen from Eddie Davis, which often misfired; and ammunition -- some old .22 shells that were defective. The identity is further supported by other tips made to the police identifying the sketch of the suspect as Nick Boer.

Scott Johnson knew Nick Boer was the shooter. But identifying Boer would expose Johnson's corruption. Johnson at first told people he hadn't seen the shooter. When Hill's sketch of the shooter looked like Boer, Johnson had to derail the investigation by naming someone else. He named Marty Jones, created a "motive" of anger over the impound, and manipulated the identification process so he could "identify" him. The Washington State Patrol accepted Johnson's identification without question.

This newly discovered evidence requires a new trial where the jury can hear and consider the evidence implicating Nicolas Boer as the shooter.

As a state agent, Johnson's knowledge of the truth was exculpatory evidence the State withheld. His testimony was false evidence on which the conviction is based. Both aspects violate due process.

The State also withheld evidence of internal investigations of Johnson, including a planned transfer and an unauthorized firearm he carried and Sgt. Metz helped him conceal. This evidence was exculpatory and impeaching as to Johnson.

New evidence also establishes that the scientific community now agrees there is NO scientific basis for the bunter mark evidence that was admitted in this case as "scientific." The claim that this evidence was "science" also was false, no longer qualifies under *Frye*, and was prejudicial as it was the only forensic evidence suggesting a connection between Jones and the shooting.

IV. LEGAL AUTHORITY AND ARGUMENT

This Court will grant relief on a personal restraint petition if the conviction was obtained in violation of the United States or Washington Constitutions; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding ...; or

...
(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding

RAP 16.4.

The petitioner must either make a prima facia showing of a constitutional error that, more likely than not, constitutes actual and substantial prejudice, or a nonconstitutional error that inherently constitutes a complete miscarriage of justice.

In re Pers. Restraint of Cook, 114 Wn.2d 802, 810, 812, 792 P.2d 506 (1990).

However, these threshold requirements do not apply "when the challenge is to a decision ... from which the inmate generally has had no previous or alternative avenue for obtaining state judicial review." ... Where that is so, the appellate court reviews the petition by examining only the requirements of RAP 16.4. ... Restraint is unlawful where material facts exist which have not been previously presented and heard, which, in the interest of justice, require vacation of the conviction.

State v. Roche, 114 Wn. App. 424, 440-41, 59 P.3d 682 (2002), quoting *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994).

A. THE EVIDENCE THAT NICOLAS BOER COMMITTED THIS CRIME IS NEWLY DISCOVERED AND REQUIRES A NEW TRIAL.⁴⁸

1. THE EVIDENCE IS NEWLY DISCOVERED AND WARRANTS A NEW TRIAL.

The legal standard to grant relief for newly discovered evidence requires:

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.

In re Pers. Restraint of Spencer, 152 Wn. App. 698, 707, 218 P.3d 924 (2009); *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981).

In reviewing the likelihood that new evidence would change the result of the trial, this Court should consider the new evidence in the context of all the evidence at trial. *State v. Hawkins*, *supra*, 181 Wn.2d at 172.

⁴⁸ RAP 16.4(b)(3); U.S. Constitution., Amend. 14 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law"); Constitution, Art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.").

[I]f it *is* material, and applicant could not have discovered it with reasonable diligence, common justice demands that he should have the benefit of it.

State v. Stowe, 3 Wash. 206, 209, 28 P. 337 (1891).

a. *The Evidence Will Probably Change the Result of the Trial.*

At trial, there was no evidence that another person could have committed this crime. The court excluded even the testimony that another person was seen on the streets. The State argued Jones was angry enough about the impound to shoot Johnson; but impounding the van had no significant financial impact on the Joneses, and Marty had never even seen Johnson before the trial. Yet at trial there was no apparent motive for Johnson to lie.

Now we know Nick Boer was paying Johnson and other officers to avoid arrest for dealing drugs. This is not only motive for Boer, but also motive for Johnson to lie, to protect Boer and so himself.

There was no evidence Jones had a gun that could have fired the shot. Nick Boer had access to a .22 caliber gun prone to misfiring, and ammunition prone to defective firing -- explaining

the "pop" sound and the failure of a bullet shot point-blank to penetrate Johnson's skull.⁴⁹

All evidence except Johnson's identification indicated Jones was home all night. Nick was not only not home, but left before the shooting, phoned home shortly after the shooting to report the shooting occurred, and phoned from the residence of another drug dealer very near the crime scene. He then avoided the police by taking the beach to a residence in Seaview only two blocks from Jones's home, where he confessed to the crime.

If a jury could believe this new evidence, it would probably reach a different result. *State v. Ramel*, 65 Wn.2d 326, 327, 396 P.2d 988 (1964). *Compare: In re Pers. Restraint of Bradford*, 140 Wn. App. 124, 131, 165 P.3d 31 (2007) (new DNA evidence warrants new trial despite defendant's confession; "the jury probably would have decided differently on the issue of the confession's reliability had it known about the DNA evidence.")

This evidence will probably change the result of the trial for Marty Jones.

⁴⁹ The "starter pistol" Nick Boer carried when arrested two months later in Centralia may also explain the sound and lack of impact.

b. *The Evidence Was Discovered Since the Trial and Could Not Have Been Discovered Before Trial With Due Diligence.*

This trial occurred in January-February, 2011. Mike McLeod did not tell his parents that he heard about Nick Boer's confession until 2012. Peter Boer told his friend Mike, but was compelled to lie and provide his brother an alibi so long as his mother was alive. She died in 2012. Neither of these people knew Marty Jones. Thus this evidence could not have been discovered in time for trial.

c. *The New Evidence Is Material.*

There was never a reasonable explanation for why Marty Jones, with no criminal record or inclination toward violence, would suddenly erupt and shoot a police officer point-blank. He consistently denied he did so. There was no forensic evidence connecting him to the shooting.

There was never a reasonable explanation why Johnson's "identification" completely contradicted Hill's exclusion of Jones and his sketch of Nick Boer. This evidence provides that explanation.

The new evidence shows a suspect who confessed, who had a motive, had access to a weapon and ammunition consistent with the evidence, was in

the immediate vicinity of the crime, knew about it within minutes, and matched the sketch from George Hill's description. The new evidence also explains why Johnson would lie to say Jones was the shooter. It is highly material.

d. *The Evidence Is Not Merely Cumulative or Impeaching.*

"Cumulative evidence is additional evidence of the same kind to the same point." *Williams*, 96 Wn.2d at 223-24. Here the evidence is an entirely new theory of how this crime occurred, why it occurred, and who did it. It is not merely cumulative or impeaching.

To the extent it impeaches Johnson's trial testimony:

[I]mpeaching evidence can warrant a new trial if it devastates a witness's uncorroborated testimony establishing an element of the offense. In such case the new evidence is not merely impeaching, but critical.

State v. Savaria, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996). Clearly the evidence that Johnson was on the take with drug dealers devastates his testimony and provides him a powerful motive to lie. His testimony identifying Marty Jones was uncorroborated. Thus this new evidence is not

"merely impeaching, but critical." *State v. Roche, supra* (new trial on drug convictions required where lab technician diverted drugs to own use).

This newly discovered evidence requires a new trial for Marty Jones.

2. DUE PROCESS REQUIRES THE DEFENSE HAVE THE OPPORTUNITY TO PRESENT THIS EVIDENCE TO A JURY.

Where the [newly discovered] evidence relates to the essential fairness of the proceeding leading to conviction, including claims of denial of constitutional guarantees, there is greater reason to seek full consideration of the merits.

State v. Davis, 25 Wn. App. 134, 138 n.4, 605 P.2d 359 (1980) (remanding where new evidence supported defense theory of conspiracy).

Jones has the constitutional right to present this evidence that Nicolas Boer committed this crime.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." ... This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"

Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Fundamental standards of relevancy, subject to the discretion of the court to exclude cumulative evidence and to insure orderly presentation of a case, require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged.

United State v. Crosby, 75 F.3d 1343, 1347 (9th Cir. 1996); *United States v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980); *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

In *Holmes*, the South Carolina court excluded evidence of another suspect in a murder case.

South Carolina's test turned on the strength of the prosecution's case: if the state's evidence was strong, then the defense was not permitted to present evidence of another suspect.

The *Holmes* Court held, however, that where the defense did not concede the credibility or reliability of the state's evidence, but challenged the forensic evidence with its own evidence that it was contaminated or planted, the defense was entitled to present evidence that the other suspect was in the neighborhood the morning of the crime and had made inculpatory statements. This was the holding, although the other suspect denied making the statements and provided an alibi. *Holmes*, 547 U.S. at 330. "Nor has the State identified any other legitimate end that the rule serves." *Id.* at 331.

Here we have evidence that Nicolas Boer was in the neighborhood at the time of the crime and made inculpatory statements, even if he later claimed an alibi. We also have evidence destroying his alibi.

The standard for relevance of other suspect evidence is whether there is evidence 'tending to connect' someone other than the defendant with the crime. ... [T]his inquiry, properly conducted, 'focuse[s] upon whether the evidence

offered tends to create a reasonable doubt as to the *defendant's* guilt, not whether it establishes the guilt of the *third party* beyond a reasonable doubt.'

State v. Franklin, 180 Wn.2d 371, 381, 325 P.3d 159 (2014) (Court's emphases). Thus petitioner need not prove beyond a reasonable doubt that Nicolas Boer committed this crime. He is entitled to present the evidence that Nicolas Boer could have committed this crime.

Unlike *Thomas*, *supra*, petitioner has the evidence that Nicolas Boer had the means, the opportunity, the motive, and was practically at the scene of the crime, and boasted later that night that he had done it. His long criminal history also is consistent with his motive and bad character -- evidence completely lacking against Jones.

Chambers v. Mississippi also involved the shooting of a police officer. Chambers was arrested and charged. McDonald confessed he shot the officer. Once jailed, however, McDonald repudiated his confessions. The trial court accepted the repudiation and dismissed charges against him. As here, "[t]he local authorities

undertook no further investigation of his possible involvement." 418 U.S. at 288.

At Chambers's trial, the court excluded evidence of McDonald's confessions under the hearsay rule and prevented Chambers from calling McDonald as an "adverse witness" because McDonald did not accuse Chambers of the crime.

The Supreme Court reversed the conviction, finding the state court violated Chambers's rights to due process and to confrontation.

Here, Nick Boer is available as a witness and subject to cross-examination, under *Chambers*. His admission to the shooting is admissible under ER 804(b)(3), a statement against interest.

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

...
(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, ... that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

ER 804(b)(3).

The corroborating circumstances here are equivalent to those in *Chambers*. Nick confessed to his friend and fellow drug dealer that he shot the cop. He immediately asked his brother to dispose of guns or gun parts, which may have included the weapon. He had access to a .22 handgun that could have been the weapon; and he had access to old ammunition that would explain the minimal sound and impact of the shot. His brother and drug dealing partner believed he did the deed -- enough to dispose of guns and confide to his friend that night and repeatedly over the years. Nick also had a motive for the shooting -- that Johnson and other officers were compelling payments from drug dealers, including him.

Johnson's corruption further is corroborated by the strange process of "identification" that occurred in this case. The defense challenged the procedure as suspicious police work.

When, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it.

Kyles v. Whitley, 514 U.S. 419, 446 n.15, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). See also: *Spencer*, *supra* (new evidence coupled with "significant irregularities" in the prosecution, including withheld *Brady* evidence, required withdrawal of *Alford* plea).

Johnson, supposedly more alert to his surroundings because of the recent police murders, allowed the shooter to come close to him at the scene. It is likely he knew him. But if he knew him and had accepted payments from him, Johnson could not identify Boer as the shooter without risking his own exposure for corruption. And so he initially said he did not get a good look at him. He created a theory of an angry husband.

The police relied on George Hill, the witness without a head injury. Hill immediately cleared Marty Jones -- he knew the guy, that wasn't the shooter; he had a "completely different facial structure" and blonder hair.

But once Hill provided the sketch people recognized as Nick Boer, Johnson had a quandary again. Even if only Hill implicated Nick Boer, his arrest threatened to expose Johnson's corruption.

The only way to avoid being outed was to redirect the investigation. Johnson had to accuse someone else. This motive explains his urgent need to see a photograph of Marty Jones -- not in a montage, not without identification, but the DOL photo that clearly identified him. Once he saw the photo, he could guide the sketch artist and he could pick him out of a montage -- not because he was the shooter, but only because Johnson had seen the photo.

Johnson's only goal was to redirect suspicion away from Nicolas Boer. Once he named Jones, he had to stick with it. It didn't matter that no other physical evidence supported the charge. His credibility as a law enforcement officer shot in the line of duty was more than enough for his own agency's investigation to abandon George Hill as a witness.

Due process requires a new trial at which Martin Jones may present this evidence that Nicolas Boer committed this crime.

B. PETITIONER WAS DENIED DUE PROCESS BY A STATE AGENT KNOWINGLY PRESENTING FALSE EVIDENCE TO OBTAIN THIS CONVICTION.⁵⁰

The dignity of the United States Government will not permit the conviction of any person on tainted testimony.

Mesarosh v. United States, 352 U.S. 1, 9, 1 L. Ed. 2d 1, 77 S. Ct. 1, 5 (1956).

[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

United States v. Agurs, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976). In this case, then-Trooper, now Sheriff Scott Johnson knew his testimony was false.

The Fourteenth Amendment to the United States Constitution cannot tolerate a state criminal conviction obtained by knowing use of false evidence or improper manipulation of material evidence.⁵¹

⁵⁰ U.S. Constitution, Amend. 14; Constitution, Art. I, § 3.

⁵¹ *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); *Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (continued...)

[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment

. . . "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . ."

Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

The prejudice to a defendant's right to a fair trial is even more palpable when the prosecutor has not only withheld exculpatory evidence, but has knowingly introduced and argued false evidence. . . . A new trial is required "if there is any reasonable likelihood that the false [evidence] could have affected the judgment of the jury."

Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991).

Unlike these cited cases, the evidence here indicates it was not the prosecuting attorney, but the victim, himself a police officer and state agent, who knowingly presented the false evidence.

The new evidence indicates that then-Trooper Johnson was receiving cash payments and information from Nick Boer in return for not arresting him for dealing drugs. Johnson knew Nick Boer. If he did

⁵¹ (...continued)
(1957); *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935).

not immediately report him as the shooter, it likely was because he knew doing so would expose his own corruption, destroying his own career.

He needed an alternative suspect and an alternative motive. If the motive was the impound, not Johnson himself, it would redirect the investigation. Thus his intense interest in seeing a photo of "Marty," the name on his hand. It didn't matter if "Marty" had an alibi; perhaps it would save an innocent man from conviction. But he would point the investigation away from Boer, and so away from his own corruption.

Reluctance to identify the person he knew was the shooter is consistent with Johnson repeatedly telling people he did not get a good view of him and he only saw him in profile. But with George Hill's sketch he had to derail the investigation.

Johnson manipulated any effort at a real "identification" process. After seeing the DOL photo of Martin Jones, who looked nothing like Boer, he said that was the man. Compare Appendices A, B, C. Nonetheless, he worked with the sketch artist to duplicate the image -- without mentioning he'd seen the photograph. Even later, he went

through a photo montage, again identifying the same DOL photo of Jones, without telling the detective he'd already identified that photograph.

Of course the Washington State Patrol, conducting the investigation, believed Johnson. He was one of their own. He had been shot in the line of duty. If they did not know of the corruption, they had no reason to doubt him. If they knew of the corruption -- or participated in it -- they had every reason to go along with him.

It is inconceivable that evidence of perjury would not, as an objective matter, affect a factfinder's assessment of a witness' credibility. When the evidence shows that the government's only witnesses lied under oath, it is contrary to reason that confidence in the outcome of the case would not objectively be undermined. ... Evidence of bias and prejudice is certainly material for impeachment, but lies under oath to conceal bias and prejudice raise the impeachment evidence to such a level that it is difficult to imagine anything of greater magnitude that would undermine confidence in the outcome of any trial.

Bagley v. Lumpkin, 798 F.2d 1297, 1301 (9th Cir. 1986).

The newly discovered evidence demonstrates Johnson lied, why he lied, and that this conviction is based on false evidence. Due process requires reversal.

C. PETITIONER WAS DENIED DUE PROCESS WHEN THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE TO WHICH HE WAS ENTITLED UNDER *BRADY v. MARYLAND* AND *KYLES v. WHITLEY*.⁵²

There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.⁵³

The State is required to provide the defense any material evidence that is exculpatory for the defendant, whether it is substantive or impeaching, irrespective of the good faith or bad faith of the prosecution.⁵⁴

In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'

Strickler v. Green, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (quoting *Kyles*, 514 U.S. at 437); *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995) (in prosecution for conspiracy to

⁵² U.S. Constitution, Amend. 14; Constitution, Art. I, § 3.

⁵³ *United States v. Olsen*, 737 F.3d 625, 626, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from order denying petition for rehearing en banc).

⁵⁴ *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963); *Moore v. Illinois*, 408 U.S. 786, 794-95, 33 L. Ed. 2d 706, 92 S. Ct. 2562 (1972).

defraud Food and Drug Administration, prosecutor was required to disclose information known to FDA). The government's obligation to disclose evidence favorable to the defense

turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention.

Kyles v. Whitley, 514 U.S. at 421.

A showing of materiality

is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434; *United States v. Bagley*, 473 U.S. 667, 678, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).⁵⁵

⁵⁵ The rule applies also to non-State-employee witnesses. *Carriger v. Stewart*, 132 F.3d 463, 479-82 (9th Cir. 1997), cert. denied, 523 U.S. 1133 (1998) (prosecutor had a duty to obtain and review a Department of Corrections file of its principle witness); *Benn v. Lambert*, 283 F.3d 1040, (continued...)

"Favorable" evidence under *Brady* includes impeachment evidence as well as exculpatory evidence. *Davila*, 184 Wn.2d at 70; *Brady*, 373 U.S. at 87.

The *Brady* duty continues after the trial has concluded. See *Smith v. Roberts*, 115 F.3d 818, 819-20 (10th Cir. 1997) (direct appeal pending); *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992) (state has duty to disclose exculpatory evidence during habeas corpus proceeding); *Monroe v. Butler*, 690 F. Supp. 521, 522-23, 525-26 (E.D. La.), *aff'd*, 883 F.2d 331 (5th Cir.), *cert. denied*, 487 U.S. 1247 (1988) (same).

A robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence. Due to the nature of a *Brady* violation, it's highly unlikely wrongdoing will ever come to light in the first place. This creates a serious moral hazard for those prosecutors who are more interested in

⁵⁵(...continued)
1055 (9th Cir. 2002 (prosecutor failed to disclose informant-witness's history of lying, law enforcement's opinion he was untrustworthy); *Amado v. Gonzalez*, 758 F.3d 1119, 1139 (9th Cir. 2014) (prosecutor withheld facts that gang rivalry and desire to seek favor with probation officers might have motivated primary witness to testify against defendant)).

winning a conviction than serving justice.

Olsen, supra, at 630 (Kozinski, C.J., dissenting).

1. TROOPER JOHNSON WITHHELD HIS KNOWLEDGE WHO THE SHOOTER WAS, HIS MOTIVE TO LIE, AND THAT MARTIN JONES DID NOT SHOOT HIM.

For purposes of *Brady*, the State is charged with knowledge of any exculpatory information the police possess. *Kyles v. Whitley*, 514 U.S. 437-38. Scott Johnson was a Washington State Trooper when he identified Martin Jones as the shooter. He was Pacific County Sheriff when he testified that Martin Jones was the shooter.

As an agent of the State, Johnson's failure to inform the prosecutor and ultimately the defense that Jones was not the shooter, that Johnson had been taking money from local drug dealers including Nicolas Boer in return for "protection," and that Nicolas Boer shot him, denied Martin Jones due process of law.

2. THE STATE WITHHELD EVIDENCE OF INTERNAL INVESTIGATIONS, PENDING TRANSFER, AN UNAUTHORIZED FIREARM, AND DISCIPLINE OF TROOPER JOHNSON.

Personnel records frequently contain *Brady* evidence. Even the Washington Association of

Sheriffs & Police Chiefs recognize that "In-Lieu-of Actions/Agreement" may be *Brady* evidence:

Actions/agreements such as resignation, demotion, retirement or separation from service of an employee/officer in lieu of disciplinary action may be *Brady* information if it is relevant to the case at hand.

"Model Policy for Law Enforcement Agencies Regarding *Brady* Evidence And Law Enforcement Witnesses Who Are Employees/Officers," WASPC (Nov. 19, 2009). *See also*: Declaration of Winthrop Taylor ¶¶ 24-32 (WSP has such "in-lieu" practices of retirement instead of discipline); Abel, Jonathan, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STANFORD L. REV. 743 (2015).

The WASPC policy also states: "There is no requirement that law enforcement provide prosecutors with information concerning unsubstantiated findings about an employee." *Id.* It restricts the need to disclose even criminal convictions to those "related to dishonesty or untruthfulness." *Id.*

A recent opinion by this Court requires the State to disclose a broader range of information regarding an officer's misconduct. *In re Pers.*

Restraint of Griffin, Court of Appeals No. 42012-1-I (Div. Two, Sept. 7, 2016). A copy of this opinion is attached as Appendix E.⁵⁶

In *Griffin*, the defense moved during trial for disclosure of facts relating to Officer Wilken being placed on administrative leave. The prosecutor denied there was any *Brady* material to be disclosed. He presented a file "relating to Jeff Wilken" to the trial court for review under seal and in camera during the trial. The trial judge concluded there was no "admissible evidence ... for impeachment purposes" and denied the motion. *Griffin*, Slip Op. at 7.

After conviction, Mr. Griffin obtained disciplinary records from the personnel file of Officer Wilken. There were three different formal complaints and subsequent internal investigations into his conduct: (1) he gave conflicting statements in a search warrant application, an order for destruction, and testimony in court; (2)

⁵⁶ Petitioner cites this unpublished opinion pursuant to GR 14.1(a). This case has no precedential value and is not binding upon any court. However, it may be cited as nonbinding authority if identified as such, and may be accorded such persuasive value as the court deems appropriate.

he was accused of assault and faced a potential criminal investigation into the accusation; and (3) he had violated a number of internal police department policies when he conducted an unauthorized arrest while he was off-duty. The Court held all this information should have been disclosed to the defense. *Griffin*, Slip Op. at 24. Thus the misconduct was not strictly limited to matters of dishonesty, but included other policy violations.

Washington courts applying *Brady* and *Kyles* consistently have found in favor of the defense when the prosecutor did not seek out and disclose evidence of a State's witness's misconduct. *State v. Stenson*, 174 Wn.2d 474, 486, 276 P.3d 286, 292-93 (2012) (photographs of police mishandling forensic evidence); *State v. Davila*, 184 Wn.2d 55, 69-73, 357 P.3d 636 (2015) (firing of DNA analyst at crime lab for incompetence favorable to, and withheld from, defense).

WSP had a good reason to transfer Johnson away from his lifelong home territory. That reason is unquestionably in his personnel file. It should have been disclosed to the defense.

The additional information regarding an unauthorized weapon also supports a conclusion that there are internal reviews and investigations contained in his file. It should have been released, and should be released now.

D. NEWLY DISCOVERED EVIDENCE ESTABLISHES THE BUNTER MARK ANALYSIS IS NO LONGER GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY AND DOES NOT MEET THE *FRYE* STANDARD. THE CONVICTION BASED ON THIS EVIDENCE VIOLATES DUE PROCESS.

As shown above, the Fourteenth Amendment to the United States Constitution cannot tolerate a state criminal conviction obtained by false evidence or improper manipulation of material evidence. *Napue v. Illinois, supra.*⁵⁷

1. THE STATE MAY NOT BASE A CONVICTION ON OUTDATED INVALIDATED SCIENCE.

The court is the ultimate "gatekeeper" for admitting scientific evidence in court.

[U]nder the [Evidence] Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

...
But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation -- i.e., "good grounds," based on what is known. In

⁵⁷ See also cases cited at n. 51, *supra*.

short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 589-90, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (bold emphasis added).

Washington courts apply the *Frye* standard to determine if scientific evidence is admissible in criminal cases.⁵⁸

Under *Frye*, a court is to determine if the evidence in question has a valid, scientific basis. Because judges do not have the expertise required to decide whether a challenged scientific theory is correct, **we defer this judgment to scientists**. This inquiry turns on the level of recognition accorded to the scientific principle involved -- we look for *general acceptance* in the appropriate scientific community. . . . **If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted.**

Cauthron, 120 Wn.2d at 887 (bold emphases added).

Once this court has made a determination that the *Frye* test is met as to a specific novel scientific theory or principle, trial courts can generally rely upon that determination as settling such theory's admissibility in future cases. **However, trial courts must still undertake the *Frye* analysis if one party**

⁵⁸ *State v. Cannon*, 130 Wn.2d 313, 922 P.2d 1293 (1996); *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996); *State v. Cauthron*, 120 Wn.2d 879, 886-87, 846 P.2d 502 (1993).

produces new evidence which seriously questions the continued general acceptance or lack of acceptance as to that theory within the relevant scientific community.

Id., 120 Wn.2d at 888 n.3 (emphasis added).

When general acceptance is reasonably disputed, it must be shown, by a preponderance of the evidence, at a hearing held under ER 104. . . . We review "de novo," which means without deference.

State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977 (1999), review denied, 140 Wn.2d 1022 (2000).

The United States Supreme Court recently insisted that courts rely on current scientific standards rather than outdated ones previously approved in precedent.⁵⁹ This court granted relief where petitioner showed a "paradigm shift" in

⁵⁹ See: *Hall v. Florida*, 572 U.S. ____, 134 S. Ct. 1986, 1995-2000, 188 L. Ed. 2d 1007 (2014) (Court relied on the most recent versions of the leading diagnostic manuals to conclude Florida violated the Eighth Amendment by "disregard[ing] established medical practice"); *Moore v. Texas*, ___ U.S. ____, (No. 15-797, 3/28/2017) (Court vacated state court judgment that death row inmate was not intellectually disabled because the state court applied 1992 precedent instead of current scientific standards and definitions).

scientific knowledge about shaken baby syndrome since her conviction 13 years earlier.⁶⁰

2. NEW SCIENTIFIC STUDIES ESTABLISH THE BUNTER MARK EVIDENCE IS NOT GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY.

At this 2011 trial, forensic examiner Schoeman extended the concept of toolmark examination to the bunter marks -- something he had never examined before. The defense argued the 2009 National Academy of Science report ("NAS Report") questioned the foundation of toolmark evidence. New studies since then have solidified the conclusion that firearm/toolmark identification has no valid scientific foundation.

In September, 2016, the President's Council of Advisors on Science and Technology (PCAST) issued its *Report on Forensic Science in Criminal Courts*:

⁶⁰ "At the time of Ms. Fero's trial, many doctors would have agreed with the doctors for the state. ... However, shaken baby syndrome theories as applied in this case are no longer supported by the scientific literature." *In re Personal Restraint of Fero*, 192 Wn. App. 138, 150, 367 P.3d 588 (2016), review granted, ___ Wn.2d ___ (No. 92975-1, 3/10/2017).

Ensuring Scientific Validity of Feature-Comparison Methods (PCAST Report).⁶¹

This report built on the 2009 Congressionally-mandated study by the National Research Council,⁶² and the work done since then by the Department of Justice (DOJ) and the National Institute of Standards and Technology of forensic feature-comparison methods.⁶³

"Foundational validity" requires:

(a) a reproducible and consistent procedure for (i) identifying features in evidence samples; (ii) comparing the features in two samples; and (iii) determining, based on the similarity between the features in two sets of features, whether the samples should be declared to be likely to come from the same course ("matching rule"); and

⁶¹ Available (last visited 4/19/2017) at: https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_scienc_e_report_final.pdf.

⁶² *Strengthening Forensic Science in the United States: A Path Forward*, available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> (last visited 4/18/2017).

⁶³ Starting in 2012 DOJ and the FBI "undertook an unprecedented review of testimony in more than 3,000 criminal cases involving microscopic hair analysis," concluding FBI examiners had provided scientifically invalid testimony in more than 95% of cases where that testimony was used to inculcate a defendant at trial. PCAST Report at 3.

(b) empirical estimates, from appropriately designed studies from multiple groups, that establish (i) the method's false positive rate--that is, the probability it declares a proposed identification between samples that actually come from different sources and (ii) the method's sensitivity--that is, the probability it declares a proposed identification between samples that actually come from the same source.

PCAST Report at 65. "Validity as applied" requires:

(a) the forensic examiner must have been shown to be *capable* of reliably applying the method, as shown by appropriate proficiency testing ..., and must *actually* have done so, as demonstrated by the procedures actually used in the case, the results obtained, and the laboratory notes ...; and (b) assertions about the probative value of proposed identifications must be scientifically valid--including that examiners should report the overall false positive rate and sensitivity for the method established in the studies of foundational validity; demonstrate that the samples used in the foundational studies are relevant to the facts of the case; where applicable, report probative value of the observed match based on the specific features observed in the case; and not make claims or implications that go beyond the empirical evidence.

PCAST Report at 66.

PCAST observed that although firearms analysis has been used for many decades, only recently had meaningful empirical testing occurred. Yet only one proper study has been done to measure validity

and estimate reliability. At least one more similar test is required to demonstrate that the method is reproducible. PCAST Report at 112.

The PCAST report and subsequent confirmatory supplement ("Addendum") signal culmination of a momentous paradigm shift in the scientific community's understanding and perception of this evidence. The scientific community now generally rejects firearm and toolmark identification as practiced in *Jones*, rejects that it is a "science", and concludes the forensic practice of firearms identification to be without scientific foundation.

Declaration of William A. Tobin at 2.

PCAST addressed directly the effect of changes in scientific knowledge. In Chapter 8, "Recommendations to the Attorney General: Ensuring the Use of Scientifically Valid Methods in Prosecutions," PCAST recommended:

(A) The Attorney General should direct attorneys appearing on behalf of the Department of Justice (DOJ) to ensure expert testimony in court about forensic feature-comparison methods meets the scientific standards for scientific validity.

While pretrial investigations may draw on a wider range of methods, expert testimony in court about forensic feature-comparison methods in criminal cases--which can be highly influential and has led to many wrongful convictions --must meet a higher standard. In particular, attorneys appearing on behalf of the DOJ should ensure that:

(i) the forensic feature-comparison methods upon which testimony is based have been established to be foundationally valid, as shown by appropriate empirical studies and consistency with evaluations by the National Institute of Standards and Technology (NIST), where available; and

(ii) the testimony is scientifically valid, with the expert's statements concerning the accuracy of methods and the probative value of proposed identifications being constrained by the empirically supported evidence and not implying a higher degree of certainty.

PCAST Report at 140 (bold original). PCAST also recommended regarding DOJ expert testimony:

(B) The Attorney General should issue instructions directing that:

...
(ii) Where there are not adequate empirical studies and/or statistical models to provide meaningful information about the accuracy of a forensic feature-comparison method, *DOJ attorneys and examiners should not offer testimony based on the method.* If it is necessary to provide testimony concerning the method, they should clearly acknowledge to courts the lack of such evidence.

(iii) In testimony, examiners should always state clearly that errors can and do occur, due both to similarities between features and to human mistakes in the laboratory.

PCAST Report at 141 (bold original; italics added).

Not only did the State here offer testimony based on a scientifically invalid method, instead of limiting it to investigative purposes. Instead of acknowledging no scientific basis, its expert repeatedly asserted an ancient scientific basis confirmed by courts.

In Chapter 9, "Actions to Ensure Scientific Validity in Forensic Science: Recommendations to the Judiciary," PCAST advised courts consider the changed understanding of the scientific underpinnings of feature-comparison examinations.

[PCAST's] scientific review found that most forensic feature-comparison methods ... have historically been *assumed* rather than *established* to be foundationally valid. Only after it became clear in recent years (based on DNA and other analysis) that there are fundamental problems with the reliability of some of these methods has the forensic science community begun to recognize the need to *empirically test* whether specific methods meet the scientific criteria for scientific validity.

This creates an obvious tension, because many courts admit forensic feature-comparison methods based on longstanding precedents that were set before these fundamental problems were discovered.

From a purely *scientific* standpoint, the resolution is clear. When new facts falsify old assumptions, courts should not be obliged to defer to past precedents; they should look afresh at the scientific issues. How are such

tensions resolved from a legal standpoint? The Supreme Court has made clear that a court may overrule precedent if it finds that an earlier case was "erroneously decided and that subsequent events have undermined its continuing validity."⁶⁴

PCAST expresses no view on the legal question of whether any past cases were "erroneously decided." However, PCAST notes that, **from a scientific standpoint, subsequent events have indeed undermined the continuing validity of conclusions that were not based on appropriate empirical evidence.** These events include: (1) the recognition of systemic problems with some forensic feature-comparison methods, including through study of the causes of hundreds of wrongful convictions revealed through DNA and other analysis; (2) the 2009 NRC report from the National Academy of Sciences, the leading scientific advisory body established by the Legislative Branch, that found that some forensic feature-comparison methods lack a scientific foundation; and (3) the scientific review in this report by PCAST, the leading scientific advisory body established by the Executive Branch, finding that some forensic feature-comparison methods lack foundational validity.

PCAST Report at 143-44 (italics original; bold added).

After the release of this unanimous report, many members of the forensic analysis community,

⁶⁴ The PCAST Report cites *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 238 (1970), and *Patterson v. McLean Credit Union*, 485 U.S. 617, 618 (1988).

including the FBI and members of AFTE,⁶⁵ responded with concerns PCAST had overlooked "numerous published research studies" they thought met PCAST's criteria to provide foundational validity. In response, PCAST undertook a further review of the scientific literature and invited DOJ and others to identify "any published...appropriately designed studies" it had not considered that established validity and reliability "of any of the forensic feature-comparison methods that the PCAST report found to lack such support." DOJ ultimately concluded it had no additional studies.

On January 6, 2017, PCAST issued An Addendum to the PCAST Report on Forensic Science in Criminal Courts,⁶⁶ reaffirming its conclusions: There has been only one valid empirical study of toolmark evidence. Scientific validity requires at least two such studies to demonstrate replication. There

⁶⁵ Association of Firearm/Toolmark Examiners, a trade association for forensic examiners.

⁶⁶ Available (last visited 4/18/2017) at: https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensics_addendum_finalv2.pdf.

is no scientific foundation for firearm and toolmark comparison evidence.

Once the scientific community made its opinion of forensic examinations and recommendations clear, the Department of Justice took some notice. In 2016, United States Attorney General Loretta Lynch issued a Memorandum in response to recommendations from the National Commission on Forensic Science. She directed Department of Justice personnel to implement the following policy:

Department forensic laboratories will review their policies and procedures to ensure that forensic examiners are not using the expressions "reasonable scientific certainty" or "reasonable [forensic discipline] certainty" in their reports or testimony. Department prosecutors will abstain from use of these expressions when presenting forensic reports or questioning forensic experts in court unless required by a judge or applicable law.

Lynch, Loretta, Memorandum for Heads of Department Components ("Lynch Memorandum") (Sept. 6, 2016) at 1.⁶⁷ DOJ implemented a new Code of Professional Responsibility for the Practice of Forensic Science with this Memorandum. It requires that forensic examiners' "[r]eports should disclose known

⁶⁷ A copy of the Memorandum is Appendix M to the Dec. of L. Nussbaum.

limitations that are necessary to understand the significance of the findings." *Id.*

- a. *The New Studies are Newly Discovered Evidence of What the Scientific Community Accepts.*

The new studies occurred after the trial in this case, and so could not have been discovered in time for trial. It goes to the actual admissibility of the evidence, and so is not "merely impeaching or cumulative." It is material because the State relied on this evidence as the only forensic evidence possibly connecting Jones to this crime, and argued it both in opening⁶⁸ and closing. *State v. Williams, supra.*

Other than Johnson's identification, the bunter mark evidence was the only evidence suggesting Marty Jones was connected to the scene of the crime. If the jury had concerns about Johnson's identification completely contradicting that of George Hill, Schoeman's testimony completely wrapping himself in the cloak of "science" lended false credibility to his very limited and completely subjective testimony.

Combined now with the other newly discovered

⁶⁸ RP(1/18/2011) 24-25.

evidence presented with this Petition, this evidence puts the entire case into a completely different perspective. Excluding this "expert" testimony is likely to cause a different result on retrial.

b. *The Relevant Scientific Community is Broader Than the Forensic Firearm and Toolmark Analysts.*

PCAST consists of eminent scientists and engineers from the academic and private sectors, in consultation with prominent federal judges, law professors, and statisticians. PCAST Report at v-ix. Building on the prior NAS study and a thorough review of published studies, the PCAST Report is

the first and only historical memorialization of the aggregate views and opinions of the most respected voices (NAS and PCAST) of the true scientific community regarding foundational validity of, for the case at bar, firearms/toolmarks identification.

Dec. of W. Tobin at 4-5.

Our Supreme Court relied on the work of just such a committee from the National Academy of Sciences in *Cauthron, supra*, to determine the admissibility of DNA evidence.

Because of the broad range of scientists involved in the Committee, it represents

the sort of general scientific acceptance needed to satisfy *Frye*.

Cauthron, 120 Wn.2d at 885, 896.

[T]he evaluation of scientific validity should be based on the appropriate scientific criteria for the scientific field. Moreover, the appropriate scientific field should be the larger scientific discipline to which it belongs.

PCAST Report at 142 & n.384. For example, in *Frye*, the court evaluated whether a proffered lie detector had gained "standing and scientific recognition among physiological and psychological authorities," rather than among lie detector experts. *Frye, supra*. The relevant scientific community thus must be much broader than AFTE.

3. THIS COURT APPLIED *FRYE* TO REJECT SIMILAR EXTENSIONS OF FORENSIC ANALYSIS WITH NO SCIENTIFIC BASIS.

The significance of the PCAST report applied here can be seen in *State v. Kunze, supra*. There the trial court admitted evidence that a partial latent earmark found on a glass door could be "matched" to the defendant's ear. With his usual thorough analysis, Judge Dean Morgan wrote the court's opinion reversing the murder conviction.

As here, the Washington State Patrol Crime Lab analyst specialized in firearm and toolmark

identification, and had analyzed "impression evidence" of other kinds.

He claimed that latent earprint identification is generally accepted in the scientific community, reasoning that "the earprint is just another form of impression evidence," and that other "impression evidence is generally accepted in the scientific community."

He opined that "it's likely" the defendant caused the imprint found at the crime scene. *Id.* at 837-38. As Judge Morgan explained, forensic science requires individualization: finding not merely class characteristics that can be compared, but specific individual characteristics that identify one item.

An opinion of nonexclusion (e.g., that a particular person cannot be excluded as the maker of a latent print) can rationally be based on readily discernable class characteristics, but an opinion of inclusion (e.g., that a particular person made or probably made a latent print) cannot be.

Kunze, 97 Wn. App. at 856.⁶⁹ See also Declarations of William A. Tobin and Clifford Spiegelman filed with this Petition.

In firearm examinations, there are identifiable "class characteristics" such as striations to compare. But Schoeman here failed to identify any such class characteristics, much less individual characteristics, for bunters. Instead he relied on his "experience" and "judgment."

The difficulty is that Schoeman had no "experience" analyzing bunter marks. And with no "method" for conducting the analysis -- no identification of class characteristics or individualization characteristics, much less their relationship to one another -- there is nothing on which to base his "judgment." See Dec. of W. Tobin at 10-13; Dec. of C. Spiegelman at ¶¶ 2-5.

PCAST addressed this approach in its Addendum:

Some respondents...suggested that forensic science should be considered as analogous to medicine, in which

⁶⁹ See also: *State v. Sipin*, 130 Wn. App. 403, 123 P.3d 862 (2005) (reversing and remanding for new *Frye* hearing on computer program of accident reconstruction); *State v. Huynh*, 49 Wn. App. 192, 742 P.2d 160 (1987) (1987) (comparing unaltered gasoline with burned gasoline not generally accepted in scientific community).

physicians often treat patients on the basis of experience and judgment even in the absence of established empirical evidence. However, the analogy is inapt. Physicians act with a patient's consent for the patient's benefit. There is no legal requirement, analogous to the requirement imposed upon expert testimony in court by the Federal Rules of Evidence, that physician's actions be based on "reliable principles and methods." Physicians may rely on hunches; experts testifying in court about forensic feature-comparison methods may not.

PCAST Addendum at 3 n.6.

As expert Tobin explains:

In particular, as the evidence was presented in this case, the toolmark examiner's testimony was not only misleading, but also patently false. The testimony characterized firearm/toolmark identifications as being "based on scientific principles" from studies "over a hundred years that ... made it scientific, so that we can answer questions in the justice system, or in a court of law." The underlying assumption for his forensic identification, the assumption of discernible uniqueness required by logical necessity for specific source attributions, has never been scientifically established. His assumption of discernible uniqueness of bunter mark features, "sufficient similarities", and ultimate conclusion that shell casings "were indeed" stamped from the same bunter bear no support in the scientific literature or scientific community.

Dec. of W. Tobin at 3.

These new studies are newly discovered evidence that the scientific community no longer accepts toolmark evidence as scientifically valid. It requires this Court remand the case for a *Frye* hearing.

V. CONCLUSION

The newly discovered evidence establishes that Nicolas Boer, not Martin Jones, shot Scott Johnson. This Court should vacate Jones's conviction and remand for a new trial at which the jury can hear this evidence.

The newly discovered evidence also establishes that the State withheld exculpatory evidence and now casts the *Brady* light on more evidence the State apparently has that, given the new evidence, also is exculpatory. This Court should order that evidence produced for the defense now.

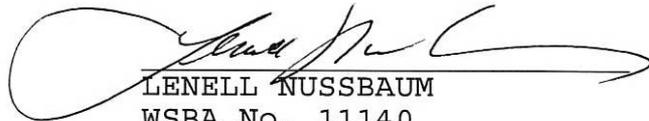
Newly discovered evidence also establishes that the forensic bunter mark evidence the State presented is false and not scientifically valid. It should remand the case for a new trial, or at least for a *Frye* hearing, where the court can consider the new evidence that feature-comparison

examinations are not generally accepted in the scientific community.

As requested in a separate motion, if this Court cannot resolve this matter on the pleadings, it should order a reference hearing and the right for discovery so Petitioner can subpoena and depose witnesses otherwise unwilling to talk to his investigator, conduct further DNA comparisons with Nicolas Boer, and obtain the exculpatory evidence the State withheld.

DATED this 18th day of April, 2017.

Respectfully submitted,



LENELL NUSSBAUM
WSBA No. 11140
Attorney for Petitioner
Martin A. Jones

APPENDICES

- A Exhibit 59: Sketch drawn from George Hill's Description of the shooter
- B Photograph from Florida Department of Corrections of Nicolas Dean Boer, obtained from Florida DOC's website (Dec. of W. Taylor)
- C Department of Licensing Photograph of Martin Jones (the same image used in Exhibits 92 and 435) (Dec. of L. Nussbaum ¶ 2)
- D The portion of the map of Long Beach, WA, on which Peter Boer indicated, in an interview March 27, 2017, the location of "'Shroomy Joe's" apartment at Idaho and 15th, from which Nicolas Boer phoned him shortly after the shooting (Dec. of W. Taylor ¶ 10, App. B)
- E *In re PRP of Griffin*, No. 42012-1-I (Sept. 7, 2016)

APPENDIX A



TCSD
KING 37

APPENDIX B



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Florida State Prison Inmate Details for BOER NICHOLAS D

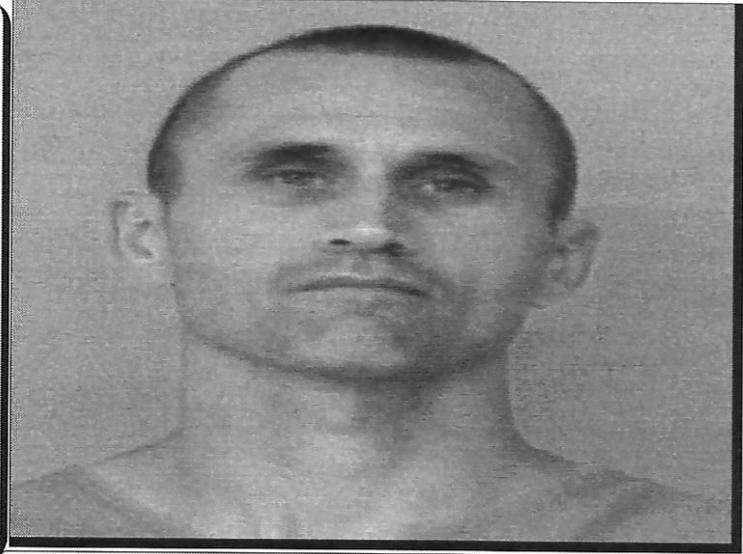
Court Records Online TruthFID

I WILL NOT use this information to stalk anyone
 If I see someone I know, I WILL NOT publicize their information or spread gossip
 I WILL NOT harass people whose criminal records appear on this site.
 If I learn someone close to me is a dangerous criminal, I WILL NOT confront them

Enter

Sorry. Bond Information is unavailable.

Please speak with an attorney for more information.



BOER NICHOLAS D Booking Details

Florida State Prison (DOC) Visitation Information
[\(https://bailbondcity.com/visitations-florida-state-doc-prisoners/\)](https://bailbondcity.com/visitations-florida-state-doc-prisoners/)

Get Background Check Here
[\(https://bailbondcity.com/referral.php?id=835\)](https://bailbondcity.com/referral.php?id=835)

Remove Mugshot
[\(https://bailbondcity.com/referral.php?id=735\)](https://bailbondcity.com/referral.php?id=735)

Florida State Prison (DOC) Booking Details

Court Records: 3 Sources Found

- I WILL NOT use this information to stalk anyone
- I WILL NOT harass people whose criminal records appear on this site
- If I see someone I know, I WILL NOT spread gossip

Records Updated Daily! TruthFID

Review Court Records >>

APPENDIX C

Department Of Licensing – IDL System



A handwritten signature in black ink, appearing to read "Martin Arthur Jones". The signature is written in a cursive, flowing style.

Picture Number: JONESMA362D5
Control Number: 3D090714D1258
Name: JONES,MARTIN ARTHUR
Production Status: Mailed - 03-16-2009
Issue Date: 03-12-2009
Report Date: Feb 14, 2010 6:51:16 PM

APPENDIX D

Gray Whale Skeleton
WorldMark Long Beach

Adrift

World Kite Museum
& Hall of Fame

Go Kites
Stacy

Shanny
Joe

7th St SW

7th St SW

11th St SW

Sid Snyder Dr

9th St S

Sid Snyder Dr

11th St S

Washington Ave

Idaho Ave S

Boulevard Ave

California Ave

Pacific Ave

14th St SW

14th St SW

Boulevard Ave

California Ave

Idaho Ave S

17th St SW

17th St SW

17th St S

Lost Room

18th St SW

Boulevard Ave

19th St S

Pacific Ave

Washington Ave

Idaho Ave S

51st St

50th St

K.P.I.

L.P.I.

50th St

51st St

48th Pl

47th Pl

46th Pl

46th Pl

Pacific Way

N.P.I.



APPENDIX E

In re Pers. Restraint of Griffin

Court of Appeals of Washington, Division Two

September 7, 2016, Filed

No. 42012-1-I

Reporter

2016 Wash. App. LEXIS 2147 *

*In the Matter of the Personal **Restraint** Petition of
LESTER JUAN **GRIFFIN**, Petitioner.*

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *In re Pers. Restraint of Griffin*, 2016 Wash. App. LEXIS 2300 (Wash. Ct. App., Sept. 7, 2016)

Prior History: [*1] Date first document (petition, etc) was filed in the Court of Appeals: 06/14/2011.

Counsel: For Petitioner: Kate Huber, UW Law Clinic-Innocence Project NW, Seattle, WA.

Maria Fernanda Torres, Petitioner, Appearing Pro se, Seattle, WA.

Jacqueline Mcmurtrie, Petitioner, Appearing Pro se, Seattle, WA.

For Respondent: Anne Mowry Cruser, Clark County Prosecuting Attorney, Vancouver, WA.

Judges: Authored by Linda Cj Lee. Concurring: Lisa Sutton, Jill M Johanson.

Opinion by: Linda Cj Lee

Opinion

¶1 LEE, J. — Lester Juan Griffin was convicted of first degree burglary and first degree assault in 2009. This court affirmed his convictions on direct appeal in 2010¹

and then dismissed his personal restraint petition on procedural grounds in 2014.² The Supreme Court remanded Griffin's petition for determination on its merits.³

¶2 In his petition, Griffin raises three broad arguments. First, he asserts that his rights under *Brady v. Maryland*⁴ were violated when his defense counsel did not receive evidence relating to investigations against the lead investigating officer for: (1) conflicting statements made under oath in a different criminal proceeding; (2) sexual harassment and assault of a coworker; and (3) an off-duty, [*2] unauthorized investigation and arrest of a suspect. Second, he asserts that his trial counsel was ineffective for failing to: (1) adequately investigate the officer's conduct described above; (2) impeach the testimony of the accomplice and investigating officer with a prior inconsistent statement; and (3) object to the prosecutor's conduct during the State's case in chief, closing, and rebuttal. Third, Griffin asserts that several instances of prosecutorial misconduct warrant reversal of his convictions.

¶3 We grant Griffin's petition and remand for new trial because the State failed to disclose evidence favorable to Griffin that, in the aggregate, create a reasonable probability that the outcome of the proceedings would have been different. We also hold that Griffin's counsel was deficient in failing to object to the prosecutor's improper vouching during the State's case in chief and there is a reasonable probability that prejudice resulted. Finally, we dismiss Griffin's prosecutorial misconduct argument because he fails to establish that a curative instruction could not have obviated the prejudice.

¹ *State v. Griffin*, noted at 157 Wn. App. 1001 (2010).

² *State v. Griffin*, 181 Wn. App. 99, 325 P.3d 322 (2014).

³ *State v. Griffin*, 182 Wn.2d 1022, 349 P.3d 819 (2015).

⁴ 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

FACTS

¶4 Lester Juan Griffin was convicted in 2009 of attempted first degree burglary, with [*3] a firearm enhancement, and first degree assault, with a firearm enhancement. His convictions precipitated from the attempted robbery, and subsequent shooting, of Gary Atkinson around midnight on May 17, 2008.

A. THE CRIME

¶5 Around midnight on May 17, 2008, Atkinson awoke to a loud pounding on the front door of his apartment. He opened his front door partway and saw two African-American males standing outside his door. The men wore bandanas covering their mouths, but not their noses, and both had guns pointed at him. The men shouted for Atkinson to “[g]et down,” as Atkinson tried to shut the door on them. Verbatim Report of Proceedings (VRP) at 100. Unable to shut the door, Atkinson allowed the door to swing open and pushed his way through the two men. Outside of his apartment, Atkinson heard one say, “We’ll shoot. We’ll shoot.” VRP at 101, 106, 123. He heard two shots, and felt one of the bullets hit him in the back.

¶6 Atkinson ran to his neighbor's apartment for help. Atkinson's neighbor had heard the gunshots and, after Atkinson came inside, stepped outside to see two men running down the hallway towards the carport area. The neighbor then called 911. The first 911 call came in at 12:12 a.m. on May 17.

¶7 Atkinson [*4] said he recognized one of his attackers as Garry Alexander. Atkinson said he recognized Alexander by his voice, build, eyes, nose, and tattoo under his eye. Atkinson told the responding officer that Alexander was one of his attackers, and he identified Alexander in a photo laydown⁵ later at the hospital. Atkinson testified that he knew Alexander through Atkinson's girlfriend, whom Alexander had a child with. Atkinson said that he and Alexander had spoken more than twenty times over the prior two years, that Alexander had been to Atkinson's home and work, and that Alexander had a “distinctive” voice. VRP at 117. Atkinson also said that his girlfriend had told him that Alexander was planning to punch Atkinson in the stomach the next time Alexander saw him.⁶

⁵At a photo laydown, a witness is presented with several pictures of different people for the purpose of potentially identifying the individual who committed the witnessed act.

⁶This threat is significant to Atkinson because he had had six

B. PRE-TRIAL INVESTIGATION

¶8 Alexander was arrested later in the day on May 17. He was interviewed on May 18 and May 19 by lead investigator Officer Jeffrey Wilken, of the Vancouver Police Department. [*5] In the first interview, Alexander denied involvement in the crime. In the second interview, Alexander confessed to his involvement, but named Griffin and Christopher Perkins as the two men who showed up at Atkinson's front door. In the second interview, Alexander described the events leading up to the attempted robbery as follows

[Wilken]: And what did those two [Griffin and Perkins] do?

[Alexander]: Um, they (unintelligible) and then they came back and I walked ... I wanted something to drink so I walked to Chevron.

[Wilken]: Okay.

[Alexander]: Got something to drink. Well, actually, went to (unintelligible) and then left and went back, you know, (unintelligible). They got in the car, (unintelligible) I mean, I didn't think, you know what I'm saying, that they was going to go ... go over there for real.

Personal Restraint Petition (PRP)⁷ Ex. 16, at 44. Alexander told Wilken the three then went to the Evergreen Park Apartments, near Atkinson's apartment complex, and parked there. PRP Ex. 16, pg. 46. Alexander said he was supposed to be the getaway driver, but had thought better of it and left Griffin and Perkins stranded at the apartments after they got out of the car.

¶9 Perkins was picked up by police and went with Sergeant Michael Chylack and another officer as they searched the area around the Evergreen Park Apartments during the day on May 19. The officers had to abandon their search, however, because they were afraid Perkins would be seen working with the police. Perkins told the police where to find a glove that was used in the crime. Chylack returned that night, this time with Wilken, and Chylack found a black glove along a fence line. A deoxyribonucleic acid (DNA) analysis was performed on the glove. Griffin's DNA was found on the glove, along with other unknown contributors, while Alexander and Perkins were excluded as possible

stomach surgeries.

⁷There were several [*6] briefs filed in support of Griffin's petition, the procedural propriety of which is not before this court. When citing to the “PRP” in this opinion, we are referring to the brief entitled “Opening Brief in Support of Amended Personal Restraint Petition.”

contributors.

¶10 After Alexander's second interview, Alexander entered into a plea deal with the State in exchange for his testimony against Griffin. The plea agreement stated that Alexander would be given a sentence of 48 months for first degree attempted robbery in exchange [*7] for his truthful testimony against Griffin and Perkins. The plea agreement also stated that Alexander would be subject to a polygraph test at any time. The plea agreement was later admitted at trial without objection from Griffin's trial counsel.

C. TRIAL TESTIMONY

¶11 Alexander testified that on the night of the attempted robbery, he and Perkins were at Griffin's apartment when Alexander and Perkins decided to walk to a nearby Chevron convenience store for snacks. The convenience store did not take EBT cards as a form of payment, so Alexander and Perkins walked to the mini-mart across the street. Griffin met them on the way to the mini-mart. The three were captured on the mini-mart's surveillance system entering at 11:39 p.m. and leaving at 11:41 p.m. on May 16. After leaving the mini-mart the three went back to Griffin's apartment, got into Griffin's car, and then the three drove back to the mini-mart in Griffin's car where Griffin bought a Steel Reserve beer. Security footage from the mini-mart shows Griffin arriving at 11:54 p.m. and leaving with a silver aluminum can at 11:58 p.m. on May 16. Only Griffin could be seen in the later photos from the mini-mart.

¶12 Alexander also testified that [*8] after leaving the mini-mart, they parked at the Evergreen Park Apartments because it was further away from where the robbery would take place, and then Griffin and Perkins got out to go rob Atkinson. Alexander "lost his nerve" and drove to the apartment of his ex-wife, Tina Williams, so he could use her phone to call his fiancée. VPR at 264. He said he wanted his fiancée to help him get Griffin's car back to Griffin's apartment.

¶13 Marilyn Green was Griffin's friend and lived in the Evergreen Park Apartments. She testified that Griffin and another African-American male arrived at her doorstep about 11:00 p.m., or a little bit after, asking to use her phone. She could not remember on what day this occurred. Griffin told her they had been drinking at a bar, Griffin's car had broken down, and they needed to call for a ride. This testimony was confirmed by Green's daughter, who also testified at Griffin's trial.

¶14 Wilken also testified at Griffin's trial. He testified that Alexander's testimony at trial was consistent with what Alexander had told him during the second interview, before Alexander had been offered a plea deal. Specifically, Wilken testified that Alexander had told him they made a second [*9] stop at the mini-mart so that Griffin could buy a Steel Reserve beer. This testimony was admitted over objection as a prior consistent statement because, as the prosecutor argued to the judge, "This witness [Wilken] would testify that Garry Alexander told him the exact same thing in the interview that was before the cooperation agreement was signed, so I submit it's not hearsay, it's a prior consistent statement." VRP at 399.

D. BRADY REQUEST

¶15 Shortly before trial, the defense learned that Wilken was placed on administrative leave from the Vancouver Police Department. Griffin's trial counsel brought this to the trial court's attention and asked for the facts related to the administrative leave to determine if they went to the "truth and veracity, which could have an effect ... in this case." VRP at 87. The prosecutor responded that he did not know how the defense found out that Wilken was on administrative leave, but that he had "looked into it to find out if there was any Brady material," and that he was "specifically advised by the chief criminal deputy" "that there was no allegation of any issues that would go to Wilken's truth or veracity and directed me not to disclose the fact that he's on administrative [*10] leave to the [d]efense." VRP at 88. The trial court reserved ruling until after the prosecutor had a chance to confer further with the chief deputy.

¶16 Partway through the trial, the chief deputy prosecutor gave the court a "file relating to Jeff Wilken." VRP at 180. The trial court accepted the file under seal for an in-camera review of its contents. After reviewing the file, the trial court found:

I have reviewed the materials related to Officer Wilken's suspension or administrative leave. It's the Court's opinion after that review that the documents do not contain admissible evidence in these proceedings either for substantive or for impeachment purposes; therefore, the motion to disclose is denied.

VRP at 303.

E. WILKEN'S CONDUCT

1. Internal Affairs Investigation - IA #00-38

¶17 The petition identifies three different formal complaints and subsequent internal investigations into Wilken's prior conduct that Griffin claims should have been disclosed for his defense. First, Griffin cites to IA #00-38, which was filed by the Clark County Prosecutor's Office. The complaint alleged that Wilken "provided testimony in court that was in conflict with a search warrant affidavit he authored as well as an Order for Destruction of Hazardous [*11] Substances." PRP at Ex. 2. After an internal investigation into the complaint was conducted, the Vancouver Police Department concluded:

[T]here appears to be sufficient evidence that you [Wilken] provided testimony on several occasions that contradicted other testimony provided by you in this criminal case. Specifically, you provided testimony via several written documents authored by you (e.g., police reports, affidavit for search warrant, and Order for Destruction of Hazardous Substances) and during the course of a pre-trial conference and a Suppression Hearing in Clark County Superior Court. Review of each of these documents, your statements during the pre-trial conference and testimony during the Suppression Hearing revealed several inconsistencies in your testimony. The allegation that you violated Vancouver Police Department Policy 7.13.18 Statements/False Statements is **not sustained**. The allegation that you violated Vancouver Police Department Policy 5.1 Neglect of Duty is **sustained**. The allegation that you violated Vancouver Police Department Policy 5.2 Incompetence is **sustained**.

PRP Ex. 1.

2. Sexual Harassment and Assault Allegations

¶18 Second, Griffin cites to sexual harassment and assault [*12] allegations against Wilken for conduct towards a female community corrections officer that was pending at the time of Griffin's trial. Tanis Conroy was the community corrections officer, and she was assigned to work on a Neighborhood Response Team with Wilken. The complaint alleged several instances of inappropriate conduct by Wilken including placing a pair of women's underwear on Conroy's head during the execution of a search warrant, handcuffing her to a chair and wheeling her into the men's locker room, and making sexual remarks towards her.

¶19 The Clark County Sheriff's Office and the Prosecuting Attorney's Office investigated the matter,

and Wilken was placed on administrative leave during the investigation. As part of the investigation, Wilken was interviewed by the sheriff's office. During that interview, Wilken made the following statement as to why he believed Conroy had initiated the complaint:

My belief is Tanis got herself in a jam at McNicholas's party with Acee. They're [Tanis and her fiancé, Gordon, another police officer] two weeks from getting married. The car being—the seat being forward. The—I think there was issues going on between her and Gordon. They're a couple weeks [*13] from getting married.

Then the handcuffing thing happens, she called, she goes home, and in that week time period, it's, as I said, I don't know Gordon from anybody. There are cops that I work with that couldn't figure their way out of, out of a room. They don't know how to ask someone basic questions. Then there are cops, and I ain't blowing my own horn, that are as good as me that can sit in a room and get someone that didn't do it to say they did it.

And my belief is I give Gordon any credit at all, is he had a conversation which was probably a long drawn-out one with her, like "What the [expletive] is going on? You have this, you have this, you have this. You told me he handcuffed you. What other [expletive] has he done? ..."

...

That's the reason why she's crying to people. That's the reason why she's all freaked out. Because I think it was a choice. It was my new husband or it was my reputation. And it was her husband. ...

PRP Ex. 12, at 66. After reviewing the evidence, the prosecutor's office decided not to bring charges against Wilken.

3. Internal Affairs Investigation - IA #02-33

¶20 Third, Griffin cites to IA #02-33, where the Vancouver Police Department investigated Wilken [*14] for apprehending a suspect without authorization, and while off-duty with his kids. IA #02-33 involved a situation where Wilken was off-duty and received a tip on where a suspect could be found. Wilken proceeded, without authorization, in his personal vehicle with his minor children present, to the identified location where he found the suspect. Wilken then arrested the suspect and placed her in the back of a marked police car that had arrived. After placing the suspect in the police car, Wilken removed the suspect's handcuffs and left the back windows of the police car rolled down. The suspect escaped, resulting in a footrace to re-apprehend the

suspect. Based on the investigation, the Vancouver Police Department found Wilken violated the Department's policies of "Neglect of Duty," "Duty to Report Information," "Unauthorized Investigations," "Chain of Command," and "Prisoner Security"; and "[s]ufficient evidence exists to substantiate the allegation that [Wilken] failed to exercise diligence, good judgment, and the interest of the Department." PRP Ex. 3. In the letter of reprimand to Wilken, the chief of police also noted:

First, you failed to meet reasonable expectations of performance while [*15] handling a case of this nature. Second, there is a sufficient history of internal affairs investigations with you as the subject of the investigation, three of which resulted in sustained policy violations for incidents in which you also failed to exercise good judgment in your duties as a police officer. Third, you have already received counseling and retraining for previous performance errors. Fourth your actions placed you and a probationary officer in a potentially harmful situation given the lack of resources available at the time you took this unauthorized action. ... The totality of your actions in response to this situation reveal both neglect and disregard for departmental rules and regulations.

PRP Ex. 3, Letter of Reprimand at 2.

F. PROCEDURAL POSTURE

¶21 In his direct appeal to this court, Griffin argued that his constitutional rights to a speedy trial, to present a defense, to effective assistance of counsel, and to be protected against double jeopardy were violated. State v. Griffin, noted at 157 Wn. App. 1001 (2010). This court disagreed and affirmed his convictions in an unpublished opinion. *Id.* Now, Griffin argues in his personal restraint petition that he is entitled to relief for the State's *Brady* violations, receiving [*16] ineffective assistance of counsel, and being subject to prosecutorial misconduct.

ANALYSIS

A. PERSONAL RESTRAINT PETITION

¶22 When considering a personal restraint petition, a court may grant relief to a petitioner only if the petitioner is under an unlawful restraint, as defined by RAP 16.4(c). In re Pers. Restraint of Yates, 177 Wn.2d 1, 16, 296 P.3d 872 (2013). The collateral relief afforded under a personal restraint petition is limited, and requires the

petitioner to show that he was prejudiced by the alleged error of the trial court. In re Pers. Restraint of Hagler, 97 Wn.2d 818, 819, 650 P.2d 1103 (1982). There is no presumption of prejudice on collateral review. *Id.* at 823. The petition does not serve as a substitute for appeal; nor can the petition renew an issue that was raised and rejected on appeal, unless the interests of justice so require.⁸ In re Pers. Restraint of Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004).

¶23 The petitioner must either make a prima facie showing of a constitutional error that, more likely than not, constitutes actual and substantial prejudice, or a nonconstitutional error that inherently constitutes a complete miscarriage of justice. In re Pers. Restraint of Stockwell, 161 Wn. App. 329, 334, 254 P.3d 899 (2011), *aff'd*, 179 Wn.2d 588, 316 P.3d 1007 (2014); Hagler, 97 Wn.2d at 826; In re Pers. Restraint of Cook, 114 Wn.2d 802, 810, 812, 814, 792 P.2d 506 (1990). Without either such showing, we must dismiss the petition. Cook, 114 Wn.2d at 810, 812; *see also* In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). However, with respect to claims of *Brady* violations or ineffective assistance of counsel, the prejudice element of a petition is established by showing "a reasonable probability that the outcome of the proceedings would have been different" absent the *Brady* violation or ineffective assistance of counsel. In re Pers. Restraint of Grace, 174 Wn.2d 835, 845, 280 P.3d 1102 (2012).

¶24 The petitioner's allegations of prejudice must present specific evidentiary support. In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). Such support may come from the trial court record. "If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts

⁸ In his direct appeal, Griffin argued that he received ineffective assistance because he had a conflict of interest with his defense counsel due to the fact that Griffin had filed a bar complaint against the defense counsel. Griffin, noted at 157 Wn. App. 1001. Here, Griffin raises different reasons for receiving ineffective assistance, one of which we hold warrants reversal. Because we may hear issues that have already been raised where the interests of justice so require, and one of the issues already raised warrants [*17] reversal, we allow the issue. In re Pers. Restraint of Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004); *see also* In re Pers. Restraint of Percer, 150 Wn.2d 41, 47, 75 P.3d 488 (2003) (holding that the court of appeals can properly review in a PRP the identical double jeopardy issue rejected on direct appeal).

that entitle him to relief," which may include affidavits [*18] or other corroborative evidence. *Id.* Bald assertions and conclusory allegations are insufficient support. *Id.* If a petitioner makes a prima facie showing of prejudice, but the merits of his assertions cannot be determined on the record, we will remand for a hearing pursuant to RAP 16.11(a) and RAP 16.12. Hews, 99 Wn.2d at 88.

B. BRADY VIOLATION

¶25 Griffin first argues his due process rights were violated under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, and its progeny of cases. Griffin asserts that, under *Brady*, the State violated its duty to disclose evidence favorable to the accused by failing to turn over four types of evidence that would impeach the testimony of Wilken. The first involved the complaint, IA #00-38, to the Clark County prosecutor's office regarding Wilken's conflicting statements in a search warrant application, an order for destruction, and his testimony at a suppression hearing. The second was the investigative report following the claims of Wilken's sexual harassment and assault of Tanis Conroy. The third involved the complaint, IA #02-33, that Wilken attempted to investigate and arrest a suspect while off-duty.⁹ We hold that there is a reasonable probability that the outcome of Griffin's trial would have been different had evidence relating to IA [*19] #00-38, the sexual harassment and assault allegations, and IA #02-33 been disclosed to the defense.

1. Legal Principles

¶26 To establish a *Brady* violation, the petitioner must demonstrate the existence of each of three necessary elements: first, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;" second, "that evidence must have been suppressed by the State, either willfully or inadvertently;" and third, "prejudice must have ensued" such that there is a reasonable probability that the result of the proceeding would have

⁹Griffin also asserted a fourth basis: an e-mail from the Clark County prosecutor's office complaining that Wilken was interfering in plea negotiations with one of his confidential informants who had been caught shoplifting. This fourth basis is not included in the body of this opinion because Griffin only raises it in a footnote with no supporting argument. Therefore, we do not consider this assertion. RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

differed had the prosecution disclosed the evidence to trial counsel. Strickler v. Greene, 527 U.S. 263, 281-82, 289, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). If a defendant fails to demonstrate any of the three elements, his *Brady* claim fails. *Id.*; State v. Sublett, 156 Wn. App. 160, 199-201, 231 P.3d 231 (2010), aff'd, 176 Wn.2d 58, 292 P.3d 715 (2012).

¶27 Favorable evidence must be disclosed [*20] to the accused "where the evidence is material either to guilt or to punishment," regardless of whether the accused requests such evidence. In re Pers. Restraint of Stenson, 174 Wn.2d 474, 486, 276 P.3d 286 (quoting Brady, 373 U.S. at 87), cert. denied, 133 S. Ct. 444 (2012). Favorable evidence "encompasses impeachment evidence as well as exculpatory evidence." Stenson, 174 Wn.2d at 486; see United States v. Price, 566 F.3d 900, 907 (9th Cir. 2009) ("evidence that would impeach a central prosecution witness is indisputably favorable to the accused."); see also United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004) ("*Brady/Giglio* information includes 'material ... that bears on the credibility of a significant witness in the case.'") (alteration in original) (quoting United States v. Brumel-Alvarez, 991 F.2d 1452, 1461 (9th Cir. 1993)). Evidence need not be admissible to be subject to disclosure under *Brady*. Price, 566 F.3d at 912.

¶28 Suppression occurs when the government withholds material evidence favorable to the accused, "irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87; Stenson, 174 Wn.2d at 486. "[S]uppressed evidence [is] considered collectively, not item by item." Kyles v. Whitley, 514 U.S. 419, 436, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). The scope of the government's "duty to disclose evidence includes the individual prosecutor's 'duty to learn of any favorable evidence known to the others acting on the government's behalf ... including the police.'" Stenson, 174 Wn.2d at 486 (quoting Strickler, 527 U.S. at 281).

¶29 Prejudice is shown when the "admission of the suppressed evidence would have created a 'reasonable probability of a different result.'" Price, 566 F.3d at 911 (quoting [*21] United States v. Jernigan, 492 F.3d 1050, 1053 (9th Cir. 2007)); In re Pers. Restraint of Woods, 154 Wn.2d 400, 428, 114 P.3d 607 (2005) (stating that evidence is material and "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."). "[R]easonable probability" is defined as "a probability sufficient to undermine

confidence in the outcome.” *Price*, 566 F.3d at 911 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). Whether our confidence in the outcome is undermined requires us to weigh the withheld evidence “in the context of the entire record.” *Price*, 566 F.3d at 913 (quoting *Jernigan*, 492 F.3d at 1053). Because we consider the prejudicial effect of all suppressed evidence favorable to the defendant, this opinion discusses the favorable and suppressed nature of each evidentiary item raised by Griffin, and then addresses the aggregate prejudice of the favorable and suppressed evidence.

2. IA #00-38

¶30 Griffin first asserts that the State violated its duty to disclose favorable evidence by failing to turn over evidence relating to Wilken's conflicting statements in a search warrant application, an order for destruction, and his testimony at a suppression hearing. IA #00-38 resulted from a complaint from the Clark County Prosecutor's office alleging that Wilken “provided materially false statements under oath in Clark County Superior [*22] Court” and “[d]uring the course of the review of this incident additional potential policy violations were noted.” PRP Ex. 1. We hold the evidence was both favorable to Griffin and suppressed by the State.

a. “Favorable to the Accused”

¶31 IA #00-38 identified specific instances where Wilken provided contradictory and inconsistent statements under oath to the superior court regarding a criminal case. IA #00-38 concluded that Wilken did provide contradictory and inconsistent statements and that he had violated Vancouver Police Department Policy 5.1 Neglect of Duty and Vancouver Police Department Policy 5.2 Incompetence.

¶32 Here, the suppressed evidence was favorable and material because it could have been used to impeach Wilken's testimony. *ER 608(b)* allows, at the trial court's discretion, cross-examination of specific instances of a witness's conduct for purposes of impeaching the witness's character for truthfulness or untruthfulness. Wilken was the lead investigating officer and was the officer who conducted the interviews of Alexander. Alexander's testimony was the only evidence that identified Griffin as committing the illegal acts for which Griffin was convicted, and Alexander provided that testimony in [*23] return for a significant reduction in his own sentence. The prosecutor acknowledged to the trial

court that Wilken's testimony was offered to rehabilitate Alexander's earlier testimony to the jury by showing that Alexander's prior statements to Wilken were consistent. Wilken's testimony rehabilitating Alexander's testimony was significant, if not central, to the State's case against Griffin. *Price*, 566 F.3d at 907 (“evidence that would impeach a central prosecution witness is indisputably favorable to the accused.”), 912 (“evidence is material if it might have been used to impeach a government witness.”) (quoting *Paradis v. Arave*, 240 F.3d 1169, 1179 (9th Cir. 2001)); see also *Blanco*, 392 F.3d at 387 (“*Brady* ... information includes ‘material ... that bears on the credibility of a significant witness in the case.’”). Therefore, the evidence from IA #00-38 was favorable to Griffin, and the first element of a *Brady* violation for the nondisclosure of evidence relating to IA #00-38 is met.

b. “Suppressed by the State”

¶33 There is no dispute that evidence relating to IA #00-38 was not turned over to the defense.¹⁰ The reasons for the State's failure to disclose evidence relating to IA #00-38 is immaterial, and the withholding is determinative. *Brady*, 373 U.S. at 87; *Stenson*, 174 Wn.2d at 486. Evidence relating to IA #00-38 was suppressed [*24] by the State, and the second element of a *Brady* violation for the nondisclosure of evidence relating to IA #00-38 is met.

3. Sexual Harassment and Assault Allegations

¶34 Griffin next asserts the State violated its duty under *Brady* by failing to disclose the criminal investigation involving Wilken. Griffin argues that the State wrongfully suppressed three pieces of evidence relating to the criminal investigation into sexual harassment and assault allegations against Wilken: the first was Wilken's placing a pair of women's underwear on Tanis Conroy's head during the execution of a search warrant; the second was the potential criminal investigation against Wilken for the entirety of his conduct towards Conroy; and the third was the transcript of Wilken's interview with the sheriff's office regarding his interactions with Conroy. We hold that evidence of the criminal investigation against Wilken was favorable to Griffin and should have [*25] been disclosed to the defense.

¹⁰ There is nothing in the record or in the State's briefing to suggest evidence relating to IA #00-38 was turned over for the trial court's review. The State's silence on this point supports the conclusion that the evidence relating to IA #00-38 was not disclosed.

a. "Favorable to the Accused"

(i) Conduct during Search Warrant

¶35 First, Griffin contends that the evidence of Wilken's placing a pair of women's underwear on Conroy's head during the execution of a search warrant is favorable because it "show[s] Officer Wilken's disregard for the proper handling of evidence." Pet'r's Reply to State's July 29, 2013 Response at 11. Griffin's argument on this point fails, however, because nothing in the record indicates there was any mishandling of evidence. The record shows the incident occurred after the search party had found no evidence of drugs, and was exiting the room when Wilken took the underwear off a clothes pile or drawer and placed them on Conroy's head, who was walking in front of him. The officer assigned to evidence collection on that search warrant was not concerned with Wilken's conduct from an evidence collection standpoint. Griffin fails to establish how Wilken's conduct is material to Griffin's guilt or punishment, or how it could impeach Wilken's credibility or lead to impeachment evidence.

(ii) Criminal Investigation

¶36 Second, Griffin contends that the evidence of a potential criminal investigation against Wilken [*26] based on his conduct towards Conroy is favorable because it indicates a potential bias in Wilken's testimony, despite the prosecutor's office decision not to file charges. The defense is allowed to show on cross-examination that the witness has a motivation to present testimony consistent with the State's theory of the case. Davis v. Alaska, 415 U.S. 308, 311, 317-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). As Griffin points out, the prosecutor's office's decision not to press charges does not prohibit the State from instituting charges in the future. Thus, evidence of a potential criminal investigation against Wilken was evidence bearing on his credibility and impeaching. The evidence was favorable to Griffin.

(iii) Wilken's Statement

¶37 Third, Griffin contends that Wilken's statement to the sheriff's department regarding his interactions with Conroy is favorable to Griffin because it shows Wilken's "admitted disregard for an honest investigative outcome." PRP at 18. The allegedly damning portion of Wilken's statement is, "there are cops, and I ain't blowing my own horn, that are as good as me that can sit in a room and get someone that didn't do it to say

that they did it." PRP Ex. 12, at 66. Wilken's statement discussed how Conroy's fiancé, who was also a police officer, might [*27] have questioned Conroy about her potential infidelity. But, in the statement, Wilken never insinuates that he has obtained, or would ever try to obtain, a false confession. Thus, this evidence would not be of any impeachment value to Griffin, and Griffin fails to establish how this evidence could lead to the discovery of any other impeachment evidence.

b. "Suppressed by the State"

(i) Conduct During Search Warrant

¶38 We do not reach the issue of whether the evidence of Wilken's placing a pair of women's underwear on Conroy's head during the execution of a search warrant was suppressed by the State because that evidence is not favorable to Griffin. See e.g., Strickler, 527 U.S. at 281-82 (failing to establish any element of a *Brady* violation causes the claim to fail).

(ii) Criminal Investigation

¶39 The evidence of a potential criminal investigation against Wilken for his conduct towards Conroy was not provided to the defense. And although the evidence was provided to the trial court,¹¹ the State's good faith withholding of evidence is immaterial for the purposes of analyzing *Brady* violations. See e.g., Price, 566 F.3d at 907-08 ("We perform th[e suppression] step of the inquiry 'irrespective of the good faith or bad faith of the prosecution.'") (quoting [*28] Brady, 373 U.S. at 87). Thus, the evidence of a potential criminal investigation against Wilken for his conduct towards Conroy was suppressed by the State.

¹¹ The State argues that giving the file to the trial court for in-camera review constitutes disclosure to satisfy *Brady*. In support, the State cites cases analyzing discovery requests under an abuse of discretion standard. The State's position is incorrect because the prosecution is required to make *Brady* disclosures, regardless of whether the defense makes a discovery request. See United States v. Kennedy, 890 F.2d at 1056, 1058 (1989) ("The *Brady* doctrine has been expanded to include cases where the defendant has not requested the relevant material."), cert. denied, 494 U.S. 1008 (1990); see also State v. Knutson, 121 Wn.2d 766, 771-72, 854 P.2d 617 (1993). Moreover, a violation of the *Brady* doctrine violates a defendant's constitutional right to due process. Brady, 373 U.S. at 87. Such constitutional questions are reviewed for constitutional error, not for an abuse of the trial court's discretion. See Kyles, 514 U.S. at 435.

(iii) Wilken's Statement

¶40 We do not reach the issue of whether Wilken's statement to the sheriff's department regarding his interactions with Conroy was suppressed because the evidence was not favorable to Griffin. See e.g., Strickler, 527 U.S. at 281-82 (failing to establish any element of a *Brady* violation causes the claim to fail). [*29]

4. IA #02-33

¶41 Griffin also asserts the State violated its duty under *Brady* by failing to turn over evidence related to Wilken's off-duty, unauthorized investigation and arrest of a suspect in 2002. Griffin asserts that this evidence was favorable to him because it would have bolstered his argument that Wilken's finding of the glove with Griffin's DNA on it was not credible based on Wilken's "pattern of running afoul of police department policies." PRP at 17. The State does not appear to dispute that this evidence was favorable to Griffin nor does the State contend that evidence relating to IA #02-33 was disclosed to the defense.¹²

a. "Favorable to the Accused"

¶42 The evidence in IA #02-33 is favorable to Griffin because it could arguably be used to impeach Wilken on his investigation into this case. [*30] The conclusions reached in IA #02-33 were that Wilken had violated the Vancouver Police Department's policies of "Neglect of Duty," "Duty to Report Information," "Unauthorized Investigations," "Chain of Command," and "Prisoner Security"; and "[s]ufficient evidence exists to substantiate the allegation that [Wilken] failed to exercise diligence, good judgment, and the interest of the Department." PRP Ex. 3. This evidence would be favorable to Griffin in arguing to the jury that the integrity of Wilken's investigation of the crime Griffin was charged with could be doubted.

¶43 More importantly, however, this evidence could also lead to finding that other investigations into Wilken's conduct as an officer have been conducted improperly.

¹² Instead, the State only argues that "[i]t is difficult to imagine how these acts of misconduct ... would be admissible in Griffin's" case. Response to PRP at 31. The admissibility of the evidence is properly addressed in determining whether the evidence would affect the outcome of the proceeding, not in determining whether the evidence is favorable to the defendant or whether the evidence was suppressed. State v. Gregory, 158 Wn.2d 759, 797, 147 P.3d 1201 (2006); Knutson, 121 Wn.2d at 772-73.

In the Letter of Reprimand to Wilken for IA #02-33, the chief of police said:

Second, there is a sufficient history of internal affairs investigations with you as the subject of the investigation, three of which resulted in sustained policy violations for incidents in which you also failed to exercise good judgment in your duties as a police officer. Third, you have already received counseling and retraining for previous performance errors.

PRP Ex. 3, Letter of Reprimand at 2. This would have led [*31] Griffin or Griffin's attorneys to ask about Wilken's "history of internal affairs investigations," such as IA #00-38, which would be admissible to impeach Wilken's testimony. PRP Ex. 3, Letter of Reprimand at 2. Thus, Griffin satisfies the first element of a *Brady* violation by showing that the evidence from IA #02-33 was favorable.

b. "Suppressed by the State"

¶44 There is nothing in the record, nor in the State's briefing, that suggests evidence relating to IA #02-33 was turned over to the defense. Therefore, the State suppressed evidence relating to IA #02-33, and the second element of a *Brady* violation for the nondisclosure of evidence relating to IA #02-33 is met.¹³

5. Prejudice

¶45 The evidence Griffin has identified that is both favorable to him and was suppressed by the State is evidence relating to: (1) IA #00-38; [*32] (2) the potential criminal investigation against Wilken for his conduct towards Conroy; and (3) IA #02-33. We consider the prejudicial effect of this evidence collectively and in the context of the entire record. Price, 566 F.3d at 913.

¶46 The favorable evidence that the State failed to disclose to Griffin was both likely admissible and likely to lead to other evidence that could be admissible to impeach Wilken. First, evidence relating to IA #00-38

¹³ Griffin also asserts, in a footnote, that but for Wilken's resignation, another internal investigation would have been launched into Wilken's alleged interference with the plea negotiations between the prosecutor's office and a confidential informant. Griffin does not provide any further argument or discussion relating to Wilken's alleged interference. Consequently, we do not consider this argument. RAP 10.3(a)(6); Cowiche Canyon Conservancy, 118 Wn.2d at 809.

was likely admissible under *ER 608(b)* to show a specific instance where Wilken gave inconsistent statements under oath in a criminal proceeding. Second, evidence of a potential criminal investigation against Wilken for his conduct towards Conroy would likely be admissible to show Wilken had motivation to present testimony consistent with the State's theory of the case. *Davis*, 415 U.S. at 311, 317-18. Third, evidence relating to IA #02-33 could have exposed other admissible impeachment evidence, such as the existence previous internal investigations like IA #00-38.¹⁴

¶47 The [*33] State contends that the evidence relating to IA #00-38 would be inadmissible because the investigation was too remote in time. In support, the State relies on *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), and *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991). *Gregory*, however, held that evidence where the victim had lied, even when not under oath, was likely admissible under *ER 608(b)*. 158 Wn.2d at 798-99. And, in *Lord*, the court considered admissibility of evidence under *ER 608(a)*, not *ER 608(b)*. 117 Wn.2d at 874-75. Thus, neither *Gregory*, 158 Wn.2d 759, 147 P.3d 1201, nor *Lord*, 117 Wn.2d 829, 822 P.2d 177, support the State's argument that evidence relating to IA #00-38 is inadmissible.

¶48 We are not ultimately concerned with the concrete admissibility of withheld evidence; instead, we are concerned with the materiality of the withheld evidence and the effect of any potentially resulting prejudice. *Price*, 566 F.3d at 911-12. Without evidence relating to IA #00-38, the sexual harassment and assault allegations, and IA #02-33, the defense was not able to impeach the veracity of Wilken's investigation and testimony. Wilken's testimony validated the story Alexander told to the jury. Alexander was the only witness to testify with firsthand knowledge that Griffin committed the crime, and Alexander's credibility was in question because of his plea deal with the State and the victim identifying Alexander as the perpetrator. Had the State disclosed [*34] the evidence relating to IA #00-38, the criminal investigation, and IA #02-33, Griffin could have used that evidence to discredit Wilken, whose testimony validated the State's theory and discredited the victim's identification of Alexander as his assailant.

Given the nature and extent of evidence withheld, there is a reasonable probability that the outcome of Griffin's trial would have been different had evidence relating to IA #00-38, the criminal investigation, and IA #02-33 been disclosed to the defense.

¶49 Therefore, we hold that the State violated *Brady* by failing to disclose evidence relating to Wilken. And the State's violation had a reasonable probability of affecting the outcome of Griffin's trial, thereby, prejudicing Griffin.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

¶50 Griffin argues he received ineffective assistance of counsel in three ways. First, Griffin claims his trial counsel did not adequately investigate Wilken's conduct to impeach Wilken's testimony. Second, Griffin claims his trial counsel failed to impeach Alexander's testimony and Wilken's testimony on Alexander's statements. And, third, Griffin claims he was prejudiced by his attorney's failure to object to prosecutorial [*35] misconduct. We hold that Griffin was prejudiced by his trial counsel's failure to object to improper vouching evidence during the prosecution's case in chief.

¶51 The right to effective assistance of counsel is afforded criminal defendants by the *Sixth Amendment to the United States Constitution* and *article I, section 22 of the Washington Constitution*. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Our Supreme Court has held that a personal restraint petitioner meets his burden to show actual and substantial prejudice when he makes a successful ineffective assistance of counsel showing under *Strickland*. *In re Crace*, 174 Wn.2d at 842.

¶52 To establish ineffective assistance of counsel, Griffin must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). To show prejudice, Griffin must demonstrate that there is a probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335. If Griffin fails to satisfy either prong, we need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). There is a strong presumption of effective assistance, and Griffin bears the burden of demonstrating the absence of a strategic

¹⁴ Griffin seems to claim that IA #02-33 would be admissible to show that Wilken had a "pattern of running afoul of police department polices." PRP at 17. Griffin does not cite any law or evidentiary rule to support that IA #02-33 would be admissible.

reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

¶53 We view the decisions whether and when to object as “classic example[s] of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review [*36] denied, 113 Wn.2d 1002 (1989). “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 *Madison*, 53 Wn. App. at 763). It is a legitimate trial tactic to forego an objection in circumstances where counsel wishes to avoid highlighting certain evidence. *Davis*, 152 Wn.2d at 714. Where a defendant bases his ineffective assistance of counsel claim on trial counsel’s failure to object, the defendant must show that the objection would likely have succeeded. *State v. Gerdts*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007).

1. Investigation of Wilken

¶54 Griffin first asserts that his attorney “had an independent duty to conduct a full investigation” into Wilken’s prior conduct. PRP at 24-25. Griffin provides no legal support or supporting argument for this assertion.¹⁵ Moreover, Griffin does not provide any evidence to suggest his attorney did not investigate Wilken’s prior conduct.

¶55 The record shows Griffin’s attorney discovered, through his own investigation, that Wilken had been put [*37] on administrative leave. The record also shows that Griffin’s attorney asked the court to have the prosecution turn over the information so that he could determine if the information might have an effect on the case. Finally, the record shows that Griffin’s attorney saw the prosecution give the trial court a sealed file, containing an unknown amount and unknown type of information, for an in camera review, and the trial court determined the information did not need to be disclosed to Griffin’s attorney. In his petition, Griffin does not offer any argument or citation to authority as to how his attorney’s performance fell below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705.

¹⁵We do not consider assertions without argument or authority. *RAP 10.3(a)(6)*; *Cowiche Canyon Conservancy*, 118 Wn.2d at 809. Moreover, “[w]here no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Therefore, Griffin’s claim fails because he cannot establish that his trial counsel was deficient.

2. Impeaching on a Prior Inconsistent Statement

¶56 Griffin asserts that his attorney was ineffective for failing to impeach both Alexander and Wilken. This argument is based on Alexander’s statement to Wilken in Alexander’s second interview with Wilken before Alexander had been offered a plea, where Alexander described the timeline of events leading up to the robbery. The transcribed record of Alexander’s statement is ambiguous [*38] at best, and thus we hold that Griffin’s attorney was not deficient in failing to use it to impeach Alexander and Wilken.

¶57 Griffin points to the following exchange between Alexander and Wilken as showing Alexander’s prior inconsistent statement is as follows:

[Wilken]: And what did those two [Griffin and Perkins] do?

[Alexander]: Um they (unintelligible) and then they came back and I walked ... I wanted something to drink so I walked to [the convenience store].

[Wilken]: Okay.

[Alexander]: Got something to drink. Well, actually, went to (unintelligible) and then left and went back, you know, (unintelligible). They got in the car, (unintelligible) I mean, I didn’t think, you know what I’m saying, that they was [sic] going to go ... go over there for real.

PRP Ex. 16, at 44. Griffin contends that this statement does “not contain any mention of going back to the mini-mart” where Griffin was seen on camera, by himself, buying a beer shortly before midnight. PRP at 27. Therefore, when Alexander testified at trial that he and Perkins had gone with Griffin back to the mini-mart so that Griffin could buy a beer, Griffin’s attorney should have impeached Alexander with this statement that he made to Wilken. [*39] Similarly, Griffin contends that his attorney should have used this statement to impeach Wilken when Wilken testified that Alexander’s story to the jury was consistent with the story he told before being offered a plea deal. And, Griffin further contends his attorney should have impeached Wilken’s police report wherein Wilken states Alexander told him that Alexander had been with Griffin when Griffin bought the beer on the way to commit the robbery.

¶58 Griffin must establish that counsel’s performance for failing to bring Alexander’s statement to attention of the trial court and the jury fell below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. Reading

Alexander's statement, it is impossible to determine where Alexander is saying he "went back" to—he could either be referring to going back to somewhere other than the mini-mart, as Griffin asserts, or Alexander could be referring to going back to the mini-mart, as the State asserts. PRP Ex. 16, at 44. We do not hold that Griffin's trial counsel's performance was deficient for not arguing the existence of a prior inconsistent statement when it is questionable whether a prior inconsistent statement existed. Therefore, having failed to establish [*40] that his trial counsel's performance was deficient, this argument for ineffective assistance of counsel fails as well.

3. Failure to Object to Prosecutorial Misconduct

¶59 Griffin argues he was prejudiced by ineffective assistance of counsel when his attorney failed to object to questions and comments made by the prosecutor during the State's case in chief, closing argument, and rebuttal. Griffin contends the prosecutor improperly vouched for the credibility of Alexander during the State's case in chief and closing argument. We hold that Griffin's trial counsel was deficient in failing to object to the misconduct and the petition should be granted because there is a reasonable probability that the failure to object affected the outcome of the trial.

¶60 Where a defendant bases his or her ineffective assistance of counsel claim on trial counsel's failure to object, the defendant must show that the objection likely would have succeeded. *Gerdts*, 136 Wn. App. at 727. Therefore, we examine the underlying claim of prosecutorial misconduct.

¶61 To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). First, we determine whether the prosecutor's conduct [*41] was improper. *Id.* at 759. If the prosecutor's conduct was improper, the question turns to whether the prosecutor's improper conduct resulted in prejudice. *Id.* at 760-61. Prejudice is established by showing a substantial likelihood that the prosecutor's misconduct affected the verdict. *Id.* at 760.

¶62 A prosecutor commits misconduct by personally vouching for a witness's credibility or veracity. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996); *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). "Improper vouching generally occurs (1) if the prosecutor expresses his or

her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony." *Ish*, 170 Wn.2d at 196.

¶63 Prosecutors have "wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). Typically, closing arguments made by prosecutors do not constitute improper vouching for witness credibility unless it is clear that the prosecutor is not arguing an inference from the evidence but, instead, is expressing a personal opinion about witness credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009).

a. Prosecution's Case in Chief

¶64 First, Griffin argues the prosecutor committed misconduct during the State's case in chief when [*42] the prosecutor questioned Alexander about the plea agreement Alexander had made to testify favorably in exchange for reduced charges and then introduced the plea agreement into evidence. Griffin specifically identifies as misconduct the part of Alexander's testimony where the State elicited testimony that Alexander has to testify truthfully in order to get the reduced charges. The pertinent part of the testimony follows:

[Prosecutor]: So, what is it you're supposed to do?

[Alexander]: Tell the truth.

[Prosecutor]: Okay. In this trial?

[Alexander]: Yes.

...

[Prosecutor]: Okay. All right. And are there terms in that contract that say what happens if you are not truthful in your testimony, you know, what happens if you're not truthful?

[Alexander]: Yeah.

[Prosecutor]: What does it say happens?

[Alexander]: That I'll get the full range of two charges.

VRP at 286-87. No objection was entered by defense counsel during this testimony and defense counsel told the trial court that the defense did not object to the agreement being entered into evidence. Griffin contends this failure to object constitutes reversible ineffective assistance of counsel. We agree that Griffin's trial counsel was deficient for failing [*43] to enter an objection and that Griffin was prejudiced by his trial counsel's failure to object.

¶65 In *State v. Ish*,¹⁶ the trial court admitted evidence of a plea agreement between the State and Ish's cellmate, and allowed the State to question the cellmate about the agreement on direct examination. *170 Wn.2d at 193, 196-97*. The agreement contained several statements indicating that the cellmate "agree[d] to provide 'a complete and truthful statement,' to 'testify truthfully,' and to 'have told the truth, to the best of his knowledge.'" *Id. at 193* (emphasis omitted). On direct examination, the prosecutor established that the State agreed to reduce the cellmate's charges in an unrelated matter in exchange for his testimony against Ish. *Id. at 192, 194*. The prosecutor asked, "With regard to exchanging testimony in this case, what type of testimony?" to which the witness answered, "Truthful testimony." *Id. at 194*. On redirect, the prosecutor implied that the State would revoke the agreement if the witness breached it, and he then reiterated the agreement's use of "truthfully." *Id.* Finally, the prosecutor asked, "Have you testified truthfully?" to which the witness answered, "Yes, I have." *Id. at 194*.

¶66 The *Ish* court held that admitting the plea agreement and the prosecutor's subsequent questioning constituted vouching by the prosecutor.¹⁷ *Id. at 201*. The court reasoned:

Evidence that a witness has promised to give "truthful testimony" in exchange for reduced charges may indicate to a jury that the prosecution has some independent means of ensuring that the witness complies with the terms of the agreement. While such evidence may help bolster the credibility of the witness among some jurors, it is generally self-serving, irrelevant, and may amount to vouching, particularly if admitted during the State's case in chief. "[P]rosecutorial remarks implying that the government is motivating the witness to testify truthfully: '... are prosecutorial overkill.'" [*United States v. Roberts*, 618 F.2d [530,] 536 (second alteration in original) (quoting *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1150 (2d Cir. 1978)]

¹⁶ *Ish* was decided after Griffin's trial. However, our Supreme Court in [*44] *Ish* adopted the reasoning used in *State v. Green*, 119 Wn. App. 15, 23-24, 79 P.3d 460 (2003), which was the controlling law at the time of Griffin's trial.

¹⁷ *Ish* was a plurality opinion, but a majority of the justices agreed that the prosecutor improperly vouched for the witness's credibility. *170 Wn.2d at 199-200* (plurality opinion), 206 (Sanders, J., dissenting).

(Friendly, J., concurring)). We agree with the court's conclusion in *Green* that evidence that a witness has agreed to testify truthfully generally has little probative value and should not be admitted as part of the State's case in chief. Evidence is not admissible merely because it is contained in an [*45] agreement, and reference to irrelevant or prejudicial matters should be excluded or redacted. [*State v. Green*, 119 Wn. App. [15,] 24, 79 P.3d 460 (2003); see also [*State v. Jessup*, 31 Wn. App. [304,] 316, 641 P.2d 1185; *Roberts*, 618 F.2d at 536].

Id. at 198.

¶67 Here, the plea agreement was admitted into evidence without objection, and the State questioned Alexander on direct examination about his obligation under the agreement to tell the truth. Under *Ish*, this constitutes vouching by the prosecution and the trial court likely would have prohibited it, had an objection been entered. *Id. at 201* ("Evidence that a witness has entered into a formal agreement with the State to testify truthfully should be excluded during direct examination."). Thus, Griffin's trial counsel was deficient for failing to enter an objection.

¶68 Also, Griffin was prejudiced by his trial counsel's failure to object. To show prejudice for ineffective assistance of counsel, Griffin must demonstrate that there is a reasonable probability that, but for counsel's deficient performance in failing to object, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335.

¶69 Here, there [*46] is a reasonable probability that the result of the proceeding would have been different had defense counsel objected. The evidence presented at trial against Griffin was not overwhelming. The evidence against Griffin consisted of the glove found at a nearby apartment complex with his DNA and others' on it, his asking Green to use her phone late on an unknown night, and Alexander's testimony. Alexander's testimony naming Griffin as one of Atkinson's assailants was the only evidence presented at trial that linked the glove to its possible use in the crime.¹⁸ Alexander's testimony was also the only evidence that created an alternative reason, and provided a date, for Griffin's presence at Green's apartment. Finally, Alexander's testimony was

¹⁸ Even this link was weak. Alexander testified that he did not know if Griffin or Perkins were wearing gloves. He testified that Griffin had gotten gloves out of his apartment.

the only evidence presented at trial that put Griffin at Atkinson's door attempting the robbery, and contradicted the evidence of Atkinson's identification of Alexander and the footage of Griffin alone at the mini-mart shortly before midnight.

¶70 Had defense counsel objected, the trial [*47] court would have been able to limit the improper vouching evidence and/or issue a curative instruction. A curative instruction would have eliminated the credibility imparted onto Alexander's testimony through the State's improper vouching, and the jury would have been in a better position to judge Alexander's credibility independently. Therefore, but for trial counsel's failure to object, "there is a reasonable probability that" "the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335.

¶71 Thus, there is a reasonable probability that had defense counsel objected, the objection would likely have been sustained. Griffin has shown that defense counsel was deficient for failing to object to the prosecutor's vouching during the State's case in chief.

b. Prosecution's Closing and Rebuttal

¶72 Griffin claims that he received ineffective assistance of counsel when defense counsel failed to object to the State's closing argument and rebuttal closing argument. Griffin cites four instances that defense counsel should have objected. Griffin does not support any of his claims relating to these instances with applicable legal argument, and therefore, his claims fail.

¶73 First, Griffin points to the following [*48] in the prosecutor's closing:

Well, [Atkinson] certainly when he testifies he knows Garry Alexander's behind this. I mean, he knows Garry Alexander is one of the three charged co-defendants in this. So he obviously, you know, isn't gonna have any big moral dilemma testifying that Garry Alexander is one of them.

VRP at 442-43.

¶74 To support his contention that this was improper, Griffin cites *State v. Fleming* for the following general proposition: "it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Griffin does not provide any other analysis. The prosecutor's statements here are not similar to those made by the prosecutor in *Fleming*. The prosecutor in *Fleming* said, "for you to find

the defendants ... not guilty ... you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom." 83 Wn. App. at 213 (emphasis omitted). Without any argument as to how *Fleming* is applicable, this claim fails.

¶75 Second, Griffin points to the following in the prosecutor's closing:

You know, something that [*49] you can do as jurors is just think about Garry Alexander's testimony. I submit to you that he came across as a forthright witness. He did not hold back. In fact, when he's being confronted with this idea of doing a deal where he has to tell the truth about everything, at that point, you know, months after he confessed, he admits, well, we actually planned to do it a week earlier but nobody's home that time. You know, so he's—he's not holding anything back.

And when he testifies, he—he doesn't try to sugarcoat anything, he doesn't try to sugarcoat his involvement, he's like, you know, yeah, we—we were doin' this thing.

...

But he—he didn't pull any punches on the stand, you know, he didn't try to sugarcoat his involvement, and on cross-examination by Defense counsel, he, you know, admitted to everything. All right.

So I submit to you that he comes off in his presentation on the witness stand as a guy who was involved in this but is forthright in what his involvement was.

VRP at 449-50.

¶76 Griffin contends that this was improper vouching "in two of the ways outlined in *United States v. Brooks*, 508 F.3d at 1209." PRP at 36. Griffin also cites *Ish*, to say that "[b]y making this statement, the prosecutor 'expresse[d] his ... personal belief as to the veracity of the [*50] witness.'" PRP at 36 (quoting *Ish*, 170 Wn.2d at 196). Again, Griffin does not provide any further argument as to how either *Brooks* or *Ish* apply. Both *Brooks* and *Ish* considered the prosecution's examination of witnesses during the prosecution's case in chief. Here, however, Griffin claims error in the prosecution's closing and provides no argument as to how the discussions in *Brooks* or in *Ish* apply. Consequently, this claim fails.

¶77 Third, Griffin points to the following in the prosecutor's closing:

So I encourage you to think about, you know, who a deal should be made with in this scenario. Certainly not one of the guys at the door that's involved in the actual shooting of the victim, but the driver. That's the guy that makes sense to make a deal with, just like if it's a bank robbery and you have a, you know, a driver and guys that go in and rob the bank, it's most likely the deal would be made with the driver, and that's what happens here.

VRP at 446-47.

¶78 Griffin's claim of error for these statements is not accompanied by any legal argument or citation to legal authority. "[W]here no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, [*51] has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193, 195 (1962). Consequently, this claim fails. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *RAP 10.3(a)(6)*.

¶79 Finally, Griffin points to the following in the prosecutor's rebuttal:

The polygraph. Remember, you can look at that contract that the defendant signed, and you can see that throughout that contract it's all hinged on the defendant giving truthful statements that—at all interviews, pretrial interviews, testimony and in any proceeding in the matter of this defendant and Christopher Perkins.

The defendant knows full well, it's very clear on that contract, he can be given a polygraph at any time. If he fails, that could be used against him to pull his deal. He knows that. And he knows that when he's testifying. All right. So you can see that in the contract.

VRP at 489.

¶80 Griffin contends that this was error and quotes *Ish*, 170 Wn.2d at 198, for the general proposition that "[P]rosecutorial remarks implying that the government is motivating the witness to testify truthfully: '... are prosecutorial overkill.'" PRP at 38 (quoting *Ish*, 170 Wn.2d at 198). But *Ish* did not consider prosecutorial misconduct during closing arguments; rather, the *Ish* court considered evidence elicited through the prosecution's direct examination. 170 Wn.2d at 201 ("Evidence that a witness has entered into a formal agreement with the State to testify [*52] truthfully should be excluded *during direct examination*."). (emphasis added).

¶81 Moreover, the *Ish* court explicitly stated that the prosecution would be allowed to point out the witness's contractual obligation to testify truthfully if the defendant brought it up. 170 Wn.2d at 199 ("If the agreement contains provisions requiring the witness to give truthful testimony, the State is entitled to point out this fact on redirect if the defendant has previously attacked the witness's credibility."). Here, the defense in closing argument first introduced the provision for a polygraph test in Alexander's plea agreement. In the defense's closing argument, defense counsel argued:

[Y]ou'll notice in the cooperation agreement, which will be back in the jury room, it's on page 2, and [Alexander] agreed to take a polygraph test to determine the truth of his story. The State didn't do one. They had him take a polygraph test prior, before he came up with the new story, but after the story, the State had the ability to do a polygraph test, they chose not to.

VRP at 483.

¶82 Griffin provides no argument as to how *Ish* applies. However, even if Griffin had provided a substantive legal argument on this claim, his argument would still fail because [*53] the defense opened the door to the State's rebuttal. Prosecutors are afforded "wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence," *Lewis*, 156 Wn. App. at 240, and the State is entitled to point out provisions of the agreement with a witness that require the witness to testify truthfully if that witness's credibility has first been attacked, *Ish*, 170 Wn.2d at 199. Therefore, we hold Griffin's ineffective assistance of counsel claim fails.

D. PROSECUTORIAL MISCONDUCT

¶83 Griffin claims that the prosecutor committed prejudicial misconduct. Specifically, Griffin argues that the prosecutor improperly vouched for the credibility of Alexander during the State's case in chief and closing argument.¹⁹ We hold that Griffin's argument fails because he does not establish that a curative instruction would not have obviated any resulting prejudice.²⁰

¹⁹ Griffin does not cite to any conduct by the prosecutor in the prosecutorial misconduct section of his brief. He is presumably relying on the prosecutor's actions he points to in his ineffective assistance of counsel argument, so those are addressed in this opinion.

²⁰ The extent of Griffin's argument as to why a [*54] curative instruction would not obviate any prejudice consists of the

¶84 If a defendant does not object at trial, he or she is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Under this heightened standard of review, the defendant must show misconduct and that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making that determination, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762.

¶85 Here, Griffin tells this court "[i]t's hard to conceive what instruction" could have cured the prejudice he claims to [*55] have suffered, but he does not make any argument to show how a curative instruction would not have obviated any prejudicial effect on the jury. PRP at 43; *Emery*, 174 Wn.2d at 761. That a curative instruction is hard for Griffin to think of, does not satisfy his burden of proof under *Emery*. Griffin also does not present any argument to show how or whether any resulting prejudice existed and "'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). Thus, having failed to establish both prongs of *Emery*, Griffin's claims for prosecutorial misconduct fails.

E. CUMULATIVE ERROR BASED ON *BRADY* AND *STRICKLAND* VIOLATIONS

¶86 Finally, Griffin argues that the cumulative effect of the errors he alleges above undermines the confidence in the outcome of his trial. Under the cumulative error doctrine, the appellate court will reverse a trial court verdict when it appears reasonably probable that the cumulative effect of errors materially affected the outcome, even when no one error alone mandates reversal. *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994); *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Because we hold that Griffin has

following sentence: "It's hard to conceive what instruction could have adequately informed the jury that they need not decide whether the government made a mistake in giving Alexander a deal." PRP at 43. This argument is not supported by citation to case law or the record. Thus, we do not consider this argument. *RAP 10.3(a)(6)*; *Cowiche Canyon*, 118 Wn.2d at 809; *DeHeer*, 60 Wn.2d at 126.

established *Brady* and *Strickland* errors independently warranting reversal under *Grace*, 174 Wn.2d 835, 280 P.3d 1102, we do not consider this argument.

F. CONCLUSION

¶87 In conclusion, we grant Griffin's petition and [*56] remand for new trial because the State failed to disclose *Brady* evidence favorable to Griffin that, in the aggregate, create a reasonable probability that the outcome of the proceedings would have been different. We also grant Griffin's petition and remand for new trial because he received ineffective assistance of counsel when trial counsel failed to object to the prosecutor's improper vouching during the State's case in chief and had his trial counsel objected, there is a reasonable probability that the outcome of the proceedings would have been different. We dismiss Griffin's prosecutorial misconduct argument because he fails to establish that a curative instruction could not have obviated the prejudice. Finally, we do not consider Griffin's argument that the cumulative effect of the State's failure to disclose and ineffective counsel claims because these errors independently warrant reversal.

¶88 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 in accordance with *RCW 2.06.040*, it is so ordered.

JOHANSON and SUTTON, JJ, concur.

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