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Division II
State of Washington

Kitsap County Superior Court No. 81-1-00394-8

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

In re the Personal Restraint of

ROBERT FRAZIER,

Petitioner

PERSONAL RESTRAINT PETITION

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I. STATUS OF THE PETITIONER

In 1981, Robert Frazier plead Guilty to Felony Murder in Kitsap County Superior Court under Cause Number 81-1-00394-8. State v. Frazier, 99 Wn.2d 180, 661 P. 2d 126 (1983). Mr. Frazier was only fifteen years old at the time of the crime. Frazier, 99 Wn. 2d at 182. He was initially charged in juvenile court, then declined to adult court and sentenced as an adult. Id. In 1981, at the young age of sixteen, Mr. Frazier was sentenced to the maximum possible penalty of life in prison. Id. Because Mr. Frazier was sentenced prior to the Sentencing Reform Act, the Indeterminate Sentence Review Board can decide the amount of time he actually serves in prison rather than the sentencing court.

In 1983, Mr. Frazier filed an Appeal challenging the issue of his inability to plead Guilty in juvenile court. Id. He then filed Personal Restraint Petitions in the Court of Appeals, Division 2, in 2000 in cause number 255332, in 2003 in cause number 311496, in 2004 in cause number 316668, and in 2014 in cause number 459795.

Mr. Frazier was arrested for alleged parole violations on November 17, 2015. Exhibit A, Findings and Conclusions of Indeterminate Sentence Review Board, page 1. A Parole Board hearing was not held until October 20, 2016 to address the violations. Id.

After that parole hearing, the representative of the Indeterminate Sentence Review Board found Mr. Frazier guilty of one of the five allegations against him and not guilty of the other four. Id at page 3. Based on that finding, Mr. Frazier is now serving forty-four months at Monroe Correctional Facility.

II. STATEMENT OF THE CASE

A. Background

When Robert “Andre” Frazier was fifteen-years-old, he, along with an older juvenile co-defendant, confronted an elderly man in an alley and robbed him. Frazier, 99 Wn.2d at 181. The two children beat the 83-year-old man; he lost his balance and fell to the concrete ground. Id. He died a few days later from his injuries. Id. Mr. Frazier plead guilty and was sentenced as an adult to Felony Murder before his eighteenth birthday. Id. This all occurred in 1981. Id. On August 11, 2015, Mr. Frazier was released from prison and began three years of Community Custody Supervision. Exhibit A, Findings and Conclusions of Indeterminate Sentence Review Board, page 1.

B. Procedural History

On November 20, 2015, Mr. Frazier was charged with Assault in the Third Degree and Felon in Possession of a Firearm in King County Superior

Court, Cause Number 15-1-05771-1 SEA. Exhibit F, Information, State v. Robert Frazier, No. 15-1-05771-1 SEA. Those charges stemmed from a Department of Corrections (herein after “DOC”) search of a motel room and a Honda CRV that officers claimed were Mr. Frazier’s residence and vehicle. Id. During the search, officers claimed Mr. Frazier rammed a vehicle into the side of a DOC officer’s van. Id. On January 29, 2016, those charges were dismissed without prejudice and subsequently filed in Federal Court. Exhibit B, Order at page 1, U.S. v. Robert Andre Frazier, No. 16-33RAJ (W. D. Wash. Aug. 25, 2016), ECF #113.

On February 1, 2016, Mr. Frazier first appeared in the Western District of Washington under cause number CR16-00033-RAJ. Id. On February 11, 2016, Mr. Frazier was indicted on one count of Felon in Possession of a Firearm. Id. His attorneys filed a motion to suppress the evidence claiming that there was insufficient reasonable suspicion to believe that Mr. Frazier violated a condition of his parole and thus lacked authority to search. Id. at page 4. One argument focused on the lack of reliability and credibility of the sole source of information, a confidential informant (herein after “CI”). Id. The day prior to the scheduled trial and suppression hearing, defense counsel learned information she believed constituted a Brady v. Maryland violation and filed a motion to dismiss. 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963). After an evidentiary

hearing on the matter, Judge Richard Jones dismissed the federal indictment due to constitutional violations. Exhibit B, Order at page 9. The dismissal order was filed on August 24, 2016. Id.

Nonetheless, the Indeterminate Sentence Review Board (herein after “ISRB”) moved forward with a parole violation hearing relying on the same facts as the underlying two dismissed cases. Exhibit A, Findings and Conclusions of Indeterminate Sentence Review Board. Mr. Frazier was appointed a different attorney than his criminal cases for this hearing. Id at page 2.

DOC officers arrested Mr. Frazier on November 17, 2015. Id at page 1. He was served that same day with notice of one alleged violation of his DOC conditions of not residing at a DOC approved residence. Recording of Indeterminate Sentence Review Board Hearing at 33:45, Indeterminate Sentence Review Board v. Robert Frazier, DOC #280118. Probable Cause for that violation was found on December 3, 2015. Id at 33:50. The ISRB then postponed the hearing due to the pending criminal charges in federal court. Id. On January 28, 2016, the ISRB conditionally released Mr. Frazier to the Federal Detention Center to address the federal charges. Id. Mr. Frazier then filed a request for release to a work release program in order to be closer to medical treatment on March 25, 2016 and the ISRB denied that

request on April 8, 2016. Id. On August 24, 2016, Judge Jones of the Western District of Washington dismissed the federal charges against Mr. Frazier. Id. An initial ISRB hearing was then scheduled for September 1, 2016 but continued at Mr. Frazier's attorney's request. Id. The hearing was rescheduled to September 22, 2016 and continued again at the request of the Community Corrections Officer (hereinafter "CCO") due to witness unavailability. Id. The hearing was then rescheduled to September 29, 2016 when it was again continued because Mr. Frazier's attorney was not available. Id. At the rescheduled hearing on September 30, 2016, Mr. Frazier requested that new counsel be appointed to represent him. Id. The hearing was then rescheduled to October 6, 2016 but was continued again because Mr. Frazier was in Harborview Hospital. Id. The hearing was finally held on October 20, 2016, one day after Mr. Frazier was released from the hospital. Id.

Mr. Frazier is now serving forty-four months in prison after the ISRB found him guilty of failing to obey all laws by assaulting DOC Specialist Winfrey when he was performing his official duties. Exhibit A, Findings and Conclusions of Indeterminate Sentence Review Board, page 7. The ISRB revoked Mr. Frazier's parole based on the same underlying facts associated with the two cases that were dismissed in state and federal courts. Id. at page 7.

C. The Illegal Arrest

On November 6, 2015, a confidential informant contacted Washington State Department of Corrections personnel to share information about a homicide that occurred on November 4, 2015 in the City of Renton. Id at page 4. The deceased was allegedly Mr. Frazier's uncle. Id. While sharing this information, the anonymous informant provided a "tip" that Mr. Frazier might be in possession of a firearm and may be looking to get revenge for the death of his uncle. Id. The informant did not indicate whether he had actually seen Mr. Frazier in possession of a firearm. Id. Instead, the only information provided is: "this person shared with [Officer Rongen] that they were concerned that Frazier was in possession of a gun." Exhibit C, Officer Rongen's Report, page 2. Renton Police had already tried to obtain a statement from Mr. Frazier about possible information he may have had pertaining to this unsolved murder, but he refused to cooperate with them.

On November 15, 2015, this same confidential informant "was informed" by someone else that Mr. Frazier was staying at the Star Motel in Room #2. Id. This anonymous person also informed Officer Rongen that "they saw a gun on the bed in the room which was in a black holster. The gun had a black rubber grip and appeared to be a chrome revolver." Id.

The next day, on November 16, 2015, Officer Rongen and Officer Conaty set up a surveillance operation on the Star Motel. At 11:00 AM, they observed Mr. Frazier and a female identified as Adriana Izquierra walk out of Room #2. Id. Mr. Frazier assisted Ms. Izquierra with placing various bags into a black Honda CRV. Id. The car had temporary tags in the back window. Id. The car was not registered to either Ms. Izquierra or Mr. Frazier. Id. Officers Rongen and Conaty followed the vehicle to its destination. Id. Interestingly, the destination was the *Department of Corrections office* where Mr. Frazier met with his CCO, Officer Moen. Id. Officer Moen did not ask Mr. Frazier if he was living at the Star Motel, but did confirm that Mr. Frazier's residence was still 7325 Rainer Avenue South, Apartment 109. Id. At no time did officers go to 7325 Rainer Avenue South to inquire about whether Mr. Frazier was still residing there, nor did they attempt to contact his fiancé, Teresa, who they knew lived with Mr. Frazier. Exhibit A, Findings and Conclusions, at page 4.

At 5:00 that same day, November 16, 2016, Officer Rongen returned to the Star Motel and interviewed the motel staff. Exhibit C, Officer Rongen's Report. A female staff member confirmed that the motel room was in Ms. Izquierra's name only. Id. Ms. Izquierra had rented the room on November 15 and 16, and had paid \$69.00 each time. Id. Officer Rongen obtained a copy of her registration. Id. Motel staff also confirmed they saw

a black male with Ms. Izquierra. Id. On November 14, a black male by the name of John Burnley rented the room with Ms. Izquierra. Id. On his registration card, Mr. Burnley lists his vehicle as “Honda.” Id.

The next day, on November 17, 2015, Seattle Police Department officers, including a full NCI team, along with Department of Corrections Officers Rongen, Conaty, and Winfrey went to the Star Motel at 9:30 in the morning to arrest Mr. Frazier for failing to reside at his DOC approved address. Id. Officer Conaty’s report confirms that the reason for effectuating a DOC search and arrest was for “violation of DOC conditions of supervision for *not residing at his WA DOC listed address.*” Exhibit D, Officer Conaty’s Report, page 1. Another report authored by Officer Reyes states “The Star Motel is not a DOC approved address. If *located* at the hotel, Frazier would be in violation and subject to arrest.” Exhibit E, Officer Reyes’ report, page 1.

At 11:10 a.m., the Black Honda CRV arrived and backed into a stall near Room #2. Exhibit C, Officer Rongen’s Report, Page 2. The NCI team immediately blocked the car in with a law enforcement van, while Officer Rongen drove his white crew cab Ford pickup “nose to nose with Frazier’s vehicle.” Id. In fact, Officer Rongen’s own bumper was touching the Honda CRV bumper. Id. Officer Conaty immediately charged toward the vehicle

with his gun drawn yelling “police get out.” Exhibit E, Officer Reyes’ Report, Page 1. The law enforcement van driven by Officer Winfrey continued to come toward the Honda, in an attempt to box the vehicle in. Id. The Honda CRV suddenly lurched forward and struck the NCI van driver door. Id. Mr. Frazier then got out and ran. Id. Officers quickly detained Mr. Frazier. Id. In total, there were at least six Seattle Police Department officers and three DOC officers on scene. Id.

Immediately after putting Mr. Frazier in handcuffs and securing him in the back of a DOC vehicle, DOC Officers Conaty and Winfrey searched the Honda CRV. Exhibit C, Officer Rongen’s Report, Page 3. The justification for the warrantless search was: “As Department of Corrections has legal authority over his property, a search of Frazier’s vehicle was performed by Specialist Conaty, Rongen, and Winfrey.” Exhibit E, Officer Reyes’ Report, page 1. Officer Conaty never asked Mr. Frazier if the vehicle was his property. Exhibit A, Findings and Conclusions of Indeterminate Sentence Review Board, at page 7. Further, officers knew that the vehicle was not registered to Mr. Frazier’s name. Id. They never attempted to contact the registered owner. Id. Instead, Officer Conaty determined the vehicle was Mr. Frazier’s property after observing him as a *passenger* in it for one car ride the day before the search, and observing him driving the vehicle back to the hotel that day. Id. at page 5. These same officers observed

Ms. Izquierra driving the vehicle the previous morning. Id. And these same officers knew that Ms. Izquierra was still at the motel prior to their search. Id. Officers never asked Ms. Izquierra whether she owned the vehicle prior to their search. Id.

Officer Conaty explains in his report: “I began to conduct a WA DOC search of the Honda CRV that Frazier was driving ... to look for any violations of Frazier’s conditions of release.” Exhibit E, Officer Conaty’s Report, page 2. In the backseat of the Honda CRV, there was a non-descript camouflage bag. Id. There was no indication who the bag belonged to. Officers Conaty and Winfrey did not attempt to ascertain whether the bag belonged to Mr. Frazier. Id. They did not ask him whether it was his property, despite the fact that he was detained a close distance away in the DOC van. Instead, they immediately searched the bag. Id. They found a black firearm secured in a black nylon holder wrapped in a white towel. Id. The firearm was a .38 Special revolver. Id. DOC officers took the firearm as evidence. Id. They left the bag and all its contents inside the vehicle. Id. There were no documents or items related to Mr. Frazier in the bag. Nothing else was seized from the bag. A fingerprint analysis was completed on December 10, 2015. No latent prints were recovered from the firearm.

After searching the Honda CRV, DOC Officers Rongen and Winfrey then searched the motel room with Ms. Izquierra inside, telling her that they were there “under DOC authority” and were searching for “DOC violations.” Exhibit C, Officer Rongen’s Report, page 2. Inside Ms. Izquierra’s room was a small amount of methamphetamine, and various black bags. *Id.* Officer Rongen did not ask her whether Mr. Frazier lived with her in the hotel, nor whether Mr. Frazier was staying there temporarily with her. *Id.* Ms. Izquierra was interviewed by trial counsel and confirmed that “Frazier was not staying in the room.”

D. The Brady Violation

On the day before the trial and suppression hearing, July 22, 2016, the government disclosed impeachment information about the CI. Exhibit B, Order at page 4. The CI was the sole reason the investigation began, and provided all of the information to DOC necessary to support a search of Mr. Frazier’s property. *Id.* at page 5. Specifically, the government disclosed that the CI failed a polygraph given by DOC on the same day he first came forward with information about Mr. Frazier. *Id.* at page 2. Further DOC records revealed that the DOC officers working with the CI to develop reasonable suspicion required to be able to search Mr. Frazier had serious concerns about his veracity and noted such throughout his DOC

chronological history reports. Id. Thus, the veracity issues were known to DOC officers before they used the CI in Mr. Frazier's case, but they represented him to be reliable and credible. Id. By the time the government provided this information to Mr. Frazier's counsel, the Confidential Informant was no longer available to be cross examined because he was shot and killed by law enforcement on February 26, 2016. Id. at page 6.

Based on this information, Judge Jones of the Western District of Washington in Seattle dismissed the federal charges for a violation of Brady. 373 U.S. 83. The order specifically found that "CCS Rongen would not have begun an investigation into Mr. Frazier but for receiving information from confidential informant." Id. at page 2. Mr. Frazier was not provided the information until "July 22, 2016, mere days before the date of trial and the hearing date for Mr. Frazier's motion to suppress." Id. at page 4. Judge Jones went on to say that "the Government's misconduct was unabashedly negligent." Id. at page 7. "After hearing testimony from CCS Rongen, CCO O'Connor, and CCO Turner, the Court is convinced that the Government's agents have taken a cavalier attitude toward their Brady obligations." Id. at page 9. "Instead, the Government continued to minimize the egregiousness and prejudice to Mr. Frazier caused by the nondisclosure even when confronted with the behavior of its agents." Id. "In this Court's view, that unwillingness to own up to this misconduct supports this

remedy.” Id. “The officers in this investigation continuously passed on their obligations to disclose information about [the CI] even when they had actual knowledge or ready access to this information.” Id. “The Court will not countenance such a careless attitude toward their obligations to identify evidence favorable to the Defendant.” Id. For the cited reasons, Judge Jones ultimately dismissed the charges in federal court due to the Officer’s intentional misconduct in this case. Id.

E. ISRB Hearing

Mr. Frazier went into the Board hearing alleged to have violated the following conditions of supervision: 1) Failing to reside at DOC approved residence on or about 11-17-2015; 2) Failing to obey all laws by having in his control a firearm after having previously been convicted of a serious offense on or about 11-17-2015; 3) Failing to abide by conditions of release by possessing ammunition on or about 11-17-2015; 4) Failing to obey all laws by assaulting DOC Specialist Winfrey, while he was performing his official duties on or about 11-17-2015; and 5) Failing to abide by conditions of release by possessing methamphetamine on or about 11-17-2015. Exhibit A, Findings and Conclusions of the Indeterminate Sentence Review Board, at page 1. The Board issued a decision on October 28, 2016 finding Mr. Frazier not guilty of the first allegation because “while it is possible Mr.

Frazier may have spent a night or possibly 2 at the Star Motel, in this instance the Board Member does not consider this to be a change in residence that rises to the level of a violation.” Id at page 4. The Board member went on to say “it is not unreasonable for a person on supervision to occasionally spend the night away from home. In addition, no one involved went to his approved residence to verify whether or not he was still living there.” Id. The Board also found Mr. Frazier not guilty of allegations 2 and 3 “based on the fact that evidence was not presented to show Mr. Frazier owned the car in question and that in fact Adrianna had been the primary person previously witnessed to be driving the vehicle.” Id at page 7. Finally, the Board found Mr. Frazier not guilty of the fifth allegation “because no evidence was presented to demonstrate Mr. Frazier had dominion and control over Room #2 of the Star Motel on the date in question.” Id.

Mr. Frazier’s counsel for the ISRB hearing stated on the Record that he had just received, that morning, documents and information from the State and Federal investigations and cases from his attorney on those cases but that he “could not actually open those.” Recording of Indeterminate Sentence Review Board Hearing at 23:30, Indeterminate Sentence Review Board v. Robert Frazier, DOC #280118. Mr. Frazier testified that he spoke with his attorney for the hearing one time, for less than thirty minutes. Id at

28:35. He also stated that there are 5,000 pages worth of documents involved in this case. Id at 28:40. His attorney stated “it is not enough that he be appointed a lawyer, I believe that the reason why the rules say that he should have a lawyer is so that his lawyer can effectively represent him.” Id at 30:30. “The reason why is so that his lawyer can represent him effectively.” Id at 30:45. He concluded his argument by saying “there is so much going on in this case that the time I have to represent him is not enough for me to effectively do so.” Id at 31:00.

F. Board Member’s Conflict of Interest

The Chair of the Indeterminate Sentence Review Board is married to the lead office in Mr. Frazier’s case, Officer Rongen. Id at page 2. That Board member immediately recused herself from any involvement with Mr. Frazier’s case. Id. However, the Board member that did hear Mr. Frazier’s case has been on the ISRB with the wife of one of the main witnesses for a year and a half prior to Mr. Frazier’s hearing. Recording of Indeterminate Sentence Review Board Hearing at 00:07, Indeterminate Sentence Review Board v. Robert Frazier, DOC #280118. The Board Member stated during the hearing that she believed that she could be fair and impartial despite that relationship. Id.

III. GROUNDS FOR RELIEF

- A. SUPPRESSION OF EVIDENCE IN A CRIMINAL CASE RESULTING FROM A CONSTITUTIONAL VIOLATION BY GOVERNMENT MISCONDUCT MUST EXTEND TO INDETERMINATE SENTENCE REVIEW BOARD HEARINGS
- B. ONCE THE BOARD DETERMINED THERE WAS NO PROBABLE CAUSE TO ARREST MR. FRAZIER, THE ACTIONS RESULTING FROM THAT UNCONSTITUTIONAL ARREST SHOULD NOT HAVE BEEN THE BASIS FOR A VIOLATION OF PAROLE
- C. COUNSEL WAS INEFFECTIVE FOR FAILING TO REVIEW OR PROVIDE THE COURT WITH ALL RELEVANT INFORMATION PRIOR TO THE BOARD HEARING
- D. THE BOARD MEMBER OF THE INDETERMINATE SENTENCE REVIEW BOARD WHO HEARD MR. FRAZIER'S CASE WAS NOT FAIR AND IMPARTIAL.

IV. PRP PROCEDURAL ISSUES

- A. THE PETITION IS NOT BARRED AS SUCCESSIVE

A subsequent Personal Restraint Petition is being filed with this same Court. This Personal Restraint Petition challenges a finding of the Indeterminate Sentence Review Board from October of 2016. The other Personal Restraint Petition requests a new sentencing for Mr. Frazier after a substantial change in the law. Because the Petitions address two separate hearings by two separate bodies, Counsel chose to file separate Personal Restraint Petitions.

Several provisions of Washington case law, statutes, and rules bar successive claims under certain circumstances. RAP 16.4(d), RCW 10.73.140. None of them apply here. This is Mr. Frazier's first time requesting relief based on this particular ruling of the Indeterminate Sentence Review Board, therefore, this falls under one of the exceptions to the limit on successive Personal Restraint Petitions under RAP 16.4(d). For the same reasons, RCW 10.73.140, which limits the jurisdiction of the Court of Appeals over some successive petitions, does not apply.

B. THE PETITION IS TIMELY

RCW 10.73.090(1) gives a defendant one year—measured from the date the judgment becomes final—to file a collateral attack on his conviction or sentence. Here, Mr. Frazier's re-committment became final when the Board filed its Order of Parole/Community Custody Revocation and Return to State Custody on October 28, 2016. RCW 10.73.090(3)(c). This PRP, filed on the date indicated in the certificate of service, was filed less than one year from that date; this PRP is therefore timely.

C. UNLAWFUL RESTRAINT

A PRP is one way to collaterally attack an unlawful conviction or sentence. To warrant relief, the PRP must show that the petitioner is under "restraint" and such restraint is "unlawful." RAP 16.4(a). Mr. Frazier was convicted of Murder in the First Degree and sentenced to life in prison. Mr.

Frazier is currently serving that sentence in a prison here in Washington State at Monroe Correctional Complex and is, therefore, clearly under restraint. RAP 16.4(b). “Restraint” includes current incarceration, collateral consequences of conviction, or any other “disability” caused by the conviction. In re Martinez, 171 Wn.2d. 354, 362, 256 P.3d 277 (2011).

Such restraint is unlawful and subject to collateral attack if Mr. Frazier can show that his case meets one of the numerous criteria defined in RAP 16.4(c). This definition includes any conviction or sentence that was “entered,” “obtained,” or “imposed” in violation of the Constitution or any other “laws of the State of Washington.” Id. The arguments raised below address violations of Mr. Frazier’s constitutional rights, making his restraint unlawful. RAP 16.4(c)(2).

V. ARGUMENTS FOR RELIEF

A. SUPPRESSION OF EVIDENCE IN A CRIMINAL CASE RESULTING FROM A CONSTITUTIONAL VIOLATION BY GOVERNMENT MISCONDUCT MUST EXTEND TO INDETERMINATE SENTENCE REVIEW BOARD HEARINGS

This is an issue of first impression in Washington State as no appellate court has decided if facts that were the basis for a dismissal of criminal charges due to a Brady violation can be used against the same defendant in a parole revocation hearing regarding the exact same facts and governmental misconduct. In this particular case, unlawful possession of a

firearm charges in State court were dismissed, then Federal charges of Felon in Possession of a Firearm were ultimately dismissed by a judge due to a violation of Brady. Exhibit B, Order. Then Mr. Frazier was convicted of a Parole Violation and sentenced to forty-four months in prison based on the exact same information that the judge deemed was obtained through a violation of Mr. Frazier's constitutional rights. Exhibit A, Findings and Conclusions of Indeterminate Sentence Review Board. The judge dismissed the Federal charges after finding "Mr. Frazier was prejudiced by the Government's late disclosure," and "the government's conduct here was unabashedly negligent." Exhibit B, Order at pages 6-7. That judge went on to say "in fact, the government withheld impeaching information beyond mere questions about [Redacted]'s criminal history- it did not reveal benefits that [redacted] received for [redacted]'s cooperation." Id at page 7. Most importantly for this court's analysis, the judge found "after hearing testimony from CCS Rongen, CCO O'Connor, and CCO Turner, the Court is convinced that the Government's agents have taken a cavalier attitude toward their Brady obligation." Id at page 9. Finally, the court concluded stating "the officers involved in this investigation continuously passed on their obligations to disclose information about [REDACTED], even when they had actual knowledge or ready access to this information. The Court will not countenance such a

careless attitude toward their obligations to identify evidence favorable to the defendant.” Id. The Court sent a very clear message to the officers involved in this incident that their actions led to the dismissal of the Federal charges because they violated Mr. Frazier’s constitutional rights. See Id. The Court specifically stated “the Court finds that this remedy is appropriate to deter future illegal conduct.” Id.

When the ISRB used the same facts, tainted by unconstitutional actions, to send Mr. Frazier to prison for forty-four months, it circumvented the judicial system’s remedy for the government agent’s misconduct. Dismissal of a case by a federal court judge is a rare remedy. “Dismissal is appropriate when the investigatory or prosecutorial process has violated a federal constitutional or statutory right and no lesser remedial action is available.” United States v. Struckman, 611 F.3d 560, 575 (9th Cir. 2010). The Court’s dismissal sent a strong message that the misconduct in this case was particularly egregious. Exhibit B, Order. The Court found misconduct in this case and Mr. Frazier was still sentenced to prison time because the ISRB completely ignored the Federal Court judge’s findings and decision. Exhibit A, Findings and Conclusions. The ISRB and DOC should not be allowed to completely disregard a criminal court’s rulings regarding the violations of a defendant’s constitutional rights.

While parolees and probationers are typically afforded less rights based on the fact that they have already been convicted of crimes, they do still have the right to due process. See Grisby v. Herzog, 190 Wn. App. 786, 362 P.3d 763 (Div. 1 2015). Therefore, many of the constitutional rights do apply. Grisby, 190 Wn. App. 786. For example, a “person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence. However, if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.” Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 2603 (1972). In this case, Mr. Frazier was never given the opportunity to confront and cross-examine the CI because of the government’s misconduct. Exhibit B, Order at page 6. For this reason, the federal court dismissed the charges. Id at page 9. The Board stated that it would not rely on any of the information obtained from the CI. Exhibit A, Findings and Conclusions of Indeterminate Sentence Review Board, page 2. However, as the federal court found, without the CI’s information, agents would have never investigated Mr. Frazier, never searched his property, and never arrested him. Exhibit B, Order. Therefore, Mr. Frazier’s constitutional right to due process in the ability to cross-examine and confront witnesses against him was violated. See Grisby, 190 Wn.

App. 786, Morrissey, 408 U.S. 471. Though Mr. Frazier had the ability to cross-examine Officer Rongen, the entirety of Officer Rongen's information for investigating Mr. Frazier in the first place was based on information provided by the CI, who Officer Rongen deliberately kept him from having an opportunity to confront. Exhibit B, Order at page 2. The alleged assault on Officer Conaty would never have happened if it had not been for the unreliable information provided to Officer Rongen by the CI.

Ultimately, a Federal Court judge ruled that Mr. Frazier's constitutional rights were violated by egregious officer conduct. Id. Yet, the ISRB was allowed to circumvent Mr. Frazier's constitutional rights and impose forty-four months in prison for the exact same egregious and illegal conduct of the officers. Exhibit A, Findings and Conclusions. The ISRB in this case completely took the sting of the deterrent effect intended by the Federal judge's ruling out of Mr. Frazier's case by ignoring that court's ruling. This is an obvious and severe violation of Mr. Frazier's constitutional rights, which should be reversed and Mr. Frazier should be released from custody. See Grisby, 190 Wn. App. 786, Morrissey, 408 U.S. 471, Brady, 373 U.S. 83.

B. ONCE THE BOARD DETERMINED THERE WAS NO PROBABLE CAUSE TO ARREST MR. FRAZIER, THE ACTIONS RESULTING FROM THAT UNCONSTITUTIONAL ARREST SHOULD NOT HAVE BEEN THE BASIS FOR A VIOLATION OF PAROLE

Washington law construes the "reasonable cause" phrase in RCW 9.94A.631(1) to require the officer to have a "well-founded suspicion that a violation has occurred." State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996). "Analogous to the requirements of a Terry stop, reasonable suspicion requires specific and articulable facts and rational inferences." State v. Parris, 163 Wn. App. 110, 119, 259 P.3d 331 (Div. 2 2011) (referring to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). "Articulable suspicion" is defined as a *substantial* possibility that criminal conduct has occurred or is about to occur. State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)(emphasis added).

Here, there was not a well-founded suspicion to believe that Mr. Frazier was violating a condition of his supervised release. Exhibit A, Findings and Conclusions, at page 4. Specifically, the justification for arresting Mr. Frazier and subsequently searching the Star Motel, Honda CRV, and Camouflage bag, was that Mr. Frazier was not residing at his DOC approved address. Id. There certainly was not a "substantial possibility" to believe that Mr. Frazier was living at the Star Motel. Id. Nor were there rational inferences from specific facts that would tend to show that Mr. Frazier was

actually *residing* at the Star Motel when officers only saw him there on one other occasion, his name was not on the registration sheet, he did not pay for the room, and officers never even went to his listed DOC address to confirm whether he was still living there. *Id.* Without a well-founded suspicion to believe that Mr. Frazier was violating a condition of his parole, there is no justification for his arrest on November 17, 2015 and therefore, the arrest was in violation of his Fourth Amendment right against unlawful seizure. *See Grisby*, *supra*.

Mr. Frazier went into the Board hearing alleged to have violated 5 conditions of his supervision. Exhibit A, Findings and Conclusions, at page 1. Ultimately, the Board ruled that he did not violate any of the conditions for which he was being arrested on November 17, 2015. *Id.* The Board member specifically stated that “while it is possible Mr. Frazier may have spent a night or possibly 2 at the Star Motel, in this instance the Board Member does not consider this to be a change in residence that rises to the level of a violation.” *Id.* at page 4. The Board member went on to say “it is not unreasonable for a person on supervision to occasionally spend the night away from home. In addition, no one involved went to his approved residence to verify whether or not he was still living there.” *Id.* The Board’s decision and reasoning made it clear that based on the lack of investigation and information known prior to the arrest the officers did not have a well-

founded suspicion to arrest Mr. Frazier for not living at his DOC approved residence. See Id. As soon as the Board made that ruling, then any and all actions and evidence stemming from that unlawful arrest should have been suppressed. See Morrissey, 408 U.S. 471, Kennedy, 107 Wn.2d 1.

Because Officer Rongen did not have probable cause or even a well-founded suspicion that Mr. Frazier had violated any conditions of his supervision at the time of the incident that led to allegation #4, his detention and arrest was unconstitutional and therefore, any action stemming therefrom was fruit of the poisonous tree. State v. Lampman, 45 Wn. App. 228, 724 P.2d 1092 (Div. 2 1986), State v. Proctor, 16 Wn.App. 865, 867, 559 P.2d 1363 (Div. 1 1977). “In our judgment only when the police act in bad faith should evidence which is illegally seized be suppressed in a probation revocation proceeding.” Proctor, 16 Wn.App. at 867. As discussed above, the bad faith actions of Officer Rongen are evident throughout this case and the Federal charges against Mr. Frazier were dismissed because of Officer Rongen’s bad faith actions. Exhibit B, Order. Though Lampman and Proctor both dealt with unlawful searches under the fourth amendment, the fourth amendment protection against unlawful seizures applies in the same fashion to unlawful arrest. 45 Wn. App. 228, 16 Wn. App. 867. Furthermore, as Lampman ruled that Article 1, Section 7 provides more protections than the fourth amendment, the

same concepts of illegal searches would apply to unlawful arrests in Washington state as well. 45 Wn. App. 228.

As soon as the Board ruled that there was not a well-founded suspicion that Mr. Frazier was not living at his DOC approved residence, the arrest of Mr. Frazier on that basis became unconstitutional. See Id. Because the arrest of Mr. Frazier was unconstitutional, any and all charges stemming from the arrest and search afterward, should have been suppressed. Id. If the Board had properly suppressed the evidence resulting from the unlawful arrest, then Mr. Frazier would have been found not guilty of all of the alleged violations and he would not be incarcerated right now. For those reasons, the Court should overturn the Board's finding of Guilty and release Mr. Frazier from custody.

C. GENERAL STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL

1. The accused is entitled to the effective assistance of counsel

A parolee has a state and federal constitutional right to effective assistance of counsel once the Board has deemed that the parolee may have the assistance of counsel. Gagnon v. Scarpelli, 441 U.S. 778, 93 S. Ct. 1756 36 L.Ed.2d 656 (1973), Grisby, 190 Wn. App. 786.

2. Ineffective Assistance Claims are Reviewed de Novo

A claim that counsel was ineffective is a mixed question of law and fact that is reviewed de novo. Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

3. PRP Standard for Review – Ineffective Assistance of Counsel

To obtain relief on collateral review based on a constitutional error, the petitioner must demonstrate by a preponderance of the evidence that he was actually and substantially prejudiced by the error. In re Pers. Restraint of Davis, 152 Wn.2d 647, 671–72, 101 P.3d 1 (2004).

But “if a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice.” In re Crace, 174 Wn.2d 835, 846–47, 280 P.3d 1102 (2012).

4. Standard for Proving Ineffective Assistance of Counsel.

“A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct.” State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993) (emphasis omitted) (citing Strickland, 466 U.S. at 687–88). Thus, to prevail on a claim of ineffective assistance of trial counsel, an appellant must show both deficient performance and prejudice. Strickland, 466 U.S. at 687.

The first requirement—the performance prong—measures whether defense counsel’s conduct fell within the wide range of competence for a criminal defense attorney. To show deficient performance, the petitioner must show that defense counsel’s conduct, measured by “prevailing professional norms” fell below “an objective standard of reasonableness.” *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (citing *Strickland*, 466 U.S. at 688-89). In assessing the merits of ineffective counsel claims, courts look to the totality of counsel’s efforts. *Gerlaugh v. Stewart*, 129 F.3d 1027, 1036 (9th Cir. 1997).

The second requirement—the prejudice prong—asks whether, despite the error, the defendant received a fair trial. *Strickland*, 466 U.S. at 694. To show prejudice, the appellant need not prove that the outcome would have been different but must show only a “reasonable probability”—by less than a more likely than not standard—that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. *Id.* To rebut the presumption of reasonableness, a defendant must establish an absence of any legitimate trial tactic that could explain counsel’s performance. *Matter of Lui*, 188 Wn.2d. 525, 539, 397 P.3d 90, (2017) *quoting State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic

choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed. 2d 471 (2003) (quoting Strickland, 466 U.S. at 690-91).

D. COUNSEL WAS INEFFECTIVE FOR FAILING TO REVIEW OR PROVIDE THE COURT WITH ALL OF THE RELEVANT INFORMATION PRIOR TO THE BOARD HEARING

1. Deficient Performance

Counsel's failure to review and file with the board the records provided by trial counsel in the criminal matters constitutes both deficient performance and was unreasonable under Strickland. 466 U.S. 691. Effective assistance of counsel requires trial "counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client." Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir.1994) (citing Strickland, 466 U.S. at 691).

The law governing the basic function of a criminal defense attorney to investigate the facts is well established. Wiggins v. Smith, 539 U.S. 510, 521-22, 525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (holding that counsel must investigate to make an informed decision about strategy); Strickland, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of

the adversarial process that the trial cannot be relied on as having produced a just result.”) Strategic decisions are entitled to deference *only* if they are made after *thorough investigation of law and facts* or are supported by reasonable professional judgments. Strickland, at 690-91 (emphasis added.)

Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. See Sanders, 21 F.3d at 1457. Defense counsel “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691. “A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance.” Lord v. Wood, 184 F.3d 1083, 1093 (9th Cir.1999) (quoting Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir.1999)) (internal quotation marks omitted).

In particular, counsel's failure to investigate possible methods of impeachment may in itself constitute ineffective assistance of counsel. Tucker v. Ozmint, 350 F.3d 433, 444 (4th Cir.2003). Failure to interview or attempt to interview key prosecution witnesses constitutes deficient performance. United States v. Tucker, 716 F.2d 576, 583 (9th Cir.1983); Baumann v. United States, 692 F.2d 565, 580 (9th Cir.1982) (“We have

clearly held that defense counsel's failure to interview witnesses that the prosecution intends to call during trial may constitute ineffective assistance of counsel.”). The duty to investigate is especially pressing where, as here, the witnesses and their credibility are crucial to the government’s case. *See Reynoso v. Giurbino*, 462 F.3d 1099, 1112–13 (9th Cir. 2006).

Here, Mr. Frazier’s attorney failed to review important documents provided to him by the attorney who obtained the dismissal in the criminal cases based on the Brady Violation. Recording of Indeterminate Sentence Review Board Hearing at 23:30. Counsel obtained critical records that would have been a necessary part of Mr. Frazier’s defense at the Board Hearing and yet when he realized that he was not able to open the attachment from prior counsel, rather than seeking another way to review the documents, he simply chose not to review the documents and to not submit them to the Board. *Id.* Counsel admitted to the Board that he had received the documents but had not been able to review them prior to the hearing, nor did he provide them to the Board. *Id.* Counsel specifically told the Board that he did not believe that he could effectively represent Mr. Frazier because of the complexities of the issues in the case and the limited time that he had to prepare for the case. *Id.* Yet the Board still ruled that his Counsel could provide effective representation and refused the request for a continuance to adequately prepare for the hearing. *Id.* at 31:00.

The same witnesses that the criminal court determined were found by the judge in the criminal proceedings to have committed misconduct which was “unabashedly negligent” were the community corrections officers that were testifying in front of the Board against Mr. Frazier. Exhibit B, Order at page 7. Counsel was ineffective in not reviewing the documents because they contained a wealth of information that he could have used to cross-examine the corrections officers that testified during the hearing. Strickland, 466 U.S. 668. He was also ineffective in not providing those documents to the Board prior the hearing because if she had those documents in front of her, she may have seen the egregious nature and lack of credibility of the corrections officers involved. Id. Counsel did not even file any motions or documents on Mr. Frazier’s behalf to be considered at the hearing at all. Exhibit A, Findings and Conclusions. Instead, counsel relied upon a Motion to Dismiss that was filed by Mr. Frazier’s previous counsel. Id.

Counsel did request a continuance so that he could review and present this information to the Board. Id. The Board denied that continuance based on the fact that Mr. Frazier had multiple attorneys represent him and that Mr. Frazier had months to prepare for this hearing. Recording of Indeterminate Sentence Review Board Hearing at 30:00. That Board decision violated Mr. Frazier’s Constitutional right to effective assistance

of counsel because the Board did appoint Mr. Frazier counsel, which constitutionally had to be effective. Gagnon, 441 U.S. 778, Grisby, 190 Wn. App. 786. Instead, the Board provided Mr. Frazier a body to stand next to him during the hearing to provide the appearance that the Board was providing Mr. Frazier with his constitutional due process right to counsel, without allowing that counsel the time necessary to be effective in his representation. By appointing Mr. Frazier counsel for the Board hearing, the Board acknowledged that the complexity of the issues in this case required the assistance and advice of legal counsel, but the Board did not actually provide that counsel with the ability to provide effective assistance of counsel to Mr. Frazier. The Board violated Mr. Frazier's constitutional right to effective counsel when it denied Counsel's request for a continuance. See Id.

2. Prejudice

Having established deficient performance, Mr. Frazier must also "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Hinton v. Alabama, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014); In re Pers. Restraint of Netherton, 277 Wn.2d 798, 801, 306 P.3d 918 (2013) (ineffective assistance of appellate counsel).

Here, had defense counsel properly reviewed the relevant documents and provided those to the Board, the testimony on cross-examination would have been remarkably different. The criminal charges stemmed from the exact same conduct that the Board was considering during this hearing and the entirety of the reason that those criminal charges were dismissed was due to the severe Brady violations of the witnesses and officers involved as well as the government representatives in both State and Federal Court. Exhibit B, Order. Thus, “when considering the case, defense counsel failed to provide the meaningful adversarial role that the Sixth Amendment to the United States Constitution guarantees.” State v. Jones, 183 Wn.2d 327, 331, 352 P.3d 776 (2015).

Had trial counsel reviewed the documents necessary to defend Mr. Frazier, there is a reasonable chance that the Board would have found Mr. Frazier not guilty of the parole violation. Counsel attempted to explain that the criminal charges surrounding these probation violations had been dismissed but did not adequately explain the reasoning behind the dismissal which would have made it clear to the Board that she had no choice but to uphold Mr. Frazier’s constitutional rights and find him not guilty of the probation violations. Therefore, there is sufficient evidence that Counsel was ineffective during the Board Hearing and the Board’s ruling should be overturned and he should be released from prison.

E. THE BOARD MEMBER OF THE INDETERMINATE SENTENCE REVIEW BOARD WHO HEARD MR. FRAZIER'S CASE WAS NOT FAIR AND IMPARTIAL

The purpose of having a hearing to determine if there is probable cause to impose a parole revocation is to ensure that a fair and impartial person is making the decision. Morrissey, 408 U.S. 471. The Morrissey court emphasized that “due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case.” Id at 485. However, in this case the Chair of the ISRB is married to the lead officer in this case, Officer Rongen. Exhibit A, Findings and Conclusions, at page 2. That board member immediately recused herself from any involvement in this case, and the Board member that heard Mr. Frazier’s revocation hearing stated that she could be fair and impartial. Id. However, the Board member that heard Mr. Frazier’s case has been on the Board with Officer Rongen’s wife for one and a half years. Recording of the Indeterminate Sentence Review Board at 00:07. Therefore, this Board member heard testimony from an officer determined by a federal court judge to have committed bad faith actions in violating Mr. Frazier’s constitutional rights with a prior credibility determination of that witness. Exhibit B, Order. Regardless of that, the admonishments of the federal judge were clearly a reflection on the officers involved in this case, who are officers employed

by department of corrections to monitor the parolees under the supervision of the ISRB. Id. Therefore, if the Board ruled that the officers conduct in this case was unconstitutional, then it would bring into question many of the cases ruled on by the ISRB, and that made the Board member an involved party with an interest in the outcome of the hearing. This clearly violated Mr. Frazier's due process right to a fair and impartial independent officer. Morrissey, 408 U.S. 471.

VI. CONCLUSION

For the foregoing reasons, this Court should grant this petition and reverse the ISRB ruling against Mr. Frazier as it was obtained in violation of Mr. Frazier's constitutional rights. Mr. Frazier would then be released from custody.

DATED this 25th day of October, 2017.

Respectfully submitted,

GAUSE LAW OFFICES, PLLC



Andrea Kim, WSBA #46339
Attorney for Petitioner

VII. STATEMENT OF FINANCES

Pursuant to RAP 16.7(4), the court of appeals can waive the filing fee if the petitioner is indigent and submits a statement proving that indigence. Here, Mr. Frazier is indigent and will submit a statement proving such. Upon receipt of that statement, Mr. Frazier asks this court to waive the filing fee in this case.

VIII. OATH

I declare under penalty of perjury under the laws of the State of Washington that I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

DATED this October 30, 2017, in Seattle, WA.

Respectfully submitted,



Andrea Kim, WSBA #46339
Attorney for Petitioner

EXHIBIT A



STATE OF WASHINGTON
INDETERMINATE SENTENCE REVIEW BOARD
PO BOX 40907 • Olympia, Washington 98504 • (360) 493-9266 FAX (360) 493-9287

FINDINGS AND CONCLUSIONS

NAME:	FRAZIER, Robert	
DOC#:	280118	
MEETING TYPE:	Violation Hearing	<input checked="" type="checkbox"/> Pre-84
DATE:	October 20, 2016	<input type="checkbox"/> CCB
LOCATION:	King County Jail	
BOARD MEMBER:	Lori Ramsdell-Gilkey	
FINAL DECISION DATE:	October 28, 2016	

This matter came before the above named Presiding Board Member of the Indeterminate Sentence Review Board (ISRB or the Board) on the above date for a parole/community custody violation hearing. Mr. Frazier appeared in person and was represented by his attorney Michael Ewetuga. Present for the Department of Corrections was Community Corrections Officer Jeff Moen, who was represented by Assistant Attorney General Katie Faber. The Board Member, having heard all evidence and testimony of witnesses and considering arguments of counsel and any documents submitted by all parties, makes the following:

FINDINGS:

- I. Mr. Frazier was convicted of the following offense:
Murder in the First Degree under Kitsap #81-1-00394-8

- II. Mr. Frazier was released from custody on August 11, 2015, subject to the rules and conditions of parole/community custody and under the supervision of a Community Correction Officer (CCO).

- III. On November 17, 2015, parole/community custody was suspended for allegedly committing the following violations of supervision:
 1. Failing to reside at DOC approved residence on or about 11-17-2015.
 2. Failing to obey all laws by having in his control a firearm after having previously been convicted of a serious offense as defined in per RCW 9.41.040, on or about 11-17-2015.
 3. Failing to abide by conditions of release by possessing ammunition on or about 11-17-2015.
 4. Failing to obey all laws by assaulting DOC Specialist Winfrey, while he was performing his official duties, per RCW 9a.36.031, on or about 11-17-2015.
 5. Failing to abide by conditions of release by possessing methamphetamine on or about 11-17-2015.

- IV. The above violations are in connection with the Order of Release issued by the Board on July 6, 2015.

PRELIMINARY MATTERS:

Attorney Michael Ewetuga made a motion to suppress in regards to violations 1, 2, 3, and 5 based on the same grounds as were cited in his Federal case briefs. Mr. Ewetuga stated the DOC had no basis for conducting a search of the vehicle Mr. Frazier was driving, nor the hotel room he was suspected of staying in as there was no "reasonable cause" to believe the offender was in violation of any of his conditions of parole/supervision.

AAG Faber argued the case law supporting the dismissal of the Federal indictment which included alleged "Brady" violations are not applicable to Washington State parole cases and the Exclusionary Rule does not apply in this case either. In addition, the DOC staff involved in the search had reasonable suspicion to believe Mr. Frazier was not residing at an approved residence and was therefore in violation and subject to search.

The Board Member denied the motion and stated all violations would be heard and evidence admitted. To date it has not been found that the Exclusionary Rule applies to Washington State Parole hearings nor have violations of Brady v Maryland been applied to these administrative hearings.

Mr. Frazier indicated he did not think it appropriate to have this hearing as the person who provided information regarding the initial allegation(s) was deceased and could not be questioned about his statements. The Board indicated we would proceed and the Board would make its findings on the evidence presented today. It is unfortunate the State's "confidential informant" is now deceased, however that person's direct testimony is not critical to the violations being addressed here today.

Mr. Frazier brought forth his desire to have the hearing continued so he might have "his" attorney from his Federal case present to assist him. He stated she could not be present today as she was involved in a trial. He also claimed to have additional evidence such as Court transcripts etc. that he would like to have submitted. The Board denied this request for a continuance based on the following grounds: Mr. Frazier has been in custody for 11 months and has known for 11 months that this on-site hearing was pending (in fact it has been scheduled to occur no less than 5 times and continued each time) and has had more than ample time to prepare; and Mr. Frazier has an appointed attorney, Mr. Ewetuga, at his side today who is familiar with the case and more than capable of assisting him in his defense.

Mr. Frazier and his attorney expressed concern that the Chair of the Board is the husband of one of the DOC Specialists involved in this case and would be a potential conflict of interest, and he would not receive a "fair shake" nor an impartial hearing. This Board Member informed Mr. Frazier and his attorney that the Chair had immediately recused herself from any involvement in this case as soon as it came to light. It was this Member's opinion that she could be fair and impartial in today's proceedings.

Lastly, Mr. Frazier stated he was interested in calling many witnesses to testify about the facts of the case and the behavior of CCS Rongen. The Board Member advised Mr. Frazier that after all evidence is heard today, if it appears there is additional evidence that is critical to Mr. Frazier's defense, the hearing would not close and it would be continued to allow for the appearance or telephonic testimony of additional witnesses.

At the hearing on October 20, 2016, Mr. Frazier entered a plea of Not Guilty to violations 1, 2, 3, and 5; and Guilty with an explanation to violation 4 as charged. The Presiding Member finds Mr. Frazier Not Guilty of violations 1, 2, 3, and 5; and Guilty of violation 4 as charged

EVIDENCE RELIED UPON:

The Presiding Member heard the testimony of the following witnesses: Robert A. Frazier, CCO Jeff Moen, Community Corrections Specialists (CCS's); John Conaty, Kris Rongen and Chad Winfrey.

The Presiding Member also considered: Probable Cause (PC) Review sheet dated/updated on 12/3/15, 12/29/15, 8/16/16, and 9/15/16; Violation Specified dated 11/17/15, 8/15/16 and 9/13/16; Board Notice of Violation (Violation Report) dated 12/03/15, and 9/12/16; Judgment and Sentence dated 11/23/81; ISRB Order of Release/Parole dated 7/6/15; and all documents and photos provided in Discovery prior to the hearing.

Regarding violation 1, Mr. Frazier testified he did not move from his approved residence and did not reside at the Star Motel as alleged. He testified he reported in person to his CCO on 11/16/16 and reported at that time he was living at his approved address of 7325 Rainier Ave Apt #109 with his girlfriend. CCO Moen testified he had no actual knowledge that Mr. Frazier had moved from his approved residence. Further he stated that as Mr. Frazier is classified as "Low risk" he is required to go to his residence only quarterly and had not been there recently. He was aware that CCS Rongen had received information that Mr. Frazier had moved.

CCS Rongen was called to testify telephonically and after being sworn in stated he received information on 11/6/16, from a confidential informant (later identified as the now deceased Marvin Hunter aka Che Taylor aka Che T). This informant told CCS Rongen that he was concerned that Mr. Frazier had a handgun in his possession and was planning on taking revenge for the murder of his "uncle" Jerry Turner, who had been murdered just days before.

Mr. Ewetuga asked CCS Rongen about how he confirmed Mr. Hunter was a reliable informant. He stated that he was "vouched" for by a prison I&I staff person and he (CCS Rongen) also later confirmed the

Offender FRAZIER, Robert

DOC #: 280118

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provided information for himself. He was asked if he provided money to Mr. Hunter for his confidential information. He testified he did receive authorization for a \$200 payment that was made after Mr. Frazier's arrest.

CCS Rongen went on to state that later that month, on 11/15/16 this same confidential informant told him that Mr. Frazier was staying at the Star Motel in Room #2. Registration records at the hotel, copies which were provided in discovery, showed that "Adrianna" was staying in Room 2 and only 1 key was checked out for that room. It appeared Adrianna was staying in that room on the 14th, 15th and 16th. On one of those days a male (not Mr. Frazier) was also listed as an occupant.

CCS Rongen testified that he spoke to hotel staff who informed him Mr. Frazier was staying in Room 2, regardless of what the registration showed. He did not recall the names of the staff he spoke to about this.

While it is possible Mr. Frazier may have spent a night or possibly 2 at the Star Motel, in this instance this Board Member does not consider this to be a change in residence that rises to level of a violation. Mr. Frazier is not a sex offender that has strict residence restrictions in place. In fact the CCO testified he is considered "low" risk by the DOC and he sees him in the field only quarterly. It is not unreasonable for a person on supervision to occasionally spend the night away from home. In addition, no one involved went to his approved residence to verify whether or not he was still living there. I found Mr. Frazier NOT GUILTY of this violation.

Regarding violation 4, failing to obey all laws by assaulting DOC Specialist Winfrey while he was performing his official duties per RCW 9A.36.031, on or about 11/17/15, Mr. Frazier pled GUILTY with an explanation. He admitted he did commit this violation but felt there were extenuating circumstances for his behavior. I accepted his guilty plea and found him GUILTY.

CCO Moen read from his violation report outlining the incident that occurred on 11/17/15, in which Specialist Chad Winfrey was driving an official vehicle and assisting CCS's Rongen and Conaty, and Seattle Police Officers, in the apprehension of Mr. Frazier for suspected violations. After CCS Rongen and CCS Conaty witnessed Mr. Frazier back a vehicle into a stall at the Star Motel, they pulled their vehicle close to the front of Mr. Frazier's in an effort to block him. CCS Winfrey then pulled his marked vehicle towards Mr. Frazier's to assist, and Mr. Frazier drove his vehicle into the driver's side door of Winfrey's vehicle. Mr. Frazier then leapt out of his vehicle and ran. The DOC Specialists quickly apprehended him.

Mr. Frazier did not dispute this rendition of events, but did basically say he panicked. He went on to testify that during the evening of 11/14/15 or early morning hours of 11/15/15, he had been accosted on the streets of Seattle. He stated 4 men dressed in black police type uniforms confronted him and beat him

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with a hammer and a bat, sprayed him with pepper spray, and fired a weapon at him. He stated at the time of the assault he was in fear of his life and believed they were somehow involved with the recent murder of his "uncle" Jerry Turner. Mr. Frazier was able to fight with these men and get away. He called a friend to pick him up and take him to his girlfriend's house, then later went to Swedish Hospital for treatment of his wounds. Mr. Frazier stated it was this previous assault that caused him to be in fear for his life and to react the way he did when boxed in by the DOC vehicles on 11/17/15. In addition, Mr. Frazier stated he did not even notice the van he hit until he actually hit it. He explained it all happened extremely fast. In addition, he claimed not to recognize these were DOC staff members until he was "tasered" by CCS Rongen.

CCO Moen testified that when Mr. Frazier reported to the DOC office on 11/16/15 he did report being assaulted by several men and receiving medical treatment for it. They discussed possible places he might go to stay safe. Mr. Frazier was interested in going to California temporarily, however such a move would require the approval of the ISRB.

Regarding allegations 2, 3 and 5, testimony was received from Mr. Frazier, CCO Moen, CCS's Conaty, Winfrey and Rongen. CCS John Conaty was contacted via telephone to testify. He testified he began surveillance of Mr. Frazier on 11/16/16. He testified that when they were surveilling Mr. Frazier, Adrianna was driving the vehicle. He stated they followed Mr. Frazier for several hours and ended the surveillance that evening. He testified he did not personally observe Mr. Frazier at the Star Motel on 11/16/16. He had in-person contact with Mr. Frazier at the Start Motel on 11/17/16 when they arrested him. CCS Conaty testified he participated in the search of the vehicle Mr. Frazier was seen driving to the motel on 11/17/16. After Mr. Frazier was taken into custody he was placed into the back of the DOC/SPD van, and the vehicle he was driving was searched by CCS Conaty. When asked how he knew the car belonged to Mr. Frazier he stated an informant had told CCS Rongen this and also after his arrest, the woman in Room #2 (Adrianna) told them the car was Mr. Frazier's. In addition, Mr. Frazier was the sole occupant of the car at the time they saw him pull into the Star Motel. He stated they found a camouflage backpack in the backseat of the vehicle. Inside of that closed backpack they found a handgun in a holster and wrapped in a towel. The revolver was loaded with ammunition, but was missing one round.

Mr. Ewetuga questioned CCS Conaty regarding his knowledge of the right to search an offender on supervision. Mr. Conaty stated he did not need a warrant if he had reasonable suspicion that a violation of the conditions of supervision had occurred. Mr. Conaty stated they had suspicion Mr. Frazier was not living where he was supposed to be and had information he may be in possession of a firearm. Then after he witnessed Mr. Frazier assault CCS Winfrey with the vehicle he was driving, he had more than just reasonable suspicion, he had an observed violation of the law.

After being sworn in, CCS Winfrey testified regarding allegations 2, 3 and 5. He testified that he and CCS Conaty started searching the vehicle Mr. Frazier was seen driving. He started searching in the

back of the car and found a backpack on the back seat behind driver's seat. It was zipped shut. CCS Winfrey testified he opened it, saw a gun, and stopped searching and told Conaty. The gun was in a holster and wrapped in a towel but somewhat visible. He believed it to be a revolver. CCS Winfrey testified he then went to help search the motel room and found a substance he believed to be methamphetamine, and informed CCS Rongen. He did not have any other involvement in the disposition of the alleged drugs. He did not recall finding any documents that belonged to Mr. Frazier to indicate he was a resident of the motel room.

CCS Rongen testified that on 11/16/15 they began surveilling Mr. Frazier. He was observed loading the car with belongings from Room 2 at the Star Motel. Adrianna was with him and she drove the car that day. Mr. Frazier was observed reporting to the DOC office that day and then going to several different locations in Seattle before they lost contact with the car. CCS Rongen went back to the Star Motel around 5 that evening and received documentation the female "Adrianna" was staying there in room 2. Staff at the Motel confirmed Mr. Frazier had been seen at the motel and was believed to be staying in Room 2. Mr. Frazier was identified through a photo CCS Rongen showed to them.

CCS Rongen testified they set up surveillance the next day beginning around 9:30 am. There was no car there but a female answered the phone in the room. At 11:10 am Frazier drove up in the black SUV and backed into a stall by room # 2. CCS Rongen contacted CCS Winfrey and told him to drive in and help block the vehicle. Mr. Frazier failed to obey their shouted commands, and instead drove into CCS Winfrey's vehicle, then ran. He was quickly apprehended and placed into custody. Subsequent to his arrest the car he had driven up in was searched as was the motel room. After the small amount of methamphetamine was found in the motel room he asked Adrianna about it and she said it belonged to Mr. Frazier. She also stated the car belonged to Mr. Frazier. The handgun and ammunition in the handgun were also identified by Adrianna as belonging to Mr. Frazier. CCS Rongen stated he did not question Mr. Frazier about any of these items since he had been Mirandized and chose not to speak to him.

Mr. Frazier testified that he never stayed the night at the Star Motel. He admitted he did help Adrianna load her belongings in the car. She had been in a fight with her boyfriend and that is why she was staying at the motel. He testified the car he drove to the motel the morning of the 17th belonged to Adrianna and her boyfriend. He testified that he himself drove a Nissan Altima. He stated his girlfriend Teresa was with him the morning of the 17th. She was driving him to a medical appointment and in the meantime Teresa had received a call from Adrianna asking if they could pick her car up and return it to her at the motel. Mr. Frazier stated he did not notice the bag on the backseat and he never looked in it. He stated he had one bag of his own with him that morning and it contained his computer and telephones. Nothing else in the car belonged to him. He testified he never noticed the camouflage bag in the back seat. He stated his fingerprints were not found on the gun.

Based on the fact that evidence was not presented to show Mr. Frazier owned the car in question and that in fact Adrianna had been the primary person previously witnessed to be driving the vehicle, Mr. Frazier was found NOT GUILTY of violations 2 and 3. Because no evidence was presented to demonstrate Mr. Frazier had dominion and control over Room #2 of the Star Motel on the date in question, he was found NOT GUILTY of allegation 5.

Based upon the foregoing findings of fact, the Indeterminate Sentence Review Board makes the following:

CONCLUSIONS:

- I. Mr. Frazier has violated the conditions of parole as stated above.

- II. It would be in the best interest of the public and for the best welfare of Mr. Frazier that an Order of Parole/Community Custody Revocation be issued and Mr. Frazier be returned to the Washington Corrections Center at Shelton, Washington, or other institution as determined by the Department of Corrections. The Indeterminate Sentence Review Board (ISRB) will administratively set a new minimum term within 30 days of this decision.

REASONS FOR DECISION:

This was Mr. Frazier's third opportunity on parole. He was first paroled in November of 2009 and revoked less than 2 years later in September of 2011. He had been found guilty of one count of "Attempted possession of a Stolen Vehicle" and incurred new violations of failing to obey all laws by conspiring to deliver methamphetamine and cocaine. The Board found him guilty of these violations and revoked him.

He was paroled/released next in September of 2012 and revoked in August of 2013 after being found guilty of 2 violations of possessing a deadly weapon (brass knuckles) and a knife with a fixed 6 inch blade.

He was last paroled/released on August 11, 2015 and his parole suspended just 3 months later in November of 2015 when he was charged with several serious violations. Three of these were new law violations and it took almost a year for these to be resolved through the Courts. Ultimately the Federal case he was facing was dismissed by a Judge citing "Brady" violations and a failure to disclose certain information.

Mr. Frazier was found guilty of a very serious violation. As in all of his previous hearings, Mr. Frazier had long convoluted stories to explain everything. He committed a serious law violation when he failed to immediately stop the vehicle he was driving and instead attempted to elude officers. He could have caused serious injury to CCS Winfrey had he been exiting his vehicle when it was hit by Mr. Frazier.

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Mr. Frazier is a violent offender and should be monitored closely in the community as he has demonstrated repeatedly a lack of genuine prosocial behavior. For more than a decade Mr. Frazier has claimed to have been involved in a financially successful business, yet has never been able to provide any evidence of this. Mr. Frazier stated he had a bag with him with his computer and 4 phones he used for business and schooling. Based on his criminal history and lack of legitimate employment, it is more likely he has continued to engage in criminal behavior.

As in past hearings, Mr. Frazier has claimed his health is very fragile and he doesn't know how long he has to live. In spite of his claims, Mr. Frazier's behavior indicates he appears to function without significant impairment of any kind. As claimed in past hearings, Mr. Frazier stated he was only trying to help a female friend who has a drug problem. He continues to blame these women for his parole violations.

Mr. Frazier is an intelligent, antisocial man who is not rehabilitated and not a fit subject for release in the community. Until he is willing to live a prosocial lifestyle, follow the law, and stop blaming others for his predicament, he should remain incarcerated.

His next parole plan should include a condition he have no contact with known felons in any capacity and no contact with drug users. In addition, while on supervision he should be required to prove how he is supporting himself. He should be required to live at his approved release address for a minimum of 6 months to demonstrate stability.

LRG:is

CC: Robert Frazier/Offender
Michael Ewetuga/Attorney
Jeff Moen/CCO
Katie Faber/AAG
File

EXHIBIT B

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT ANDRE FRAZIER,

Defendant.

CASE NO. CR16-33RAJ

ORDER

[REDACTED]

I. INTRODUCTION

THIS MATTER comes before the Court on Defendant Robert Andre Frazier's Motion to Dismiss for Violation of *Brady v. Maryland*. Dkt. # 87. For the reasons set forth below, the Court will **GRANT** the Motion. Rather than dismiss the counts, however, the Court will pursue the less drastic remedy of excluding any and all evidence derived from the confidential informant. Nevertheless, given the Government's proffer – namely that it has no evidence beyond that derived from the confidential informant – the Court will dismiss the indictment.

II. BACKGROUND

Mr. Frazier is charged with a single count of Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1). *See* Dkt. # 11. Specifically, Mr. Frazier is alleged to have knowingly possessed a firearm on or about November 17, 2015 when he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year. *See id.*

1 The genesis of the Government's investigation into Mr. Frazier began in
2 November 2015. *See* Aug. 11, 2016 Hrg. Tr., Rongen Test. at 6:21-7:4, 36:19-24
3 (indicating that CCS Rongen would not have begun an investigation into Mr. Frazier but
4 for receiving information from confidential informant). Kris Rongen, a community
5 corrections specialist ("CCS") with the Washington Department of Corrections ("DOC")
6 (*id.* at 4:5-9), learned that an individual wanted to provide information about Mr. Frazier
7 (*id.* at 7:14-20). That individual was [REDACTED]. *Id.* at 7:25-8:2.

8 CCS Rongen met with [REDACTED] on November 6, 2015 at the DOC criminal
9 justice center in downtown Seattle. *Id.* at 8:13-21. [REDACTED] reported to that
10 location because [REDACTED], like Mr. Frazier, was on community custody. *Id.* at
11 8:22-24. CCS Rongen was joined at this meeting by community corrections officer
12 ("CCO") Leslie O'Connor. *Id.* at 9:12-14. Although CCS Rongen had access to
13 [REDACTED]'s chronos,¹ he did not review [REDACTED]'s chronos prior to meeting
14 with [REDACTED]. *See id.* at 10:9-16. However, at that time, CCS Rongen learned that
15 [REDACTED] had a criminal history and that [REDACTED] was at the DOC criminal
16 justice center that day to take a polygraph. *See id.* at 13:9-14:4.

17 At the meeting, [REDACTED] told CCS Rongen that [REDACTED] had
18 information about a homicide that had taken place a few days prior and that another
19 individual – Mr. Frazier – was in possession of a firearm and was seeking retribution for
20 the victim's death. *See id.* at 11:18-25. CCS Rongen corroborated the information
21 through several avenues (*see id.* at 12:4-22) and brought the case forth at an ATF task
22 force meeting a few days later where he received supervisory approval to continue
23 investigating (*see id.* at 16:10-17:7). Soon after, on November 15, [REDACTED] called
24 CCS Rongen to inform him that Mr. Frazier was staying at the Star Motel in the South

25 _____
26 ¹ A "chronos" is a chronological note taking system in the DOC's computer system. A note is
27 ordinarily placed in a probationer's chronos whenever the DOC makes contact or meets with the
28 probationer. Aug. 11, 2016 Hrg. Tr., Rongen Test. at 10:4-8. DOC officers have easy access
probationers' chronoses. *See id.* at 10:9-11, 37:4-6; O'Connor Test. at 70:20-24.

1 end of Seattle. *See id.* at 17:8-17, 18:4-9. CCS Rongen set up surveillance at the motel
2 the next day, ultimately observing Mr. Frazier loading a black SUV at the motel. *See id.*
3 at 17:20-18:3, 18:16-19:3. CCS Rongen also spoke with motel management, who
4 confirmed that Mr. Frazier was staying there. *See id.* at 23:11-23. According to Mr.
5 Frazier's probation officer, Mr. Frazier's residence at the Star Motel would violate the
6 terms of his probation. *See id.* at 21:7-22:2. As a result, CCS Rongen and several other
7 officers arrested Mr. Frazier on November 17.² *See id.* at 26:13-27:14, 32:21-23.

8 [REDACTED] had a checkered history. [REDACTED] supervising CCO, Patricia
9 Turner, had reservations about [REDACTED]. *See* Aug. 11, 2016 Hrg. Tr., Turner Test.
10 at 77:21-23, 79:2-10. CCO Turner suspected that [REDACTED] was violating the
11 conditions of [REDACTED] release – and that [REDACTED] was lying to her when
12 [REDACTED] met with her. *See id.* at 79:4-22. These suspicions prompted CCO Turner
13 to investigate [REDACTED], but she was unable to establish enough facts. *See id.* at
14 79:23-80:9.

15 As part of this investigation, CCO Turner referred [REDACTED] for a polygraph
16 examination. *See id.* at 80:10-12. [REDACTED] failed it. *Id.* at 86:9-12. CCO Turner
17 likely was informed the day [REDACTED] took the polygraph. *See id.* at 82:14-17. And
18 CCO O'Connor learned from CCO Turner that [REDACTED] failed the polygraph the
19 day she and CCS Rongen met with [REDACTED]. *See id.* O'Connor Test. at 57:23-
20 58:12. Neither of them told CCS Rongen despite having other contact with CCS
21 Rongen. *See id.* O'Connor Test. at 57:23-58:15, Turner Test. at 86:13-87:2. The fact
22 that [REDACTED] failed the polygraph was entered into [REDACTED] chronos just a
23 few days later. *See id.* Turner Test. at 83:4-9.

24 Beyond [REDACTED] failed polygraph, [REDACTED] also had significant
25 problems complying with the conditions of [REDACTED] community custody. *See id.*

26 _____
27 ² The details and circumstances of the actual arrest are irrelevant for purposes of the instant
28 Motion.

1 Turner Test. at 89:21-90:23. In fact, [REDACTED] chronos – visible to all DOC officers
2 – reflected these issues and numerous others. *See id.* at 90:25-93:5, 93:23-98:25. Other
3 chronos entries indicated that [REDACTED] admitted to violating the conditions of
4 [REDACTED] community custody, admitted lying to [REDACTED] supervising CCO,
5 and documented reports of [REDACTED]’s drug dealing and pimping activities. *See id.*
6 Neither CCO Turner nor CCO O’Connor provided this information to CCS Rongen prior
7 to the November 6, 2015 meeting with [REDACTED]. *See id.* at 99:1-5. In fact, CCO
8 Turner expressly relied on CCO O’Connor to convey this information to CCS Rongen.
9 *See id.* at 100:21-23.

10 [REDACTED] continued to violate the conditions of [REDACTED] community
11 custody after November 6. For example, when CCO Turner confronted [REDACTED]
12 about [REDACTED] failed polygraph, [REDACTED] not only continued to lie, but
13 admitted to pimping activities. *See id.* at 102:14-103:25. Despite knowing that
14 [REDACTED] was being used as a witness before a grand jury in Mr. Frazier’s case,
15 CCO Turner still did not present her concerns about [REDACTED]’s credibility to the
16 prosecutors. *Id.* at 104:1-9.

17 Whatever the case, Mr. Frazier was arraigned on February 16, 2016. *See* Dkt. #
18 17. And just a few days later, [REDACTED] died. *See* Aug. 11, 2016 Hrg. Tr., Turner
19 Test. at 105:3-10. None of this information about [REDACTED] was disclosed to Mr.
20 Frazier until July 22, 2016 (*see* Dkt. # 87-1, Ex. A at 2), mere days before the date of trial
21 (*see* Dkt. # 25) and the hearing date for Mr. Frazier’s motion to suppress (*see* July 6,
22 2016 Docket Entry). This is in spite of the fact that Mr. Frazier’s public defender in the
23 state court proceedings requested discovery in November 2015 (*see* Dkt. # 103 at 3) and
24 that Mr. Frazier’s counsel requested discovery pursuant to Local Rule 16³ during Mr.
25 Frazier’s arraignment hearing in the instant case (*see* Dkt. # 17).

26
27 ³ This Local Rule covers, of course, *Brady* material. *See* Local Rules. W.D. Wash. CrR
16(a)(1)(K).

III. ANALYSIS

1
2 The requirements for establishing a *Brady* violation are well known. A defendant
3 generally must show three elements: favorability, suppression, and materiality. In other
4 words, “[t]he evidence at issue must be favorable to the accused, either because it is
5 exculpatory, or because it is impeaching; that evidence must have been suppressed by the
6 State, either willfully or inadvertently; and prejudice must have ensued.” *United States v.*
7 *Olsen*, 704 F.3d 1172, 1181 (9th Cir. 2013) (quoting *Gentry v. Sinclair*, 693 F.3d 867,
8 887 (9th Cir. 2012)). Suppression may be either intentional or inadvertent, and even
9 “[a]n ‘innocent’ failure to disclose favorable evidence constitutes suppression even where
10 there is no allegation that the prosecutor acted ‘willfully, maliciously, or in anything but
11 good faith’—‘sins of omission are equally within *Brady*’s scope.” *Id.* (quoting *United*
12 *States v. Price*, 566 F.3d 900, 907 (9th Cir. 2009)). Finally, “[e]vidence is prejudicial or
13 material ‘only if there is a reasonable probability that, had the evidence been disclosed to
14 the defense, the result of the proceeding would have been different.’”⁴ *United States v.*
15 *Kohring*, 637 F.3d 895, 902 (9th Cir. 2011) (quoting *United States v. Bagley*, 473 U.S.
16 667, 682 (1985)).

17 The Court finds that all three elements are met.

18 The suppressed evidence regarding [REDACTED]’s credibility is clearly
19 favorable. “*Brady* encompasses impeachment evidence, and evidence that would
20 impeach a central prosecution witness is indisputably favorable to the accused.” *Price*,
21 566 F.3d at 907 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States*
22 *v. Blanco*, 392 F.3d 382, 387 (9th Cir. 2004)). The sole basis for CCS Rongen’s decision
23 to investigate Mr. Frazier rested on information he received from [REDACTED]. As a
24 result, whether [REDACTED] testified or not, [REDACTED] credibility was at issue.

25
26 ⁴ Numerous courts have commented that the pretrial standard is even more exacting, requiring
27 prosecutors to disclose any favorable information without attempting to predict whether its
28 disclosure will affect the outcome of trial. *See Olsen*, 704 F.3d at 1183 n.3 (collecting cases);
see also Price, 566 F.3d at 913 n.14 (citing *United States v. Acosta*, 357 F. Supp. 2d 1228, 1239-
40 (D. Nev. 2005); *United States v. Sudikoff*, 36 F. Supp. 2d 1196 (C.D. Cal. 1999)).

1 Underscoring [REDACTED]'s centrality to this case, the Government relied upon
2 [REDACTED]'s testimony to support its indictment.

3 Moreover, the evidence was plainly suppressed. It was not produced until the eve
4 of trial and well after [REDACTED]'s death. Untimely production of a witness'
5 testimony may qualify as suppression for *Brady* purposes, particularly where disclosure
6 occurs at a time where disclosure is no longer helpful to the accused. *See United States v.*
7 *Aguilar*, 831 F. Supp. 2d 1180, 1203-06 (C.D. Cal. 2011); *see also United States v.*
8 *Gamez-Orduno*, 235 F.3d 45, 461 (9th Cir. 2000) (quoting *United States v. Span*, 970
9 F.2d 573, 583 (9th Cir. 1992)) ("Such a due process violation may be cured, however, by
10 belated disclosure of evidence, so long as the disclosure occurs at a time when disclosure
11 would be of value to the accused.") (internal quotation marks omitted); *cf. United States*
12 *v. Miller*, 529 F.2d 1125, 1128 (9th Cir. 1976) (citing *United States v. Hiber*, 463 F.2d
13 455, 459 (9th Cir. 1972) (indicating that the pertinent issue "is whether the lateness of the
14 disclosure so prejudiced appellant's preparation or presentation of his defense that he was
15 prevented from receiving his constitutionally guaranteed fair trial"). And the evidence
16 here was certainly unhelpful to Mr. Frazier by the time it was disclosed. [REDACTED]
17 had long since passed away by the time the Government even disclosed [REDACTED]
18 identity to Mr. Frazier, leaving Mr. Frazier with no real opportunity to investigate the
19 basis for [REDACTED]'s knowledge, [REDACTED]'s motivations for assisting the
20 Government, or for cross-examining and impeaching [REDACTED] testimony.

21 And finally, Mr. Frazier was prejudiced by the Government's late disclosure. It is
22 abundantly clear that Mr. Frazier was never provided an opportunity to investigate
23 [REDACTED] (and [REDACTED] checkered past). And the fact that this impeachment
24 evidence was not provided until after [REDACTED]'s death only compounds the
25 prejudice Mr. Frazier faces. *See United States v. Fitzgerald*, 615 F. Supp. 2d 1156, 1161-
26 62 (S.D. Cal. 2009) (finding that defendant suffered substantial prejudice from *Brady*

1 violation where government suppressed evidence impeaching the credibility of its key
2 witness until after witness had testified and then died).

3 Having found that a *Brady* violation has occurred, the question turns to the
4 appropriate remedy. Mr. Frazier requests that the Court dismiss the indictment, but a
5 district court generally may only do so if the Government's conduct is outrageous so as to
6 constitute a due process violation or in cases of flagrant prosecutorial misconduct. *See*
7 *United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008). Moreover, in order for a
8 district court to dismiss an indictment under its supervisory powers, the defendant must
9 have suffered substantial prejudice and there may be no lesser remedial action available.
10 *See id.* at 1087 (citing *United States v. Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988); *United*
11 *States v. Barrero-Moreno*, 951 F.2d 1089, 1092 (9th Cir. 1991)).

12 “[T]he Supreme Court as well as the Ninth Circuit has repeatedly pointed out that
13 dismissal of an indictment, particularly with prejudice, is a drastic measure.” *United*
14 *States v. Isgro*, 974 F.2d 1091, 1098 (9th Cir. 1992). Instead, “when faced with
15 prosecutorial misconduct, a court should ‘tailor[] relief appropriate in the
16 circumstances.’” *Id.* (quoting *United States v. Morrison*, 449 U.S. 361, 365 (1981)).

17 The circumstances here do not necessarily support dismissal. The Government's
18 conduct here was unabashedly negligent. It withheld [REDACTED]'s identity (and the
19 abundant concerns about [REDACTED] credibility) despite initiating its investigation of
20 Mr. Frazier based solely on [REDACTED] information and, just as critically, using
21 [REDACTED] as a witness to support the indictment. In fact, the Government withheld
22 impeaching information beyond mere questions about [REDACTED]'s criminal history –
23 it did not reveal benefits that [REDACTED] received for [REDACTED] cooperation.
24 Specifically, [REDACTED] received \$200 and CCS Rongen may have left a message for
25 [REDACTED]'s CCO informing her that [REDACTED] would be late for
26 [REDACTED] curfew. *See* Aug. 11, 2016 Hrg. Tr., Rongen Test. at 24:24-25:21.
27 Indeed, the Government continued to withhold evidence impeaching [REDACTED]'s

1 credibility after [REDACTED] death. This was in spite of the fact that every DOC
2 officer involved in this case has had access to (and some knowledge of) [REDACTED]’s
3 many veracity problems. This information was of course imputed to the prosecutor. *See*
4 *Aguilar v. Woodford*, 725 F.3d 970, 982 (9th Cir. 2013) (citing *Kyles v. Whitley*, 514 U.S.
5 419, 437 (1995)). Ultimately, however, even negligent behavior will not necessarily
6 support dismissal. *See United States v. Dominguez*, 641 F. App’x 738, 740 (9th Cir.
7 2016) (affirming district court’s imposition of sanctions rather than dismissal of
8 indictment where the Government conceded “that it was ‘sloppy, inexcusably tardy, and
9 almost grossly negligent’ and [did] not dispute the district court’s findings that it
10 committed numerous *Brady*, *Giglio*, *Jencks Act*, and Rule 16 violations.”).⁵

11 In this Court’s view, the proper remedy here is exclusion and suppression of all
12 evidence derived from [REDACTED]. Specifically, the Court excludes any and all
13 evidence connected to [REDACTED]’s activities as it relates to the investigation of Mr.
14 Frazier. If [REDACTED] was still alive, the prejudice could readily be cured –
15 particularly as trial has not yet taken place. *See Kohring*, 637 F.3d at 913 (citing
16 *Chapman*, 524 F.3d at 1086) (indicating that the appropriate remedy for a *Brady* violation
17 is typically a new trial). Unfortunately, because of [REDACTED]’s death, that option is
18 not available – and there really is no lesser remedy available. *See Fitzgerald*, 615 F.
19 Supp. 2d at 1162.

20
21
22 ⁵ Generally speaking, the appropriate remedy for a *Brady/Giglio* violation is a new trial. *See*
23 *Kohring*, 637 F.3d at 913 (quoting *Chapman*, 524 F.3d at 1086). And, the Ninth Circuit has
24 found that even egregious government misconduct may not necessarily warrant dismissal of an
25 indictment. *See United States v. Struckman*, 611 F.3d 560, 577-78 (9th Cir. 2010) (affirming
26 district court’s remedy of suppression of evidence, not dismissal of indictment where the
27 Government lied about the identity of a confidential informant, failed to disclose an IRS audit of
28 a Government witness by lying that it did not exist, and Government’s agent concealed deal
between the Government and the witness); *see also Kohring*, 637 F.3d at 912-13 (remanding for
new trial where Government suppressed evidence that key witness was investigated for sexual
misconduct with minors, that cast doubt on his memory, and that suggested he made payments to
legislator-defendant out of friendship and pity rather than corrupt *quid-pro-quo* relationship, as
well as other impeaching evidence).

1 In addition, the Court finds that this remedy is appropriate to address the
2 Government's conduct in this case. After hearing testimony from CCS Rongen, CCO
3 O'Connor, and CCO Turner, the Court is convinced that the Government's agents have
4 taken a cavalier attitude toward their *Brady* obligations. This information was not
5 disclosed to Mr. Frazier – either during the state court proceedings or in the instant case –
6 even though each of these individuals had knowledge and ready access to
7 [REDACTED]'s problematic conduct. In fact, if Mr. Frazier had received this
8 information during the state court proceedings – or even immediately after being
9 arraigned in the instant case – he may have been able to properly investigate
10 [REDACTED]'s background prior to [REDACTED] death. Mr. Frazier is no longer able
11 to do so. Instead, the Government continued to minimize the egregiousness and
12 prejudice to Mr. Frazier caused by the nondisclosure even when confronted with the
13 behavior of its agents. *See* Dkt. # 100. In this Court's view, that unwillingness to own up
14 to this misconduct supports this remedy. *See Chapman*, 524 F.3d at 1087 (quoting
15 *United States v. Kojayan*, 8 F.3d 1315, 1318 (9th Cir. 1993)).

16 Additionally, the Court finds that this remedy is appropriate to deter future illegal
17 conduct. That consideration is, of course, important in the Court's exercise of its
18 supervisory power. *See Chapman*, 524 F.3d at 1085 (quoting *United States v. Simpson*,
19 927 F.2d 1088, 1090 (9th Cir. 1991)). The officers involved in this investigation
20 continuously passed on their obligations to disclose information about [REDACTED],
21 even when they had actual knowledge or ready access to this information. The Court will
22 not countenance such a careless attitude toward their obligations to identify evidence
23 favorable to the defendant.

24 IV. CONCLUSION

25 For the foregoing reasons, the Court **GRANTS** Defendant's motion.

26 The Court recognizes that the AUSA was placed in an increasingly untenable
27 position, especially as the full extent of the Government's misconduct was slow to

1 develop. In these circumstances, the Court acknowledges that the AUSA acted promptly
2 when the evidence of [REDACTED]'s reliability and veracity finally came to light. But
3 ultimately, "the individual prosecutor has a duty to learn of any favorable evidence
4 known to the others acting on the government's behalf in the case, including the police."
5 *See Kyles*, 514 U.S. at 437. That did not happen here.

6 DATED this 24th day of August, 2016.

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10 The Honorable Richard A. Jones
11 United States District Judge
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EXHIBIT C

Title of Investigation:
FRAZIER, Robert Andre

Investigation Number:
7870 6-0008

Report Number:
2



DOC - CRIMINAL INCIDENT REPORT

Incident No SPD 15-401392						Page 1 of 4
Address: 1550 - 4th Ave. S., Ms: Tb-12A Seattle WA 98134		Phone:	Fax:	Reporting Email:		
Reported By/Date: Kristoffer Rongen, 11/17/2015				Reviewed By/Date: / /		
Incident Location						
Location: 5216 S 4 th Ave S, room 2		City: Seattle		State: WA		Zip Code:
Rep Date: 11/17/2015	Rep Time: 1110 hours	From Date: / /	From Time:	To Date: / /	To Time:	
Incident Information						
Role: Arrested	Last Name: Frazier	First Name: Robert		Middle Name: A	Sex: Male	Race: Black
Birth Date: 08/09/1965		Ethnicity:		Role Description:		
Age: 50	Height: 6 ft 5 in	Weight: 300	Hair: Black	Eyes: Brown	Employment/Occupation	
Driver's Lic #:	Driver's Lic Issuer:	SSN: 552-13-2218	State ID #:	FBI #: 407858X6	Alias:	
Comments:					DOC #: 280118	
Address: 7325 Rainier Ave South APT 109		City: Seattle		State: WA		Zip Code: 98118
						Phone: 206 772 5242
Role: Friend	Last Name: Izquierra	First Name: Adriana		Middle Name: M	Sex: Female	Race: Caucasian
Birth Date: 1994		Ethnicity:		Role Description:		
Age:	Height: 5'8	Weight: 120	Hair: Black	Eyes: Brown	Employment/Occupation	
Driver's Lic #:	Driver's Lic Issuer:	SSN:	State ID #: WA	FBI #:	Alias:	
Comments:					DOC #:	
Address: 		City: Des Moines		State: WA		Zip Code: 98198
						Phone:
Description of New Criminal Activity in Officer Presence						

Title of Investigation: FRAZIER, Robert Andre	Investigation Number: 7870 6-0008	Report Number: 2
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I, Kris Rongen, am a Community Corrections Specialist (CCS) with the Washington State Department of Corrections (DOC). I have been employed by DOC for the past 13 years.

On 11/23/1981, Robert A Frazier DOC Number 280118, was sentenced in Kitsap County Superior Court for cause 811003948 for Murder 1 and was sentenced to the Parole Board for Supervision. Frazier's release date from DOC supervision would have been 08/11/2018.

I am currently assigned to the Northwest Community Response Unit (NW CRU). One of my primary duties as a member of NW CRU is to look for and apprehend WA DOC offenders with outstanding WA DOC warrants. I am also a Task Force Officer (TFO) assigned to the Federal Bureau of Alcohol, Tobacco, and Firearms Seattle Division. I work in the Gun Crime Intelligence Task Force. The primary partner I work with is fellow CCS/TFO John Conaty.

On 11/06/15, I had a conversation with a person who wants to remain anonymous and they shared some information about a homicide that had occurred on 11/04/15 in the city of Renton. This person shared with me that they were concerned that Frazier was in possession of a gun and he may be looking to get revenge for the death of his uncle.

On 11/10/15, I brought Frazier up in my weekly ATF Taskforce meeting and gained support from the Task Force to look at him as a possible ATF target due to his Murder 1 conviction. Special Agent Cole agreed to open a case on him.

On 11/15/15, I talked with the person who wants to remain anonymous and was informed that Frazier was staying at the Star Motel in room #2. The Star Motel is located at 5216 S Bennett St in Seattle. The anonymous person informed me that they saw a gun on the bed in the room which was in a black hostler. The gun had a black rubber grip and appeared to be chrome revolver.

On 11/16/15, at approximately 1100 hours I spotted Frazier loading items into his car which was a black Honda CRV with no plates and a replacement silver colored hatchback. He had a white female girl who was assisting him loading the car with numerous bags. She was later identified as Izquierra, Adriana M [REDACTED] /94. They left the motel at approximately 1130 hours and traveled down 4th Ave heading north. CCS Conaty was able to meet up with them several miles north of the motel as he was coming from the north. We followed them to the DOC Office. He reported to his DOC Officer Moen. We later talked with Officer Moen who informed us that he confirmed with Frazier that he was living at his DOC approved address located at 7325 Rainier Ave South APT 109, Seattle. Officer Moen further informed us that Frazier was not to be staying anywhere else nor did he have permission to stay at the Star Motel.

CCS Conaty and I followed Frazier until we lost him in the Capitol Hill of Broadway. We then relocated them at Dick's Drive-In located at 115 Broadway. We had Special Agent Cole, Special Agent Jacobsen and Seattle Gang Detective Jones join us for surveillance. We followed Frazier away from the area and followed him down to the Bell Town area of Denny Way and 8th Ave and lost him again. We ended our surveillance of Frazier.

At approximately 1700 hours, I went to the Star motel and learned the Frazier and Izquierra had checked out. Motel staff informed me that they both were staying there and had checked in on 11/15/15 but only Izquierra rented the room in her name. I obtained a copy of her registration.

On 11/17/15, we learned that they were both checked back into the same room at the Star Motel. At approximately 0930 hours, CCS Conaty arrived in the area to setup on surveillance in my Department issued White Crew Cab Ford Pickup which is fully equipped with emergency lights throughout the vehicle to include the front windshield, side windows, front headlights, back taillights and back window. I requested the Seattle Police NCI team to assist us in the arrest of Frazier for failing to reside at his DOC approved address. The NCI team is made up of SPD Officers and DOC Officers. SPD Officer Reyes and DOC Specialist Winfrey came to our location in their fully marked SPD Van which has SPD markings and Police Lights on top of the van and throughout the vehicle. At approximately 1000 hours, they arrived at our location and parked south of the room #2 down a block on 5th Ave out of sight.

At approximately 1100 hours, we had motel staff confirm that they were still in the room since the Black Honda CRV was not at the motel. They called into the room and spoke with a female who stated they were checking out very soon, she was just waiting for her friend to pick her up.

At approximately 1110 hours, the Black Honda CRV arrived and backed into the stall near the motel door for #2. We notified the NCI team to assist us in blocking the vehicle in. I arrived first and went nose to nose with Frazier's vehicle and activated my emergency lights. Frazier was the only occupant in the vehicle. CCS Conaty got out of my car wearing his tactical vest with Police markings. He was giving clear and loud commands to Frazier to turn off the car and show his hands. I heard Frazier revved the engine and was fearful that he was going to attempt to hit CCS Conaty or my vehicle. I closed the gap between our two vehicles and touched his bumper with mine. At this time the NCI Van was pulling to the right of my vehicle blocking any escape route. Frazier revved the engine again and hit the accelerator. He was able to push past my vehicle striking my bumper and then striking the NCI Van in the driver's door. Frazier then took off westbound on foot. He then cut through the motel heading south. He rounded the next corner and was now facing eastbound. He was tazed by CCS Conaty and myself after failing to comply with our commands to show his hands which were in his waist area and we could not see what was in his waist area as his back was to us. After an effective deployment of the tazer, he was taken into custody.

After he was checked for weapons, he was brought to the location of our vehicles. I Mirandized him with my Department issued card. He informed me that he understood his rights and this was done in front of CCS Winfrey. He wanted to know what was going on. I told him he was in big trouble for ramming the police. He told me that he thought we were out to get him and we were fake police. I pointed out to him all the emergency lights my vehicle has and then asked him how he could mistake the SPD Van. He stated I "fucking knew they were the Police". I asked why he rammed their vehicle if he knew they were the police. He did not answer nor did he make any further statements to me.

I went into the room and Mirandized Izquierra who was in the room. I informed her that she was not under arrest but I just wanted to ensure she understood her rights. She informed me that she understood them and was willing to talk. I further explained to her that I was going to search the room under DOC authority and I would be searching for DOC violations. I asked her how long she knew Frazier and she indicated only for a few days. I asked her if they were boyfriend/girlfriend and she said no. Sitting on a table next to her was a bag that was open wide enough to see inside it. It had a Halloween type mask in it. I asked her what that was about and she said it was Frazier's. I asked if he was doing "Licks" and she said no, it was for going after the person who killed his uncle. She said he has another one in the room. I asked her if she has seen him with a gun and she said yes. I saw some CO2 cartridges for a BB gun and asked her if she knows it's a real gun. She stated yes, he had it out and she saw it. I asked her if it looked like mine and removed my magazine and she said no, it was a revolver type that was in a black holster. I asked her where she slept last night,

EXHIBIT D

Title of Investigation:
FRAZIER, Robert Andre

Investigation Number:
78708 3-0008

Report Number:
2



DOC - CRIMINAL INCIDENT REPORT

Incident No. ATF: 787085-16-0008						Page 1 of 3
Address: 606 W. Gowe St., Kent, WA 98032		Phone: [REDACTED]	Fax: (253) 372-6184	Reporting Email: [REDACTED]		
Reported By/Date: John Conaty, 11/23/2015						
Incident Location						
Location: 5126 4 th Ave S #2		City: Seattle	State: WA	Zip Code: 98108		
Rep Date: 11/17/2015	Rep Time: 12:00	From Date: 11/17/2015	From Time:	To Date: 11/23/015	To Time:	
Incident Information						
Role: Arrested	Last Name Frazier	First Name: Robert	Middle Name: Andre	Sex: Male	Race: Black	
Birth Date: 8/9/1965		Ethnicity:	Role Description:			
Age: 50	Height: 6 ft 5 in	Weight: 308	Hair: Black	Eyes: Brown	Employment/Occupation	
Driver's Lic #:	Driver's Lic Issuer:	SSN: 552-13-2218	State ID #: 11998991	FBI #: 407858X6	Alias:	
Comments:					DOC #: 280118	
Address: 7325 Rainier Ave So		City: Seattle	State: WA	Zip Code: 98118	Phone: (206) 772-5242	
Off#:	Offense RCW:		Offense:	Att./Completed:		
Role: Witness	Last Name Izquierra	First Name: Adriana	Middle Name: M	Sex: Female	Race: White	
Birth Date: [REDACTED]/1994		Ethnicity:	Role Description:			
Age: 21	Height: 5'8"	Weight: 120	Hair: Black	Eyes: Brown	Employment/Occupation	
Driver's Lic #:	Driver's Lic Issuer:	SSN:	State ID #:	FBI #:	Alias:	
Comments:					DOC #:	
Address: Homeless		City: Des Moines	State: WA	Zip Code:	Phone: [REDACTED]	
Off#:	Offense RCW:		Offense:	Att./Completed:		
Off#:	Offense RCW:		Offense:	Att./Completed:		

Title of Investigation: FRAZIER, Robert Andre	Investigation Number: 7870 6-0008	Report Number: 2
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Description of New Criminal Activity in Officer Presence

I, John Conaty, am a Law Enforcement Officer employed by the Washington State Department of Corrections (WA DOC) and a Federally Deputized Task Force Officer (TFO) with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). I have over 11 years of law enforcement experience.

I am currently assigned to the Northwest Community Response Unit (NW CRU) and ATF Puget Sound Regional Crime Gun Task Force. One of my primary duties as a member of NW CRU and ATF is to look for and apprehend WA DOC offenders with outstanding WA DOC warrants. The primary partner I work with is fellow CCS and TFO Kris Rongen.

On 11/23/1981, Robert Andre Frazier (DOB: 8/9/65 and DOC: 280118), was sentenced in Kitsap County Superior Court for cause 81-1-00394-8 for Murder 1st. Frazier was sentenced to life in prison. On 8/11/2015 Frazier was released from prison and sentenced to 3 years Community Custody Supervision. As of the writing of this report Frazier has a supervision end date of 8/10/18.

I was informed by CCS/TFO Rongen that Frazier might be in possession of a firearm. I familiarized myself with Frazier's physical characteristics as well as most recent photograph. I was also informed by CCS/TFO Rongen that Frazier was recently the victim of an attack where he was allegedly shot at and beaten.

On 11/17/15 I was informed by CCS/TFO Rongen that Frazier was staying at the Star Motel at 5216 4th Ave S, Seattle, WA in room #2. I assisted CCS/TFO Rongen with surveillance. I was told that Frazier was driving a black Honda CRV with a temporary license tag in the rear window. I was also informed that Frazier was in violation of his WA DOC conditions of supervision by not residing at his WA DOC listed address.

CCS/TFO Rongen contacted WA DOC CCS Chad Winfrey and Seattle Police Officer Felix Reyes and asked for their assistance. CCS Winfrey and Officer Reyes assisted us with the apprehension of Frazier. CCS Winfrey and Officer Reyes were riding together in a marked Seattle Police Van equipped with an overhead red and blue lightbar.

CCS/TFO Rongen and I were riding in our WA DOC issued vehicle. This vehicle is a white Ford F-150 pick up equipped with emergency equipment to include red and blue flashing lights as well as a siren and loud speaker.

On 11/17/15 at approximately 11:10am I witnessed a black Honda CRV travel southbound on 5th Ave S from S. Bennett St. The black Honda stopped outside room #2 and backed into a parking stall right outside the front door. WA DOC CCS Chad Winfrey and Seattle Police Officer Felix Reyes were assisting us on this arrest. As the Honda began to back into the parking stall CCS/TFO Rongen and I began to move from our surveillance location to "box in" the Honda and arrest Frazier. As we began to move CCS Winfrey, the driver of the van, began to approach the vehicle as well. As we began to driver toward the Honda I activated our emergency lights and CCS/TFO Rongen positioned the front bumper of our vehicle within inches of the Honda. I exited the passenger door with my gun drawn and began to yell verbal commands "Show me your hands," and eventually "Stop Police." As I was yelling verbal commands I could see the blue Seattle Police van pull up along side of me and about 6 feet off the front left bumper of the Honda. As I was yelling verbal commands I heard the engine on the Honda rev up. It appeared as though Frazier had attempted to put the vehicle in drive and sped away, however he accidentally put it in neutral instead. Frazier quickly put the vehicle in drive and accelerated rapidly. As he did this he scraped the front bumper of our White F-150 truck and then gained speed and crashed directly into the drivers side door of the Seattle PD van. It appeared to me that Frazier deliberately crashed his vehicle into the Seattle PD van.

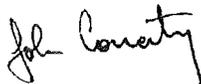
After Frazier deliberately rammed the van he got out of his vehicle and fled on foot. CCS/TFO Rongen, Seattle Police Officer Reyes and I pursued Frazier on foot. As I passed the Honda I could see that no one else was inside the vehicle. Frazier ran around the corner at S. Bennett St and 5th Ave S and began to head westbound on S. Bennett St. CCS/TFO Rongen was immediately behind Frazier and Office Reyes was close behind CCS/TFO Rongen. After running about 75 yards I observed Frazier turn left and begin to run southbound behind one of the buildings of motel. I began to parallel Frazier's path in between 2 buildings. I encountered Frazier in a parking lot on the south end of the building. As I approached Frazier his hands were at his waistband. I was concerned for my safety as well as the safety of the public since Frazier was reportedly in possession of a firearm. I quickly transitioned from my firearm to my department issued taser. I deployed my taser and observed one of the probes strike Frazier in the abdomen area. Frazier lowered himself to the ground. After repeated attempts to get Frazier to put his hands behind his back we were able to get him in handcuffs.

Based on the information received from CCS/TFO Rongen I began to conduct a WA DOC search of the Honda CRV that Frazier was driving and the sole occupant of. I began to look for any violations of Frazier's conditions of supervision. CCS Winfrey assisted me with the search of the Honda CRV. CCS Winfrey advised me that he located a firearm in a backpack in the vehicle. I took pictures of the scene to include pictures of the backpack and firearm. I removed the firearm from the holster it was in and "made it safe." The firearm was a .38 Special revolver. There were 4 rounds in the 5 round cylinder. I placed the firearm in a brown paperbag. I also placed the 4 rounds of ammunition in a separate bag. I continued to search the vehicle for violations of Frazier's conditions of supervision. I located multiple phones in the vehicle. There was a black ZTE cell phone plugged into a car charger that was lying on the floor. I presume the cell phone fell to the floor after Frazier rammed the police vehicle. There were other phones in a black bag located just behind the center armrest. I took the phones into evidence. I also took the gun and ammunition into evidence.

I went to the WA DOC Kent/Federal Way office and entered all the evidence. I entered all of the evidence that I recovered as well as what CCS/TFO Rongen recovered. I packaged the firearm in a box to preserve for prints and/or DNA. I also packaged the ammunition in a paper bag to preserve for prints and/or DNA. I field tested the suspected methamphetamine and it returned with a positive result from a commercially produced field drug test kit. The methamphetamine had a package weight of 0.9 grams. I completed the evidence log and secured the evidence into the appropriate locker.

On 11/23/15 I signed out the firearm and ammunition from the evidence locker at the Kent/Federal Way WA DOC office and transferred custody of that to ATF Special Agent Catherine Cole.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct (RCW 9A.72.085).



John Conaty

11/24/2015

Community Corrections Specialist Signature

Name (Print)

Date

Distribution: ORIGINAL - Prosecuting Attorney COPY - Imaging System via DOCSwiftCertain@doc.wa.gov. Field File

EXHIBIT E



SEATTLE POLICE DEPARTMENT
NARRATIVE TEXT HARDCOPY

GO# 2015-401392 OPEN

1311-0 ASSLT-AGG-POLICE-WEAPON

On 11/17/2015 I was in full Seattle Police uniform patrol as unit 412, my partner was Department of Corrections Specialist Winfrey. Our unit is collaboration between the Seattle Police and the Department of Corrections and is assigned a fully marked van with emergency light bar and siren. On this date CCS Winfrey was driving and I was in the front passenger's seat when DOC Specialists Rongon and Conaty had asked for our assistance. CCS Rongon and Conaty are attached to the Bureau of Alcohol, Tobacco and Firearms Gun Crime Task Force /Seattle Office. CCS Rongon and Conaty had information that Robert Frazier was operating an older model Honda CR-V plate unknown plate, residing at the Star Motel, 5216 4 Av S room #2 and was in possession of a firearm.

The Star Motel is not a DOC approved address. If located at the Motel, Frazier would be in violation and subject to arrest.

At 1009 hours, Specialist Winfrey and I arrived at the Motel and confirmed with management that Frazier and a female named Izquierria, Adriana M (/94) had used their WA ID to register. Adriana was currently inside the room #2 and was awaiting Frazier's return to check out.

Specialists Rongon and Conaty staged their un-marked vehicle within view of room #2. Rongon and Conaty were wearing clearly marked Police/DOC vest and their vehicle is equipped with bright emergency lights and a siren.

The following was captured on my ICVS:

At approximately 11:11 hours, CCS Rongon and Conaty observed Frazier behind the wheel of a Black Honda CR-V. They observed him back into the parking stall in front of room #2. CCS Winfrey and I were approximately three car lengths behind when I observed CCS Rongon and Conaty maneuver their truck a half a car length in front of Frazier's vehicle. I observed their vehicle's emergency lights fully

activated when CCS Rongon and Conaty exited. I observed CCS Rongon and Conaty attempt to contact Frazier. As Winfrey and I drew closer I heard Conaty yell in

a clear voice "Police get out" with his gun drawn. Frazier remained inside the CR-V. CCS Winfrey maneuvered the van to the right of Rongon and Conaty to prevent Frazier from fleeing. Frazier disregarded CCS Conaty's repeated commands

and with what appeared to be total disregard to our vans close proximity accelerated and rammed his vehicle into our van's driver side door as CCS Winfrey was placing our vehicle into park. The collision prevented CCS Winfrey from exiting on the driver's side.

Immediately after the collision Frazier exited and fled on foot disregarding numerous commands to stop and get to the ground. CCS Rongon, Conaty and I pursued Frazier on foot. He was taken into custody after a short foot pursuit and a Taser application by CCS Conaty.

Frazier was returned to the original location and as Department of Corrections has legal authority over his property a search of Frazier's



SEATTLE POLICE DEPARTMENT
NARRATIVE TEXT HARDCOPY

GO# 2015-401392 OPEN

1311-0 ASSLT-AGG-POLICE-WEAPON

vehicle was performed by Specialist Conaty, Rongon and Winfrey. A stolen fully loaded .38 caliber revolver was located on the rear driver's side seat. The firearm was within lunge distance and easily accessible by the driver. The revolver was a verified stolen from a reported burglary in September (SPD # 15- 308857). Also suspected Methamphetamine was located inside of the motel room. CCS Rongon and Conaty maintained custody of the firearm and drugs. Frazier later complained of chest pain and was evaluated by Seattle Fire and transported to HMC for further treatment. At the time of this report Frazier was still at HMC under SPD hospital guard. Our van sustained significant damage to the driver's side door/fender and had to be towed from the scene. Sgt. Brown responded to the scene and screened the entire incident.

]

Location : 5216 4 AV S
 X-coordinate : 1271049
 Y-coordinate : 206074
 Longitude : -122.32927
 Latitude : 47.5551001
 Latitude-Degrees : 47
 Latitude-Minutes : 33
 Latitude-Seconds : 18.36
 Latitude-Hemisphere : N
 Longitude-Degrees : 122
 Longitude-Minutes : 19
 Longitude-Seconds : 45.39
 Longitude-Hemisphere : W

PERSON

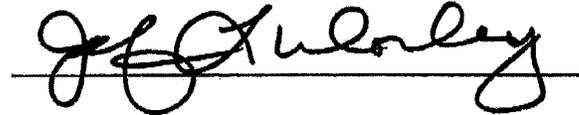
=====
 Role : 3 (ARRESTED)
 No : 1
 Surname : FRAZIER
 First : ROBERT
 Middle : ANDRE

EXHIBIT F

1
2 Contrary to RCW 9.41.040(1), and against the peace and dignity of the State of
Washington.

3 DANIEL T. SATTERBERG
4 Prosecuting Attorney

5 By:

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7

8 Jennifer L. Worley, WSBA #32800
9 Senior Deputy Prosecuting Attorney

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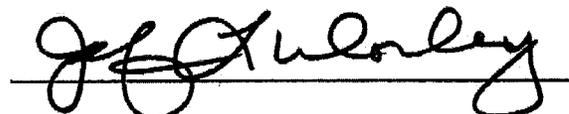
CAUSE NO. 15-1-05771-1 SEA

PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR
CONDITIONS OF RELEASE

The State incorporates by reference the Certification for Determination of Probable Cause prepared by Detective Heriberto Garcia of the Seattle Police Department for case number 15-401392.

Pursuant to CrR 2.2(b), the State requests bail set in the amount of \$100,000.00; as set by the court at First Appearance. The defendant was convicted in 1981 of Murder in the First Degree and sentenced to life in prison. Presumably released on parole, the defendant is under the supervision of the Department of Corrections. Here, he was caught living at a non-DOC-approved address, a violation of his conditions of release. When officers attempted to arrest him, he rammed an officer's vehicle, pinning that officer inside the vehicle and fled on foot. Officers then located a loaded revolver inside the car that the defendant was driving. Inside his motel room were some drugs. The defendant is clearly violating his DOC conditions and is not someone who will abide by conditions of release. The defendant is also a flight risk and a danger to the community at large.

Signed and dated by me this 20th day of November, 2015.



Jennifer L. Worley, WSBA #32800
Senior Deputy Prosecuting Attorney

CAUSE NO. _____



SEATTLE
POLICE
DEPARTMENT

**CERTIFICATION FOR DETERMINATION
OF PROBABLE CAUSE**

GENERAL OFFENSE # 2015-401392
UNIT FILE NUMBER

That Ed Garcia is a Detective with the Seattle Police Department and has reviewed the investigation conducted in Seattle Police Department Case Number 2015-401392;

There is probable cause to believe that Robert Andre Frazier, B/M, DOB 08/09/65 committed the crime(s) of Assault and VUFA within the City of Seattle, County of King, State of Washington.

This belief is predicated on the following facts and circumstances:

Robert Andre Frazier is under close Washington State Department of Corrections supervision for a for a Murder in the 1st degree conviction. Frazier's DOC number is 280118. As part of Frazier's DOC supervision, he is mandated to reside or stay at a DOC approved address. On 11/17/15, DOC Officer's C. Winrey, Rongon, Conaty and Seattle Police Officer Reyes respond to the Star Motel located at 5216 4th Ave S. The officers received information that Frazier was staying at this motel in violation of his DOC restrictions and were going to place him under arrest.

Rongon and his partner DOC/ATF Specialist Conaty set up on surveillance just south of the motel. SPD Officer Reyes, and Winrey arrived at the hotel and asked the manager if Mr. Frazier had stayed there the previous night. The manager confirmed that Frazier and a female had stayed there last night and had not checked out to the best of her knowledge. She also had a copy of both of their driver's licenses further confirming the identity of the two in the room. The motel manager also had the vehicle information associated with the two that coincided with the information the officers had that Frazier was using a Black Honda CRV. The officers were in a fully marked SPD/DOC patrol vehicle and took extra care to be out of sight.

As the officers are surveilling the motel, Specialist Rongon calls Officer Winrey and alerts him that Frazier had arrived and that it was time to move in and affect the arrest. Officers Rongon and Conaty move in driving an unmarked white Ford F-150. Their vehicle was unmarked but is equipped with very bright blue and red police lights placed in several conspicuous locations around their vehicle. Those lights were on when they moved in to make contact with Frazier in his car.

Officers Winrey and Reyes drive up in a clearly marked police patrol van. Officers Rongon and Conaty exit the vehicle wearing clearly marked Police/DOC vests with their vehicle lights on and attempt to give Frazier commands to exit his vehicle. As Officers Winrey and Reyes are pulling up in their own car, Frazier turns his car sharply towards Winrey and Reyes, and in an attempt to get away, closes the distance quickly and rams his car into the vehicle occupied by Officers Winrey and Reyes. Frazier then immediately exited his car and fled on foot. Due to the collision, Officers Winrey's door was pinned closed so he exited the car via the passenger side and gave chase with the other officers. After a brief foot pursuit, Frazier was tased by Officer Conaty, and taken into custody without further incident.



SEATTLE
POLICE
DEPARTMENT

**CERTIFICATION FOR DETERMINATION
OF PROBABLE CAUSE**

INCIDENT NUMBER 2015-401392
UNIT FILE NUMBER

DOC Officers searched the vehicle that Frazier was driving after the arrest and recovered a loaded .38 caliber revolver inside a camouflaged bag that was behind the driver's seat. Officer Reyes conducted a records check on the recovered firearm. The records check showed that the recovered firearm was stolen during a reported burglary in Seattle, (SPD #2015-308857).

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to best of my knowledge and belief. Signed and dated by me this 18th day of November, 2015, at Seattle, Washington.

Ed Garcia



**SEATTLE POLICE DEPARTMENT
GENERAL OFFENSE HARDCOPY
KC PROSECUTOR RELEASE COPY**

GO# 2015-401392 OPEN

1311-0 ASSLT-AGG-POLICE-WEAPON

Related Image - OTHER

Attachment Description: OFC'S SUPERFORM
Reference Number:

AGENCY Seattle PD	WASPD0000	CASE NUMBER 15-401392	FILE NUMBER	PCN NUMBER	SUPERFORM	
DATE & TIME OF VIOLATION 11/17/2015 11:21 PM		CRIMINAL / FM / FC CITATION / ATTACHED <input type="checkbox"/> YES <input type="checkbox"/> NO		ACCOMPLISHED		
DATE OF ARREST/DATE 11/17/2015 11:21 PM		ARREST LOCATION 15216 4 Av S				
NAME (LAST, FIRST, MIDDLE INITIAL (I.E. J)) FRAZIER, ROBERT ANDRE			DOB 8/6/1965	ALIAS, NICKNAMES		
ARMED/DANGEROUS <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		IDENTITY IN DOUBT <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		CITIZENSHIP		
PHYSICAL DETAILS						
SEX M	HEIGHT 605	WEIGHT 280	SKIN TONE DRK	RACE B	EYE BRN	
SCARS, MARKS, TATTOOS, DISFORMITIES						
IDENTIFICATION DETAILS		APR # 00166389		STATE ID # WA11888891	DRIVER'S LICENSE #	
COB 189347B	PREV. BAL # 313019226	APR # 00166389	FIN # 407858X6	STATE WA	ISSUE DATE	
EMPLOYMENT / SCHOOL						
EMPLOYER / SCHOOL (ADDRESS, SHOW/NOT NUMBER)						
RESIDENCE ADDRESS 22811 LAKEVIEW DR UNIT: APT F306 NT LK TERRACE, WA 98043						
RESIDENCE PHONE						
BUSINESS PHONE						
OCCUPATION						
EMERGENCY CONTACT						
PERSON TO BE CONTACTED IN CASE OF EMERGENCY			RELATIONSHIP	ADDRESS	PHONE	
OFFENSES						
OFFENSE	OV	FUGITIVE	1 - ASSAULT INV	ROW / ORD# 1309	COURT / CAUSE #	CITATION #
OFFENSE	OV	FUGITIVE	1 - UNLAW POSS FRARM INV	ROW / ORD# 5212	COURT / CAUSE #	CITATION #
OFFENSE	OV	FUGITIVE	1 - STOLEN FIREARM INV	ROW / ORD# 5289	COURT / CAUSE #	CITATION #
OFFENSE	OV	FUGITIVE		ROW / ORD#	COURT / CAUSE #	CITATION #
WARRANTS						
WARRANT DATE 11/17/2015 12:00:00 AM	WARRANT NUMBER 280118	OFFENSE DOG DETAINER	AMOUNT OF BAIL 0.0000	WARRANT TYPE PR		
ISSUING AGENCY DOG OLYMPIA		ISSUING AGENCY 000	WARRANT RELEASED TO (SERIAL # / UNIT / DATE / TIME) 1 /			
WARRANT DATE 11/17/2015 12:00:00 AM	WARRANT NUMBER 280118	OFFENSE DOG DETAINER	AMOUNT OF BAIL 0.0000	WARRANT TYPE PR		
ISSUING AGENCY DOG OLYMPIA		ISSUING AGENCY 000	WARRANT RELEASED TO (SERIAL # / UNIT / DATE / TIME) 1 /			
PROPERTY						
LIST VALUABLE ITEMS OR PROPERTY LEFT FOR ARRESTEE AT JAIL						
DECLARATIONS						
LIST VALUABLE ITEMS OR PROPERTY ENTERED INTO EVIDENCE (SIMPLE DESCRIPTION, IDENTIFYING MARKS, SERIAL #)						
LIST ITEMS ENTERED INTO SAFEKEEPING						
TOTAL CASH OF ARRESTEE \$0.00		WAS CASH TAKEN INTO EVIDENCE? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		AMOUNT: \$0.00		
SIGNATURE OF JAIL STAFF RECEIVING ITEMS / SERIAL #						
ARRESTING OFFICER / SERIAL # REVVS, Felix M 7428						
SUPERVISOR'S SIGNATURE (BY SIGNATURE OR SEAL #) REVVS, Felix			TRANSPORTING OFFICER / SERIAL #			
SUPERVISOR'S SIGNATURE (BY SIGNATURE OR SEAL #) REVVS, Felix			SUPERVISOR SIGNATURE / SERIAL #			
CONTACT PERSON FOR ADDITIONAL INFORMATION (NAME / SERIAL # / PHONE)						
SUPERIOR COURT						
FILING INFO		<input type="checkbox"/> IN CUSTODY	<input type="checkbox"/> AT LARGE	<input type="checkbox"/> OUT ON BOND	COURT CAUSE (STAMP OR WRITE)	
COURT/ST		DST / DT		DST / CT DATE		
CT NO.		BOND #				
PERSON APPROVING EXTRADITION						
SEMI-LOCAL ONLY WHICH STATE WOULD		<input type="checkbox"/> WHICH STATE WOULD EXTRADITE FROM 2-A OR ONLY		<input type="checkbox"/> WHICH WILL EXTRADITE FROM OR TO HI, HI, WY, CA, WY, HI, CO, AZ, WA, OR, NV		
WHICH STATE WOULD EXTRADITE FROM ALL 50 STATES		<input type="checkbox"/>		<input type="checkbox"/>		
CC#	DOC	DOC	DOC			
WAD	IDE	IDE	TOC			

Rev 07/08 Updated on 11/17/2015 12:00:00 PM

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT ANDRE FRAZIER,

Appellant.

No. 81-1-00394-8
COA No. _____

CERTIFICATE OF SERVICE

CERTIFICATE

I certify that I mailed a copy of the Personal Restraint Petition to:

Kitsap County Prosecuting Attorney's Office
614 Division Street, MS-35
Port Orchard, WA 98366

And to:

Robert Andre Frazier
DOC # 280118
P.O. Box 888
Monroe, WA 98272

DATED this 27th day of October, 2017, in Seattle, WA.


Attorney for Appellant Robert Andre Frazier
Andrea Kim, WSBA #46339
GAUSE LAW OFFICES, PLLC

GAUSE LAW OFFICES, PLLC

October 31, 2017 - 2:47 PM

Filing Personal Restraint Petition

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: Case Initiation
Trial Court Case Title: State Vs Frazier
Trial Court Case Number: 81-1-00394-8
Trial Court County: Kitsap Superior Court
Signing Judge:
Judgment Date:

The following documents have been uploaded:

- 0-PRP_Personal_Restraint_Petition_20171031144618D2011063_6406.pdf
This File Contains:
Personal Restraint Petition
The Original File Name was Robert Andre Frazier ISRB PRP one doc.pdf

Comments:

Contains Personal Restraint Petition, Exhibits, and Certificate of Service.

Sender Name: Andrea Kim - Email: andrea@emilygauselaw.com

Address:

130 ANDOVER PARK E STE 300

TUKWILA, WA, 98188-2990

Phone: 206-660-8775

Note: The Filing Id is 20171031144618D2011063