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NO. 50262-3-II

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

In re the Personal Restraint of
MARTIN A. JONES,
Petitioner

REPLY BRIEF IN SUPPORT OF
AMENDED PERSONAL RESTRAINT PETITION

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I. STATEMENT OF CASE IN REPLY

A. THE RECORD THE STATE CITES DOES NOT SUPPORT ITS VERSION OF FACTS.

Any brief requires:

(5) *Statement of the Case.* A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

RAP 10.3(a)(5), 10.3(b).

Petitioner does not wish to spend an entire Reply Brief comparing the State's assertion of facts with the record. Nonetheless, a few short examples warrant this Court reviewing the record very carefully before accepting the State's version of the evidence.

1. JONES WAS NOT WALKING UP PACIFIC AVENUE LOOKING FOR HIS VAN AND HIS WIFE.

Unknown to Johnson, Martin Jones was walking up Pacific Ave. looking for his van and his wife.

Response (Resp.) at 7 (no record cited). There is, of course, no evidence to support that Marty Jones was walking up Pacific Avenue. The evidence contradicts it.

Testimony and cell phone records showed various calls on Marty's phone at or near the time

of the shooting,¹ but no one saw the shooter talking on a cell phone.

No one except Johnson claimed to have seen Marty anywhere but in his home that night. RP 2762-2944; Amended PRP at 7-8, 12-14, 30. When specifically asked, Ms. Wanke twice denied Martin Jones told her he was walking to Susan's van. RP 1623, 1632. "My recollection is he told me that he was going back to bed." RP 1632. Marty never left the house while Susan was gone. Am.PRP at 13-14.

2. CHARLOTTE WANKE PHONED MARTY AFTER SHE SAW SUSAN; THEY DIDN'T DISCUSS THE VAN.

Wanke immediately called Martin Jones on his cell phone after learning the location of Mrs. Jones and the van. RP 1628-29, 2631, 2803-04. After talking to Martin Jones, Wanke drove to the Long Beach Police Department. RP 893, 1628-29, 2175.

Resp. at 7. The cited record contradicts these statements.

Ms. Wanke testified she did not call Martin Jones until after she had seen Susan at the Long Beach Police Department.

¹ Compare: Resp. Appendix E -- Dec. of John Hillman at 5-8, showing calls to and from Martin Jones's cell phone at 12:39-12:42 a.m. -- with Hill's call to WSP dispatch at 12:42 a.m. to report the shooting. Resp. at 11; RP 998, 1320.

A My memory -- I believe I called him after I saw her.
Q Did you tell him where his van was?
A No.
Q Was the Defendant angry when you called him?
A No.
Q You didn't tell him where his van was?
A I couldn't have told you where his van was. I don't remember. It wasn't until a couple of days later that I realized the cross street.

RP 1628-29.

3. THE MAN GEORGE HILL SAW APPROACH, SHOOT AND FLEE FROM THE SCENE WAS NOT MARTY JONES.

The State claims "Jones initially fled north up the sidewalk past Hill's tow truck," and Hill chased "Jones." It cites to George Hill's testimony in the record. Resp. at 10. Although Mr. Hill chased the shooter, he never identified the shooter as Jones. RP 1301-1445.

The State claims "George Hill later admitted he could not identify the shooter RP 1327." Resp. at 15.² The cited record does not support this claim. In fact, Mr. Hill did everything possible to help the police identify the shooter. In addition to working with the sketch artist to

² See also reference without citation to Hill's "candid admissions to the jury that he did not know who shot Trooper Johnson." Resp. at 35.

produce the sketch that looked like Nicolas Boer, he repeatedly told the police the shooter he saw before, during and chased after the shooting was NOT Marty Jones. See Am.PRP at 9-10, 16-19, 26.

4. JOHNSON DID NOT CALMLY GIVE THE DISPATCHER A DESCRIPTION OF THE SHOOTER; GEORGE HILL DID.

In an apparent effort to discredit George Hill's testimony, the State describes him as

"distraught," "freaked out," "shaken," "rattled, and "in an excited emotional state." ... While Hill was shocked and animated, Johnson was a veteran police officer of 30 years. ... Even though he had been shot in the head, Johnson took Hill's cell phone and calmly gave the dispatcher a description of the shooter.

Resp. at 11-12. It claims Johnson made the statement "I got a good look at him" on the audio-video recording Hill made, Ex. 61. Resp. at 12 n.5.

Petitioner urges this Court to review Exhibit 61, the audio-video George Hill made at the scene immediately after the shooting. The voices demonstrate that Mr. Hill was well controlled as he spoke to dispatch after placing the call.

Hill, not Johnson, said very quickly, "I can ID the guy if we see him, Scott." Ex. 61 at 1:29. "I got a good look at him too." Id. at 2:25.

Johnson's voice, higher pitched perhaps from the stress of the incident, then said, "He was -- what do you think George?" And Hill said, "30-40 years old," to which Johnson assented. *Id.* at 2:25-2:42.

Other than agreeing with Hill to this age, the only description Johnson gave dispatch was that the shooter wore grey two-tone clothes.³ *Id.* at 00:47. No such clothes were ever connected to Jones.

It was Hill who told Johnson to keep his gun and asked if he had a shotgun. He then directed Johnson to "sit down and put your hands on the wound." *Id.* at 1:45-2:10.

By 3:55 on the recording, Scott Johnson was removed from the scene to the hospital. After that, George Hill's voice told other officers the shooter was 30-45, clean shaven with some scruffy or stubbly beard, 5'10"-5'11", 200-210 lbs. and maybe a stocking cap. *Id.* at 6:00-6:50.⁴ "I'd recognize his face if I saw him though." *Id.* at 6:50.

³ Petitioner mistakenly attributed the two-tone grey statement to Hill in his Amended PRP at 10. Counsel apologizes for this error.

⁴ This description largely matches Nicolas Boer: white male with short brown hair, 5'11" in his 30s. Dec. of L. Nussbaum filed with PRP, App. A (Tip Sheet 0066).

Hill was calm enough that he first spotted the .22 caliber shell casing on the pavement. He urged officers to protect it so it didn't get kicked. *Id.* at 10:00. He told the officers Johnson shot two rounds, although Johnson told dispatch he only shot once. *Id.* at 7:23.

Hill said at least four times, "I thought it was a cap gun." *Id.* at 4:44, 5:46, 7:25, 11:40.⁵

5. JOHNSON TOLD MANY PEOPLE HE DID NOT SEE THE SHOOTER'S FACE STRAIGHT ON.

The State quotes Johnson saying he "looked at Jones 'eye to eye straight on.'" *Resp.* at 10. He made this statement in an interview with his lawyer present after Marty Jones was arrested. RP 2894-95. Johnson's other testimony of how good a look he got of the shooter⁶ is contradicted by his many statements to others the night of and day after the shooting: he did not get a good look at the shooter's face, he saw him mostly in profile. See *Am.PRP* at 21, 23; RP 1585-88 (Trooper Hodel), 1689-90 (Trooper Layman), 1698-99 (Trooper Robley), 2695

⁵ The State still offers no explanation of this impressively odd sound.

⁶ *Resp.* at 37, citing RP 2811-18.

(EMT Beaulaurier), 1266 (Det. Slater), 1727 (Det. Harper), 1771 (sketch artist Dep. King).

6. THE DESCRIPTION JOHNSON GAVE METZ ALSO FITS NICK BOER.

The State notes Johnson told Sgt. Metz the shooter was a white male in his 40s, about 5'10" with short brown hair. It claims without citing the record that Marty Jones fit this description. Resp. at 12. This very general description closely fits Nicolas Boer: white male with short brown hair, 5'11" in his 30s. Dec. of L. Nussbaum filed with PRP, App. A (Tip Sheet 0066).

7. THERE IS NO EVIDENCE FROM KEN PARKS.

The State claims that Ken Parks "dispute[s]" that Nick Boer said he shot Johnson, Resp. at 37; that he "den[ies]" such a statement was uttered, Resp. at 41. Yet it has not offered any evidence from Mr. Parks. The only hearsay information we have from Mr. Parks is that he told investigator Taylor he could not remember any events from that long ago. Dec. of W. Taylor at 4.

B. THE POLICE INTERVIEWED PETER BOER IN 2010 BUT HE DID NOT TELL ON HIS BROTHER.

The State claims the defense could have obtained Peter Boer's version of events before the

trial. But the police interviewed him February 18, 2010, after he was arrested. He told them "all the information he heard about the incident he obtained through the rumor mill once he was in the jail." Apps. C and D.

C. PETER BOER'S 2017 STATEMENTS RE-CONFIRMED SIGNIFICANT DETAILS OF HIS 2014 TESTIMONY.

The State speculates what "Peter Boer would testify" to. Resp. at 34. But this Court has Peter Boer's testimony.

Peter Boer's three statements from 2014⁷ were made under oath. They are competent evidence. Am.PRP, Apps. A, B, C at 3 ("having been first duly sworn"); ER 601-603.

Peter Boer's statements to Win Taylor in 2017 were not under oath. Nonetheless, he reconfirmed all significant points of his 2014 testimony, including: his brother Nick was not at their mother's house when Johnson was shot; he phoned from very near where the shooting occurred very shortly after it happened to tell Peter about it;

⁷ The second Declaration of Peter Boer is actually dated 8/25/2014 at the signature, although the top of the statement shows the date "8/25/15." Resp. at 26; Am.PRP at App. B.

he returned to the house not long after that; he and Nick drove down the beach to Ken Parks's house; Nick said he shot the cop the same night as the shooting occurred; they discussed the cop was dirty; Nick had access to Eddie Davis's gun, an unusual .22; Peter took a backpack of guns or gun pieces to Mike McLeod's house, then dumped them in the ocean; and Nick and others in the drug trade were paying police and providing information to avoid arrest. Compare: Am.PRP, Apps. A, B, C, with Dec. of W. Taylor at 1-3.

D. PETER BOER'S CHARACTERIZATION OF NICOLAS BOER'S CONFESSION AS "JOKING" BECAUSE OF JASON HALL'S REPORT CONTRADICTS HIS EARLIER SWORN STATEMENTS AND THE STATE'S EVIDENCE.

The State grasps onto Peter Boer's unsworn 2017 characterization that "Nick was 'joking' when he made statements about shooting the trooper." See Resp. at 26, and at 2, 31-32, 34, 40-42, 44-46, 48, 50. The State eventually expands its rhetoric to refer to "statements from Peter Boer, who admits that **if his brother said anything**, he was 'joking.'" Resp. at 48 (emphasis added). It again does not cite the record; indeed it cannot, because

Peter never suggested his brother did not make this statement. Dec. of W. Taylor 1-3.

This "joking" supposedly was based on Peter, Nick and Ken Parks discussing Jason Hall's report to police that the sketch looked like Nick, which they all thought was very funny. *Id.*; Resp. at 26-27.

This record proves they could not have been discussing Jason Hall's report the same night as the shooting. Scott Johnson was shot Friday night just after midnight. George Hill didn't meet with the sketch artist to prepare a sketch until Saturday afternoon. Am.PRP at 17. Jason Hall didn't call the police until Saturday night to report the police sketch looked like Nick: at 2050 hrs (8:50 p.m.) February 13, 2010.⁸

Peter Boer consistently has stated under oath the conversation with his brother occurred within hours of the shooting, after midnight Friday, at Ken Parks's house. Indeed, by Saturday night, Peter Boer was in custody for warrants, not with

⁸ See Dec. of L. Nussbaum (filed with PRP), App. A (Tip Sheets 0049) (WSP communications record of call); Dec. of Jason Hall, App. G to Declarations and Sworn Statements in Support of PRP.

Nick on the beach or at Ken Parks's or Mike McLeod's. Resp. App. P (Bates No. 2750-51); Resp. App. G (jail records). Mike McLeod confirmed this timing: Peter told him Nick confessed during the early morning hours the night the cop was shot. Am.PRP at 52; Dec. of Gregory Michael McLeod (Decs. and Sworn Statements in Support of PRP, App. D).

In Peter's sworn statements, he repeatedly said he believed Nick shot Trooper Johnson. Am.PRP at 45, 48; PBoer Exam at 55-57. In his nearly 20 discussions with Mike McLeod about it over the years, Mike was convinced Peter believed Nick shot Trooper Johnson. Dec. of G.M. McLeod at 2; Am.PRP 51-52. There is no indication that Peter ever told Mike Nick was "joking." It is reasonable to conclude if he had, Mike would not have bothered to tell his father about it two years later. Dec. of Gregory D. McLeod.

If any aspect of Peter Boer's relevant statements are "incompetent," it is the characterization of Nick's confession as "joking."

Nicolas Dean Boer's statement does not deny paying law enforcement officers or threatening Peter to provide him an alibi. It is not competent

evidence of anything that Lynnae Boer said or would say. Resp. at 27 & App. M. As on the night after the shooting, he is creating his alibi witnesses. Again the State is accepting his word. See Am.PRP at 19-20; Resp. App. P at Bates 002752.⁹

E. MARTIN JONES WAS NOT HOUSED WITH, DID NOT SEE, MEET, TALK OR INTERACT WITH PETER BOER AT THE PACIFIC COUNTY JAIL.

The State provided a Declaration of Mark Patterson to convey that Peter Boer was held at the Pacific County Jail during some of the time that Martin Jones was there on this charge. Resp., App. G. Mr. Patterson provides no information regarding where within the jail the two inmates were housed; merely that there were some overlapping dates when they were both somewhere in the institution.

Attached as Appendix A to this Reply Brief is the Declaration of Martin Jones. He was never housed in a cell with Peter Boer. He never saw,

⁹ [SATURDAY, FEBRUARY 13, 2010]
2352 Team Charlie reports contacted Nicholas Boer. He provided tape recorded statement, based on photo, he was eliminated as suspect. He denied any knowledge of crime. ...

Contacted Peter Boer. Arrested for Failure to Register as Sex Offender Warrant. Eliminated as suspect. Did not match physicals.

met, spoke with, or interacted with Peter Boer.

Before his arrest, Martin Jones knew nothing of Peter Boer, Nicolas Boer, Gregory Michael "Mike" McLeod, or Gregory D. McLeod. Before trial he had no reason to know or believe any of these people knew anything about his case. He had no reason to know any police were taking payments from drug dealers. App. A.

F. DEFENSE COUNSEL HAD NO INFORMATION REGARDING THE McLEODS, TO CONTRADICT NICK BOER'S ALIBI, OR TO QUESTION LAW ENFORCEMENT'S RELATIONSHIP WITH NICK BOER OR OTHERS IN THE LOCAL DRUG TRADE.

The State provided in discovery 1610 pages of "tip sheets" gathered in the days immediately after the shooting, proposing innumerable possible suspects. Of those 1610 pages, three involved calls from people reporting Nicolas Boer matched the sketch George Hill helped prepare; two others proposed his name.¹⁰ None placed Nicolas at the scene. App. C (Second Dec. of L. Nussbaum).

The police interviewed Nicolas Boer and were satisfied he had an alibi for the night. Am.PRP at 19-20.

¹⁰ Dec. of L.Nussbaum filed with PRP, Apps. A, B (tip sheets 000073-74, 84, 87, 148).

Defense counsel obtained no information during their investigation that contradicted that alibi. They had no information regarding Mike McLeod until Gregory McLeod contacted them in 2012, after the trial. They had no information that Nicolas Boer and others were paying law enforcement officers to protect their drug dealing before the trial. See App. B (Dec. of Todd Maybrow).

G. THE WASHINGTON STATE PATROL HAS DESTROYED SCOTT JOHNSON'S RECORDS WITH ITS OFFICE OF PROFESSIONAL STANDARDS.

The State provided an unredacted copy of Scott Johnson's "personnel file" with the Washington State Patrol. Resp., App. C. It contains no record of complaints or internal investigations.

After seeing the gaps from this file, Petitioner's counsel requested as public record former-Trooper Johnson's file with WSP's Office of Professional Standards. WSP OPS responded that all such records have been destroyed. Apps. C, F.

II. LEGAL AUTHORITY AND ARGUMENT IN REPLY

A. THE TRIAL EVIDENCE GREATLY CORROBORATES THE NEWLY DISCOVERED EVIDENCE.

The State argues petitioner "simply reargues the evidence from trial;" it claims this evidence is not "new." Resp. at 34-35.

This Court must consider the new evidence in the context of all the evidence at trial. *State v. Hawkins*, 181 Wn.2d 170, 172, 332 P.3d 408 (2014); see generally Am.Brf. at 4-16. The Amended PRP clearly distinguishes between the new evidence discovered since trial, Am.PRP at ii, 37-54, and the evidence from the time of trial which provides the corroborating context for the new evidence, Am.PRP at iii, 54-61.

B. PETER BOER'S 2014 SWORN STATEMENTS ARE COMPETENT EVIDENCE.

This Petition relies on Peter Boer's sworn statements from 2014. They are competent evidence of what Peter Boer witnessed, experienced, participated in, and heard. They are far "more than speculation, conjecture, or inadmissible hearsay." ER 601-603; *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992); *In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 641-42, 362 P.3d 758 (2015).

Peter Boer's testimony beyond Nick's confession clearly is admissible: that his brother was not home before the shooting, came home after the shooting, drove with him down the beach to Ken Parks's house, delivered drugs, gave him a backpack

full of guns; that he went to Mike McLeod's and dumped the guns in the ocean; that he was willing to confirm Nick's alibi because Nick and his mother threatened him, but once his mother was dead he didn't need to lie anymore; and that his brother was paying police and giving information to avoid arrest.

1. PETER BOER'S TESTIMONY DESTROYING NICK BOER'S ALIBI IS COMPETENT ADMISSIBLE EVIDENCE.

Peter Boer's sworn statements regarding his interactions with Nick Boer the night of the shooting destroy Nick's claimed alibi of being at his mother's home all that night. Nick claimed Peter was with him and would confirm his alibi. He and his mother threatened Peter that he had to support Nick's alibi. With their mother dead, Nick in prison in Florida, and confronted with his statements to Mike McLeod, Peter gave up that ruse and told the truth, explaining why he had not done so earlier. Peter maintained these facts were true in 2017. See Am.PRP at 38-48; Dec. of W. Taylor.¹⁰

¹⁰ 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. The State baldly asserts the claim Peter did not admit the truth until his mother died is

2. PETER BOER'S TESTIMONY THAT NICK BOER CONFESSED HE SHOT THE COP IS COMPETENT ADMISSIBLE EVIDENCE AMPLY CORROBORATED.

[W]hatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest.

Chambers v. Mississippi, 410 U.S. 284, 300-01, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

A reasonable person would not admit he shot the cop unless he believed it to be true. As Peter said in his second declaration, "my brother boasted that he had shot the cop" to his friend and his brother. Am.PRP at 39-40. Peter believed he did it. Am.PRP at 45, 48.

a. *Corroborating Circumstances*

The State claims "Jones does not identify corroborating circumstances indicating the trustworthiness of the statement." Resp. at 44, 44-46. *But see* Am.Brf. at 14-16 (setting out the corroborating circumstances).

In case those circumstances were not clear in that format, the evidence establishes the following

"specious." Resp. at 49. Yet it offers no suggestion of how counsel would have discovered this evidence before trial.

corroborating circumstances, which clearly indicate the confession's trustworthiness.

- Peter Boer confirms that Nick Boer was not at their mother's house that night; he left before the shooting and returned after it
- Nick Boer phoned Peter before he returned and told Peter a cop was shot, to lie low until he got there -- ER 803(a)(1) (present sense impression)
- Nick called him from Shroomy Joe's, within a few blocks of the shooting -- ER 803(a)(1) (present sense impression)
- When Nick returned, Peter immediately suspected him of shooting the cop and asked him if he did - and Nick didn't deny it
- Peter followed up: "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." PBoer Exam at 7; Am.PRP at 41.
- Peter and Nick were waiting for a drug shipment; when it arrived, they drove down the beach to avoid the traffic surrounding the crime scene to get to their friend's, Ken Parks¹¹
- Nick had Peter dump a load of guns or gun parts into the ocean to destroy evidence
- Peter asked Mike McLeod to go with him to dump the guns the same night the cop was shot

¹¹ Ken Parks's address and friendship with them is further confirmed by the evidence their mother died at his home in 2012. See Dec. of W. Taylor at 5-6 & App. D; Dec. of G.D. McLeod.

- Peter Boer reported to Mike McLeod that same night that his brother confessed to the crime
- Peter Boer believed Nick shot the cop when he told Mike the night of the shooting that Nick said he did it (PBoer Exam at 42-43; Am.PRP at 45)
- Peter Boer repeated his brother's confession to Mike McLeod about 20 times over the next two years, never suggesting it was a joke (PBoer Exam at 55-57)
- Peter Boer believed in 2014 that Nicolas Boer shot Trooper Johnson (PBoer Exam at 55-57; Am.PRP at 45, 48)
- Nicolas Boer matched the police sketch made from George Hill's description of the shooter
- Many people who knew Nicolas Boer recognized the police sketch of the shooter as him
- Nicolas Boer had access to an unusual gun that shot .22 ammunition, and to defective .22 ammunition that explains (1) the "popping" sound George Hill heard instead of a "bang;" (2) the lack of burning or singeing on the back of Johnson's head from a contact gunshot; (3) the failure of the bullet to penetrate Johnson's skull
- The State's dog tracking evidence ended very nearly at Ken Parks's home, where Nicolas Boer was¹²

¹² The dog track did not in fact go to Jones's house, as the State claims. Resp. at 35. Nor did the trackers establish what or whose scent the dog was tracking. The trackers stopped short of the Jones home. Am.PRP at 14-15; Ex. 2.

- Nick threatened Peter to give him an alibi for that night (PBoer Exam at 55-57).

See: Am.PRP at 39-58; Dec. of W. Taylor; *Chambers*, 410 U.S. at 298-303.

The State claims Nicolas Boer's confession to Peter Boer is inadmissible hearsay. Resp. at 30-33, 44-46. See also Amended Brief in Support of PRP (Am.Brf.) at 9-16 regarding the admissibility of Nick Boer's confession, despite his denial. The State cites no authority contradicting petitioner's authorities. Nick's confession also may be admitted as an excited utterance. ER 803(a)(2).

Although the State obtained a short declaration from Nicolas Boer, he does not say he is willing and available to testify and be cross-examined. He does not mention having consulted with counsel. Resp., App. M. There is no way to know whether he will be "available" as a witness to answer questions and be cross-examined until a reference hearing is ordered.¹³

¹³ Cf. President Donald Trump announced he is willing and eager to be interviewed by Special Investigator Mueller; but cautioned he will have to consider his lawyers' advice when he receives it. Haberman, M. and Davis, J.H., *Trump Says He Is Willing to Speak Under Oath to Mueller*, NEW YORK TIMES (1/24/2018).

b. *Due Process Requires This Evidence be Admitted.*

Due process does not tolerate reviewing one piece of evidence at a time under various rules of evidence. When the entire body of evidence serves to corroborate the defense theory, it is all admissible. See Am.PRP at 9-16.

Due process requires this court to consider the cumulative evidence this Petition presents in support of the defense that Nicolas Boer committed this attempted murder. *Chambers v. Mississippi*, 410 U.S. at 290 n.3 (due process claim rests on cumulative effect of evidence excluded under evidence rules); *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (constitutional right to present a defense); U.S. Const., amend. 14; Const., art. I, § 3.

In *Chambers*, McDonald, the other suspect for shooting a police officer, testified at trial. The court allowed into evidence his sworn written out-of-court confession to the crime.¹⁴ But McDonald

¹⁴ The State argues petitioner does not present a signed written confession from Nick Boer or a witness who saw him at the scene. Resp. at 43. But *Chambers* establishes non-written non-sworn confessions are admissible, even if repudiated by the declarant; and George Hill witnessed Nicolas

testified he repudiated that confession and why. The trial court excluded as hearsay the testimony of three other witnesses to whom McDonald had admitted he shot the officer. Similar to Peter Boer's testimony, witness Turner would have destroyed McDonald's alibi and said McDonald urged him "not to 'mess him up.'" Another witness was not permitted to testify that McDonald told him he disposed of the gun after he shot the officer, and he was with him when he bought another gun to replace it.

The Court held due process required the defendant be permitted to present these additional "statements against interest" as exceptions to the hearsay rule, although McDonald clearly was "available" and had testified at trial. *Chambers*, 410 U.S. at 302-03.

Nicolas Boer's declaration from the State at most creates a material issue of fact, it does not resolve it. This issue of fact warrants an evidentiary hearing. RAP 16.11(b).

Boer at the scene with the gun in his hand -- which he demonstrated by providing the sketch.

3. PETER BOER'S TESTIMONY THAT NICK WAS
PAYING POLICE IS COMPETENT
ADMISSIBLE EVIDENCE.¹⁵

Peter Boer testifies not only that Nick told him he was paying the police; he also witnessed police pick up Nick when he was carrying drugs, guns, and cash, then met him a short time later, still with drugs, guns, and cash -- only less drugs and cash. Am.PRP at 45-48. Court records confirm Nick Boer was never prosecuted for drugs in Pacific County. Am.PRP at 57-61.

A reasonable person would not explain to his drug-dealing brother that he was paying the police and/or offering information to avoid criminal charges for the drugs he was dealing and the guns he was illegally carrying unless it were true. They were business partners dealing drugs.¹⁶ Nick had to explain the reduced amount of cash and drugs after the police picked him up and released him.

The evidence establishes the following corroborating circumstances, which clearly indicate the confession's trustworthiness.

¹⁵ See Resp. at 37.

¹⁶ Cf. ER 801(d)(2)(v) (statements by a coconspirator of a party during the course and in furtherance of the conspiracy are not hearsay).

- Nick Boer told police the night after the shooting that he was a drug user and had been dealing drugs and stealing guns (Am.PRP at 19-20);
- Peter Boer saw his brother more than once get arrested in Pacific County with drugs, money and guns, and yet be released and return with less drugs and money, but still with drugs, money and guns (PBoer Exam at 45-47, 49)
- Despite Nicolas Boer's admissions and many witnesses' report that he dealt drugs, there is no record of him being prosecuted for drugs in Pacific County or illegal possession of a firearm (Am.PRP at 57-61);
- An out-of-county officer stopped Nick on Sunday after the shooting, recognizing him as matching the sketch, and seized drugs from him; yet there is no record he was prosecuted in Pacific County for those drugs (Am.PRP at 57-61).

C. THE NEW EVIDENCE WILL PROBABLY CHANGE THE OUTCOME OF THE TRIAL.

"A reasonable probability that the result of the proceeding would have been different" is established if "one juror might have had reasonable doubt" that Marty Jones committed this crime. *In re Pers. Restraint of Stenson*, 174 Wn.2d 474, 493 & n.9, 276 P.3d 286 (2012). The relevance of other-suspect evidence is whether it

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).

In *Chambers*, the defense presented at trial the sworn written confession McDonald gave, but the court excluded the testimony of three other witnesses to whom he had confessed, and the testimony of one destroying his alibi.

In sum, then, this was Chambers' predicament. As a consequence of the combination of Mississippi's [evidence rules], he was unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity. **Chambers had, however, chipped away at the fringes of McDonald's story** by introducing admissible testimony from other sources indicating that he had not been seen in the cafe where he said he was when the shooting started, that he had not been having a beer with Turner, and that he possessed a .22 pistol at the time of the crime. But all that remained from McDonald's own testimony was a single written confession countered by an arguably acceptable renunciation. **Chambers' defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination or had the other confessions been admitted.**

Chambers, 410 U.S. at 294 (emphases added). The Court ordered a new trial where this additional evidence could be presented.

At trial, Marty Jones had nothing like the evidence admitted at Chambers's trial to support his theory that McDonald shot the officer. While the defense "chipped away" at Johnson's identification of Marty, he was unable to offer evidence of who actually committed this crime or why this Washington State Trooper would lie or be mistaken about who did it.

Now he has that evidence. If the exclusion of the confessions in *Chambers* was enough to require a new trial, the discovery of this confession, the motive for Johnson to lie, the destruction of Nicolas Boer's alibi, his access to an unusual weapon and ammunition that explains George Hill's repeated exclamations that it sounded like a cap gun, and the overwhelming corroborative evidence requires a new trial with a jury hearing what really was happening in Pacific County.

With this evidence, the jury's choice is dramatically different from the 2011 trial. They would now have someone else to consider as a suspect. They would consider a reason to question the testimony of an officer many years in the same community. Applying common sense, at least one

juror probably would conclude that shooting a law enforcement officer point-blank in the head is not an entry-level crime; that more likely someone with long experience in violence and drug dealing, tired of paying off police officers, would commit such a crime than a financially secure grandfather with no criminal background at all.

D. THE NEW EVIDENCE COULD NOT HAVE BEEN DISCOVERED BEFORE TRIAL WITH DUE DILIGENCE.

The State argues the defense could have discovered Peter Boer's 2014 testimony before the trial in 2011. It refers to a few witnesses' names it provided the defense in discovery. Resp. at 38-39 and Resp. App. E.

The State's discovery included the police interview with Nick Boer from Saturday night, in which he provided an alibi. Am.PRP at 19-20. If the State had any evidence contradicting this alibi, it was obligated to provide it to the defense under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).

Defense counsel had a right to rely on [the *Brady*] requirement as well as its own reasonable assessment of need to further inquir[e] into the file and therefore had no duty to pursue further

discovery when no materiality appeared likely. ...

... "[T]here was no lack of due diligence by defense trial counsel or defense counsel on subsequent PRPs in failing to discover the full FBI file material."

Stenson, 174 Wn.2d at 490. Thus in *Stenson*, defense counsel properly relied on the state's investigation to determine what warranted further investigation and what not. With no information to contradict the police investigation that relied on Nicolas Boer's alibi, the defense had "no duty to pursue further discovery when no materiality appeared likely."¹⁷

Nick Boer still maintains his innocence and his alibi, so interviewing him before the trial would not have produced this evidence.

The police interviewed Peter Boer February 18, 2010. Despite their skilled investigation, Peter told them the only information he had about the shooting were rumors he'd heard in the jail after he was arrested. App. D.

The State's argument further disregards Peter Boer's own testimony: Until at least 2012, Nick

¹⁷ *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001), relied on by the State, Resp. at 39, did not involve due diligence.

and his mother had threatened Peter if he did not support Nick's alibi. Even if someone had interviewed Peter or his mother, they would have supported the false alibi before trial. By 2014, Nick was in prison in Florida, so his threat carried no weight; and their mother died in 2012, so Peter no longer had to meet her demands. Am.PRP at 44-45, 48; PBoer Exam at 41, 55-57.

The only evidence that Peter Boer disclosed this information before the trial is from Mike McLeod. The State does not suggest it had or provided his name to the defense. There is no evidence Mike McLeod told anyone else about this information before he told his father, Greg McLeod, in 2012, more than a year after trial. Greg McLeod then contacted Marty Jones's lawyers. Dec. of Gregory D. McLeod.

The State offers no evidence that it knew Mike McLeod was a relevant witness before this trial. Neither Marty Jones nor trial counsel knew of him or had any reason to believe he had information related to this case. See Apps. A, B.

Although a few witnesses identified George Hill's sketch as Nicolas Boer before trial, their

identifications were nullified by Nicolas Boer's claimed alibi. They are offered here to corroborate Nick's confession to Peter and demonstrate why the new evidence is likely to cause a different outcome.

Without evidence to place Nick Boer near the scene of the shooting, this evidence was not admissible.¹⁸ It certainly did not permit the defense to argue that Nick Boer was the shooter.

Before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.

State v. Mak, 105 Wn.2d 692, 716, 718 P.2d 047, cert. denied, 479 U.S. 995 (1986).¹⁹

**E. THE NEWLY DISCOVERED EVIDENCE IS
ADMISSIBLE TO PROVE SOMEONE ELSE SHOT
SCOTT JOHNSON.**

¹⁸ This Court affirmed even the exclusion of another person Trooper Green saw walk by the scene whose description matched that given by George Hill. *State v. Jones*, 175 Wn. App. 87, 303 P.3d 1084 (2013), reversed on other grds., 185 Wn.2d 412, 372 P.3d 755 (2016) (App. L to State's Response, at 25-27).

¹⁹ See also: *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932); *State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933); *State v. Drummer*, 54 Wn. App. 751, 775 P.2d 981 (1989); *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993).

The State argues the new evidence would not be admissible to prove an alternative suspect in this case. Resp. at 40-44; but see Am.Brf. at 9-16.

The bulk of the State's argument on this point turns on it disputing Peter Boer's credibility.²⁰ Resp. at 40-44. Thus the State is disputing material facts, which requires this Court to grant a reference hearing. RAP 16.11(b); *Rice*, 118 Wn.2d at 886-87.

It is not this Court's duty to determine the credibility of a witness from this cold record. The correct standard is whether the newly discovered evidence, "if believed by the jury," would likely change the outcome of the trial. *State v. Ramel*, 65 Wn.2d 326, 396 P.2d 988 (1964). If the State disputes the credibility of the newly discovered evidence, a reference hearing permits the State to challenge that credibility, and a judge to see and hear the witnesses and make a

²⁰ Remarkably, the State argues Peter's "lengthy list of crimes of dishonesty would show he is not a credible person." Resp. at 41. Yet it urges this Court to accept without further thought the Declaration of Nicolas Boer, whose criminal record is equally impressive. And it urges this Court to utterly disregard the testimony of Marty Jones, who has no criminal history whatsoever.

credibility determination. RAP 16.11(b); *State v. Rolax*, 84 Wn.2d 836, 838, 529 P.2d 1078 (1974); *State v. West*, 139 Wn.2d 37, 41, 983 P.2d 617 (1999) (trial court proper to determine witness credibility at evidentiary hearing); *State v. Macon*, 128 Wn.2d 784, 801, 911 P.2d 1004 (1996) (same).

F. THE SAME EVIDENCE THAT NICOLAS BOER SHOT SCOTT JOHNSON BECAUSE HE WAS TAKING PROTECTION PAYMENTS, COMBINED WITH TRIAL EVIDENCE SURROUNDING SCOTT JOHNSON'S BIZARRE IDENTIFICATION OF MARTY JONES, ESTABLISHES HE GAVE FALSE TESTIMONY.

The evidence discussed above combined with trial evidence leads inexorably to the conclusion that Scott Johnson lied when he identified Marty Jones as the shooter. Resp. at 46-51. It is not "merely impeaching" because it provides a powerful motive for him to lie that was completely unimagined at the time of trial. The power of this motive -- that he knew the shooter and had accepted payments or information to protect his drug dealing -- truly "devastates a witness' uncorroborated testimony establishing an element of the offense." *State v. Savaria*, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996); Am.Brf. at 8-9.

Johnson has not been confronted with these allegations. The State does not offer any declaration from him.

The corroborating trial evidence includes his repeated denials that he got a good look at the shooter -- until after he saw the sketch drawn from George Hill's description. He insisted on seeing a photo of "Marty," the name written on his hand, the registered owner of the van. And he asked to keep his request secret. Am.PRP at 20-22.

Only after he saw the DOL photo, which is dramatically different from George Hill's sketch and Nicolas Boer, did he latch onto that image to pretend he was operating from memory when he met with the sketch artist and saw the montage.

On direct appeal, this Court concluded the identification procedure was "impermissibly suggestive." *State v. Jones, supra*, (unpublished portion of opinion) (App. L to State's Response, at 19-21).

The defense had no information, and so was not able to investigate the allegations raised here of police officers accepting payments and drugs from drug dealers in Pacific County. Marty Jones, not a

member of the drug-dealing and drug-using community, had no knowledge of what was occurring in his community. Defense counsel had no basis to investigate this subject area. Thus they could not have discovered this evidence by using due diligence. Apps. A, B.

A reference hearing or a new trial would permit discovery to uncover what other evidence exists. The evidence presented here is sufficient to require both. RAP 16.11.

G. JOHNSON'S PERSONNEL FILE DOES NOT RESOLVE THE BRADY ISSUE.

The availability of records through a public records request does not alleviate or excuse the government of its affirmative duty to learn of and disclose any exculpatory or impeachment evidence known to the prosecution or others working on its behalf.

For this reason, the reasonable probability standard for obtaining relief from a Brady violation is less onerous than the standard for newly discovered evidence. *In re Personal Restraint of Lui*, 188 Wn.2d 525, 567 n.14, 397 P.3d 90 (2017).

The redacted portions from Scott Johnson's WSP personnel file, now provided, contain evaluations reflecting only creditable conduct. Yet the file

is incomplete. Resp. App. C. The Washington State Patrol has destroyed all records of Johnson's discipline, complaints, or internal investigations. App. E.

The personnel records still offer no explanation or evidence to explain why WSP placed Johnson on a list to be transferred to Spokane, the other side of the state. Contrary to the State's assertion, nothing in the Interoffice Communications suggests Johnson requested the transfer; and nothing else in his records would suggest he would do so after living his entire life on the west coast.²² The only two references are from 2010, and so date only after this shooting. See Resp. at 53-54; Am.Brf. at 24-28; Resp. App. C at 18-19.

Evaluations begin in 1998, thirteen years after Johnson began his employment. Resp. App. C at 153-57. There is no evaluation for his final year, 2010, which would include the time period of any investigation following this shooting. There

²² See, e.g., Resp. App. C at 0041-0063 (Johnson worked other off-duty jobs, and operated his own construction/excavation business since 1987).

is no record of being placed on leave, with or without pay, or disability.

A few evaluations note no "sustained complaint." *Id.* at 146, 150, 154. After 2001, evaluation forms do not contain a place to indicate whether there was a "sustained complaint." *Id.* at 74-138. But see Am.PRP at 62-64 and Dec. of W. Taylor ¶ 24 (WSP allows troopers facing discipline to retire without final adjudication of pending discipline).²³

The file does not contain any citizen or official complaints, sustained or not; or any internal investigations into such complaints. WSP has destroyed all such records maintained by the Office of Professional Standards. App. E.

H. THE BUNTER MARK EVIDENCE WAS ADMITTED AND AFFIRMED BASED ON THE "FIREARM BALLISTICS EVIDENCE" PCAST FOUND TO BE WITHOUT SCIENTIFIC FOUNDATION.

When new facts falsify old assumptions, courts should not be obliged to defer to past precedents; they should look afresh at the scientific issues.

²³ The State dismisses Mr. Taylor as "a defense investigator." Resp. at 55. Mr. Taylor's experience and credentials as an expert witness on police practices and use of force are set out in his Declaration at ¶ 22 and App. A.

President's Council of Advisors on Science and Technology (PCAST), *Report on Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Sept. 2016) https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_scienc_e_report_final.pdf (last visited 2/21/2018) ("PCAST Report") at 143-44.

The State argues this Court should disregard the PCAST report because it did not address bunter mark evidence specifically, but firearm ballistics evidence. Resp. at 61.

But the State's witness Shoeman testified the bunter mark evidence was scientifically reliable and admissible precisely because it was firearm toolmark evidence.

When we talk about the theory of identification, we talk about sufficient agreement of the markings present on a cartridge case or a bullet.

RP 2469.

On direct appeal, this Court acknowledged "there was no reported Washington appellate case on this issue." Nonetheless, it affirmed admitting the evidence by concluding "bunter mark evidence, like other firearm ballistics evidence, is

generally accepted." *Jones, supra*, Resp. App. L at 29.²³ Thus, since PCAST concluded "firearms/ toolmark" evidence lacks a scientific basis, its conclusion must apply with at least equal force to bunter mark evidence. This new evidence warrants this Court reconsidering its conclusion.

PCAST found firearm toolmark identification was scientifically unreliable, although that application of toolmark evidence has identifiable class characteristics to compare, e.g., striations left on a bullet from the rifling inside a gun barrel, or indents the gun leaves on the casing as it ejects. Guns indeed create these identifiable impressions, similar to whorls and loops in fingerprints, by which one can make comparisons.

Bunter marks, in contrast, have no identifiable class characteristics. Mr. Shoeman did not identify a single class or individual characteristic he saw on any of the bunter marks on these casings. Unable to articulate what he saw or

²³ Indeed, the cases this Court cited all dealt with firearms toolmark identification; none with bunter marks. The cases the State cites, Resp. at 64-75, primarily involved no challenge or objection to the bunter mark evidence, and so do not resolve the issue; and/or pre-date the PCAST report.

what he was looking for, he simply said he saw better than the jury could with his microscope, his experience informed him he had a match, and it was "scientific." Yet it has even less scientific foundation than firearm identification.

The PCAST report indeed contained many recommendations to the DOJ and to courts, but made no effort to determine whether individual past cases were "erroneously decided." Nonetheless, it concluded:

from a *scientific* standpoint, subsequent events have indeed undermined the continuing validity of conclusions that were not based on appropriate empirical evidence.

Am.Brf. at 37 (emphasis original). In this case, these subsequent events require this Court to reconsider its conclusion on direct appeal, and remand for a *Frye* hearing on the bunter mark evidence.

III. MOTION FOR DISCOVERY

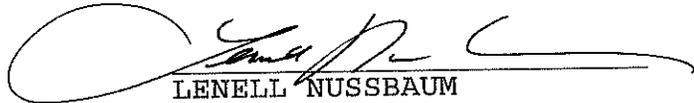
With this Reply, Petitioner has filed a Motion for Discovery, based on the evidence supporting his Petition.

IV. CONCLUSION

The newly discovered evidence, combined with the evidence available at trial, clearly indicates another person shot Scott Johnson. This Court should grant Petitioner's Motion for Discovery, grant an evidentiary hearing where the State and Defense may conduct a complete investigation, and grant Marty Jones a new trial where the jury may hear the evidence implicating Nicolas Boer.

DATED this 26th day of February, 2018.

Respectfully submitted,



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

APPENDICES

- A Declaration of Martin Jones
- B Declaration of Todd Maybrow
- C Second Declaration of Lenell Nussbaum
- D Discovery page 000219
- E Email Public Records Act request and responsive emails from Washington State Patrol Office of Professional Standards

APPENDIX A

DECLARATION OF MARTIN JONES

Martin Jones declares:

1. I am the petitioner in this personal restraint petition proceeding. I am competent to make this Declaration.

2. After being arrested in February, 2010, I was housed in the Pacific County Jail before my trial. There were multiple cells at the Pacific County Jail.

3. At no time while I was in the Pacific County Jail was I housed with Peter Boer. To my knowledge, I did not see or meet Peter Boer. I certainly never interacted or conversed with Peter Boer.

4. Prior to being arrested, I had no knowledge of Peter Boer, Nicolas Boer, or any of their activities. I did not become acquainted with their names in the discovery until after I was convicted and sentenced.

5. Prior to my trial, I had no reason to believe law enforcement officers in the area were involved in any way with drug dealers, except I assumed they were arresting them.

6. Prior to my trial, I had no knowledge of Gregory Michael "Mike" McLeod or his father, Gregory D. McLeod. I had no reason to know that they would have any information relevant to my case.

I declare under penalty of perjury under the laws of the state of Washington that the above statements, paragraphs 1-6, are true and correct to the best of my knowledge.

Feb. 14, 2018 - Walla Walla, WA.
Date and Place

Martin Jones
MARTIN JONES

APPENDIX B

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5 IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
6 DIVISION TWO

7 In re the Personal Restraint Petition of
8 MARTIN A. JONES,
9 Petitioner.

NO. 50262-3-II

DECLARATION OF
TODD MAYBROWN

10
11 I, Todd Maybrow, do hereby declare:

12 1. I am an attorney admitted to practice and in good standing with the Washington
13 State Bar Association since 1989. I am currently a partner in the law firm of Allen, Hansen,
14 Maybrow & Offenbecher, P.S., in Seattle.

15 2. Along with my partner David Allen, I represented Martin Jones in his trial for
16 attempted murder of Washington State Patrol Trooper Scott Johnson in Long Beach,
17 Washington. *See State of Washington v. Martin Jones*, Pierce County Cause No. 10-1-03735-
18 9.¹ Two associates with my office, Ariella Wagonfeld and Cooper Offenbecher, provided
19 assistance during the pretrial phases of the case. I make this Declaration based on my personal
20 knowledge and information I obtained within that representation.

21 3. The shooting incident occurred on or around February 13, 2010. Trial was held
22 about a year later, during January/February of 2011. To my knowledge, Martin Jones has
23
24

25
26 ¹ The case was initially filed in Pacific County under Cause No. 10-1-0025-7, but venue was transferred
to Pierce County.

DECLARATION OF TODD MAYBROWN - 1

Allen, Hansen & Maybrow &
Offenbecher, P.S.
600 University Street, Suite 3020
Seattle, Washington 98101
(206) 447-9681

1 repeatedly and consistently denied the State's allegations in this case. During trial, the defense
2 maintained that this case involved a classic example of mistaken identity.

3 4. Before trial, the defense attempted to locate evidence that would demonstrate
4 that some other person, not Martin Jones, had been involved in the shooting incident of
5 February 13, 2010. The attorneys in my office relied upon the assistance of a professional
6 investigator during that process.

7 8. During the pretrial phase of the litigation, my office received thousands of pages
8 of discovery from the State. Among other things, we obtained and reviewed more than 1500
9 pages of "tip sheets" alone. These tip sheets purported to document information the police had
10 received in the days following the shooting incident from potential witnesses, along with any
11 follow-up investigation. The attorneys in my office and the investigator carefully reviewed all
12 of these tips.

13 6. I understand that a few of these tip sheets listed callers who had identified
14 "Nicholas Boer" or "Nick Boer" as a possible suspect or as an individual who resembled the
15 person in a police sketch that was published shortly after the shooting. The State's discovery
16 also showed that police detectives had interviewed Nicolas Boer soon after the incident and
17 eliminated him as a potential suspect because he was able to provide an alibi for the date and
18 time of the shooting. The State's discovery also included a recorded interview, in which Peter
19 Boer claimed that the only information he knew about the shooting incident was based upon
20 rumors he heard after he was arrested and in placed in the Pacific County Jail. We never
21 developed any information that contradicted these interviews.

22 7. As noted above, the attorneys in my office conducted a thorough and extensive
23 investigation in an effort to identify credible "other suspect" for the incident in question. We
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25
26

1 followed up on numerous reports and leads and attempted to locate records that could support
2 Martin Jones' defense in this case. In doing so, we were mindful of the legal requirements
3 regarding the presentation of such "other evidence" during a criminal trial. See, e.g., *State v.*
4 *Pacheo*, 107 Wn.2d 59 (1986); *State v. Condon*, 72 Wn.App. 638 (1993); *State v. Rehak*, 67
5 Wn.App. 157 (1992). Unfortunately, we were never able to develop any information that
6 placed another individual – such as Nicholas Boer – at or near the scene of the shooting
7 incident.²

8
9 8. To the best of my knowledge, my office had no information about, or reason to
10 question, Gregory Michael McLeod or Gregory D. McLeod during our investigation. I do not
11 believe that we had ever heard these names prior to the *Jones* trial, and we had no reason to
12 believe that they had information relevant to this case. We first learned of these individuals
13 when Gregory D. McLeod contacted our office long after the trial had concluded.

14
15 9. Suffice it to say, my office had no information before trial that Pacific County
16 law enforcement officers (or former Washington State Patrol Trooper Scott Johnson) had been
17 accepting money to protect drug dealers in Pacific County.

18 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
19 WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF
20 MY KNOWLEDGE.

21 DATED at Seattle, Washington, this 22 day of February, 2018.

22 Respectfully submitted,

23 
24 _____
Todd Maybrown, WSBA #18557

25 ² We did develop information that an eyewitness had placed a person other than Martin Jones at or near
26 the scene before the incident and that we attempted to present that evidence at trial. However, it is my
recollection that the trial judge ruled that the defense would not be able to present any "other suspect"
evidence – including information regarding that other person – to the jury.

APPENDIX C

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

IN RE THE PERSONAL RESTRAINT OF)	
)	NO. 50262-3-II
)	
)	SECOND DECLARATION OF
)	LENELL NUSSBAUM
MARTIN A. JONES,)
))
Petitioner.)
))
))

Lenell Nussbaum declares to the Court:

1. I am an attorney admitted to practice and in good standing with the Washington State Bar Association. I represent Martin A. Jones in his Personal Restraint Petition. I make this Declaration based on my personal knowledge and information I obtained within that representation, including trial counsel's files.

2. Attached as Appendix D to the Reply Brief in Support of Personal Restraint Petition ("Reply Brief") is a true and correct copy of page 000219 from the discovery the State provided to defense counsel in this case.

3. Attached as Appendix E to the Reply Brief are email communications I had with the Washington State Patrol's Office of Professional Standards February 19-21, 2018, regarding internal investigations or disciplinary records of Scott Johnson. All such records have been destroyed.

1 I declare under penalty of perjury under the laws of
2 the state of Washington that the above statements, paragraphs
3 1-3, are true and correct to the best of my knowledge.

4 22 February 2018 Seattle WA 
Date and Place LENELL NUSSBAUM

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APPENDIX D

proceeded back into his residence. Barker-Sayce believed Jones was going to get a gun and shoot the dog. The dog was secured before Jones returned outside. When Jones did come outside, Barker-Sayce observed a silver metallic object in Jones' hand which she thought was possibly a gun. Jones later told Barker-Sayce he was not going to shoot the dog; he was just going to scare it with his cap gun. A copy of the taped statement is included with this case report.

Hughes and I re-contacted the Custer residence and briefly talked with them about meeting for an interview. They agreed to come to the Sheriff's Office to be interviewed later in the evening. The Custer's were interviewed by Detective Spangler and Thoet.

On February 18, 2010, Detective Hughes and I contacted the Pacific County Jail to interview Patrick L. Saunders and Patrick Boer who had information about the shooting. Saunders had already been transported to Shelton when we arrived. Boer stated all the information he heard about the incident he obtained through the rumor mill once he was in the jail. Hughes and I obtained a copy of all the telephone calls Martin Jones made while at the jail. Susan Jones only made one call to her attorney which we did not obtain. The CD of phone calls was given to the case officer for inclusion in the case file.

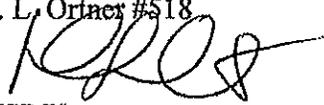
On February 18, 2010, I assisted WSP K-9 bomb dogs with a search of the area of 48th and L Place, and the Peninsula Church Center. Nothing was located.

On February 19, 2010, Detective Hughes and I were tasked with obtaining a CD of the telephone calls originating from Martin Jones at the Pacific County Jail. Hughes and I obtained a CD of those phone calls at approximately 11:00 am. We also obtained a copy of all individuals which were booked into the jail since the shooting. The CD of the phone calls was given to Detective Spangler to be analyzed. A list of the booked individuals was developed into a tip sheet for future contact. While at the jail, Hughes and I interviewed John Renfro, who was the only one still at the jail who was booked since the shooting. Renfro stated he heard about the shooting from Tom Williams, but did not have any other information. Williams is a volunteer fire fighter. It appeared Renfro did not know much about the shooting.

We also interviewed Jonathan Moore, who was being booked into the jail for a second DUI charge, while we were waiting for the CD of phone calls. Moore stated he was the brother in law of Corey Jones. Moore spent several hours at Corey Jones' residence on February 18, 2010, but they did not discuss the shooting. Moore stated he was there to morally support Jones because he was feeling depressed. Moore did not divulge any more information about his visit to Corey Jones.

I certify (declare) under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. (RCW 9A.72.085) Long Beach, Washington

D. L. Ortner #518


WSP/Vancouver

MARTIN JONES 000219

APPENDIX E

Lenell Nussbaum

From: "Lenell Nussbaum" <nussbaum@seanet.com>
Date: Monday, February 19, 2018 2:23 PM
To: <pubrecs@wsp.wa.gov>
Attach: PRA Request 2-19-2018 re Internal Investigations.doc
Subject: Public Records Request

Dear WSP Public Records:

Please see attached request.

Thank you for your attention to this matter.

Lenell Nussbaum
Law Office of Lenell Nussbaum
2125 Western Ave., Suite 330
Seattle, WA 98121
Tel: (206) 728-0996
Email: lenell@nussbaumdefense.com



**Washington State Patrol
REQUEST FOR PUBLIC RECORDS**

TRACKING NUMBER	DATE OF REQUEST — 2-19- 2018
-----------------	------------------------------------

REQUESTED BY

Name of Requestor: — Lenell Nussbaum

Address: — 2125 Western Ave., Suite 330

City, State, ZIP: — Seattle, WA 98121 Phone No.: — 206-728-0996

E-Mail Address: — nussbaum@seanet.com

Your Relationship to Incident: — investigating

I prefer to receive these records in the following format:

Electronic (Charges may apply)

Paper Copy (Charges may apply)

View by appointment (No charge for viewing records by appointment).

RECORDS REQUESTED

— All Washington State Patrol records of complaints made, whether substantiated or unsubstantiated, and all investigations into those complaints, all investigations into use of force, and all records within the Office of Professional Responsibility, regarding former Washington State Patrol Trooper Scott Johnson, ending December 31, 2010. I make this request pursuant to Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398 (2011).

INCIDENT INFORMATION

DATE OF INCIDENT — <u>1984-2010</u>	TIME OF INCIDENT — _____	LOCATION (INCLUDE COUNTY) — <u>Washington state</u>	
PARTIES INVOLVED #1 — <u>Trooper Scott Johnson</u>		PARTIES INVOLVED #2	
INVESTIGATING OFFICER	BADGE NUMBER	CASE NUMBER	ALTERNATE CASE NUMBER

RCW 42.56.070(9) prohibits the use of lists of individuals provided by the Washington State Patrol for commercial purposes.

Requested records may be redacted in accordance with Chapter 42.56 RCW or other statutes as applicable.

OFFICE USE ONLY

Lenell Nussbaum

From: "OPS Admin" <opsadmin@wsp.wa.gov>
Date: Tuesday, February 20, 2018 2:24 PM
To: <nussbaum@seanet.com>
Attach: 18-1030-0046 Denial Letter to Requestor.pdf
Subject: WSP Public Records Request PD-18-1030-0046

Good Afternoon Mr. Nussbaum,

Attached is our response to your public records request regarding former Trooper Scott Johnson. Since you are receiving this information electronically, a hard copy will not be sent to you via U.S. Mail. If you have any questions regarding this matter, please feel free to contact our office and reference PD-18-1030-0046.

Respectfully,

Amanda Rice
Forms and Records Analyst 2
Washington State Patrol
Office of Professional Standards – Internal Affairs
PO Box 42611 | Olympia, WA 98504-2611
Mailstop 42611
360-704-2342 | VoIP 11342
opsadmin@wsp.wa.gov
"Service with Humility"

From: Lenell Nussbaum [<mailto:nussbaum@seanet.com>]
Sent: Monday, February 19, 2018 2:24 PM
To: Webmaster - Pub Rec Reqts
Subject: Public Records Request

Dear WSP Public Records:

Please see attached request.

Thank you for your attention to this matter.

Lenell Nussbaum
Law Office of Lenell Nussbaum
2125 Western Ave., Suite 330
Seattle, WA 98121
Tel: (206) 728-0996
Email: lenell@nussbaumdefense.com

JAY INSLEE
Governor



JOHN R. BATISTE
Chief

STATE OF WASHINGTON
WASHINGTON STATE PATROL

PO Box 42611 • Olympia, Washington 98504-2611 • 360-704-4220 • www.wsp.wa.gov

February 20, 2018

Mr. Lenell Nussbaum
2125 Western Ave., Suite 330
Seattle, WA 98121
nussbaum@seanet.com

Dear Ms. Nussbaum:

The Washington State Patrol (WSP), Office of Professional Standards, has received your February 19, 2018, public disclosure request regarding former Trooper Scott Johnson, specifically:

"All Washington State Patrol records of complaints made, whether substantiated or unsubstantiated, and all investigations into those complaints, all investigations into use of force, and all records within the Office of Professional Responsibility, regarding former Washington State Patrol Trooper Scott Johnson, ending December 31, 2010. I make this request pursuant to Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398 (2011)."

The Office of Professional Standards retains agency records regarding disciplinary action, complaints, misconduct and internal investigations. This office does not have any public records containing the information you requested. RCW 42.56.010. *Citizens for Fair Share*, 117 Wn. App. at 435 (citing *Smith v. Okanogan County*, 100 Wn. App. 7, 13–44(2000)), *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409 (1993), *Sperr v. City of Spokane*, 123 Wn. App. 132, 96 P.3d 1012 (2004), and *Neighborhood Alliance of Spokane County v. County of Spokane*, No. 84108-0 (Wash. Sept. 29, 2011).

If you have any questions or need further assistance with this request, please call Ms. Amanda Rice, Public Records Coordinator for the Office of Professional Standards at (360) 704-2342 and reference PD-18-1030-0046.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Saunders".

Captain Michael Saunders
Office of Professional Standards

MSS:aer



Lenell Nussbaum

From: "OPS Admin" <opsadmin@wsp.wa.gov>
Date: Wednesday, February 21, 2018 8:42 AM
To: "Lenell Nussbaum" <nussbaum@seanet.com>
Subject: RE: WSP Public Records Request PD-18-1030-0046

Good Morning Mr. Nussbaum,

Our office did not have any records related to or for former Trooper Scott Johnson. The records we might have had for former Trooper Johnson have been destroyed pursuant to our record retention guidelines.

Please let me know if you have any questions or concerns.

Respectfully,

Amanda Rice
Forms and Records Analyst 2
Washington State Patrol
Office of Professional Standards – Internal Affairs
PO Box 42611 | Olympia, WA 98504-2611
Mailstop 42611
360-704-2342 | VoIP 11342
amanda.rice@wsp.wa.gov
"Service with Humility"

From: Lenell Nussbaum [<mailto:nussbaum@seanet.com>]
Sent: Tuesday, February 20, 2018 3:59 PM
To: OPS Admin
Subject: Re: WSP Public Records Request PD-18-1030-0046

Dear Ms. Rice,

Thank you for your very prompt response.

Can you tell me: Is the denial because: (1) records exist but are exempt from the Public Records Act or are not defined as public records within the Act; (2) no records ever existed within the scope of the request; or (3) all such records have been destroyed pursuant to a records retention policy?

Lenell Nussbaum
Law Office of Lenell Nussbaum
2125 Western Ave., Suite 330
Seattle, WA 98121
Tel: (206) 728-0996
Email: lenell@nussbaumdefense.com

From: [OPS Admin](#)
Sent: Tuesday, February 20, 2018 2:24 PM
To: nussbaum@seanet.com

Subject: WSP Public Records Request PD-18-1030-0046

Good Afternoon Mr. Nussbaum,

Attached is our response to your public records request regarding former Trooper Scott Johnson. Since you are receiving this information electronically, a hard copy will not be sent to you via U.S. Mail. If you have any questions regarding this matter, please feel free to contact our office and reference PD-18-1030-0046.

Respectfully,

Amanda Rice
Forms and Records Analyst 2
Washington State Patrol
Office of Professional Standards – Internal Affairs
PO Box 42611 | Olympia, WA 98504-2611
Mailstop 42611
360-704-2342 | VoIP 11342
opsadmin@wsp.wa.gov
"Service with Humility"

From: Lenell Nussbaum [<mailto:nussbaum@seanet.com>]
Sent: Monday, February 19, 2018 2:24 PM
To: Webmaster - Pub Rec Reqts
Subject: Public Records Request

Dear WSP Public Records:

Please see attached request.

Thank you for your attention to this matter.

Lenell Nussbaum
Law Office of Lenell Nussbaum
2125 Western Ave., Suite 330
Seattle, WA 98121
Tel: (206) 728-0996
Email: lenell@nussbaumdefense.com

LENELL NUSSBAUM

February 22, 2018 - 3:46 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50262-3
Appellate Court Case Title: Personal Restraint Petition of Martin A Jones
Superior Court Case Number: 10-1-03735-9

The following documents have been uploaded:

- 502623_Briefs_20180222154044D2920761_9233.pdf
This File Contains:
Briefs - Petitioners Reply
The Original File Name was Reply Brief in Support of Amended Personal Restraint Petition.pdf

A copy of the uploaded files will be sent to:

- CRJSeaEF@atg.wa.gov
- johnh5@atg.wa.gov
- kim@gordonsaunderslaw.com
- melaniet@atg.wa.gov

Comments:

Sender Name: Alexandra Fast - Email: ahfast2@gmail.com

Filing on Behalf of: Lenell Rae Nussbaum - Email: lenell@nussbaumdefense.com (Alternate Email:)

Address:
2125 Western Ave
Suite 330
Seattle, WA, 98121
Phone: (206) 728-0996

Note: The Filing Id is 20180222154044D2920761