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Division II  
State of Washington

NO. 50262-3

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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IN RE PERSONAL PETITION OF:

MARTIN A. JONES,

Petitioner.

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**STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION**

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## **I. AUTHORITY FOR RESTRAINT OF PETITIONER**

Petitioner Martin A. Jones is confined in the Washington State Department of Corrections pursuant to an order of judgment and sentence entered in Pierce County Superior Court. Appendix A (Judgment and Sentence). A jury found Jones guilty of attempted murder in the first degree. Appendix A. The Washington Supreme Court affirmed the judgment and sentence. *State v. Jones*, 185 Wn.2d 412, 372 P.3d 755 (2016). Judgment and sentence became final on May 13, 2016. Appendix B (Mandate). Jones timely filed a personal restraint petition (“PRP”) challenging his detention. Jones has since filed an amended petition and brief in support.

## **II. INTRODUCTION**

Martin Jones shot Washington State Patrol Trooper (WSP) Scott Johnson in the head. Trooper Johnson did not know Jones but spoke to him face-to-face minutes prior to the shooting and looked at Jones face-to-face immediately after the shooting. Trooper Johnson survived. A jury found Jones guilty of attempted murder. The conviction was affirmed on appeal.

Jones alleges “newly discovered evidence,” but his evidence was available before trial, is merely impeachment evidence, and would not change the outcome of the trial. Jones also alleges that the State committed “*Brady* violations,” but his petition fails to prove that the State withheld

material evidence from him, including Trooper Johnson's personnel file or information about firearms not material to this case.

Jones' "new" evidence is primarily hearsay evidence from prison inmate Peter Boer and a post-conviction academic paper on forensic science. Jones offers as new evidence hearsay from Peter Boer that his brother Nick Boer jokingly said he shot Trooper Johnson. Peter Boer's hearsay is not competent evidence, was discoverable before trial, and would not change the outcome of the trial.

Jones' *Brady* claims fail because neither Trooper Johnson's personnel file or firearms not involved in the shooting of Trooper Johnson were material to this case. There was no "*Brady* violation."

A 2016 policy paper on forensic sciences—the "PCAST"—is not "newly discovered evidence" that would change the outcome of the trial. The PCAST limited its discussion of tool mark evidence to one subset of tool marks—ballistics. It did not address bunter marks, which was the evidence at issue in Jones' trial. The PCAST is not "newly discovered evidence" because it would merely serve an impeaching purpose and Jones thoroughly impeached the State's forensic evidence at trial using materials similar if not identical to the PCAST.

### III. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION

- A. Does Jones fail to establish the criteria for a new trial based on newly discovered evidence of another suspect where his evidence is incompetent hearsay, would not change the outcome of the trial, and was discoverable before trial?
- B. Does Jones fail to establish the criteria for a new trial based on newly discovered evidence that a witness allegedly gave false testimony where Jones' evidence is incompetent hearsay, would not change the outcome of the trial, was discoverable before trial, and is merely impeaching?
- C. Does Jones fail to establish *Brady* violations for nondisclosure of Trooper Johnson's personnel file and nondisclosure of additional information about unrelated firearms where Jones does not present evidence that the personnel file or firearms were material?
- D. Does Jones fail to establish the criteria for a new trial based on newly discovered evidence where the 2016 PCAST does not constitute "new evidence," would merely serve to impeach evidence that Jones thoroughly impeached at trial with similar evidence, and would not change the outcome of the trial?

### IV. STATEMENT OF THE CASE

#### A. Trooper Johnson

Scott Johnson spent the entirety of his 26 years as a state trooper patrolling the highways of Pacific and Wahkiakum Counties before Martin Jones shot him in the head in February 2010. RP 2768; Appendix C (Personnel File). Trooper Johnson's career with WSP was distinguished and honorable. Appendix C. Johnson's personnel file contained no incidents of

misconduct or alleged misconduct when he retired in 2010, even after 26 years of service and 40,000 citizen contacts. RP 2775; Appendix C.

Johnson survived Jones' attempt to kill him and spent the short remainder of his WSP career on leave until he retired. Appendix C. The citizens of Pacific County elected Johnson as their Sheriff in November 2010. RP 2763; Appendix C. Johnson became the Sheriff of Pacific County in January 2011, a position he continues to serve in today. RP 2763.

**B. Facts**

Martin Jones' attempted murder of Johnson occurred in Long Beach, WA during the early morning hours of February 13, 2010. RP 2825-26. On the night of February 12, 2010, Johnson patrolled the highways of Pacific County, while his colleague Trooper Jesse Green patrolled SR 103 in Long Beach. RP 874-75, RP 2873. SR 103 is the main street of Long Beach and known as Pacific Avenue within the city. RP 874-75.

While the troopers patrolled the highways that night, Martin Jones and his wife, Susan Jones, and a friend, Charlotte Wanke, went to a bar in Long Beach called Castaways. RP 1606-07, 1614, 3221. The Joneses paid their tab at 11:08 p.m. and at some point thereafter returned to their home in Seaview, WA. RP 3224-25. Seaview borders the Long Beach city limits to the south. RP 3192.

After arriving home, Mrs. Jones decided to drive back to the bar. RP 3226. Martin Jones knew that Susan was driving back to Castaways because she told him so before she left. RP 3227, 3454-55, 3687, 3744. Mrs. Jones left the house, leaving Jones without a vehicle. RP 3210, 3689, 3757.<sup>1</sup>

The Joneses lived several blocks off Pacific Ave., which runs north and south between Seaview and Long Beach.<sup>2</sup> RP 880. Castaways is located on Pacific Ave. RP 1619. Martin Jones knew that his wife would have to drive north on Pacific Ave. in order to get to Castaways. RP 3744.

Trooper Greene observed Mrs. Jones speeding north on Pacific Ave. towards Castaways. RP 875. At 11:57 p.m. on February 12, 2010, Trooper Greene activated his emergency equipment and initiated a traffic stop on Pacific Ave. near 13<sup>th</sup> St. SE, approximately one and a quarter miles north of the Jones residence. RP 880.

Trooper Greene observed that Mrs. Jones was intoxicated when he contacted her at her driver's side window. 878, 881. She provided her license and registration. RP 881. Trooper Greene collected the documents and returned to his patrol car to run a records check. RP 882. Mrs. Jones

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<sup>1</sup> The Jones' explained that there was one vehicle at the house, but Susan Jones had inadvertently taken the keys.

<sup>2</sup> Pacific Ave. turns into U.S. 101 south of Long Beach as it passes through Seaview.

remained in her vehicle. RP 882. While the trooper was away, Mrs. Jones used her cell phone to send a text message to Jones that she “got myself pulled over” and he should “pray.” RP 2627, 3238.

Martin Jones received his wife’s text message on his own cell phone and viewed it at 12:00 a.m. RP 2630, 3683, 3685. Jones knew that his wife was likely on Pacific. RP 3455. Jones did not have a vehicle at his house he could use that night. RP 3690. Although he had his cell phone, Jones used his home phone to call Charlotte Wanke at 12:01 a.m. RP 3688-89. Jones told Wanke that his wife had been stopped by police. RP 1620. Wanke told Jones that she “would go find out what was going on.” RP 1620.

Meanwhile, Trooper Greene investigated Mrs. Jones for DUI. Trooper Johnson overheard Trooper Greene’s radio traffic and drove to Long Beach to assist. RP 2788.

At 12:13 a.m. on February 13, 2010, Trooper Greene placed Mrs. Jones under arrest for DUI. RP 886. Johnson had arrived and he asked Mrs. Jones for the name and number of a person he could call to retrieve her vehicle. RP 887-88. Mrs. Jones responded that Johnson could call “Marty” and she gave a phone number. RP 973, 2794-95, 2878, 3243. Mrs. Jones would not say who “Marty” was and she was belligerent when Trooper Greene inquired further. RP 987, 2796. Johnson used a pen to write the phone number and the name “Marty” on his hand. RP 987, 2794-95.

At 12:18 a.m., Trooper Greene transported Mrs. Jones to the Long Beach Police station to administer the breath test. RP 890. The State<sup>3</sup> later charged Mrs. Jones with DUI and she pleaded guilty to a reduced charge of negligent driving in the first degree. Appendix D (Certified Docket Entry).

Johnson stayed behind to inventory the vehicle for impound. RP 2799. Unknown to Johnson, Martin Jones was walking up Pacific Ave. looking for his van and his wife.

At 12:22 a.m., Charlotte Wanke left her home about 15 minutes north of Long Beach and drove south on Pacific Ave. until she found the Joneses' van. RP 1598, 1619. Wanke arrived at the scene before Jones did. At 12:33 a.m. Wanke contacted Johnson while he was inventorying the van and asked for Susan Jones. RP 998-99, 1620-27, 2803. Johnson told Wanke that Mrs. Jones was at the Long Beach police station. RP 2803.

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. Wanke saw Mrs. Jones inside the police station, but she was told to wait outside until Trooper Green finished

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<sup>3</sup> The Pacific County Prosecuting Attorney's Office prosecuted the Susan Jones DUI case. The Washington State Attorney General's Office prosecuted Martin Jones.

processing her. RP 893-94. Wanke talked to Jones on his cell phone after seeing that Mrs. Jones was in police custody. RP 1628-29.

At approximately 12:35 a.m., local tow operator George Hill arrived to impound the van. RP 1002, 1306, 2807, 2917. Hill left his loud diesel truck running and prepared to tow the Jones' vehicle. RP 1308. Trooper Johnson noticed a man approaching from the south on foot as he continued to inventory the contents of the Jones' van. RP 2810-11, 2994, 2884, 2887. The man approached to within feet of Johnson and appeared angry. RP 2811. The man passed by Johnson and approached Hill. RP 2813. Hill's loud tow truck engine was running and he did not immediately notice the man. The man approached Hill and asked, "What are you doing?" RP 1310, 1346. Hill continued manipulating controls on the side of the truck while the man talked to him and he simply responded, "DUI impound." RP 1310, 2814. The man turned abruptly and walked back in the direction he had come from, which was towards Johnson. RP 1346, 2814.

The man appeared upset and Johnson wanted to know why. RP 2815. Johnson stepped close enough to where he "could have reached out and touched him." RP 2816. Johnson asked, "Sir, is there something I can help you with?" RP 2815. The man angrily replied "no" and continued walking south on Pacific Ave. RP 2816-17

Johnson sensed something amiss with the man and he commented to Hill, "I got a weird feeling about him." RP 1312, 2818. Johnson watched the man walk away to the south towards Seaview until he felt safe<sup>4</sup> to return to the inventory of the Jones vehicle. RP 2818.

After the man left, Johnson found Susan Jones' wallet and set it on the hood of the van. RP 1314-15, 2823-24. Johnson asked Hill to watch him count the money in Mrs. Jones' wallet to make sure he counted it accurately. RP 1315, 2825. Hill came to the front of the Jones' vehicle and the two hovered over the hood of the vehicle while Johnson counted money. RP 1315, 2825.

At approximately 12:40 a.m., the same angry man suddenly returned. Hill and Johnson had their backs turned towards the sidewalk and did not see or hear him approach with the noise of the diesel truck still running in the background. RP 2827. The man grabbed Johnson from behind with one hand and pulled him towards him. RP 1315, 1352, 2825, 2899. With the other hand, he placed a .22 caliber pistol to the base of Johnson's head and fired. RP 1315, 1340, 2826.

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<sup>4</sup> The attempted murder of Trooper Johnson followed closely in time the execution-style murder of a Seattle Police officer sitting in his parked patrol car in Seattle, and the execution-style murder of four police officers sitting in a coffee shop in Lakewood, WA. RP 2871-72. Trooper Johnson testified that those attacks and murders were on his mind frequently in February 2010 and he was especially vigilant to strangers approaching him, as Martin Jones did the night he was shot. RP 2781, 2871.

The bullet smashed into the back of Johnson's head. RP 936, 2842, 3055. Fortunately, the bullet was low caliber and struck the thickest part of Johnson's skull. RP 3090. Instead of penetrating Johnson's brain and killing him, the bullet fragmented against the skull and embedded in his neck muscles. RP 1795, 1799-1800, 3055. The fragments remain there today as doctors determined they would cause more damage digging them out of the muscle tissue in the neck then leaving them in. RP 1800-02, 2856.

Johnson felt like someone had hit him in the head with a crow bar and the noise of the gunshot left his ears ringing. RP 2826-27. Johnson felt blood on the back of his head and knew he had been shot. RP 2827. Johnson gathered himself despite the wound to his head and went to the street side of the parked vehicles. RP 2902.

Jones initially fled north up the sidewalk past Hill's tow truck. RP 1317, 1401. Hill started to chase Jones, but Jones immediately turned around to go south. RP 1317-19. Hill dove and hid behind his tow truck when Jones turned. RP 1319, 1401. Jones moved south down the sidewalk towards his home in Seaview. Hill screamed to Trooper Johnson as he hid behind his tow truck, "Don't let him get you!" RP 2830.

Johnson stood in the street and looked towards the location where he had been shot. Martin Jones was there looking at him. RP 2830. Johnson looked at Jones "eye to eye straight on." RP 2895. Johnson did not know

Jones' name, but recognized him as the same angry man who was there minutes before. RP 2830.

Johnson aimed his firearm at Jones as he moved south down the sidewalk. RP 2831. The Jones' van and Johnson's patrol car were between Johnson and Jones. RP 2831, 2896. Johnson fired but his first shot missed Jones and passed through the passenger side window of the Jones' minivan. RP 1319, 2830. Johnson fired a second shot as Jones moved down the sidewalk, but the second shot also missed and lodged in the headlight assembly of Johnson's patrol car. 2229, 2832.

Johnson considered firing more shots as Jones moved south, but there were buildings behind Jones that were in the line of fire and he did not want an errant shot to hit an innocent bystander. RP 2832. Johnson ceased firing but watched intently as Jones fled to the end of the block and turned left on 13<sup>th</sup> St. RP 2832.

George Hill was "distraught," "freaked out," "shaken," "rattled," and "in an excited emotional state." RP 899, 1206, 1983, 2902. At 12:42 a.m., Hill used his cell phone to call WSP dispatch and report the shooting. RP 998, 1320. While Hill was shocked and animated, Johnson was a veteran police officer of 30 years. RP 899, 1039, 1983, 2763-67. 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. RP 1005, 1320. Johnson advised

dispatch that the shooter ran south down Pacific and turned east on 13<sup>th</sup> St. RP 1005, 11320. Afterwards, he gave Hill his shotgun and instructed him how to use it in the event Johnson died or went unconscious and the shooter returned. RP 1321, 2836.

At 12:44 a.m., minutes after the shooting, Long Beach police officers arrived. RP 1037. Johnson stated, "I got a good look at him." RP 2858.<sup>5</sup> An officer put Johnson in his patrol vehicle and raced him to a hospital in nearby Ilwaco, WA. RP 1041, 2841. At 12:48 a.m., Johnson was admitted to the hospital. RP 930-32. He refused pain medication so he would remain alert to answer questions. RP 2843.

Sgt. Jodi Metz was Johnson's supervisor and she arrived at the hospital at 12:58 a.m., about 18 minutes after the shooting. RP 2843, 2958-59. Johnson told Sgt. Metz, "I saw the shooter and would be able to recognize him again." RP 2959. Johnson described the shooter as a white male in his 40's, approximately 5'10" with short brown hair. RP 2944, 2958. Jones was 45-years-old, 5'10", and a white male with short brown hair.

A multi-agency task force of federal and state police agencies responded to Long Beach to investigate. RP 917, 1007, 1010, 2156;

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<sup>5</sup> Johnson's statement "I got a good look at him" was captured by an audio-video recording Hill made immediately after the shooting. Ex. 61 (designated by Jones).

Appendix E (Declaration of John Hillman). A team of forensic scientists responded to Long Beach to collect evidence. RP 2211-12.

Investigators found a fired .22 short cartridge casing<sup>6</sup> on the ground where Jones shot Johnson. RP 2231. Cascade Cartridge Inc. (CCI) manufactured the fired .22 short cartridge casing found at the scene. RP 2299, 2444-45. Investigators collected the fired cartridge casing and submitted it to the Crime Lab for analysis. RP 2462.

Police cordoned off the block where the shooting occurred and searched the city of Long Beach for the shooter. RP 1208-09, 1448-49, 2729. Police stopped cars and pedestrians they encountered. Police repeatedly encountered Charlotte Wanke driving around near the crime scene during the 40 minutes after the shooting. RP 909, 1979-80, 1997. Police told Wanke that an officer had been shot. RP 910-11. Police repeatedly told Wanke to go home, but she continued to drive around the area of the crime scene. RP 907-911, 1636-40, 1977-81, 1993-1998.

At 2:52 a.m., about two hours after the shooting, a police dog named Gizmo scented at the scene of the shooting and began tracking. RP 1128-29, 1048-49. Gizmo tracked a human scent south on Pacific Ave. and turned left on 13<sup>th</sup> St. SE, just as Johnson had described the shooter's route of

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<sup>6</sup> A "cartridge casing" (also called a shell casing) holds the bullet until the bullet is fired. The cartridge casing remains after the bullet leaves the firearm. When a pistol is used, the cartridge casing is ejected from the weapon when it is fired.

travel. RP 1051-52. Gizmo tracked south for 30 minutes into Seaview to a block from the Jones residence. RP 1050-53. Investigators realized that Gizmo was heading towards the residence of the registered owner of the minivan--Martin Jones. RP 1064-1138. Police stopped Gizmo because it was dark, Johnson's assailant was at large, and investigators did not want to walk into an ambush and have another officer shot. RP 1138.

After securing the perimeter of the house, police called into the house and asked Mrs. Jones to come outside and talk to them. RP 1215, 2391, 3257-60. After the shooting, Trooper Green had released Mrs. Jones and she walked home.<sup>7</sup> RP 896, 3250-55. Mrs. Jones exited the front door as requested and met police detectives outside. RP 1278-79. While Mrs. Jones came out the front door, Martin Jones fled out the back door towards the beach. RP 1217, 1279-80. Police officers in hiding were watching the back door. RP 1470, 2004. Police followed Jones as he walked towards the beach and ordered him to "Stop!" RP 1217, 1280-82. Jones ignored the command until police pointed rifles at him. RP 1217-18, 1282. When police ordered Jones to put his hands on top of his head, he initially refused this command as well. RP 1283-84. Police interviewed Jones where

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<sup>7</sup> Mrs. Jones took a route home different than the route Gizmo took. RP 3250-55.

he was detained, and then Jones was escorted to his home to be interviewed.

RP 1878-92.

Before police could interview Jones, Charlotte Wanke drove to the police perimeter around the Jones residence and demanded to see Jones.

RP 1968. Wanke cried when told she could not see him. RP 1653, 1969.

Wanke was eventually allowed to drive through the police barrier and enter to meet with Jones. RP 1971. Jones and Wanke were alone in Wanke's vehicle for 15 minutes before police interviewed Jones. RP 1654-55, 1892, 2394, 3268.

Jones told police he was asleep at the time of the shooting and knew nothing about it. RP 1884. Jones denied knowledge that a police officer had been shot even though his wife had told him about the shooting when she came home. RP 3773.

Police transported George Hill to Jones' location. RP 1325, 3138-39. Hill looked at Jones in the company of other persons and told police that he was not the shooter. RP 1325. Hill later told police he was looking at a blonde-haired man with a goatee standing next to Jones. RP 3181. Nevertheless, police diverted their focus away from Jones after the show-up with Hill. RP 1922.

George Hill later admitted he could not identify the shooter, but he met with a sketch artist nonetheless. RP 1327. The artist created a sketch

from information provided by Hill. RP 1328-30. Police disseminated the sketch to the public. Johnson viewed the sketch from his hospital bed in Oregon and remarked that the sketch “didn’t look anything at all like the person who shot me.” RP 1577, 2847, 2853-54.

The publication of Hill’s erroneous sketch generated countless “tips” from citizens. Appendix F (Discovery Re: Nick Boer).<sup>8</sup> A number of citizens reported that Hill’s sketch resembled two local brothers with a history of drug and property crimes, Nick and Peter Boer. Police documented and investigated each tip. Declaration of Lenell Nussbaum (Appendix A); Appendix F.

Police searched for the Boer brothers on the night of February 13, 2010. Detectives were aware of an outstanding warrant for the arrest of Peter Boer for failure to register as a sex offender. Detectives went to the residence of the mother of the Boer brothers that night about 11 hours after the shooting. Ms. Boer lived in the Land’s End trailer park, about 2½ miles north of where Jones shot Johnson. Police contacted Peter Boer outside of his mother’s trailer. Peter Boer initially lied and said his name was “Nicholas Boer.” Peter Boer admitted his identity when police found photo

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<sup>8</sup> See Appendix A to “Declaration of Lenell Nussbaum,” which includes discovery provided to defense counsel bates stamped pages 47-89. The State additionally provides discovery pages 28, 1088-1096, 1850-51 and 4149-4155, which all reference Nick or Peter Boer. Appendix F to State’s Response.

identification for Peter Boer inside his wallet. Police arrested Peter Boer on the outstanding warrant for failing to register as a sex offender. Peter Boer was booked into the Pacific County Jail. Declaration of Lenell Nussbaum (Appendix E); Appendix F.

Nick Boer was inside his mother's residence and agreed to go to the Sheriff's Office for an interview. At approximately 11:15 p.m. on February 13, 2010, Nick Boer gave an audio-recorded interview to police. Nick Boer denied involvement in the shooting of Johnson. Nick Boer told police that he and his brother Peter and Peter's wife Lynnae Boer were at his mother's residence at the time of the shooting. Nick Boer admitted that he and his brother Peter Boer were drug users. Declaration of Lenell Nussbaum (Appendices E and H).

The investigation of the Boer brothers generated dozens of pages of discovery, including the transcript of the recorded interview of Nick Boer. Appendix F. The State disclosed these documents to Jones' attorneys far in advance of the 2011 trial. Appendix E.

As police identified potential suspects, they e-mailed photographs to the hospital in Portland where Johnson was recovering. RP 1501. Johnson viewed at least 14 photos of potential suspects, including Peter Boer. RP 1500-69, 1578, 1683-85, 2849. Johnson told investigators after each photo that the man in the photo was not the shooter. RP 1578, 1683-85

Johnson knew that whoever shot him seemed particularly interested in the Jones vehicle. RP 1579, 2850-51. Johnson asked to see a photograph of Susan Jones' husband. RP 1575-76, 2851. Police e-mailed a color copy of Jones' DOL photo to the hospital. RP 1535. On February 14, 2010, Johnson viewed Jones' DOL photo and recognized Jones as the person who shot him. RP 1551.

Police arrested Jones in the early morning hours of February 15, 2010 following Johnson's positive identification. RP 1665, 1832, 2706-07. Jones again told police that he did not shoot Johnson and he was asleep at the time. RP 3771-72.

Police booked Jones into the Pacific County Jail on February 15, 2010. Appendix G (Decl. of Mark Patterson). Peter Boer was already in the Jail. Appendix G. Martin Jones and Peter Boer were in the Pacific County Jail together for 90 days over the following months. Appendix G.

After Jones' arrest, investigators obtained a search warrant and searched Jones' home. RP 2105. Investigators found a box of ninety-seven unfired .22 short CCI cartridges in a dresser drawer in Jones' bedroom. RP 2122-23, 2460. This was the same brand and caliber of ammunition used to shoot Johnson. The fired .22 short CCI cartridge from the crime scene and the ninety-seven unfired CCI bullets from Jones' home had a "C" logo stamped on them, which is the logo for CCI ammunition. RP 2445, 2461-

62. CCI stamped its “C” logo onto cartridge casing heads using a “bunter,” which is a hard metal tool that impresses a letter or symbol onto the softer metal base of a cartridge casing. RP 2297, 2462.

Jones was a former bail bondsman and previously had a concealed weapons permit. RP 3200, 3668, 3675. Jones told Charlotte Wanke’s husband that he owned a handgun. RP 1825-26, 1830. However, police did not find a handgun when they searched the Jones residence on February 15, 2010. RP 2042.

A forensic scientist from the Crime Lab, Johan Schoeman, used a comparison microscope to conduct a tool mark comparison of the head stamp on the fired .22 short caliber CCI cartridge from the crime scene to the ninety-seven unfired .22 short caliber CCI cartridges from Jones’ bedroom. RP 2462. Schoeman concluded that the “C” logo on forty-eight of the ninety-seven unfired .22 short caliber CCI cartridges from the box in Jones’ bedroom was stamped by the same bunter that stamped the “C” logo on the fired cartridge casing from the crime scene. CP 1087-88, RP 2475.

**C. Procedural History-Trial**

On February 18, 2010, the State filed an information in Pacific County Superior Court charging Jones with one count of attempted murder in the first degree and one count of assault in the first degree. Appendix H

(Information). On August 20, 2010, the court transferred venue to Pierce County. Appendix I (Order on Motion to Change Venue)

On January 3, 2011, the State amended the information to a single count of attempted murder in the first degree. Appendix J (Amended Information). The amended information also alleged that Jones was armed with a firearm and knew Johnson was a law enforcement officer performing his official duties at the time of the offense. Appendix J.

Attorneys David Allen and Todd Maybrow represented Jones during the trial proceedings. The State disclosed to Jones' attorneys the many documents related to the hundreds of tips reported to police, including dozens of documents pertaining to the Boer brothers. Jones' trial counsel knew that Nick Boer was a potential "other suspect." Appendices E, F.

Jones' trial team conducted an exhaustive investigation. In addition to review of the discovery, Jones' trial team conducted interviews of at least 35 witnesses where the State attended the defense interview. The defense likely interviewed other witnesses without the State present. Appendix E.

The State moved to exclude evidence of "other suspects."<sup>9</sup> Jones opposed the motion and sought to introduce "other suspect" evidence, but after investigation and review of discovery, Jones declined to offer either

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<sup>9</sup> Supplemental Declaration of Lenell Nussbaum (Appendix A-1)

Boer brother as an “other suspect.”<sup>10</sup> Instead, Jones offered evidence that approximately 40 minutes prior to the shooting, Trooper Greene saw an unknown white male walking down Pacific Avenue, the main street of Long Beach.<sup>11</sup> The trial court granted the motion to exclude this evidence because Jones presented no evidence connecting the white male to the shooting.<sup>12</sup>

Jones filed many motions to suppress evidence. Jones moved to suppress Johnson’s identification of Jones as unduly suggestive. RP 410-40. The trial court agreed that some of the procedures were suggestive, but the identification itself was reliable and deficiencies went to the weight of the evidence and not admissibility. Appendix K (Order). This court affirmed the ruling. Appendix L (Opinion of the Court of Appeals).

Jones moved to exclude the forensic scientist’s testimony that the same bunter that stamped the “C” logo on the fired cartridge casing from the crime scene also stamped the “C” logo on 48 of the unfired cartridges in the box from the nightstand of Jones’ bedroom.<sup>13</sup> Jones moved for a *Frye v. United States*, 293 F.1013, 34 A.L.R. 145 (D.C. Cir. 1923)<sup>14</sup> hearing at trial based on a report issued by the National Research Council of the

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<sup>10</sup> Appendix A-2 to Supplemental Declaration of Lenell Nussbaum.

<sup>11</sup> Appendix A-2 to Supplemental Declaration of Lenell Nussbaum.

<sup>12</sup> Appendix A-4 to the Supplemental Declaration of Lenell Nussbaum.

<sup>13</sup> Appendices B-1 and B-2 to Supplemental Declaration of Lenell Nussbaum.

<sup>14</sup> *Frye v. United States*, 293 F.1013, 34 A.L.R. 145 (D.C. Cir. 1923). Under *Frye*, novel scientific evidence is only admissible when it is based on methods that are generally accepted in the relevant scientific community. *Id.* at 1014.

National Academies of Science entitled *Strengthening Forensic Science in the United States: A Path Forward*. (NAS/NRC report):<sup>15</sup> Based on the NAS/NRC report, Jones argued that tool mark evidence, in this case bunter mark evidence, was unreliable and no longer accepted in the relevant scientific community.<sup>16</sup> CP 369-78.

The trial court denied Jones' motion for a *Frye* hearing, finding that "bunter mark evidence is a type of tool mark evidence, and such evidence is not new and novel scientific evidence requiring a *Frye* hearing."<sup>17</sup> The court further found that expert testimony would assist the trier of fact because such evidence is beyond the general knowledge of a layperson, and the defense could attack the weight and credibility of the evidence without restriction.<sup>18</sup>

The parties tried the case over seven weeks in January-February 2011. A representative from CCI, Brett Olin, testified that CCI uses bunters to stamp its logo on the head of cartridge casings. RP 2298. Olin described a bunter as a machine with a hard metal carbide piece with CCI's "C" logo embossed on it. RP 2298-99. The bunter stamps the "C" logo onto the softer

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<sup>15</sup> National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009). <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> The State will cite this report as "NAS/NRC," which Jones refers to as the "NAS report."

<sup>16</sup> Appendices B-1 and B-2 to Supplemental Declaration of Lenell Nussbaum.

<sup>17</sup> Appendix B-4 to Supplemental Declaration of Lenell Nussbaum.

<sup>18</sup> Appendix B-4 to Supplemental Declaration of Lenell Nussbaum

metal head of CCI cartridges coming down an assembly line. RP 2299. Olin testified that CCI boxed the ammunition seized from Jones' bedroom in 1999. RP 2304. Olin testified that a single bunter might stamp millions of cartridge casing heads before it was retired. RP 2301. The jury considered Olin's testimony before returning a verdict.

Schoeman explained that tool mark comparison is based on the proven premise that a hard piece of metal can leave an identifiable mark on a softer piece of metal that can be compared to a similar mark on another object. RP 2418-20. Schoeman testified that no two bunters would leave the exact same mark on a cartridge casing because microscopic differences in each bunter would be identifiable. RP 2463. Schoeman opined that the same bunter that stamped the CCI .22 fired cartridge casing from the crime scene also stamped many of the CCI .22 unfired cartridges from the box in Jones' bedroom. RP 2475. Schoeman admitted he had never compared bunter marks on a cartridge casing, but it was no different than comparing any other tool mark left by a mass-manufactured metal tool. RP 2479, 2507-08.

Jones' counsel extensively cross-examined both the CCI rep and Schoeman. RP 2476-2524. Jones' counsel used the NAS/NRC report to attack the reliability and credibility of Schoeman's conclusions. *Id.* The jury considered all of this testimony before reaching a verdict.

Charlotte Wanke testified. RP 1598-1669. Wanke denied calling Jones' home phone at 12:09 a.m. and receiving no answer even though her cell phone records indicated that she did. RP 1622. Wanke claimed little memory of talking to Jones on his cell phone before and after the shooting even though her phone records indicated that their cell phones connected numerous times. RP 1622-24, 1634. Wanke claimed little to no memory of what she discussed with Jones during the numerous cell phone calls immediately before and after the shooting. RP 1622-24, 1634-35. Wanke admitted "driving around" Long Beach, but had no explanation for why she frantically drove around Long Beach after the shooting looking for something or someone.<sup>19</sup> RP 1637-38, 1648. Wanke testified she was told there was a shooting but she was just driving around "wasting time." RP 1641. Jones deposited voice mail messages into Wanke's cell phone voice mail during the time immediately before and after the shooting, but Wanke deleted them the next day and claimed no memory of their content when asked. RP 1634-35.

Jones testified in his own defense and denied that he shot Johnson. RP 3731. Jones told the jury he was home alone when the shooting occurred. RP 3732. Jones denied or claimed lack of memory of the phone calls he

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<sup>19</sup> The State's theory was that Wanke was either trying to find Jones to help him avoid the police search and get home after the shooting; or she was trying to help discard the gun used to shoot Trooper Johnson.

exchanged with Charlotte Wanke or what they talked about before and after the shooting despite cell phone records showing otherwise. RP 3746, 3750, 3759, 3764, 3770.

In closing argument, Jones' counsel argued that George Hill had excluded Jones as a suspect, Trooper Johnson's identification was unreliable, the K9 track was unreliable, the bunter mark evidence was unreliable, the police investigation was shoddy and biased, and Martin Jones was innocent. RP 3946-4039. After considering all of the evidence and Jones' arguments, the jury returned a verdict of "guilty."<sup>20</sup>

#### **D. Jones' Direct Appeal**

Jones appealed the judgment and sentence. The appellate proceedings lasted from 2011-2016. Jones argued that the trial court erred by admitting the bunter mark evidence and Johnson's identification of Jones. Appendix L. The Court of Appeals affirmed those rulings, but reversed the judgment on public trial grounds. Appendix L. The Washington Supreme Court reversed the Court of Appeals and reinstated the judgment in a decision that became final on May 13, 2016. *State v. Jones*, 185 Wn.2d 412, 372 P.3d 755 (2016); Appendix B (Mandate).

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<sup>20</sup> Appendix C-1 to Declaration of Lenell Nussbaum (Verdict From for Count I).

### **E. Post-Appeal**

In 2014, while the appeal was still pending, an investigator hired by Jones contacted Peter Boer in prison and took a rambling recorded statement from him.<sup>21</sup> Jones also obtained two handwritten declarations from Peter Boer—one in 2014<sup>22</sup> and one in 2015<sup>23</sup>. In the 2014 declaration, Peter Boer claimed that when the brothers heard that an acquaintance had reported Nick as a possible suspect, Nick laughed and said, “Yep, I shot that guy. I do all of the bad shit in this town.”<sup>24</sup> Peter Boer claimed in his recorded interview for Jones that his friend Ken Parks also overheard the statement.<sup>25</sup>

In 2017, Jones’ lawyer for this PRP and a new investigator, Win Taylor, re-contacted Peter Boer in prison.<sup>26</sup> Peter Boer told Jones’ lawyer and Taylor that his brother Nick was “joking” when he made statements about shooting the trooper.<sup>27</sup> Peter Boer told the lawyer and Taylor that after the shooting, an acquaintance of the Boer brothers named Jason Hall contacted police and reported that Hill’s sketch looked like Nick Boer.<sup>28</sup> Peter Boer told Jones’ lawyer and Taylor that he and Nick thought this was very funny because they believed Hall was drunk when he called the police.

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<sup>21</sup> Appendix C to Amended PRP (Oral Examination of Peter Boer).

<sup>22</sup> Appendix A to Amended PRP (Declaration of Peter Boer on 8/8/14).

<sup>23</sup> Appendix B to Amended PRP (Declaration of Peter Boer on 8/25/15).

<sup>24</sup> Appendix A to Amended PRP.

<sup>25</sup> Appendix C to Amended PRP.

<sup>26</sup> Declaration of Winthrop Taylor at 1 (paragraph 3).

<sup>27</sup> Declaration of Winthrop Taylor at 3 (paragraph 12).

<sup>28</sup> Declaration of Winthrop Taylor at 3 (paragraph 12).

Peter Boer told Jones' lawyer that while laughing about Hall's report to police, Nick Boer jokingly said he shot the trooper.<sup>29</sup>

Taylor collected declarations from Mike McLeod—a person Peter Boer said he used to get high with—and Mike's father Greg McLeod.<sup>30</sup> The McLeods declared that Peter Boer said that Nick Boer admitted shooting the trooper.<sup>31</sup> Neither McLeod had personal knowledge of anything nor heard Nick Boer say anything.<sup>32</sup>

Taylor collected declarations from Jason Hall<sup>33</sup> and Jessica Thomas,<sup>34</sup> two persons who contacted police in February 2010 and reported that Hill's sketch looked like Nick or Peter Boer, information that was disclosed to Jones' trial counsel. Appendix E. Hall and Thomas repeated the same information provided to Jones' defense counsel prior to trial.<sup>35</sup>

Taylor also contacted Lynnae Boer—Peter's wife--and Nick Boer in 2017. Appendix M (Declaration of Nicholas Dean Boer). Both disputed Peter Boer's claims that Nick Boer made any admissions about shooting a

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<sup>29</sup> Declaration of Winthrop Taylor at 3 (paragraph 12).

<sup>30</sup> Declaration of Gregory Michael McLeod, Appendix E to Amended PRP and Declaration of Gregory D. McLeod, Appendix E to Amended PRP.

<sup>31</sup> Declaration of Gregory Michael McLeod, Appendix E to Amended PRP and Declaration of Gregory D. McLeod, Appendix E to Amended PRP.

<sup>32</sup> Declaration of Gregory Michael McLeod, Appendix E to Amended PRP and Declaration of Gregory D. McLeod, Appendix E to Amended PRP.

<sup>33</sup> Declaration of Jason Hall, Appendix G to Amended PRP.

<sup>34</sup> Declaration of Jessica Thomas, Appendix H to Amended PRP.

<sup>35</sup> Appendices G and H to Amended PRP.

trooper. Appendix M. Jones did not include the statements Taylor took from Lynnae Boer or Nick Boer in the attachments to his PRP.

Taylor also contacted Ken Parks, who according to Peter Boer overheard Nick Boer's alleged confession.<sup>36</sup> Parks told Taylor he had no memory of Nick Boer admitting to shooting a trooper.<sup>37</sup>

## V. LAW AND ARGUMENT

Collateral relief undermines the finality of litigation, degrades the prominence of the trial proceedings, and sometimes costs society the right to punish guilty offenders. *In re Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). *Id.* These significant costs require that collateral relief be limited. *Id.* An error that might justify or even require reversal on direct appeal will not necessarily support a collateral attack on the judgment and sentence. *Id.* In a personal restraint action, courts draw inferences, if any, in favor of the validity of the judgment and sentence and not against it. *In re Hagler*, 97 Wn.2d 818, 825-26, 650 P.2d 1103 (1982).

The petitioner in a personal restraint action has the burden of proving claims by a preponderance of the evidence. *In re Gentry*, 137 Wn.2d 378, 409, 972 P.2d 1250 (1999). The burden is on the petitioner to prove with competent evidence (a) a constitutional error that resulted in

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<sup>36</sup> Declaration of Winthrop Taylor at 4 (paragraph 15).

<sup>37</sup> Declaration of Winthrop Taylor at 4 (paragraph 15).

actual prejudice, or (b) a non-constitutional error that resulted in a fundamental defect constituting a complete miscarriage of justice. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). Hearsay is not competent or admissible evidence in a personal restraint proceeding. *In re Yates*, 177 Wn.2d 1296 P.3d 872 (2013).

A court reviewing a personal restraint has three options: (1) dismiss the petition, (2) grant the petition, or (3) remand to superior court for a determination of the merits or a reference hearing. RAP 16.11(b); *In re Rice*, 118 Wn.2d 867, 885, 828 P.2d 1086 (1992). If alleged facts would potentially entitle the petitioner to relief, a reference hearing may be ordered to resolve materially disputed facts necessary to resolve the legal claim. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 885-86, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed.2d 344 (1992). However, a reference hearing is not a discovery device to determine if there is available evidence that could prove a claim. *Matter of Moncada*, 197 Wn. App. 601, 605, 391 P.3d 493 (2017).

**A. Peter Boer’s statement that Nick Boer jokingly admitted to shooting Johnson is incompetent hearsay, would not change the outcome of the trial, and was discoverable before trial**

Jones presents only incompetent evidence as proof of his claim that Peter Boer’s statements from 2014 constitutes “newly discovered evidence.” Jones argues that Peter Boer’s testimony would change the

outcome of the trial, but in so arguing he ignores, minimizes, or mischaracterizes the considerable evidence that caused the jury to find Jones guilty beyond a reasonable doubt. Peter Boer's statements, if true, were also discoverable at trial by the reasonable exercise of due diligence.

**1. Jones' "evidence" is incompetent**

Hearsay is not competent evidence justifying relief in a personal restraint petition. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 27, 296 P.3d 872 (2013). In *Yates*, the Washington Supreme Court reviewed aggravated murder convictions and a death sentence. *Yates*, 177 Wn.2d 1 (2013). In his personal restraint petition, Yates argued the courtroom was closed during part of his trial, which if true could warrant reversal. *Yates* at 27. Yates presented two declarations in support of his claim: (1) a declaration from a defense investigator that a juror told her that the courtroom was closed, and (2) a declaration from the prosecutor who tried the case that she did "not recall members of the public being in the courtroom" during voir dire. *Id.* There was no declaration from the juror. The court held that hearsay from the juror was not competent evidence. *Id.* The court held that the prosecutor's lack of memory did not establish any fact that would justify relief or a reference hearing. *Id.* The court dismissed the petition. *Id.* at 66.

Similarly, Jones' newly discovered evidence is hearsay from Nick Boer and a lack of memory from Ken Parks. Like the missing declaration

from the juror in *Yates*, Jones' petition is missing a declaration from Nick Boer himself that he shot Johnson; or a declaration from anyone who says he or she *saw* Nick Boer shoot Johnson. Similarly, like *Yates*, Ken Parks' lack of memory does not establish any fact that would justify relief or a reference hearing.

Jones actually interviewed Nick Boer, but Nick Boer denied ever making such a statement.<sup>38</sup> The State presents Nick Boer's declaration for this court's consideration, which *is* competent evidence. Appendix M. Nick Boer denies what Peter Boer told Jones' investigators in 2014. Appendix M. Although the declarations of Peter Boer and Nick Boer offer differing facts, there is no dispute of material fact justifying a reference hearing because Jones fails to provide any competent evidence that Nick Boer ever said anything to anyone about shooting a trooper. The only competent evidence for the court to consider is Nick Boer's declaration, which does not support Jones' claim that Nick Boer claimed responsibility for the shooting. He denied that he did.

Jones is not entitled to a reference hearing simply because Peter Boer's statements raise the speculative possibility that Nick Boer shot

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<sup>38</sup> Declaration of Winthrop Taylor at 3-4 (paragraph 14). Taylor interviewed Nick Boer in March 2017, but admits only that Nick Boer "declined to help Martin Jones in any way." Declaration of Winthrop Taylor at 3. Nick Boer clearly denied shooting Trooper Johnson or making any admissions in his declaration. Appendix K.

Johnson. A reference hearing is not a vehicle to see if a claim might be true where there is no competent evidence of the claim in the petition itself. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed.2d 344 (1992) (emphasis added).

Speculation, conjecture and hearsay do not warrant a reference hearing. *Id.* Jones produces no competent evidence and is not entitled to a reference hearing to try to find some.

Jones does not cure the fatal defects in the competency of his evidence by heaping hearsay on top of hearsay. Mike McLeod's declaration<sup>39</sup> relates an out-of-court statement by Peter Boer relating the same out-of-court statement by Nick Boer, i.e., hearsay within hearsay. Greg McLeod's<sup>40</sup> declaration relates an out-of-court statement by Mike McLeod relating an out of-court-statement by Peter Boer relating an out-of-court statement by Nick Boer, i.e., hearsay within hearsay within hearsay. Appendix E. In the end, there is nothing but hearsay presented to this court, which is not competent evidence. *Yates*, 177 Wn.2d at 27.

Jones' investigator Win Taylor also declares that when he contacted Peter Boer in 2017, Boer told him that Nick Boer was "joking" when he made a statement about the shooting and that everyone thought it was

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<sup>39</sup> Appendix D to Amended PRP.

<sup>40</sup> Appendix E to Amended PRP.

“funny.” Declaration of Winthrop Taylor at 3. According to Peter Boer, the Boer brothers thought it funny that Jason Hall called the police while drunk and reported Nick Boer as a suspect. *Id.* According to Peter Boer, Nick joked that he was the bad apple of the town and so he must have shot the trooper as they laughed about Hall’s report to police. *Id.* A hearsay statement made in jest falls short of the standard necessary to justify a new trial based on newly discovered evidence. Jones’ first claim should be dismissed for failure to produce competent evidence supporting the claim.

**2. Jones fails to establish a claim of newly discovered evidence**

The standard applied under RAP 16.4(c)(3) for a request for new trial based on newly discovered evidence is the same standard applied to a motion for new trial based on newly discovered evidence. *In re Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001). The petitioner must demonstrate that the evidence in question (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. *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). If any of the five factors are absent, relief is not to be granted. *In re Brown*, 143 Wn.2d at 453. Jones’ petition fails to establish each factor.

**a. Peter Boer's statement that Nick Boer jokingly said he shot the trooper would not change the outcome of the trial**

If Jones can establish that Peter Boer's testimony is somehow competent and admissible, he must next prove that Nick Boer's jest that he shot Johnson would probably change the outcome of the trial. *State v. Williams*, 96 Wn.2d at 223. Jones fails to establish this criterion.

Peter Boer would testify—if allowed—that his brother Nick jokingly said he shot Johnson. Peter would explain that when Nick allegedly made the statement, the two were laughing about their drunk friend calling the tip line to report Nick as a suspect.<sup>41</sup> Nick Boer would deny that he shot anyone or that he ever said that he shot anyone, joking or not.<sup>42</sup> Ken Parks—the only other person present according to Peter Boer—would similarly claim no memory of such a remark.<sup>43</sup> The addition of Peter Boer's testimony would not undermine the strength of the State's evidence.

Jones simply reargues the evidence from trial already considered by the jury to try and portray the evidence differently than the jury saw it. Jones repeats his arguments from trial that he had no motive to commit the crime, George Hill excluded Jones as a suspect, Trooper Johnson's identification was unreliable, the K9 track was unreliable, the bunter mark evidence was

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<sup>41</sup> Declaration of Winthrop Taylor at 3 (paragraph 14).

<sup>42</sup> Appendix M (Nicholas Boer); Declaration of Winthrop Taylor at 3.

<sup>43</sup> Declaration of Winthrop Taylor at 4 (paragraph 15).

unreliable, and the police investigation was biased and shoddy. There is nothing “new” about these arguments and nothing “new” about the evidence that Jones cites in support of them. The jury considered both.

Jones ignores all of the evidence that convinced the jury he was “guilty.” Jones had motive to commit the crime because he knew that WSP had pulled his wife over, arrested her for DUI, and was impounding his vehicle. RP 2627-30, 3238, 3455, 3683, 3685. The cell phone records of Jones and Wanke were direct evidence that Jones was not “asleep” before, during, or after the shooting as he told police. A K9 tracked a human scent from the scene of the shooting to Jones’ house. RP 1054. A search of Jones’ home revealed a box of the same ammunition used in the shooting—CCI .22 shorts—in a drawer in his bedroom. RP 2122-23, 2231, 2460. Johnson had “no doubt” that Jones was the man who shot him. RP 2859.

Jones argues that the jury never heard an explanation for the differing descriptions of the shooter between George Hill and Trooper Johnson. Jones litigated this issue extensively both at trial and on appeal. Jones ignores that Hill was “freaked out” at the shooting and Hill’s own candid admissions to the jury that he did not know who shot Trooper Johnson. Hill was a tow operator not expecting to witness the shooting of a police officer. Hill was manipulating the controls on the side of his truck when Jones first approached prior to the shooting. RP 2810. Hill did not get a good look at

the shooter when the man shot Johnson because Johnson was blocking his view of the shooter's face. RP 1437. Hill did not see the shooter's face when he gave chase and the shooter turned on him because it was "real dark" and he could not see the shooter's face before he dove behind his tow truck. RP 1311, 1319, 1347-48.

Hill told police and the jury that he did not know Martin Jones. RP 1421. Hill testified that when the police drove him to view Martin Jones, he thought they were asking him to look at a blonde-haired man with a goatee standing in the group of people with Jones. RP 3181. Jones' counsel extensively cross-examined Hill about all of his conflicting identifications and statements before the jury returned a verdict. RP 1331-1408.

Trooper Johnson, on the other hand, was a paid professional observer—a police officer.<sup>44</sup> Johnson was accustomed to working alone in remote areas in high-stress environments and maintaining attention to detail despite the stressors. RP 2775-79. Johnson paid particularly close attention to strangers during this period of time because of the recent murders of

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<sup>44</sup> Johnson explained how he is vigilant of strangers while he worked the roads of Pacific County:

JOHNSON: I watch their body language. I keep an eye on their hands. The hands are what hurt you. So I try and see if they are trying to project any—oftentimes a person will telegraph what they are going to do by their body language. So I am watching to see if they are making any type of motion or doing anything out of the ordinary that might tell me some type of action I need to be careful of. . . . I want to make sure that I know what's going on around me, and I do that all the time, wherever I am at. If you are a police officer, you are just always trying to pay attention to your surroundings to stay safe." RP 2777-78.

numerous police officers. RP 2781, 2871-72. Jones ignores Johnson's testimony that he interacted with Jones face-to-face minutes prior to the shooting. RP 2811-18. Johnson was so close to Jones that he "could have reached out and touched him." RP 2816. Johnson testified that he and Jones were "face to face" and he looked at Jones "eye to eye straight on" immediately after the shooting. RP 2830, 2895. Unlike Hill, Johnson gave consistent descriptions and has "no doubt" that Jones is the person who shot him. RP 2859.

Quite simply, the record demonstrated that Trooper Johnson paid close attention to Jones and Hill did not. The jury knew exactly why Trooper Johnson could identify the shooter and Hill could not. The jury considered all of the testimony, and Jones' arguments, before returning a verdict.

In the face of this evidence, a statement from Peter Boer that his brother Nick Boer "jokingly" said he shot Johnson would not change the outcome of the trial, especially where Nick Boer and Ken Parks both dispute it. Jones equally fails to offer competent evidence that Nick Boer paid Johnson, or any other officer, for anything. Jones' offer about drug "shake downs" is not even relevant without an admission by Nick Boer that he shot Trooper Johnson. Jones instead offers only hearsay from a prison inmate with a lengthy history of crimes of dishonesty who admittedly dislikes his

brother. Hearsay from Peter Boer in this context is not the quality of evidence necessary to warrant a new trial or a reference hearing.

**b. Jones could have discovered Peter Boer's statements at the time of trial with the exercise of due diligence**

This court has stated, “[d]oing nothing, and relying entirely upon the efforts of the State, fails to meet requirements of the third element requiring the exercise of due diligence.” *State v. Letellier*, 16 Wn. App. 695, 702, 558 P.2d 838 (1977). Here, the police collected information that related to Nick Boer as a possible suspect. The State promptly disclosed this information to Jones’ very able trial counsel, who reviewed and investigated it. Appendix E. A witness even told Jones’ trial counsel during a defense interview that Hill’s sketch looked like Nick Boer.<sup>45</sup> Appendix N (excerpt of defense interview of Carter Strever).

Jones’ trial counsel were provided with the name, contact info and/or statements of Peter Boer, Nick Boer, Carol May Boer (the Boer brothers’ mother), Lynnae Boer (Peter’s wife), Tresha Childers, Jason Hall, Crystal Johnson, Nina Neva and other persons who reported being with Nick Boer the night of shooting or that Nick Boer or Peter Boer were possible suspects. Declaration of Lenell Nussbaum (Appendix A);

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<sup>45</sup> This same witness told police and the defense that he saw Martin Jones near the scene of the shooting on the night of the shooting.

Appendix F. All of these persons were locatable in Long Beach back in 2010, as demonstrated by the fact that the police contacted each of them. Jones' trial counsel could have (and may have) interviewed all of these persons with the exercise of due diligence. Trial counsel either failed to exercise due diligence, or exercised due diligence but concluded that offering either Boer brother as a suspect was a strategic dead-end. Either way, Jones could have interviewed all of these persons and discovered the information that Peter Boer now claims.

Failure to establish that newly discovered evidence could not have been discovered at the time of trial through the exercise of due diligence is fatal to a claim in a personal restraint petition. *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001). Jones fails his burden of showing that his trial counsel could not have discovered Peter Boer's statements about Nick Boer through the exercise of due diligence.

**3. Nick Boer's out-of-court statements are not admissible as evidence of an "other suspect" nor exempted from the hearsay rule by the exception for statements against interest**

Recognizing that his evidence is incompetent, Jones argues that Nick Boer's alleged out-of-court statements to Peter Boer are (a) admissible evidence of an "other suspect," and (b) excepted from the hearsay rule as "statements against interest" under ER 803(b)(3). Both arguments fail.

**a. The petition fails to establish that evidence of Nick Boer as an “other suspect” would be admissible**

“The constitutional right to present a defense is not unfettered.” *State v. Rehak*, 67 Wn. App. 157, 654, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 113 S. Ct. 2449, 124 L. Ed.2d 665 (1993). The defendant bears the burden of establishing the admissibility of “other suspect” evidence. *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). Other suspect evidence must establish a clear nexus between the other suspect and the crime. *State v. Maupin*, 128 Wn.2d 918, 927, 913 P.2d 808 (1996). Mere motive, ability, and opportunity to commit a crime are not sufficient. *Id.* 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 to clearly point out someone besides the accused as the guilty party.” *State v. Mak*, 105 Wn.2d 692, 716, 718 P.2d 407 (1986) (*quoting State v. Downs*, 168 Wn. 664, 667, 13 P.2d 1 (1932)).

Peter Boer’s unbelievable tale of corruption and mistaken identity falls far short of this standard. There is no “train of facts or circumstances” tending to “clearly” point to Nick Boer as the guilty party. Were Jones’ convoluted theory allowed to play out at trial, he would call Peter Boer to testify that his brother Nick jokingly said he shot the trooper as they laughed

about a drunk friend reporting Nick to the police. The jury would hear evidence that Ken Parks was present for this statement, but has no memory of it. This does not establish a “train of facts or circumstances” that “clearly” point to Nick Boer as the guilty party. Furthermore, the jury would hear Nick Boer adamantly deny that he shot anyone or told Peter Boer that he did so, jokingly or not. Peter Boer’s lengthy list of crimes of dishonesty would show he is not a credible person. Appendix O (Criminal History).

Jones presents no clear nexus between Nick Boer and the crime. Nobody witnessed Nick Boer do anything to Trooper Johnson. Nobody will confirm Peter Boer’s unbelievable story even though he claims others were there to hear it. The only people who allegedly heard the statements—Nick Boer and Ken Parks--deny that they were uttered. Peter Boer admits whatever Nick said was a joke. Peter Boer’s statements that Nick Boer might be the guilty party pales in comparison to the evidence the jury heard about Martin Jones, to the point that the only rational conclusion is that Peter Boer’s statements would not affect the jury’s verdict.

Jones’ reliance on *Holmes v. South Carolina* is unpersuasive. *Holmes* reviewed a South Carolina rule of evidence that excluded “other suspect” evidence if the State presented strong forensic evidence of the defendant’s guilt. *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed.2d 503 (2006). *Holmes* held that South Carolina’s evidence rule

was unconstitutional because it did not allow the accused to present a meaningful defense by both challenging the forensic evidence and offering other suspect evidence. *Holmes*, 547 U.S. at 331. However, *Holmes* reiterated that state courts retain discretion to exclude evidence of “other suspects” so long as they do not preclude the accused from presenting a meaningful defense. *Id.* at 327. The Court approvingly referenced rules from other states, similar to Washington’s, that exclude “other suspect” evidence when the evidence is speculative or lacks a connection between the other suspect and the crime. *Id.*

Unlike the South Carolina evidence rule that violated the rights of the accused in *Holmes*, Washington law does not look at the strength of the State’s evidence when deciding the admissibility of “other suspect” evidence. Instead, as approved in *Holmes*, Washington law looks to whether the defendant’s offered evidence shows “a train of facts or circumstances as tend to clearly point out someone besides the accused as the guilty party.” *State v. Mak*, 105 Wn.2d 692, 716, 718 P.2d 407 (1986). Jones’ incompetent evidence does not do that. Instead, it offers rank hearsay that someone “jokingly” admitted to the shooting. Peter Boer’s offered testimony that his brother jokingly commented that he shot the trooper while they laughed about Jason Hall’s report to police is not evidence that “clearly points out someone besides the accused as the guilty party.” *Mak* at 716.

In *Chambers v. Mississippi* the United States Supreme Court found that a Mississippi rule of evidence violated the accused's constitutional rights in the "other suspects" context. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed.2d (1973). In *Chambers*, a defendant accused of murder sought to introduce evidence that another man, McDonald, committed the murder. It was undisputed that McDonald was at the scene of the murder when it occurred, gave a written confession, a witness saw McDonald commit the murder, and still another witness saw McDonald holding a gun immediately after the victim was shot. *Chambers*, 410 U.S. at 289. Chambers introduced most of this evidence, but when he called McDonald as a witness, the trial court precluded questions about McDonald's confession because McDonald repudiated the confession and Mississippi law did not allow a party to impeach its own witness. *Id.* The U.S. Supreme Court reversed on grounds that application of the Mississippi evidence rule violated Chambers' constitutional rights. *Id.*

Unlike the clear chain of facts and circumstances in *Chambers* that pointed to McDonald as the guilty party, Jones has no similar evidence. Unlike *Chambers*, Jones does not present a signed written confession from Nick Boer, a witness who observed Nick Boer at the scene of the crime, a witness who observed Nick Boer shoot Johnson, or a witness who saw Nick Boer at the crime scene with a gun in his hand. Jones only has the word of

Peter Boer that his brother “joked” that he shot the trooper. Jones’ “evidence” is a statement made in jest and uncorroborated by any other evidence. Peter Boer’s statement hardly establishes a train of facts and circumstances clearly tending to show that someone other than Martin Jones committed the crime.

**b. Nick Boer’s out-of-court statement does not satisfy the hearsay exception for statements against interest**

“Hearsay” is an out-of-court statement offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is not admissible unless specifically allowed by court rule or statute. ER 802.

Nick Boer’s alleged statements to Peter Boer are out-of-court statements offered as evidence to prove the truth of the matter asserted: that Nick Boer shot Johnson. Recognizing that Peter Boer’s declaration relates incompetent hearsay, Jones argues that Nick Boer’s alleged statement qualifies as a “statement against interest.” This argument fails for two reasons: (i) Jones does not establish that Nick Boer is “unavailable,” and (ii) Jones does not identify corroborating circumstances indicating the trustworthiness of the statement.

An out-of-court statement against the declarant's penal interest is admissible only if the declarant is "unavailable as a witness." ER 804(b).<sup>46</sup> Jones concedes, "Nick Boer is available as a witness and subject to cross-examination."<sup>47</sup> Indeed, Jones' investigator met with and took a statement from Nick Boer as recently as March 29, 2017. Nick Boer denied he did anything to Johnson. The State contacted Nick Boer even more recently and he vigorously denied that he shot anyone or admitted to his brother that he did. Appendix M. The parties agree that Nick Boer is available as a witness. An out-of-court "statement against interest" is not admissible unless the declarant is unavailable. ER 803(b).

Even if Jones could escape the availability issue, ER 803(b)(3) also requires "corroboration" of the statement against interest if offered in a criminal case. Here, there is no corroboration. Jones' sole witness does not even corroborate himself. According to Jones' own evidence, Peter Boer would testify that Nick Boer was "joking" when he made the statements at issue. Even if Jones can clear that hurdle, the people who could corroborate Peter Boer's statement, according to Peter Boer himself, would refute Peter Boer's testimony. Nick Boer would adamantly deny Peter Boer's testimony. Ken Parks would claim no memory of hearing a friend admit to shooting a

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<sup>46</sup> "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . ."

<sup>47</sup> Amend. Brief in Support of Amend. Pers. Rest. Petition at 13.

police officer. Jones fails to offer corroborative evidence that would make Nick Boer's out-of-court statement admissible under ER 803(b)(3).

**B. Peter Boer's statement that Nick Boer joked that he shot Trooper Johnson is not competent evidence to prove that Trooper Johnson gave false testimony when he identified Martin Jones as his assailant, would not change the outcome of the trial, and was discoverable before trial**

Jones fails to satisfy each of the five factors required for a new trial based on newly discovered evidence. *State v. Williams*, 96 Wn.2d at 223. Jones is not entitled to any relief. *In re Brown*, 143 Wn.2d at 453.

Without proof, Jones accuses Johnson of giving "false testimony" at trial. Jones' "evidence" that Johnson gave false testimony is the same incompetent hearsay from Peter Boer. Peter Boer's recitation of alleged out-of-court statements from Nick Boer are not competent evidence, and Jones fails to offer anything that shows Johnson knowingly gave false testimony.

Jones also fails the standard for newly discovered evidence. For the reasons discussed above, Jones fails to show that Peter Boer's testimony would change the outcome of the trial, that it was not discoverable before trial by the exercise of due diligence, or that the evidence is not merely impeaching. *Williams*, 96 Wn.2d at 223.

**1. Peter Boer's testimony would not change the outcome of the trial**

There was no reason to believe that Johnson's testimony was false in 2011 and no reason to believe it is false now. Johnson has never wavered from his identification of Martin Jones as the person who shot him. Jones attempted to exclude Trooper Johnson's identification at trial for all of the same reasons he now attacks it in this personal restraint petition. The trial court heard all of these arguments and denied Jones' motion, a ruling affirmed on appeal:

The trial court permitted evidence of Trooper Johnson's eyewitness identification, noting that any defects in the evidence go to the evidence's weight, not its admissibility. It did not abuse its discretion in doing so. We hold that the trial court appropriately allowed the prosecution to present eyewitness identification evidence, leaving for the jury the question of how much credence such evidence deserved.

Appendix L at 22.

At trial, Jones cross-examined witnesses on the suggestive aspects of Johnson's identification of Jones. RP 1561-62, 1265, 1717-27. Jones presented an expert in eyewitness identification who suggested to the jury that Johnson's identification was unreliable. RP 3557-3605. Jones' counsel argued at length in closing that Trooper Johnson's identification of Jones was unreliable. RP 4005-17. After considering all of the evidence and argument, the jury found Jones guilty. Jones' petition merely rehashes

evidence that the jury carefully considered before returning a verdict of “guilty.”

Finally, Jones’ claim relies on statements from Peter Boer, who admits that if his brother said anything, he was “joking”. Jones ignores the statements Nick Boer made to the police in 2010, Jones’ investigator in March 2017, and to the State in October 2017 that he knows nothing about Trooper Johnson’s shooting. Jones ignores his own evidence that Ken Parks, the only person left to corroborate Peter Boer, does not recall Nick Boer admitting to shooting a trooper. Jones’ theory contravenes common sense and ignores the considerable evidence from trial showing that Jones was the guilty party. Jones’ petition fails to establish that the outcome of the trial would probably change if Peter Boer testified.

**2. Peter Boer’s statement was discoverable before trial with the exercise of due diligence**

The statements of Peter Boer were discoverable by Jones before trial for the same reasons discussed above. Jones and his counsel received numerous documents showing citizens reports about the Boer brothers and the police efforts to investigate these tips. Declaration of Lenell Nussbaum (Appendix A); Appendix F. At least one witness even identified the Boer brothers during a defense interview. Appendix N.

Jones' claim that Peter Boer could not admit his brother's involvement before trial because he was waiting until their mother died<sup>48</sup> is specious. If Peter Boer's information has any truth—which the State disputes—it was available for Jones to discover before trial.

**3. Peter Boer's statement merely impeaches Trooper Johnson's testimony that Martin Jones shot him, which does not justify relief on collateral attack**

Jones is required to demonstrate that Peter Boer's testimony is more than "merely impeaching" with respect to Johnson's testimony. *State v. Macon*, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996). Jones offers Peter Boer's proposed testimony as proof that Johnson's identification of Martin Jones was knowingly false. Even if it were competent and "newly discovered," Peter Boer's proposed testimony only serves to impeach Johnson's credibility. It does not "prove" that Johnson knew his testimony was false. The offered evidence is merely impeaching and insufficient to warrant a new trial.

A limited exception to the rule that evidence offered as newly discovered must be more than impeaching was recently recognized by this court in *In re Fero*, 192 Wn. App. 138, 163, 367 P.3d 588 (2016), *review granted*, 187 Wn.2d 1024 (2017). *Fero* followed Division One's

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<sup>48</sup> Amend Brief in Support of Amend. PRP at 7.

opinion in *State v. Savaria*, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996) (overruled in part on other grounds by *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003)). The rule from *Fero* and *Savaria*—presently under review by the Washington Supreme Court—is that newly discovered impeachment evidence can warrant a new trial only if the new evidence “devastates a witness’ uncorroborated testimony establishing an element of the offense.” *In re Fero*, 192 Wn. App. at 163, review granted, 187 Wn.2d 1024 (2017).

Here, even if the *Savaria* rule survives review by the Washington Supreme Court, Jones completely fails to establish that the testimony of Peter Boer would “devastate” the credibility of Johnson’s testimony, or that Johnson’s testimony was “uncorroborated.” Peter Boer is a career criminal with a lengthy history of crimes of dishonesty who admittedly hates his brother. Peter Boer admits that even if his brother said something, he was “joking.” Jones fails to produce evidence to corroborate anything material that Peter Boer has to say.

Johnson, on the other hand, is a decorated peace officer with no history of dishonesty. A plethora of evidence corroborated Trooper Johnson’s testimony identifying Martin Jones as the shooter. A K9 tracked a human scent from the scene of the shooting to Jones’ residence. Jones had the same ammunition used to shoot Johnson in a drawer in his bedroom. Jones had motive and opportunity to commit the crime. Jones lied to police

when questioned about the shooting because cell phone records disproved Jones' claim that he was "asleep" at the time of the crime.

At best, Peter Boer's testimony might be used to impeach Johnson's testimony, but it does not establish that Johnson gave false testimony. Jones fails to establish the very limited exception to the rule that impeachment evidence can warrant a new trial because Peter Boer's testimony would not "devastate" Johnson's testimony. The claim should be dismissed.

**C. Jones' Claim Of A *Brady* Violation For Nondisclosure Of Trooper Johnson's Personnel File And/Or Information About Unrelated Firearms Fails Because Jones Does Not Present Any Evidence That Trooper Johnson's Personnel File Contained Material Information Or That Firearms Unrelated To The Shooting Were Material**

A personal restraint petitioner must state "with particularity facts which, if proven, would entitle him to relief." *In re Rice*, 118 Wn.2d at 886, 828 P.2d 1086. Bald assertions, conclusory allegations, or the petitioner's own speculation and conjecture are insufficient. *In re Rice*, 118 Wn.2d at 886, 828 P.2d 1086.

*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963)<sup>49</sup> and its progeny impose upon prosecutors an affirmative duty to learn of and disclose impeachment evidence that is material to guilt or punishment. *Matter of Pers. Restraint of Lui*, 188 Wn.2d 525, 566, 397 P.3d

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<sup>49</sup> 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

30 (2017). To establish a *Brady* violation, a defendant must demonstrate the existence of each of three necessary elements: (1) the evidence at issue must be favorable to the accused (i.e., exculpatory or impeaching), (2) the State suppressed the evidence at trial by failing to disclose, and (3) the nondisclosure resulted in prejudice to the defendant. *Matter of Lui*, 188 Wn.2d at 566. The mere possibility that undisclosed evidence might have helped the defense or might have affected the outcome of the trial does not establish materiality or prejudice. *Id.*

A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the government's files. *Matter of Lui*, 188 Wn.2d at 566. A broad, unsupported claim that a police officer's personnel file may lead to material information does not justify automatic disclosure of the file. *Id.*

In *Lui*, the State accused the defendant of murder. *Matter of Lui*, 188 Wn.2d at 533. A newspaper article publicized that the lead detective's personnel file contained past discipline for misconduct. *Lui* at 549. The newspaper article further related that the paper was unable to obtain some past allegations of misconduct because the police department identified them as "unfounded" and withheld them from public disclosure. *Id.* at 565-66. Lui was convicted of murder and filed a personal restraint petition alleging a *Brady* violation for the State's failure to disclose the contents of

the detective's personnel file. *Id.* Lui argued that based upon the newspaper article there *might* be additional *Brady* material in the file. *Id.* at 566. Lui demanded that the court order the State to provide those portions of the file not disclosed to Lui. *Id.* The Washington Supreme Court rejected Lui's argument, holding that "Lui fails to present any specific evidence that the State suppressed that would form the basis of a *Brady* violation." *Id.*

**1. Jones fails to produce any competent evidence showing nondisclosure of material information in Trooper Johnson's personnel file**

Like *Lui*, Jones fails to produce any material evidence in Johnson's personnel file that was suppressed by the State. Jones' "evidence" of the claimed *Brady* violation are two WSP interoffice memos from June and August 2010—after the shooting—where WSP advised Johnson that it was not able to satisfy a past request to transfer to Spokane.<sup>50</sup> The reason given was that another trooper who had a hardship took precedence over Johnson's old request to transfer.<sup>51</sup> Johnson was on extended leave when these interoffice memos were issued.<sup>52</sup>

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<sup>50</sup> Declaration of Lenell Nussbaum, Appendix I at pp. 18-19.

<sup>51</sup> Declaration of Lenell Nussbaum, Appendix I at pp. 18-19.

<sup>52</sup> Declaration of Lenell Nussbaum, Appendix G (Excerpt of Interview of Johnson).

Jones' own documents admit that Johnson himself requested the transfer, but WSP never granted it and he spent all 26 years of his service in Pacific County.<sup>53</sup> WSP never transferred him, much less for misconduct.

From this, Jones inexplicably speculates that "WSP had a good reason to transfer Johnson . . . [t]hat reason is unquestionably in his personnel file . . . [i]t should have been disclosed to the defense."<sup>54</sup> Jones' own pleadings directly contradict his unfounded conjecture.

Jones begins his speculation by arguing that the redacted material must be evidence of misconduct. Jones has no evidence to support this statement. He also completely ignores the cover letter he received from WSP wherein WSP advised Jones, "The WSP does not have any public record pertaining to the portion of your request for "Internal affairs Records for Scott L. Johnson."<sup>55</sup> Jones chooses to ignore the exemption log provided to him by WSP, which provided him with codes that explained each redaction. WSP told Jones that it redacted the following information from the file pursuant to the Public Records Act (PRA): job application materials, personal information (SSN, personal phone numbers, personal addresses, personal e-mail addresses, dates of birth, information on dependents, etc.),

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<sup>53</sup> Declaration of Lenell Nussbaum, Appendix I at 9 ("Scott Graduated with the 61<sup>st</sup> Academy Class and was commissioned on July 31, 19845, assigned to District 8, Raymond. Scott remained in Raymond his entire career").

<sup>54</sup> Amended Brief in Support of Amended PRP at 27.

<sup>55</sup> Declaration of Lenell Nussbaum, Appendix I, Letter of April 3, 2014.

employee photographs, and personal financial information.<sup>56</sup> Jones fails to prove that WSP withheld anything of impeachment value from him.

In *Lui*, the defense knew that the police officer in question had a disciplinary history, including additional “unfounded” complaints of misconduct in a personnel file the police withheld from him. *Matter of Lui*, 188 Wn.2d at 565-66. *Lui* held that Lui still had not shown any reason to believe that there was impeachment evidence in the file and dismissed his *Brady* claim. *Id.* This court should do the same under far less compelling facts. Jones provides no evidence that there was impeachment evidence in the file.

**2. Should the court reach the merits of Jones’ claim related to the personnel file, the State provides a copy of the file that proves Jones’ *Brady* claim is entirely unfounded**

Jones requested a copy of Johnson’s personnel file and received the aforementioned redacted copy. Ignoring the redaction codes provided to him, Jones speculates that every redaction must cover nefarious conduct by Trooper Johnson. In support of this claim, Jones offers only the declaration of Win Taylor, a defense investigator. Taylor leaps to speculative conclusions based on his vague “experience” that blacked out pages of a personnel file must be misconduct.<sup>57</sup> Taylor’s declaration is the very

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<sup>56</sup> Declaration of Lenell Nussbaum, Appendix I, “Explanation of Redaction Codes.”

<sup>57</sup> Declaration of Winthrop Taylor at 6-7.

definition of “bald assertion,” “conclusory allegation,” “speculation,” and “conjecture.” Jones’ petition and Taylor’s declaration ignore the PRA, WSP’s advisement that there were no records related to internal affairs investigations of Johnson, and the explanation of the redactions.

With Trooper Johnson’s permission, the State provides the unredacted<sup>58</sup> personnel file. Appendix C. The file contains no evidence of misconduct. The blacked out pages are positive evaluations of a distinguished career over 26 years. Appendix C. Jones’ claim is baseless.

**3. Jones fails to show that the State withheld material evidence of an “unregistered firearm”**

Jones fails to prove any “*Brady* violation” related to a firearm and he continues to ignore or misrepresent the facts. Jones’ “proof” of the *Brady* claim related to firearms is the same discovery that he admits he received pretrial. Jones’ argument, again, makes no sense. Jones does not prove a *Brady* claim by admitting that the very documents he claims the State withheld were provided to him pretrial.

Jones also fails to show that any information about these firearms was material to anything about his case. Jones produces a document he received in discovery that shows that Sgt. Metz booked into evidence some

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<sup>58</sup> To protect Sheriff Johnson’s privacy, the State has redacted his salary information, Social Security Number and personal contact information, which are all irrelevant to this petition.

firearms. Jones does not explain how or why these firearms are material to his case.

The .22 caliber handguns and 9mm handgun that Jones references on page 65 of his PRP were collected from an “other suspect” prior to Jones’ arrest. Appendix P. Police seized the firearms from a potential suspect named Bob Maple. Appendix P. The 2340 log entry from February 13— which Jones did not provide to this court--references the seizure of the identified firearms from Maple. Appendix P. The 0551 entry by Sgt. Metz on February 14, 2010 that Jones provides references that custody of the firearms seized from Maple were transferred to Sgt. Metz and she placed them into evidence in the Naselle Detachment. Appendix P. The firearms have no connection to Jones or the shooting of Johnson. Jones was provide all of this documentation pretrial. Appendix E.

Similarly, Jones fails to show that a notation in WSP records referencing an H&K model firearm “proves” a *Brady* violation. Jones’ “proof” that information about the H&K firearm was withheld from him is an excerpt of discovery that he admits the State gave him before trial. Jones again “proves” that a document was withheld from him at trial by admitting that the document was provided to him as discovery prior to trial. Jones’ argument makes no sense and his claim should be dismissed.

Jones also fails to prove how the alleged lack of disclosure was material. Jones offers no explanation as to why the H&K firearm was relevant to his defense. The document states that Trooper Slemph bought an H&K firearm from Johnson and Sgt. Metz stored it.<sup>59</sup> Jones had this document at trial by his own admission. Jones cross-examined Sgt. Metz at trial and had the opportunity to question her about the log entry if he thought it had any relevance. RP 2986-96. Not surprisingly, he chose not to because the H&K was not material.

Johnson testified that the night he was shot he was armed with his department-issued Smith & Wesson (S&W) firearm. RP 2772. Johnson testified that the S&W was issued to him by WSP only two weeks prior to the shooting. RP 2772. WSP had recently switched the firearm it issued to troopers from an H&K model to an S&W model. Appendix Q (Declaration of Trooper Slemph).<sup>60</sup> WSP policy allowed troopers to buy the old H&K model from WSP; or, another trooper could buy the H&K. Appendix Q. Trooper Slemph bought Trooper Johnson's old H&K. Appendix Q. The firearm was not material and the *Brady* claim fails.

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<sup>59</sup> Declaration of Lenell Nussbaum, Appendix D (Investigation Log Report).

<sup>60</sup> Trooper Slemph has verified the facts in the declaration attached as Appendix Q, but for the reasons set forth in Appendix E, a signed declaration is pending.

**D. Jones' Claim That The PCAST Is "Newly Discovered Evidence" Should Be Dismissed Because The PCAST Is Merely Impeachment Evidence That Would Not Change The Outcome Of The Trial**

Jones fails his burden to show that the "PCAST" is newly discovered evidence that would change the outcome of the trial. *State v. Williams*, 96 Wn.2d at 223. The PCAST is merely impeachment evidence that is almost identical to impeachment evidence previously offered at trial. Jones is not entitled to relief. *In re Brown*, 143 Wn.2d at 453.

Jones moved for a *Frye*<sup>61</sup> hearing at trial based on a report issued by the National Research Council of the National Academies of Science report entitled *Strengthening Forensic Science in the United States: A Path Forward (2009)*. ("NAS/NRC report").<sup>62</sup> From the NAS/NRC report, Jones argued that tool mark evidence, in this case bunter mark evidence, was unreliable and no longer accepted in the relevant scientific community.<sup>63</sup>

The trial court denied Jones' motion for a *Frye* hearing because "bunter mark evidence is a type of tool mark evidence, and such evidence is not new and novel scientific evidence requiring a *Frye* hearing."<sup>64</sup>

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<sup>61</sup> *Frye v. United States*, 293 F.1013, 34 A.L.R. 145 (D.C. Cir. 1923). Under *Frye*, novel scientific evidence is only admissible when it is based on methods that are generally accepted in the relevant scientific community. *Id.* at 1014.

<sup>62</sup><https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> Some documents and opinions refer to this report as the "NRC report." "NRC" is the National Research Council and "NAS" is the National Academies of Sciences. The NRC is the research branch of the NAS. The "NAS report" and "NRC report" are the same document. In his *Frye* motion, Jones referred to this report as "the NAS report." For consistency, the State will refer to this report as the NAS/NRC report.

<sup>63</sup> Appendices B-1 and B-2 to Declaration of Lenell Nussbaum.

<sup>64</sup> Appendix B-4 to Declaration of Lenell Nussbaum.

CP 1234. The court concluded that expert testimony in this area would assist the trier of fact because such evidence is beyond the general knowledge of a layperson and the defense could attack the weight and credibility of any such evidence without restriction.<sup>65</sup>

Jones now contends that a 2016 report issued by the President's Council of Advisors on Science and Technology entitled *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (PCAST)<sup>66</sup> constitutes "new evidence" which entitles him to relief in the form of a *Frye* hearing on the general acceptance of bunter mark evidence in the relevant scientific community. Jones' claim of newly discovered evidence fails because it does not establish each of the following five requirements that the PCAST (1) will probably change the result of the trial; (2) was discovered since 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. *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

The absence of any factor requires dismissal. *Id.* Jones' claim fails because the PCAST would not change the outcome of the trial and is merely cumulative and impeaching.

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<sup>65</sup> Appendix B-4 to Declaration of Lenell Nussbaum.

<sup>66</sup>[https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/report/pcast\\_forensic\\_science\\_report\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/report/pcast_forensic_science_report_final.pdf) The State does not append the PCAST due to its length and refers the court to this internet link. The state will hereafter cite to the report as "PCAST."

**1. The information in the PCAST is not new evidence because it does not specifically address bunter marks**

Jones' assertion that the PCAST contains "new" information relevant to his case fails because the PCAST does not contain a single study or finding regarding bunter marks. The PCAST never even mentions bunter mark evidence. While tool mark analysis encompasses a broad range of examinations, the PCAST limited its assessment to one specific and narrow subset, firearm analysis, which has nothing to do with the bunter mark evidence admitted in Jones' trial. Because the PCAST has no application to Jones' case, it is not "newly discovered evidence."

The PCAST report evaluated six types of forensic feature-comparison disciplines: (1) DNA analysis of single-source and simple-mixture samples, (2) DNA analysis of complex-mixture samples, (3) bite marks, (4) latent fingerprints, (5) firearms identification, and (6) footwear analysis.<sup>67</sup> PCAST at 7. "Bunter mark evidence involves a logo stamped on the shell casing of a bullet using a bunter, a metal tool that impresses a letter or character onto the base of a cartridge case." RP 2299. *State v. Jones*, 175 Wn. App. 87, n.12 (2013). *See also, Rues v. Denney*, 643 F.3d 618 (2011). None of these six categories addressed by the PCAST implicates bunter mark evidence. The PCAST addressed only a specific subset of tool mark evidence, "firearms analysis," where forensic scientists determine whether a specific bullet was fired from a specific firearm.

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<sup>67</sup> The PCAST identified hair analysis as a seventh feature-comparison discipline, but only reviewed materials for that methodology rather than undertaking a full review of that discipline. PCAST at 7.

In firearm analysis, examiners attempt to determine whether ammunition is or is not associated with a specific firearm based on “tool marks” produced by guns on the ammunition. The discipline is based on the idea that the tool marks produced by different firearms vary substantially enough (owing to variations in manufacture and use) to allow components of fired cartridges to be identified with particular firearms.

PCAST at 11, 104.

The State did not offer evidence that Jones fired a specific bullet from a specific firearm. Investigators did not recover the bullet Jones shot into Trooper Johnson’s head because doctors determined it was unsafe to remove it. RP 2856. Investigators never recovered the firearm Jones used to shoot Trooper Johnson. Therefore, no evidence of tool mark firearm analysis of the type addressed in the PCAST was ever offered.

Rather, the State presented expert testimony that the same bunter stamped both the fired cartridge casing found at the crime scene and forty-eight unfired .22 short caliber CCI cartridges found in Jones’ home. RP 2475. That analysis and testimony is completely unrelated to the narrow type of firearm tool mark evidence addressed by the PCAST. The PCAST is not “newly discovered evidence” as it pertains to bunter marks.

**2. The PCAST report is not new evidence because it repeats ideas from the NAS/NRC report published in 2009, which Jones used at trial to impeach the bunter mark evidence in this case**

In Jones’ direct appeal, this Court affirmed the trial court’s ruling that the NAS/NRC report did not warrant a *Frye* hearing on bunter mark evidence. *State v. Jones*, 175 Wn.App. 87, 108, 303 P.3d 1084 (2013)

(conviction overturned on other grounds then reinstated in *State v. Jones*, 185 Wn.2d 412, 372 P.3d 755 (2016)), Appendix L (Opinion of the Court of Appeals). This Court concluded that *Frye* was not implicated in Jones' case because bunter mark evidence is generally accepted in the relevant scientific evidence:

Bunter mark evidence—and firearm ballistics evidence generally—is hardly novel or untried. Although there is no reported Washington appellate case on this issue, numerous courts around the country have permitted firearm ballistic evidence, noting that it is an established science.

*Id.* [citations omitted]. The court was correct. Bunter mark evidence is neither new nor novel, it has long been admitted as evidence in criminal courts across the country, and the PCAST is not “new” evidence pertaining to examination of tool marks because it simply repeats ideas from the 2009 NAS/NRC report.

**a. Bunter mark evidence is not new or novel**

Jones' claim that bunter mark evidence is new and novel evidence fails. As noted, the PCAST does not address bunter marks. Jones' argument is simply a repeat of the arguments he made at trial and the arguments this court rejected on appeal. The court should dismiss this claim because a petitioner may not renew issues raised and rejected on direct appeal. *In re Stenson*, 150 Wn.2d 207, 220, 76 P.3d 241 (2003).

Even if the court revisits the issue, bunter mark evidence has been admitted in state and federal courts across the country for decades. *E.g.*, *State v. Maynard*, 954 S.W. 2d 624, 629 (Mo. Ct. App. 1979) (bunter mark evidence admitted without objection in murder trial); *Commonwealth v. Beliard*, 819 N.E. 2d 556, 565, 443 Mass. 79 (2004) (failure to challenge admission of bunter mark evidence not ineffective assistance of counsel because of the long history of acceptance of such evidence by forensic experts); *People v. Taylor*, 275 Mich. App. 177, 179-80, 737 N.W.2d 790 (Ct. App. 2007) (that bunter mark evidence supported the conclusion that sufficient evidence was presented to sustain murder conviction); *McElrath v. Simpson*, 595 F.3d 624, 628 (6th Cir. - 2010) (bunter mark evidence admitted in complicity to murder trial without objection); *Rues v. Denney*, 643 F.2d 618, 620-22 (Eight Cir. - 2011) (NAS/NCR report not “new evidence” pertaining to bunter mark evidence); *Commonwealth v. Sileo*, 32 A.3d 753, 763-64 (Pa. Super. 2011) (bunter mark evidence admitted without objection in homicide trial); *Tennessee v. Willis*, 496 S.W. 3d 653, 677 (Tenn. 2016) (bunter mark evidence admitted without objection in capital murder case). Neither the 2009 NAS/NRC or the 2016 PCAST changed the admissibility of bunter mark evidence.

**b. Federal and state courts throughout the country widely conclude that the NAS/NRC report does not affect the admissibility of tool mark evidence**

Courts that addressed the issuance of the NAS/NRC report in 2009 consistently concluded that the NAS/NRC report did not affect the admissibility of firearm and tool mark evidence. In *State v. McGuire*, 16 A.3d 411, 429-31, 419 N. J. Super. 88 (Super. Ct. App. Div. 2011) the trial court admitted expert testimony over objection that garbage bags containing the victim's deceased body had the same tool marks on them as garbage bags associated with the defendant. 16 A.3d 411, 429-31 (N.J. 2011). On appeal, McGuire argued that new scientific literature issued since the time of the trial, including the NAS/NRC report, demonstrated that tool mark evidence did not meet the *Frye* standard for admissibility. *Id.* at 434-36. *McGuire* rejected this argument, noting its agreement with other published opinions that "the purpose of the NAS report is to highlight deficiencies in a forensic field and to propose improvements to existing protocols, not to recommend against admission of evidence." *Id.* at 132, citations omitted.

In *Jones v. United States*, 27 A.3d 1130, 1136 (D.C. 2011) the defendant appealed the trial court's admission of expert testimony regarding firearm and tool mark identification without a *Frye* hearing. 27 A.3d 1130, 1136 (D.C. 2011). The D.C. Court of Appeals affirmed the trial court, finding that the motion for a *Frye* hearing was properly denied because

firearm and tool mark analysis is not new or novel. *Id.* at. 1136-37. The court rejected argument that the 2009 NAS/NRC report issued after the trial should impact its decision because “[a]lthough such evidence is not properly before us, even after considering it, we are still unpersuaded that pattern matching is no longer generally accepted.” *Id.* at n. 7.

In *People v. Robinson*, 2 N.E. 3d 383, 402 (Ill. 2013) the Illinois Court of Appeals held that the trial court properly denied the defendant’s request for a *Frye* hearing on the general acceptance of microscopic firearms comparison and properly allowed expert testimony on the subject at trial. 2 N.E. 3d 383, 402 (Ill. 2013). *Robinson* conducted an extensive survey of judicial decisions from state and federal courts across the country, noting that lengthy *Frye* and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)<sup>68</sup> hearings were held regarding tool mark evidence. *Id.* After this extensive review, *Robinson* found that courts “uniformly conclude tool mark and

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<sup>68</sup> The admissibility of novel scientific evidence is determined through application of either the *Frye* test or the *Daubert* test. The *Frye* test was established in 1923 by the United States Court of Appeals of the District of Columbia Circuit. 293 F. 1013 (D.C. 1923). Under *Frye*, the court's role is to determine whether a theory has been generally accepted in the relevant scientific community. In 1993, the United States Supreme Court rejected the *Frye* general acceptance test. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Despite the national trend towards *Daubert*, Washington continues to adhere to the *Frye* standard. *Id.* at 603 (citing *State v. Copeland*, 130 Wn.2d 244, 252, 922 P.2d 1304 (1996)).

firearms identification is generally accepted and admissible at trial.” *Id.* at 402.

*Robinson* considered the points raised in the 2009 NAS/NRC report and similar publications, and observed that while these publications raise concerns regarding such evidence “no court has found these critiques sufficient to conclude the methodology is no longer generally accepted.” *Id.*; *See also United States v. Ashburn*, 88 F. Supp. 3d 239, 247 (E.D.N.Y. 2015)(firearms and tool mark identification remains a proper subject of expert testimony after NAS/NRC report); *State v. Lee*, 217 So.3d 1266, 1278 (La. 2017) (“[E]ven after publication of the NAS Report, courts have addressed, in detail, the reliability of [firearms and tool mark identification] testimony and ruled it admissible[.]”); *United States v. Otero*, 849 F. Supp. 2d 425, 435 (D.N.J. 2012) (notwithstanding NAS/NRC report, “courts have observed that the AFTE theory of firearms and tool mark identification is widely accepted in the forensic community and, specifically, in the community of firearm and tool mark examiners”).

Moreover, in post-conviction cases involving bunter mark evidence, and more generally firearms evidence, courts across the country repeatedly hold that the NAS/NRC report does not constitute “new evidence” warranting post-conviction relief. For instance, in *Rues v. Denney*, the trial court admitted bunter mark evidence over the defendant’s objection and the

jury convicted him of first-degree murder. 643 F.3d 618 (8<sup>th</sup> Cir. - 2011). As in Jones' case, an expert testified that bunter marks on shells recovered from the crime scene matched "a number of bunter mark[s]" on shells recovered from the defendant's home. *Id.* at 620. The conviction was affirmed. *Id.*

After missing the statutory deadline for filing a habeas corpus petition, Rues argued that the 2009 release of the NAS/NRC report constituted "newly discovered evidence" which should extend his filing deadline. *Id.* The Eight Circuit rejected this argument, explaining that concerns regarding the validity of bunter mark evidence raised in the NAS/NRC report were not meaningfully different from Rues' opposition to admission of the evidence at trial. *Id.* at 621-22; *See also People v. Rodriguez*, 79 N.E. 3d 345, 355-56 (Ill. 2017) (affirming trial court's denial of a *Frye* hearing on tool mark evidence because the NAS/NRC report does not sufficiently undermine the reliability of ballistics evidence and instead goes only to the weight not admissibility of such evidence).

Similarly, in *Foster v. Florida*, 132 So.3d 40 (Fla. 2013) the Supreme Court of Florida affirmed the circuit court's order denying post-conviction relief from a capital first-degree murder conviction. 132 So.3d 40 (Fla. 2013). The court rejected a claim that counsel was ineffective for not requesting a *Frye* hearing regarding ballistic tool mark identification

evidence. The court explained that such evidence was not new or novel, and “has been used in the criminal context since at least 1929, and in Florida since at least 1937.” *Id.* at 69.

The court also rejected Foster’s argument that the NAS/NRC report, released post-conviction, constituted “newly discovered evidence.” The court reasoned that the NAS/NRC report cited to publications that existed during the trial and to others published during the years Foster was seeking post-conviction relief. Moreover, the court explained, “new research studies are not recognized as newly discovered evidence.” *Id.* at 72 (citing *Schwab v. State*, 969 So.2d 318, 325 (Fla. 2007)) (“new opinions” or “new research studies” contained in journal articles are not newly discovered evidence). *See also Dennis v. State*, 109 So.3d 680, 700 (Fla. 2012) (NAS/NRC report does not constitute newly discovered evidence).

Like its predecessor the NAS/NRC report, the PCAST does not alter the admissibility of forensic science evidence. The PCAST is not “new” evidence proving that bunter mark evidence is either unreliable or inadmissible.

**c. The PCAST report is an extension of the 2009 NAS/NRC report and does not undermine the admissibility of tool mark evidence**

The PCAST report is not new “evidence” about forensic science, but rather a continuation of ideas in the 2009 NAS/NRC report. The stated

purpose of the PCAST was to determine “whether there are *additional steps* on the scientific side, beyond those already taken by the Administration in the aftermath of the highly critical issuance of the 2009 National Research Council report on the state of the forensic sciences, that could help ensure the validity of forensic evidence used in the Nation’s legal system.” PCAST at x. (emphasis added).

As occurred after the 2009 NAS/NRC report, criminal defendants continue to overstate the importance of the PCAST but courts continue to admit tool mark evidence despite claims that the PCAST somehow changes its admissibility. In *United States v. Gregory Chester, et al.*, 13 CR 00774 (N.D. Ill. Oct. 7, 2016) the court denied a motion to exclude expert testimony on firearm tool mark analysis based on the release of the PCAST. United States District Court For The Northern District of Illinois Eastern Division, No. 13 CR 00774 (N.D. Ill. Oct. 7, 2016), Appendix R at 2 (hereafter “*Chester*”).<sup>69</sup> *Chester* noted that the PCAST “does not dispute the accuracy or acceptance of firearm tool mark analysis within the courts.” *Chester* at p. 2. Instead, the PCAST “provides foundational scientific background and recommendations for further study.” *Chester* at 1. *Chester*

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<sup>69</sup> GR 14.1(b) allows citation to unpublished decisions of other jurisdictions if citation to unpublished decisions is allowed by that jurisdiction. The Federal Rules of Appellate Procedure (FRAP) allow citation to federal decisions listed as “unpublished” or issued after January 1, 2007. FRAP 32.1. Copies of these decisions are appended in accordance with GR 14.1(d).

concluded that the PCAST does not undermine the general acceptance of tool mark evidence, and thus any concerns expressed by the PCAST could be explored on cross-examination. *Chester* at 2.

Courts that have considered motions for *Frye* or *Daubert* hearings based on the issuance of the 2016 PCAST report recognize that these motions are the same arguments that were made after issuance of the NAS/NRC report in 2009. In *Commonwealth v. Aaron Hernandez*, the court held that the “PCAST Report does not significantly alter the findings and conclusions of the NRC reports,” and thus the PCAST did not affect the reliability or admissibility of firearms evidence. *Commonwealth v. Hernandez*, Cause No. SUCR 2014-10417 (Mass. Dec. 21, 2016), & *Commonwealth v. Hernandez*, Cause No. SUCR 2015-10384 (Mass. Nov. 17, 2016), Appendix S at 5.<sup>70</sup>

Similarly, in *Commonwealth v. Legore*, Cause No. SUCR 2015-10363 (Mass. Nov. 17, 2016) the court denied the defendant’s motion for a *Daubert* hearing based on the PCAST. SUCR 2015-10363 (Superior Court of Mass., Nov. 17, 2016). Appendix T (hereafter “*Legore*”). Like this Court

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<sup>70</sup> Unpublished opinions from Massachusetts courts may be cited as non-binding persuasive authority in Massachusetts. *Chase v. Curran*, 881 N.E.2d 792, 794 n. 4 (Mass. 2008); GR 14.1(b). *Hernandez* and *Legore* are appended to the State’s response.

in *Jones*,<sup>71</sup> *Legore* observed that Massachusetts courts have previously determined that firearm comparison evidence is generally accepted and admissible, even following issuance of the 2009 NAS/NRC Report. *Legore* at 1-2. *Legore* examined whether, based on the PCAST, that precedent should be revisited. *Legore* at 2.

*Legore* concluded that the PCAST merely “echoes the concerns articulated by the National Research Council in 2009, regarding the scientific (foundational) validity of comparative ballistics analysis[.]” *Legore* at 3. *Legore* noted that while the PCAST identified studies conducted since the 2009 NAS/NRC report, the PCAST report acknowledged that “no study has undermined the claimed reliability of comparative ballistics evidence.” *Legore* at 3. *Legore* emphasized that the PCAST’s review of comparative firearms analysis “does not significantly alter the findings and conclusions of the NRC report” and therefore the court saw “no reason to conduct a formal *Daubert/Lanigan* hearing based upon the report issued by the President’s Council.” *Legore* at 3-4.

The aforementioned persuasive authorities from other jurisdictions are significant in the consistency of their reasoning and rejection of the claim that the PCAST warrants re-examination of long-standing precedent

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<sup>71</sup> *State v. Jones*, 175 Wn. App. 87, 108, 303 P.3d 1084 (2013) (conviction overturned on other grounds then reinstated in *State v. Jones*, 185 Wn.2d 412, 372 P.3d 755 (2016)). Appendix L.

that tool mark and ballistics evidence is admissible in criminal trials. Contrary to the portrayal in Jones' petition, the PCAST is not a groundbreaking new document. The PCAST simply continued the work of the NAS/NRC and echoed the non-binding findings and recommendations contained in the 2009 NAS/NRC report.

Nowhere in the PCAST do the authors suggest re-examining prior cases that have already gone to trial, yet alone trials like Jones' where trial counsel thoroughly attacked the credibility of the forensic science at issue and the rulings were affirmed on appeal. The PCAST is merely an advisory paper from academicians that "offers recommendations of Federal actions that could be taken to strengthen forensic science[.]" PCAST at 1-2. By its very nature, science is always continuing to evaluate itself and seek further improvement. A report making non-binding recommendations towards this never-ending endeavor does not constitute "newly discovered evidence."

This Court has already rejected the contention that the NAS/NRC report, and by extension the PCAST, provides a basis for granting a *Frye* hearing. Appendix L. Jones' claim that the PCAST supports revisiting his case is contrary to the report's express statement that "PCAST expresses no view on the legal question of whether any past cases were 'erroneously decided.'" PCAST at 144, 150. The PCAST does not markedly differ from

the 2009 NAS/NRC report and is accordingly not “new” evidence. This Court should dismiss Jones’ claim.

**3. Jones fails to establish that the PCAST is not merely cumulative or impeaching**

“Courts should guard against converting disputes between scientific experts into admissibility issues requiring *Frye* hearings, and allow juries to exercise their traditional roles as factfinders.” *State v. Copeland*, 130 Wn.2d 244, 301, 922 P.2d 1304 (1996) (Talmadge, J. concurring). The suggestions in the PCAST go to the weight, not the admissibility, of the bunter mark evidence admitted in this case. The PCAST simply provides additional impeachment evidence that is really no different than the NAS/NRC impeachment evidence the jury already considered. Relief cannot be granted on grounds of “newly discovered evidence” when the only purpose of proffered evidence is to impeach or discredit evidence produced at trial. *State v. Macon*, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996).

Jones thoroughly cross-examined both the State’s expert and a witness from CCI regarding the bunter mark evidence. RP 2308-25, 2327-28, 2476-2514. The cross-examination included specific references to the 2009 NAS/NRC report and the concerns raised in that report. RP 2523-25. The PCAST report and the NAS/NRC report are not meaningfully different. The PCAST simply provides the same grounds for impeachment Jones

already utilized using the NAS/NRC report. Jones presents nothing in his petition to warrant a departure from this Court's previous opinion that reports such as that issued by the NAS/NRC, and now the PCAST, do not entitle him to a *Frye* hearing. *Jones*, 75 Wn. App. at 108, Appendix L.

Use of the PCAST at trial is merely cumulative of the impeachment that already occurred at trial using the NAS/NRC report. Because Jones has not shown that the PCAST provides more than mere impeachment material, he cannot meet the requisite standard for relief. *Macon*, 128 Wn.2d at 800.

**4. There is no material dispute within the relevant scientific community as to the admissibility of bunter mark evidence**

State and federal courts across the country have admitted firearm and tool mark evidence for decades, finding that the methodology is reliable and admissible under both *Frye* and *Daubert*.<sup>72</sup> Jones has not made any showing that a material dispute exists within the relevant scientific

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<sup>72</sup> See *United States v. Bowers*, 534 F.2d 186, 193 (9th Cir. - 1976) *cert denied*, 429 U.S. 942, 97 S. Ct. 360, 50 L. Ed.2d 311 (1976)(record was sufficient to show that tool mark identifications rests upon scientific basis and is a reliable and generally accepted procedure); *Ramirez v. State*, 801 So.2d 836, 845-46 (Fla. 2001)(theory underlying tool mark evidence meets the *Frye* standard of general acceptance in the relevant scientific community and thus has a history of judicial acceptance); *Commonwealth v. Foreman*, 797 A.2d 1005, 1017-18 (Pa. Super. Ct. 2002)(“tool mark identification is a scientifically recognized area for expert testimony in the Commonwealth”); *United States v. Taylor*, 663 F. Supp 2d 1170, 1178 (D.N.M. 2009)(concluding that because the AFTE theory and its methodology is widely accepted among examiners as reliable firearm and tool mark identification evidence is admissible). See also p. 63 of this brief for a listing of numerous cases where bunter mark evidence was admitted.

community that would justify revisiting decades of judicial precedent. The evidence admitted in Jones' trial is not new or novel.

*Frye* requires only general acceptance, not complete agreement, and the mere fact that a generally accepted scientific principle has critics does not warrant a *Frye* hearing:

As we long ago recognized, “[p]ractically every new scientific discovery has its detractors and unbelievers, but neither unanimity of opinion nor universal infallibility is required for judicial acceptance of generally recognized matters.” Neither “complete agreement over the accuracy of the test [nor] exclusion of the possibility of error” is required.”

*State v. Chun*, 194 N.J. 54, 91-92, 943 A.2d 114 (2008) (citations omitted).

**a. The relevant scientific community rejects the PCAST as fundamentally flawed**

The relevant community for purposes of the *Frye* general acceptance test ideally consists of scientists with direct empirical experience with the procedure in question. *People v. Young*, 425 Mich. 470, 481, 391 N.W. 2d (1986). The PCAST did not have any members practicing in the field of firearm or tool mark analysis. See PCAST at v, vi, vii (listing names and credentials of the PCAST members).<sup>73</sup> The PCAST explicitly

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<sup>73</sup>For persuasive authority only, see also the unpublished opinion in *State v. Patel* where the court rejected a claim that issuance of the PCAST warranted a *Daubert* hearing on footwear comparison evidence. “There is no basis on which this court can conclude, as the defendant would have it, that the PCAST report constitutes “the scientific community.” 63 Conn. L. Rprt 672, paragraph 8 (2016 Conn.).

stated that “the findings and recommendations conveyed in this report are the responsibility of PCAST alone” and that the report did not “imply endorsement of the views expressed in this report” by anyone other than the PCAST members. PCAST at 2, 24. Indeed, multiple agencies and professional associations that represent forensic scientists, including those specializing in tool mark and firearm analysis, have released statements emphatically rejecting the methodology and conclusions set forth in the PCAST.

The Association of Firearm and Tool Mark Examiners (AFTE) responded that “[d]ecades of validation and proficiency studies have demonstrated that firearm and tool mark identification is scientifically valid, and that despite the subjective nature of the final comparison state of analysis, competent examiners employing standard, validated procedures will rarely, if ever, commit false identifications or false eliminations.” Appendix U at 1. AFTE expressed concern regarding the PCAST’s “stated brief review of the literature” which failed to consider the full array of existing research into the field of firearm and tool mark examinations. Appendix U at 1. In closing, AFTE noted that several comments in the PCAST report “suggest a fundamental lack of understanding about the range of analysis done in this forensic discipline” and a “lack of adequate

investigation and understanding on the part of the PCAST.” Appendix U at 1-2.

The National Institute of Standards and Technology (NIST) is a federal agency<sup>74</sup> that administers the Organization of Scientific Area Committees (OSAC). OSAC’s Firearms and Tool marks Subcommittee, which is tasked with issuing guidelines and standards for firearm and tool mark identification. OSAC issued a twelve-page report outlining “why [the subcommittee] find PCAST’s analysis to be inaccurate” with respect to firearms and tool mark identification. Appendix V at 1. The report provides citations and references to numerous errors and flaws the firearm and tool mark subcommittee identified by in the PCAST. Appendix V at 2-13.

The Federal Bureau of Investigations (FBI) also released an official statement taking issue with “many of the scientific conclusions and assertions of the report.” Appendix W. The FBI noted that the PCAST “simply created its own criteria for scientific validity and then proceeds to apply these tests to seven forensic disciplines, failing to provide scientific support that these criteria are well accepted within the scientific community.” Appendix W. The FBI noted that the report omitted “numerous published research studies” that provide support for

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<sup>74</sup> NIST is part of the United States Department of Commerce.

“foundational validity” and opined that these omissions “discredits the PCAST report as a thorough evaluation of scientific validity.” Appendix W.

The federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued an official response to the PCAST report expressing their wide-ranging disagreement with the report. “[W]e join our colleagues at the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) in expressing disappointment in the flawed methodology PCAST employed in generating the report, and join them in strong disagreement with PCAST’s recommendations regarding the admission of forensic evidence in criminal trials, particularly with respect to firmly established firearm and tool mark forensic evidence.” Appendix X at 1. The ATF noted that the PCAST failed to consult with expert firearm and tool mark examiners, and echoed the concerns of other forensic organizations that the PCAST failed to consider numerous research studies that support the validity of firearm and tool mark analysis. Appendix X at 1. *See also* “International Association for Identification (IAI) Response to PCAST Report” (noting that the PCAST lacked forensic experts and stating that evaluations of forensic evidence disciplines are “only accurate and reliable if an understanding of the discipline is part of the process”). Appendix Y.

**b. Tool mark evidence is generally accepted by the relevant scientific community and the PCAST's self-established criteria confirms the reliability and validity of such evidence**

PCAST acknowledges that studies prove that forensic examiners can perform tool mark analysis in which they accurately “match” ammunition to the firearm from which it was fired. PCAST at 111. PCAST suggests that further studies, specifically studies characterized as “black box studies,” should be conducted to better determine false positive rates.<sup>75</sup>

Numerous forensic associations have categorically rejected PCAST's claim, which Jones adopts in his brief, that a “black box study” is the only valid method by which to judge forensic science.<sup>76</sup> The PCAST does not dispute that the one black study they deemed to meet their self-established criteria demonstrates the validity and reliability of the ballistic comparison method used by AFTE. Rather, the PCAST simply opines that more black box studies should be conducted. PCAST at 111.

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<sup>75</sup> In a so-called “black box study, “many examiners render decisions about many independent tests (typically “questioned” samples and one or more “known” samples) and the error rates are determined.” PCAST at 6.

<sup>76</sup> *E.g.*, Appendix W (FBI response to the PCAST report) (questioning PCAST's inexplicable failure to explain why studies other than the Ames study do not meet PCAST's criteria for “black box studies” and describing those criteria as “subjectively derived” and “inconsistent and unreliable”); Appendix Z (Statement by the American Association of Crime Laboratory Directors (ASCLD) (disagreeing that black box studies are the singular method by which to judge an entire forensic discipline's reliability and enumerating specific concerns with PCAST.

The PCAST identifies the “Ames Laboratory Study” as an appropriate “black box” study. PCAST at 110-11. That study found a tool mark analysis error rate of 1.5%. PCAST at 110. Although the PCAST laments that there is currently no second black box study replicating the Ames study, AFTE correctly points out “the results of the Ames study were consistent with previous research demonstrating a very low error rate among properly trained examiners.” Appendix U at 1. The Ames study reported error rate of 1.5% parallels the known error rate of the AFTE method. Long-term studies have shown an error rate of between 0.9% for firearms and 1.5% for tool mark comparisons between 1978-1997 and 1.0% for firearms and 1.2% for tool marks between 1998-2002. *United States v. Otero*, 849 F.Supp.2d at 432-34 (citing to the aforementioned studies and noting that although the AFTE theory of tool mark comparison is subjective, it has been repeatedly tested and shown to achieve consistent and accurate results with low error rates).

The results of the Ames study directly support the validity and reliability of the ballistic comparison evidence presented in courts for decades by forensic experts utilizing the AFTE method. The PCAST provides no evidence that the AFTE method is not reliable, but simply calls for additional studies. A call for further studies does not support Jones’ claim that he is entitled to a *Frye* hearing.

The PCAST is the commentary of a small group of academicians and scientists from varying backgrounds and disciplines outside the field of the relevant community of forensic firearms and tool mark analysts. PCAST at v, vi, vii (listing the committee members and their credentials). The PCAST does not challenge the principle that ballistic evidence is comparable, but instead merely calls for additional studies. The full-scale rejection of the PCAST by the relevant scientific community belies Jones' claim that there has been a "paradigm shift" regarding tool mark and firearms evidence. Amended Brief in Support of Amended PRP at 30-31. If anything, the PCAST represents a minority opinion about forensic science from lawyers (who were members of PCAST), academicians, and scientists who do not even practice forensic science. Jones fails to show that a material dispute exists within the relevant scientific community as to the evidence admitted at his trial. Since no such dispute exists, Jones' request to remand this case for a *Frye* hearing should be denied and his claim dismissed.

## VI. CONCLUSION

The court should dismiss the personal restraint petition. Jones does not present competent evidence to support his claim that Nick Boer shot Johnson or Johnson knowingly gave false testimony when he identified Jones as the shooter. No evidence proves Jones' claim that Johnson's personnel file contained discoverable information that could have

impeached him. Finally, Jones fails to prove that the PCAST is “new” evidence that would change the outcome of the trial; it would merely be additional impeachment evidence. The court should dismiss the petition in its entirety.

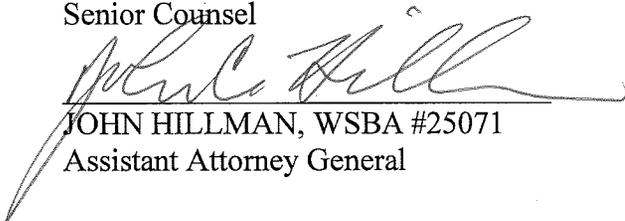
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RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of October, 2017.

ROBERT W. FERGUSON  
Attorney General

By:

  
MELANIE TRATNIK, WSBA #25576  
Senior Counsel

  
JOHN HILLMAN, WSBA #25071  
Assistant Attorney General

NO. 50262-3

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

IN RE THE PERSONAL RESTRAINT  
OF:

DECLARATION OF  
SERVICE

MARTIN A. JONES,  
  
Petitioner.

DAISY LOGO declares as follows:

On Monday, October 30, 2017, I deposited into the United States

Mail, first-class postage prepaid and addressed as follows:

LENELL R. NUSSBAUM  
2125 WESTERN AVENUE, SUITE 330  
SEATTLE, WA 98121

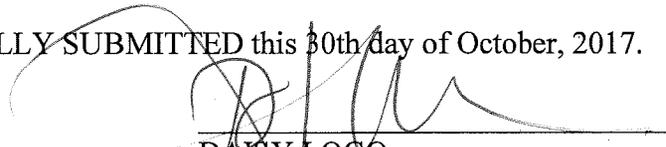
And by electronic mail to: [lenell@nussbaumdefense.com](mailto:lenell@nussbaumdefense.com)

Copies of the following documents:

- 1) State's Response to Personal Restraint Petition
- 2) Motion to File Over Length Brief of Respondent
- 3) Declaration of Service

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 30th day of October, 2017.

  
\_\_\_\_\_  
DAISY LOGO  
Legal Assistant

**WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION**

**October 30, 2017 - 4:04 PM**

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**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

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