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Court of Appeals No. 52642-5

In the

Court of Appeals for the State of Washington

Division Two

In Re the Personal Restraint of:

JAMES MITCHELL,

Petitioner.

REPLY BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION

Pierce County Superior Court No. 14-1-02979-1

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I. INTRODUCTION

James Mitchell is the petitioner in the above-captioned personal restraint petition matter. As set forth in his Personal Restraint Petition with Legal Argument and Authorities (Opening Br.), he has suffered actual and substantial prejudice from the individual and cumulative impact of several constitutional errors occurring in his trial and on appeal. The State of Washington has submitted its Response (Resp. Br.) contesting Mr. Mitchell's petition. As set forth herein, the State fails to provide a factual or legal basis for denying Mr. Mitchell's petition. Mr. Mitchell therefore requests that this Court grant his petition and remand this matter.

II. ARGUMENT

A. The trial court's order wrongly excluding other suspect evidence was "final" and Mr. Mitchell's challenge thereto was preserved.

The State argues Mr. Mitchell is not entitled to relief due to the trial court's exclusion of other suspect evidence from trial because the trial court's ruling on the issue was merely "tentative", not "final." Resp. Br. at 3-4. The authority upon which the State relies, however, undermines its position and makes clear that the court's ruling expressly "grant[ing]" the State's motion to exclude other suspect evidence in this case was in fact final. See Resp. Br. at 3-4 (citing State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615, 623 (1995)).

In Powell, the parties presented a number of evidentiary issues to the trial court for pretrial rulings. Powell, 126 Wn.2d at 249-53. The trial judge ruled that some items would be admitted and others excluded. Id. at 253-54. As to one issue, the judge expressly "reserved ruling", stating that "defense counsel would need to provide case law to support the exclusion of [the evidence]". Id. at 254. As to all other issues, the judge "stated generally that all of his rulings were subject to revision at the time of trial in terms of both nature and extent." Id. at 254.

Defense counsel did not renew objections to the challenged evidence at trial. Id. The State argued that by not renewing objections, the defendant failed to preserve the evidentiary rulings for appeal because the court's *in limine* rulings were tentative, not final, due to the trial judge's statement that his rulings were subject to revision at trial. Id. at 256.

Washington's Supreme Court rejected the State's argument, holding the trial court's pretrial rulings were "final", not "tentative", regardless of the fact that it stated its rulings were subject to revision. Id. at 257. The only issue the Court found to have been waived was the issue with respect to which the trial judge expressly "reserved ruling". Id. As to that issue only, defense counsel was required to renew his objection to preserve the issue for appeal. Id.

In Mr. Mitchell's case, the trial court did not reserve ruling on the State's motion, but rather held "[t]he State's motion to exclude other suspect evidence is ***granted***." Attach. I at 2 (emphasis added). The finality of this holding could not have been clearer.

In nonetheless arguing that the court's holding was "tentative", not "final", the State points to the court's language that "Defendant may re-litigate the issue of other suspect evidence based on evidence produced or proffered at trial." Attach. I at 2. However, this language is materially indistinguishable from the court's statement in Powell that all pretrial evidentiary rulings were subject to revision. As in Powell, the court unequivocally entered a final order "grant[ing]" the State's motion to exclude other suspect evidence, and the insertion of the invitation to re-litigate or ask the court to reconsider in no way renders the court's clear grant of the State's motion "tentative".

Moreover, in both Powell and the instant case, the open invitations to re-litigate are superfluous. Even if the court did not explicitly allow for "re-litigat[ion]" in this case or "revision" in Powell, this right would have existed anyway, as parties are generally free to seek re-consideration of any court rulings, particularly pretrial evidentiary ones, at any time prior to entry of verdict (and even afterwards under circumstances delineated in CrR 7.5 and 7.8). See, e.g., Reg'l Transit Auth. v. Heirs & Devisees, 135

Wash. App. 446, 465, 144 P.3d 322, 331 (2006) (recognizing that courts are "entitled" to reconsider *in limine* rulings during trial, despite the law of the case doctrine). Pursuant to Powell, the trial court's ruling granting the State's motion to exclude other suspect evidence was final, and Mr. Mitchell's opposition thereto was therefore preserved.

In any event, if the Court agrees with the State's argument on this point (in violation of the holding in Powell), this would serve to only strengthen Mr. Mitchell's argument that he was deprived ineffective assistance of counsel due to his attorney's failure to "re-litigate" the other suspect issue following Mr. Mitchell's testimony. See Opening Br. at 43-44. Certainly, if the court's ruling granting the State's motion to exclude crucial other suspect evidence was merely "tentative", a failure to raise the issue again during trial would have constituted deficient performance under Strickland's objective reasonableness standard. Strickland v. Washington, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

B. Mr. Mitchell identified considerable "other suspect" evidence that should have been admitted with specificity.

1. Mr. Mitchell was exceedingly clear in his Opening Brief regarding the other suspect evidence he wished to present.

The State argues Mr. Mitchell failed to identify with specificity which "other suspect" evidence he asserts would have been admitted at

trial but for the trial court's evidentiary ruling on this issue or, alternatively, defense counsel's deficient performance. Resp. Br. at 4-8. Cursory review of Mr. Mitchell's Opening Brief reveals otherwise. Opening Br. 6-10, 23-25.

Mr. Mitchell in fact set out in great detail the other suspect evidence he would have presented but for denial of his constitutional right to present a defense and to effective assistance of counsel. Specifically, as stated in Mr. Mitchell's Opening Brief, Mr. Mitchell would have elicited testimony from Det. O'Hern, Mr. Chandler, Ms. Chandler, Sylvia Lucinda, and/or Sylvia Patrick, that: Mr. Chandler had a relationship with Ms. Robinson that involved smoking crack-cocaine together and occasional sex during a period of time in the months prior to her death when Mr. Chandler was separated from his wife. Attach. D at 7; Attach. G at 5; Mr. Chandler used Ms. Robinson as a "runner". Attach. D at 7; Attach. G at 5; Mr. Chandler was "known to be violent when it came to dealing with his dealers", Attach D. at 7; "Chandler ha[d] pressured Linda and approached her with offers of money for sex," Attach. D at 10; Attach. G at 7; Mr. Chandler owed Ms. Robinson money, Attach. D at 9; Mr. Chandler "was our focus of attention" at the time of the investigation, Attach. F at 16; Mr. Chandler "was the person that [Det. O'Hern] believed probably … of the people we talked to … uh, most likely had something

to do with her death, but…" Attach. F at 17; Mr. Chandler was "a person of interest" and "suspect number one in my mind" because "he was supplying dope to her", he "could be violent to his suppliers if they didn't […] pay him on time", he "was the one guy that was involved in unlawful activity with her … prior to her death", Attach. F at 17; Mr. Chandler was "[k]inda scary," and would have "paranoia" and "get scary" when he smoked crack-cocaine, Attach. G at 6; Mr. Chandler would get violent towards Mr. McGruder out of frustration because he perceived Mr. McGruder as getting in the way of being able to have sexual relations with Ms. Robinson Attach. G at 7; Mr. Chandler and Ms. Robinson would borrow money from each other to purchase drugs, Attach. G at 12-13; and Mr. Chandler knew where Ms. Robinson's new apartment was located, and that they had recently been spending time (and money, presumably on drugs) together at the apartment. Id.

Mr. Mitchell was quite clear in his Opening Brief that the foregoing was the evidence he wished to introduce at trial, and he referenced all such evidence by attachment and page number. See Opening Br. at 6-10, 23-25. The State's assertion that Mr. Mitchell "does not tell this court what that [other suspect] evidence is", but rather simply left it for the court to blindly sort through various attachments to ascertain what other suspect evidence he would have presented, is not based in

reality. See Resp. Br. at 4. Mr. Mitchell made it abundantly clear in his Opening Brief what other suspect evidence he should have been allowed to present and has done so again here. See Opening Br. at 6-10, 23-25.

2. Mr. Mitchell was not required to anticipate and respond to each other possible evidentiary objections the State could have raised, but did not, to his proffered other suspect evidence.

The State further argues Mr. Mitchell was required in his opening brief to argue as to each piece of other suspect evidence why that evidence would have been admissible had he been permitted to pursue his other suspect defense. Resp. Br. at 4. The only authority the State cites in support of this proposition is State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). Pacheco does not even address this issue, much less support the State's assertion that a petitioner or appellant arguing denial of the right to present "other suspect" evidence has the affirmative burden of raising and responding to all other conceivable evidentiary objections the State could have raised.

In Pacheco, in the course of investigating a robbery, law enforcement questioned another suspect, Thompson, who looked like the defendant and, like the defendant, fit the robber's description. Id. at 61. It was an established fact that Thompson was in a Minnesota jail at the time of the robbery and could not have been the culprit. Id.

Nonetheless, the defendant wished to call Thompson as a witness to testify that he was questioned in connection with the robbery in order to support the defense argument that it is theoretically possible that someone else who looked like the defendant committed the robbery, even though that someone could not have been Thompson. Id. The court disallowed the testimony because it was irrelevant. Id. at 67. Pacheco thus stands merely for the straightforward proposition that evidence that someone else who could not possibly have committed the crime somewhat resembles the defendant is not relevant.

Mr. Mitchell has met his burden of showing relevance and materiality by meeting the applicable "other suspects" evidence standard set forth in State v. Franklin, 180 Wn.2d 371, 377 n. 2, 325 P. 3d 159 (2014). The State argues that after meeting this standard, the proponent must also state additional affirmative grounds for admitting each piece of evidence. Pacheco provides no support for this proposition, and the State cites no other applicable authority. Pacheco imposes no additional hurdles for appellants or personal restraint petitioners must face once relevance is established.

Mr. Mitchell's "other suspect" evidence was excluded (wrongly) under the Franklin standard. As set forth in Mr. Mitchell's Opening Brief, the trial court's decision on this point was incorrect, as there was more

than sufficient evidence tending to connect someone other than Mr. Mitchell with the crime. In any event, as set forth below, had Mr. Mitchell been allowed to present other suspect evidence, no other rules of evidence would have prevented him from doing so.

3. Mr. Mitchell's proffered other suspect evidence would have been otherwise admissible had he been permitted to pursue his other suspect defense.

The State asserts that Mark McGruder's statements, and implicitly Det. O'Hern's testimony based thereupon, would have been inadmissible as hearsay had Mr. Mitchell overcome the other suspect evidentiary hurdle, given Mr. McGruder's untimely death in 2010. Resp. Br. at 4-5. The State asserts further that Mr. Mitchell fails to establish he could have introduced evidence through other witnesses, such as Mr. Chandler, Ms. Lucinda, and Ms. Patrick, because he failed to show they would have been available. The record is clear, however, that Mr. Mitchell would have been able to present his other suspect evidence through various witnesses had he been permitted to pursue this defense. To the extent there is any uncertainty on this point, remand for an evidentiary hearing is appropriate. See In re Yates, 177 Wn.2d 1, 18, 296 P.3d 872, 880-81 (2013) ("[A] hearing is appropriate where the petitioner makes the required prima facie showing 'but the merits of the contentions cannot be determined solely on the record.'")

As a preliminary matter, even if Mr. McGruder's testimony and additional other suspect evidence (such as Mr. Chandler's failed polygraph examination and history of assaultive behavior) would have been properly excluded on other grounds, it nonetheless must be considered in evaluating Mr. Mitchell's challenge to the trial court's exclusion of his other suspect evidence. See ER 104(a) ("Preliminary questions concerning […] the admissibility of evidence shall be determined by the court […]. In making its determination it is not bound by the Rules of Evidence except those with respect to privileges"). Then, regardless of the admissibility of Mr. McGruder's statements and other evidence, Det. O'Hern would have been able to testify at trial that his investigation revealed that Mr. Chandler was "suspect number one in my mind", was "supplying dope to [Ms. Robinson]", he "could be violent to his suppliers if they didn't […] pay him on time", and "was the one guy that was involved in unlawful activity with her … prior to her death". Attach. F at 17. This evidence would have been tremendously helpful to Mr. Mitchell's defense.

Moreover, if there were a State hearsay challenge to introduction of information obtained from McGruder through Det. O'Hern's testimony, which there was not, these statements would have been admissible because Mr. McGruder was unavailable at trial, his statements contain sufficient indicia of trustworthiness to warrant admission, and his

statements were critical to Mr. Mitchell's defense. See Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

In Chambers, the United States Supreme Court found that the defendant's fundamental due process right to a fair trial under the Fourteenth Amendment was violated where he was prevented from introducing the hearsay testimony of witnesses who heard another witness confess to the charged offense of murder. 410 U.S. at 294-303. The Court determined that depriving the defendant of witnesses who provided hearsay evidence exonerating him of murder deprived him of "testimony critical to Chambers' defense", and rendered his trial fundamentally unfair. Id. at 300-302. The Court rejected a mechanistic application of the hearsay rule where to do so would "defeat the ends of justice":

> In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Id. at 302.

Based on Chambers, had the State presented a hearsay objection (which it did not) to Mr. Mitchell's proffered testimony based on Mr. McGruder's, Ms. Lucinda's, Ms. Patrick's, or Mr. Chandler's statements to Det. O'Hern, this objection should have been overruled. As in Chambers, Mr. McGruder's statements and other evidence implicating Mr. Chandler was "critical" to Mr. Mitchell's defense. Therefore, as in

Chambers, depriving Mr. Mitchell of the ability to present this evidence on the grounds that, through no fault of Mr. Mitchell's, Mr. McGruder was deceased by the time of trial and/or other witnesses were unavailable, would deprive Mr. Mitchell of his due process right to a fair trial.

Application of the holding in Chambers to the facts of this case is further appropriate because Mr. McGruder's statements have indicia of reliability. Throughout the interview, Mr. McGruder made multiple statements against penal interest that would be admissible under ER 804(3). He admitted to smoking crack-cocaine with Ms. Robinson, that he would go to "23rd" and other locations with Ms. Robinson to purchase crack-cocaine (unlawful possession), that he would purchase crack for Mr. Chandler (criminal distribution), and that he had been in a physical altercation (assault) with Mr. Chandler when they were smoking crack together. Attach. G at 4-5, 7, 10. Additionally, the interview was conducted by law enforcement, an agent for the State, rather than by a defense interviewer intending to obtain exculpatory statements from the interviewee. Mr. McGruder's statements are further corroborated by those of other witnesses, including Ms. Patrick, Mr. Chandler, and Sylvia Lucinda. Attach. D at 7-10. Mr. McGruder's statements are believable on their face, and the State provides no reason to question anything he said in his interview. Finally, on top of all these indicia of reliability, Mr.

McGruder underwent a polygraph examination and was determined to be telling the truth. Attach. D at 10; see ER 104(a).

Given the inherent reliability of Mr. McGruder's statements, and the fact that he was unavailable at trial through no fault of Mr. Mitchell, the hearsay rule may not be mechanistically applied to deprive Mr. Mitchell of this critical evidence. See Chambers, 410 U.S. at 294-303.

The State argues also that eliciting this other suspect evidence from other witnesses, such as Ms. Patrick and Ms. Lucinda, would be hearsay. Of course, if they testified to these facts on the stand, as trial counsel clearly intended before the trial court granted the State's motion to exclude other suspect evidence, it would not be hearsay.

Implicitly acknowledging the fatal flaw of this argument, the State argues "alternatively" that Mr. Mitchell's argument fails because he did not prove in his petition that Ms. Patrick, Ms. Lucinda, Mr. Chandler, or other witnesses would have been available as witnesses to testify to the facts regarding the relationship between Mr. Chandler and Ms. Robinson. See Resp. Br. at 5-6. However, statements made by Mr. Chandler, Ms. Patrick, and Ms. Lucinda are all in the record and the State provides no reason to believe these witnesses would have been unavailable or would have changed their stories at trial. Also, Mr. Mitchell would have only needed one of these witnesses to establish the nature of the relationship

between Mr. Chandler and Ms. Robinson. To the extent there is any question on this issue, an evidentiary hearing is appropriate. See In re Yates, 177 Wn.2d at 18.

In any event, if some or even all of these witnesses were unavailable, the relevant other suspects evidence nonetheless could have been introduced through Det. O'Hern pursuant to the Chambers analysis set forth hereinabove.

C. The prosecutor's statement that evidence proved Ms. Robinson and Mr. Mitchell bled at the same time was improper assertion of facts not in evidence, not a permissible inference.

The State asserts the prosecutor did not engage in misconduct by telling the jury that the existence of mixed blood proved that the two donors "bled at the same time", despite eliciting no expert testimony on this point, because this argument merely asked the jury to draw an "inference from the available facts". Resp. Br. at 8-10. The prosecutor's argument on this point was a false assertion of facts not in evidence, not an inference that can reasonably be drawn from the record.

Whether a mixture of blood samples means that the respective donors "bled at the exact same time" is a fact. Either the science shows that this is true, or it does not. At this stage we do not know the answer to this question because the State did not elicit this information from its expert witness. The answer to this question is a technical scientific matter,

not something within the common knowledge of jurors. See In re Pers. Restraint of Phelps, 190 Wash. 2d 155, 170, 410 P.3d 1142, 1149 (2018) (holding whether a prosecutor can present closing argument on a technical issue not testified to by an expert turns on whether the matter is "within the common knowledge of jurors").

Because the issue of whether the presence of mixed blood samples tell us when the donors bled is not an issue within the common knowledge of the jurors, the prosecutor's argument constitutes assertions of fact not in evidence, not mere permissible inferences to be drawn from the evidence. 02.22.16 RP 1081, 1088, 1100, 1144. By advancing this argument, the prosecutor encouraged the jury to render its verdict based on a key fact not in evidence. See State v. O'Neal, 126 Wn. App. 395, 421, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 500 (2007) ("A prosecutor improperly comments when he or she encourages a jury to render a verdict on facts not in evidence.") This argument was further flagrant, ill-intentioned, and highly prejudicial because it told the jurors that science disproved Mr. Mitchell's defense, when no such science appears in the record and when the prosecutor had no reasonable basis for believing his assertions to be true.

The State further asks this Court to reject Mr. Mitchell's assertion that this improper argument violated the Confrontation Clause because "the State introduced no new evidence in its closing and rebuttal

arguments." Resp. Br. at 10. However, the assertion that mixed blood samples can only result when two donors bleed at the same time was indeed new evidence. The evidence in this case says nothing about what the existence of mixed blood samples means with respect to when the respective donors bled. The State told the jury in closing, for the first time, that mixed blood samples mean the donors bled at the same time. The State manufactured and then introduced this new evidence for the first time in closing, in violation of Mr. Mitchell's Confrontation Clause rights.

D. The prosecutor improperly commented on Mr. Mitchell's credibility in closing.

The State asserts in conclusory fashion that the prosecutor's attacks on Mr. Mitchell's credibility were permissible because they "related the facts of the case to the issue of petitioner's credibility." Resp. Br. at 10. A review of the record shows the State did far more, crossing over the boundary of permissible conduct articulated in State v. Lindsay, 180 Wash. 2d 423, 437, 326 P.3d 125, 132-33 (2014).

The prosecutor's comments on Mr. Mitchell's credibility in this case are indistinguishable from those in Lindsay. In both cases, the prosecutors committed misconduct by expressing their personal opinion that the defendant was lying. In Lindsay, the prosecutor committed misconduct by telling the jury that the defendant's testimony was "the most ridiculous thing I've ever heard" and a "crock". Id. In Mr. Mitchell's

case, the prosecutor likewise committed misconduct by telling the jury Mr. Mitchell's testimony was not believable or credible, that it "simply isn't believable, and you shouldn't believe it, and the reason you shouldn't believe it is because it's not true", and that "[w]hat Mr. Mitchell told you was not what actually happened." 02.22.16 RP 1094-97, 1142. Lindsay controls and its application establishes that the prosecutor improperly commented on Mr. Mitchell's credibility and guilt.

In its Response Brief, the State does not even cite to Lindsay, much less attempt to distinguish it. Instead, the State baldly asserts that there was no misconduct in Mr. Mitchell's case because the prosecutor "related the facts of the case to the issue of petitioner's credibility." Resp. Br. at 10. However, the prosecutor in Lindsay also supported his credibility attacks with other facts in the record. Tying credibility attacks into the facts in evidence in no way absolves a prosecutor of the duty to refrain from inserting personal opinions on credibility and guilt.

The State has failed even to attempt to distinguish Lindsay on this point. As in Lindsay, the prosecutor in Mr. Mitchell's case committed prejudicial misconduct by improperly commenting on the defendant's credibility and guilt. This misconduct, particularly when combined with the prosecutor's assertion of facts not in evidence, was flagrant or ill-intentioned, thus warranting relief despite trial counsel's failure to object.

E. Mr. Mitchell's Confrontation Clause challenges have merit.

Mr. Mitchell was deprived of his Confrontation Clause rights under Article I, § 22 of Washington's Constitution and the Sixth Amendment by the court's decision to allow the investigating forensic officers to read directly from their narrative reports and property log at trial. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309, 129 S. Ct. 2527, 2531 (2009) (holding that statements in forensic reports are testimonial, thus implicating the defendant's right to cross-examine).

In Melendez-Diaz, the defendant's Confrontation Clause rights were deemed violated by the state's practice of admitting affidavits from its forensic analysts in lieu of having those analysts appear at trial for cross-examination. In Mr. Mitchell's case, his Confrontation Clause rights were likewise violated when the State's forensic experts were permitted to read directly from their reports of which they had no independent recollection. The end result of submission of an affidavit versus allowing witnesses to read directly from reports with regard to which they have no recollection is identical – in both cases, the prosecution is able to introduce forensic evidence in the form of a document, rather than a witness, denying the defense an opportunity to cross-examine. The circumstances held to violate the Confrontation Clause in Melendez-Diaz

are materially indistinguishable from those faced by Mr. Mitchell, and the same result should follow.

In its Response Brief, the State again does not cite to, much less meaningfully distinguish, this controlling authority. Resp. Br. at 12-14. Instead, the State relies on a distinguishable Supreme Court decision and other cases applying that decision. Resp. Br. at 12-14 (citing United States v. Owens, 484 U.S. 554, 560, 108 S. Ct. 838, 843, 98 L. Ed. 2d 951 (1988); State v. Price, 158 Wn.2d 630, 647, 146 P.3d 1183, 1191 (2006)).

Owens does not support the State's position because it did not involve a government official reading directly of a report, but rather a victim testifying on the basis of his memory, which was impaired by the assault at issue in the case. The Court in Owens held that, under these circumstances, the right to confront witnesses "is not denied when a witness testifies as to his ***current belief*** but is unable to recollect the reason for that belief." Id. at 559 (emphasis added).

Likewise, in Price, no State witnesses were permitted to read directly from reports of which they had no independent recollection. 158 Wn.2d 630. Rather, the mother of a child abuse victim and the investigating detective testified, ***based on their memories***, to pretrial statements the child victim made. Id. at 635-36. The trial court allowed this testimony under Washington's child hearsay statute, provided that the

victim would also testify. Id. The child did in fact testify from her memory, but she claimed to have forgotten the abuse. Id. No reports were read into the record. Id. Under these circumstances, the Court held the admission of the child's pretrial statements under the child hearsay statute did not violate the defendant's Confrontation Clause rights.

In this case, by contrast, the State's forensic experts had no "current belief" at all regarding the events described, and no witness testified from memory regarding those events. All the State's witnesses had were their reports, which, when read into the record, were no different than the affidavits unconstitutionally submitted in Melendez-Diaz.

Despite the broad language in Owens and Price, the facts of this case are far more analogous to the situation addressed in Melendez-Diaz than those addressed in Owens and its progeny. Allowing State forensic experts to read from a report of which they have no independent recollection is no different at all from allowing them to submit affidavits. On the other hand, allowing someone to testify to their current belief, the basis of which they may have forgotten, as in Owens, or to testify to pretrial statements under the child hearsay statute, as in Price, present fundamentally different scenarios. Accordingly, it is submitted that, despite the broad language in some opinions suggesting that merely placing a warm body (which could just as well be comatose, from the

State's perspective) on the witness stand resolves all confrontation clause issues, Melendez-Diaz is the controlling authority here and mandates reversal of Mr. Mitchell's conviction.

F. Defense counsel was ineffective for failing to seek a spoliation instruction.

The State argues there was no spoliation of evidence in this case. Resp. Br. at 15-18. The State is wrong because (1) apparent murder weapons discovered right around the time of a murder and memorialized in an investigation report constitute "evidence", and (2) Mr. Mitchell was not required to prove bad faith or intentionality in order to obtain a spoliation instruction, but rather was required to show only that the State acted in "conscious disregard" of its duty to preserve the evidence, which it did. See Tavai v. Walmart Stores, Inc., 176 Wn. App. 122, 135, 307 P.3d 811 (2013) (spoliation may be proven by showing bad faith or conscious disregard for the duty to preserve the evidence); Homeworks Const., Inc. v. Wells, 133 Wn. App. 892, 900, 138 P.3d 654 (2006) (spoliation "encompasses a broad range of acts beyond those that are purely intentional or done in bad faith").

1. The bloody knife and sawed off shotgun discovered the day after the murder were evidence.

At the outset, the State makes the false assertions that Det. O'Hern did not "discover" the weapon and that "[n]othing in the cited VRP

supports the assertion that the bloody knife was the 'likely weapon'". Resp. Br. at 15. Obviously Det. O'Hern discovered (or, in other words, became aware of) the bloody knife and shotgun that he memorialized in his report pertaining to his investigation of the stabbing death of Ms. Robinson. Mr. Mitchell was quite clear in his Opening Brief that an "apartment manager" initially discovered the weapons and reported them to law enforcement. See Opening Br. at 10-11. It is further clear that these weapons came into Det. O'Hern's actual or at least constructive possession, as he submitted a request that they be processed for fingerprints and blood. 02.08.16 RP 866-71. This never happened and the weapons vanished for reasons that no one can explain. Id.

Furthermore, Det. O'Hern clearly believed at the time that the bloody knife was at least potentially the murder weapon and, given that no other potential weapons were uncovered, the only possible murder weapon uncovered. The State baldly asserts that these weapons had nothing to do with Ms. Robinson's death, but all of the circumstantial evidence in the record suggests otherwise. If Det. O'Hern believed these weapons were irrelevant, as the State now asserts and as Det. O'Hern tried to assert in his interview, he would not have taken the trouble to obtain the weapons, bring them into possession of law enforcement, memorialize the discovery of these weapons in his report on the Ms. Robinson murder investigation,

and put in a request to have these weapons processed for fingerprints and blood in connection with the Ms. Robinson investigation.

Moreover, although the weapons were not found in the immediate proximity of Ms. Robinson's apartment, they were found along a straight route from Ms. Robinson's apartment towards a military reservation in a closet that anyone could have accessed. 02.08.16 RP 834-35, 66-71. A bloody knife found immediately after someone was stabbed to death in a location on a straight route away from the victim's apartment is evidence.

2. Defense counsel did not argue that the knife and sawed off shotgun were unrelated to the murder of Ms. Robinson.

The State makes the illogical argument that defense counsel made a strategic choice to portray the missing bloody knife and sawed off shotgun as something other than evidence in this case because arguing that this was evidence would have "undercut defense counsel's credibility with the jury", so "counsel realized that the knife was not evidence, and that the better argument was that the absence of that knife was better exploited as an example of an assertedly insufficient investigation." Resp. Br. at 17.

This is nonsense because the argument the attack on the integrity of the investigation based on the failure to process and maintain possession of the knife hinges on the assertion that the knife was actually evidence. The failure to process and maintain possession of an irrelevant, unrelated item says nothing about the sufficiency of the investigation.

The defense argument was that the knife and shotgun were evidence, and the State's failure to process and maintain possession of this evidence thus undermines the integrity of the State's investigation. See 02.22.16 VRP 1107-1117. Defense counsel's argument depended on the assertion that the weapons were linked to the murder. Defense counsel made a clear strategic decision to link the knife and shotgun to the murder. Defense counsel did not, as the State argues, make a contrary strategic decision to treat the weapons as unrelated, irrelevant items not linked to Ms. Robinson's murder, as failure to process non-evidence would have had no bearing on the integrity of the investigation.

3. The record in this case shows conscious disregard for the bloody knife and sawed off shotgun.

The State argues no spoliation instruction would have been appropriate because there was no evidence that the State acted in bad faith in destroying the evidence. Resp. Br. at 17-18. In advancing this argument, the State relies on the incorrect standard. Contrary to the State's assertions, Washington's Supreme Court has held that bad faith need not be proven to warrant a spoliation instruction. Rather, spoliation "encompasses a broad range of acts beyond those that are purely intentional or done in bad faith." Homeworks, 133 Wn. App. at 900.

Thus, Mr. Mitchell was not required to show bad faith, as argued by the State, but rather was required to prove only a "conscious disregard"

for preservation of the evidence, which goes beyond intentional conduct. Tavai, 176 Wn. App. at 135; Homeworks, 133 Wn. App. at 900. It goes without saying that a bloody knife discovered after a stabbing death is important, and Det. O'Hern's conduct in obtaining the weapons and requesting that they be processed shows that he believed these items were important as well. Yet, they disappeared without a trace and without ever having been processed. Conscious disregard for the duty to preserve this crucial evidence is the only explanation for their mysterious disappearance and the lack of any documentation as to their ultimate disposition. 02.08.16 RP 834-35, 866-71, Attach. D.

III. CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant the PRP, vacate Mr. Mitchell's conviction and sentence, and remand for further proceedings or, alternatively, remand for a reference hearing.

Respectfully submitted this 28th day of May, 2019.

LAW OFFICE OF COREY EVAN PARKER

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CERTIFICATE OF SERVICE

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on May 28, 2019, I caused to be served the document to which this is attached to the parties listed below in the manner shown below:

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