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

IN THE MATTER OF THE PERSONAL RESTRAINT OF
GREG SCHIRATO,
Petitioner.

OPENING BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION

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I. INTRODUCTION

Following a jury trial, Petitioner Greg Schirato was convicted on January 24, 2018 of second-degree rape and first-degree burglary of AL in Thurston County Superior Court. Pursuant to RAP 16.4 et seq., Schirato petitions the Court for relief and this memorandum is submitted in support of his Personal Restraint Petition (PRP). This Petition is supported by the declarations of David Allen, Greg Schirato, Wayne Fricke and Clifford Spiegelman, along with the Clerk's Papers (CP) and the Verbatim Report Proceedings (VRP) in the Superior Court.¹

II. PROCEDURAL BACKGROUND

Petitioner was charged by information on April 14, 2015 with one count of second-degree rape and one count of first-degree burglary, which allegedly occurred on December 17-18, 2015. CP1; *See State v. Schirato*, Thurston County Superior Court Cause No. 15-1-00520-4. The case proceeded to trial on January 3, 2018. *See* VRP 5. On January 24, 2018, the jury returned verdicts of guilty on both counts. CP 282, 283. The trial judge imposed an indeterminate sentence of 125 months to life in prison. CP 285-97.

¹ These VRP and CP's were filed in the direct appeal, which was dismissed and Petitioner is requesting these be transferred to this PRP matter. *See* RAP 16.7(a)(3).

Petitioner timely filed a direct appeal. CP 298. *See State v. Schirato*, No. 51665-9-II. Pursuant to a motion filed by the Petitioner, on October 30, 2018 the Court dismissed the appeal, which dismissal became final on November 30, 2018 and the Court issued its mandate on December 6, 2018.

III. STATEMENT OF THE CASE²

At trial, the State presented the testimony of complainant AL, who was the legislative director for the Washington Department of Fish and Wildlife Services (WDFW). VRP 77. On December 17, 2014, she attended a department holiday party and dinner at a restaurant. VRP 78.

AL testified that Greg Schirato, who was a deputy assistant director of the WDFW, was at the dinner. VRP 83. AL interacted with him and everybody was in good spirits. VRP 84-85. AL and others from the party left around 7:30 or 8:00 p.m. to go to a bar in downtown Olympia. VRP 88. AL drove herself to the bar. VRP 94-95. AL bought herself a drink and began playing shuffleboard with Petitioner, Jennifer Quan and Kelly Cunningham, who also work for the WDFW. VRP 95-96. AL, Petitioner, Ms. Quan and Mr. Cunningham played “shuffleboard” and later sat down around a table to talk. VRP 96-97. AL had 3 drinks, two of which were paid

² The facts in this section are taken from the VRP unless otherwise indicated.

for by Petitioner. VRP 96. Earlier she had two glasses of wine at dinner. VRP 83.

AL left the bar around 11:30 or 11:40 p.m., and drove herself home. VRP 98-100. She claims that she was intoxicated, but remembers the route she drove home and what she did when she arrived at home including unlocking the door, entering the house, and feeding her cats. VRP 100; 110. She got into her pajamas and drank a glass of water. VRP 100. She got into bed and went straight to sleep. VRP 135-36

AL testified she next remembered being “in a dream state but slightly conscious” when she felt someone’s hands on her back. VRP 136-37. The hands moved to her breasts. VRP 137. She felt her bra being unclasped and her pants being pulled down. VRP 137.

AL testified that she was “aroused”. VRP 139. Her vagina was fondled and it felt as if something was being inserted. VRP 139. She “felt pleasure from being touched”. VRP 139. She did not open her eyes to see who was touching her. VRP 139, 210. Although she did not see who was touching her, she thought it was a boyfriend, Steve Anderson. VRP 139. She testified it was a pleasurable experience for her. VRP 193.

She remembered turning her bedroom light off before going to bed. VRP 140. Later she “heard my light snap on” and afterwards, when she awoke and saw it on, she turned it off. VRP 140-141.

When she woke the next morning, she expected her boyfriend, Steve Anderson, to be there. VRP 141. AL first texted then called Anderson and said ‘I think somebody has been in my house and I was freaking out. And [she] said, ‘Had you been here?’” VRP 141. AL testified that Anderson told her, “No.”³ AL later discovered broken glass near the basement door, and she called 911. VRP 142-43.

Kelly Cunningham testified that he was also at the 2014 holiday party and joined Schirato, Quan, and AL at the bar after leaving the party. VRP 295, 398. Cunningham played team shuffle board with AL, Schirato, and Quan. VRP 399. There was high-fiving, pats on the back and other physical contact during the team shuffleboard game. VRP 407.⁴

SANE nurse Laurie Bigmedicine saw AL on December 18, 2014, the day of the incident. VRP 483. She took a history and collected swabs from AL. VRP 501-502.

The police executed a search warrant on Petitioner’s house on January 13, 2015 and seized clothing he wore on the night of the holiday party. Susan Wilson, a forensic scientist at the WSP crime lab, was asked to examine these items. RP 281. On January 23, 2016, in an attempt to

³ Anderson was not called as a witness and trial counsel did not object to this obvious hearsay. *See* §F1, *infra*.

⁴ This is significant because it provided an innocent explanation why Petitioner’s DNA was later found on AL’s bra clasp. *See* §3, *infra*.

collect evidence, she scraped these items with a spatula onto a piece of white exam paper. She found two fragments of glass from the shirt, which were both “very small,” on the paper after the scraping. VRP 289. She also found two likewise very small glass fragments after scraping the gray suit. VRP 298-299.

She testified that while she was qualified to recover glass, she was not qualified at the time to do comparisons of glass. VRP 299. She therefore recommended that the recovered glass particles be submitted to the FBI Laboratory in Quantico, Virginia, in order for them to attempt to make a comparison to the known window glass. VRP 300.

The FBI laboratory, in a report dated February 16, 2016, wrote that the glass fragments from the suit and shirt were not suitable for testing because they were too small. These items were sent back to the WSP lab.⁵ The State then had another of its forensic scientists at the WSP lab, Mr. Van Wyk, examine the glass fragments. VRP 655-56.

When Ms. Wilson was asked by the prosecutor on direct if she was familiar with the testing procedures used by the FBI, her reply was “somewhat.” Her only familiarity was that she had previously read some FBI reports. VRP 303.

⁵ The FBI report is attached as Appendix E to the Dec. of David Allen.

In spite of her lack of knowledge, she was nevertheless allowed to testify over objection that the FBI testing was destructive of the sample and that the WSP used an instrument that allows it to view a smaller sample. VRP 305-306. On cross examination, she admitted that she didn't know what instruments the FBI was currently using, saying "They may have changed" and was not sure what the FBI did with the glass in this matter. VRP 343-344.

Although the FBI lab found that the glass fragments were too small to test, the State had Mr. Van Wyk examine them. Mr. Van Wyk testified that he was trained in glass analysis by taking a week long course in California and then further being trained by the Oregon State Policed Crime Laboratory. This was only his "second actual glass case." VRP 673.⁶

Without objection, he testified that his findings were reviewed a total of five times: first by another scientist at the WSP lab; then it was sent to his trainers at the Oregon State Police Laboratory; and then administratively reviewed at the WSP laboratory. VRP 693-94. He testified, again without objection, that if any of these reviewers had a problem they would have brought it to his attention. VRP 694-695. His lab report, marked as Exhibit 174, was offered and admitted without objection. VRP 692.

⁶ It was not clear from the record if the prior "glass case" went to trial or if he testified.

Mr. Van Wyk never testified that the glass from the window “matched” the glass found on the clothes. His conclusion was that:

At no point did I find any difference that would make me say the glass from the clothing could not have possibly come from the same window as the glass that was from the door.

VRP 685. Therefore, the fragments “could have come” from the glass in the door. VRP 676.⁷

He used an instrument called a GRIM, used for measuring the refractive index of glass. VRP 688. This is the same type of instrument used by the FBI, as reported in their February 16, 2016 report. *See* Schirato Dec., App. A.

He testified that the glass fragments were “very small.” One he originally measured at 0.2 mm, but then re-measured it and then decided that it was perhaps 0.3 mm. VRP 699.⁸ If he hadn’t decided it was 0.3 mm, he probably would not have tested it because it would have been too small. VRP 699-700; 717-18. However, in his opinion there is no set number as to whether something is too small, he just uses his judgement. VRP 701.⁹

⁷ Even though Mr. Van Wyk testified he could not make a “match” (VRP 688), as will be discussed *infra*, the prosecutor during closing improperly argued to the jury that Mr. Van Wyk testified there was a “match.” § IV (E), *infra*.

⁸ *See* Dec. of Clifford Spiegelman. These fragments would have measured in their longest dimension 1/50th of an inch for the largest fragment and 1/125th of an inch for the smallest. Spiegelman Dec. at §13.

⁹ Defense attorney’s confusion with the sizes is shown where he thinks that the pieces were approximately 2 mm each, until the witness corrects him that they were 0.2 mm, which is

The defense presented the testimony of Samuel “Skip” Palenik, a purported expert on glass. VRP 984-1065. Mr. Palenik agreed with the State’s expert’s conclusions regarding the glass fragments.¹⁰

The State presented evidence from DNA expert Jennifer Hayden from the Washington State Patrol crime lab. VRP 748. A mixed DNA profile was obtained from AL’s bra clasp of the bra she wore to bed. VRP 770. The DNA mixture was consistent with both the DNA profiles of AL and Schirato. Ms. Hayden explained the phenomenon of “transfer” DNA, and conceded that the very small amount of DNA found on the bra clasp was so low that it could have been transferred from Schirato hand to AL’s hand, earlier that evening and later by her to her clasp. VRP 782-83. In spite of AL’s claim that hands were on her breasts and a finger inserted in her vagina, there was no measurable amounts of male DNA on the cervical and anal swabs. VRP 784.

Similarly, George Chan a defense expert who worked for over 30 years as a scientist at the WSP crime lab, testified for the defense that assuming physical contact such as “high fiving” earlier, that Petitioner’s

1/10th of a millimeter. VRP 701. A millimeter is 1/25th of an inch; a tenth of a millimeter is 1/250th of an inch.

¹⁰This will be discussed in detail later in this brief *infra* at §IV(D)(3)(b).

DNA could have been transferred to AL's bra clasp even though she had washed her hands. VRP 1083-87; 1088-92.

Greg Schirato testified that he attended the holiday party and later went to the bar where he played team shuffleboard with AL and others. VRP 1108-10; 1113. There was consensual touching, including high fives and patting backs, between him and AL and others while playing shuffleboard. VRP 1114. He left the bar around 12:30 or 1:00 a.m. VRP 1116. He went straight home after the bar. He denied breaking into AL's home and sexually assaulting her. VRP 1119.

IV. ARGUMENT IN SUPPORT OF PETITION

A. Petitioner Received Ineffective Assistance of Counsel, in Violation of the Sixth Amendment

The Sixth Amendment guarantees the right to the effective assistance of counsel. *See, e.g., Lafler v. Cooper*, 566 U.S. 156, 162-163 (2012). To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that trial counsel's performance was defective; and (2) a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. *See Strickland v.*

Washington, 466 U.S. 668, 694 (1984). *Accord State v. Grier*, 171 Wn.2d 17, 32 (2011).¹¹

The measure of attorney performance is reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. While reasonable tactical choices do not constitute deficient performance, decisions based on inadequate trial preparation, inadequate factual investigation or inadequate legal research are not reasonable tactical choices. *Id* at 689. Strategic decisions are only entitled to deference if they are “made after thorough investigation of law and facts.” *Strickland, Id* at 690. *See Jones v. Wood*, 114 F.3d 1002 (9th Cir. 1997)(where petitioner was convicted of first-degree murder based on allegations that he killed his wife, the Ninth Circuit wrote “When an attorney fails to examine potentially exculpatory evidence, although he repeatedly assured the petitioner of his intention to do so, the Strickland presumption that the failure is ‘sound trial strategy’ is surmounted.”)

The United States Supreme Court has held that “a single, serious error may support a claim of ineffective assistance of counsel.” *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986). To prevail, petitioner need only establish that there is a reasonable probability that, absent counsel’s

¹¹ It is now clear that the PRP prejudice standard is no different than the *Strickland* prejudice standard. *See, e.g., In re Crace*, 174 Wn.2d 835, 846-47 (2012).

deficiencies, the outcome of the trial might well have been different. *See Strickland*, 466 U.S. at 695.

B. Trial Counsel was Deficient for Failing to File a Meritorious Motion to Suppress Evidence

Most significantly, trial counsel failed to file a meritorious motion to suppress evidence obtained from Petitioner’s residence during the service of a search warrant on January 13, 2015, because Detective Johnson’s Affidavit in support of the warrant (Affidavit) failed to establish probable cause. Further, the Affidavit contained false statements and material omissions, which warranted a hearing and redactions pursuant to *Franks v. Delaware*, 484 U.S. 154 (1978).

Had trial counsel challenged the warrant by filing a motion to suppress and a motion for a *Franks* hearing, there is a reasonable probability that the State’s DNA and glass evidence would have been suppressed.¹²

1. Legal Background

The United States Supreme Court has clearly established that counsel’s failure to file a meritorious motion to suppress constitutes “ineffective assistance of counsel.” *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986).

¹² *See* Declaration of Attorney Wayne Fricke with regard to his opinion that it was ineffective assistance of counsel to fail to file a motion to suppress.

Washington State appellate courts have likewise repeatedly recognized that where a suppression motion has a substantial chance of succeeding, it is ineffective not to bring the motion. *See e.g., State v. Barron*, 139 Wn. App. 266, 276 (2007) (conduct is deficient if counsel fails to bring a “viable” motion to suppress); *In re Restraint of Klinger*, 96 Wn.App. 619, 620, 623; 625 (1999)(Division II) (“counsel was ineffective for not bringing a meritorious motion to suppress evidence”); *State v. Reichenbach*, 153 Wn.2d 126, 131 (2004) (defense counsel made no suppression motion even though “[t]his argument was available Thus . . . counsel’s conduct was deficient.”).

2. The Search Warrant Affidavit

On January 13, 2015, officers with the Olympia Police Department executed a search warrant at Petitioner’s home. *See* Allen Dec. Ex. A and B (Search Warrant and Affidavit). Petitioner will summarize the salient points in the Affidavit.¹³

a. Police Response and AL’s Initial Statements

The Affidavit recounts that on December 18, 2014 at approximately 7:23 a.m., Olympia Police Department officers were dispatched to a possible burglary and sexual assault at AL’s home. According to the

¹³ Due to the length of the search warrant affidavit (8 pages, single spaced, small font), Petitioner will address the content of the affidavit by the areas of subject matter contained therein.

Affidavit, AL told officers that she “arrived home late the prior evening intoxicated.” *Id.* at 2.¹⁴ After preparing for bed, she went to sleep and sometime during the night “she felt like the unknown subject” was touching her back under her nightshirt and slid their hand down the back of her pants and she “felt the subject penetrate her vagina with what she believed was a finger.” *Id.*

When she awoke in the morning, she called her boyfriend, Steve Anderson, who AL believed was the person who had touched her in bed. Anderson told her that he did not come over to her house during the night. *See id.* at 3.

AL later discovered that her basement door was ajar, a window next to the door was broken and glass was on the floor. She then called 911. *See Id.* She also described suspicious circumstances in the last two months, such as her gate being pulled off its hinges and someone flipping up her welcome mat as if searching for a key. *See Id.*

AL told the responding officers that she had been drinking with co-workers on the evening prior to the incident. But she noted that “she did not remember anyone at the tavern taking an interest in her or attempt to follow her.” *Id.* at 3.

¹⁴ Petitioner will cite to the page numbers on the warrant Affidavit, rather than the Bates stamp numbers later included by the prosecutor’s office for discovery purposes.

b. AL's Subsequent Statements

The Affidavit then states that AL later gave a more detailed statement as to what she did the prior evening before she was allegedly assaulted. *See Id.* at 3-4. At approximately 5:30 pm that evening, AL attended a Christmas party at a restaurant with approximately 30 co-workers from the WDFW. At the close of the party AL went to a tavern with three of her co-workers, with each of them driving separately. While at the tavern, the group had a few drinks and played shuffleboard. *Id.* at 3.

AL left the tavern before the rest of the group because she was feeling intoxicated and arrived home at approximately 12:40 a.m. *Id.* at 4. After arriving home, she fed her two cats, changed into her pajamas and “passed out” as soon as she got into bed. *Id.*

As far as her memory of the alleged incident, AL said that she was in a “dream state.” *See Id.* at 4. She described “feeling a familiar touch caressing on her back.” *Id.* The caressing moved to her breasts and also her buttocks. She stated she could feel her vagina being penetrated and believed it was with fingers and found the caressing to be “sexually arousing to her and thought that her boyfriend, Steve Anderson, had entered the residence and got into bed with her.” *Id.*

AL also told the detective that she “is a very sexual person and often has sexual dreams that include having orgasms.” *Id.* at 4. This incident

began as a sexual dream “which transferred into a belief that Anderson was with her in bed.” *Id.* She went along with this activity believing Anderson was with her and then fell asleep. *Id.*

AL woke to her alarm at 6:30 a.m. About twenty minutes later, she texted Anderson and wrote she had a “dream about [him].” *Id.* AL then called Anderson since he did not immediately respond to her texts. Anderson told AL that he had not been to her home. *Id.* She then discovered the broken window and called 911. *Id.*¹⁵

c. AL Described Her Past Relationships and Described a Former Boyfriend Who Repeatedly Showed Up Uninvited to Her House After the Breakup.

The detective wrote that he asked AL about her past relationships. She told the detective “she has had three boyfriends in the last six months.” *Id. at 4.* She had been very actively dating on the website Match.com “and had been on many dates with many different men.” *Id.* AL then described a “bad breakup,” and noted that the person had “showed up at her residence after the breakup.” *Id. at 5.* AL was so concerned that she had her residential locks changed. *Id.*

¹⁵ AL provided no information nor alleged that Greg Schirato might have been the person who had entered her home and fondled her when interviewed by police following the incident.

AL gave the detective a list of seven men with whom she recently had sexual contact and who had also been to her residence. *Id.* at 6.¹⁶

d. Interview with boyfriend Steve Anderson

The detective wrote that after meeting with AL, he interviewed Steve Anderson, AL's boyfriend. *Id.* at 5. Anderson told the detective that he had not been to AL's residence on the evening of the alleged incident. *Id.* However, he acknowledged that he had texted AL while she was at the Christmas party, and that AL had not responded to the texts. *Id.*

The detective wrote that Anderson told him that AL had previously told him about a person named Greg who worked with her and who "made passes at her and hit on her often."

e. Prior Consensual Sexual Activity between Petitioner and AL

The detective wrote that he also interviewed Jennifer Quan, a coworker of Schirato and AL at WDFW, regarding AL's dating life. Quan stated that AL had been involved in a "foursome with" Schirato and that AL had provided her then boyfriend with oral sex in front of Schirato and his wife. *Id.* at 8.

¹⁶ In the search warrant, the detective stated at pg. 10 that he contacted all of these men. His report states that he called each one of them by phone on January 12, 2015 and explained that an unknown suspect entered AL's residence and had sexual contact with her. Each of the individuals denied doing so. However, there is absolutely no indication from his the detective's report that he in any way investigated these individuals other than by asking them if they were involved with this incident and accepting there denial as true. Allen Dec. ¶11

AL likewise told the detective that she had sexual contact with Schirato in the past, that he and his wife were “swingers” and they had all engaged in consensual group sex. AL said that she, Schirato, his wife, and AL’s boyfriend had engaged in a “foursome” at Schirato’s residence in Shelton approximately a year before. *Id.* at 6. The detective also wrote that AL told him that in 2012 she provided her boyfriend with “oral sex in front of Schirato and [his wife].” *Id.* at 9.¹⁷

The detective wrote in his Affidavit that AL said that in 2013 (the year before) she received oral sex from Schirato’s wife, while Schirato and her then boyfriend watched. She said she also provided oral sex to her boyfriend in front of Schirato and his wife. She told the detective she awoke later that night while in bed with her boyfriend and Schirato was fondling her. *Id.* at 9. The affidavit also mentions other times in the prior year where AL and Petitioner, his wife and AL’s other boyfriends engaged in group sex and also when Petitioner had sexual intercourse with AL. *Id.* at 9.

The Affidavit provided no indication that any of these group sexual encounters were inappropriate or unwanted. To the contrary, it appears they were all fully consensual.

¹⁷ All evidence regarding the prior sexual relationship between Petitioner, his wife, AL, and others were held to be irrelevant and inadmissible at the Trial. VRP 56-59.

The Affidavit stated that about two weeks prior to the incident, Schirato, AL and friends were together at a tavern after work. According to AL, Schirato said he was too drunk to drive home and AL refused to let him stay at her house that evening but offered to pay for a hotel room. *Id.* at 9.

The detective wrote in the Affidavit that AL said that on September 14, 2014 (just three month prior to the incident), she invited Schirato for lunch at her residence. AL showed him vacation photos of her in a bikini from a recent Hawaii trip, and Schirato made complimentary comments about her body, saying that she was the perfect woman and he was jealous of her boyfriend. *Id.* at 9.

The detective wrote in the Affidavit that Ms. Quan told the detective that while at the Brotherhood Tavern on the night of the incident, Schirato told Quan that he wanted to see her, Quan, in a bikini. Shortly after this statement, Schirato asked Quan to put her hand between AL's legs, while he was staring at AL's legs. Quan declined the request. *Id.* at 10.

f. Statements by Petitioner

The detective wrote that he contacted Schirato on December 19, 2014 and arranged to meet him at the police department that day. *Id.* at 7. The detective told Schirato that he was investigating an incident where an

unknown subject entered AL's residence and had sexual contact with her following the WDFW holiday dinner. *Id.*

At the station, Schirato said that he had been at the WDFW dinner and later went to a tavern with AL and others and the group played shuffleboard. *Id.* at 7. Schirato bought AL two Crown Royal maple drinks. *Id.* at 8.

Schirato explained that he and his wife were close friends of AL. He was aware that AL was on a dating website and had lots of boyfriends, some of whom he knew of by name. Schirato readily admitted that he had previous sexual contact with AL saying "we play together regularly and I'll leave it at that." Schirato also said that the last time he was at AL's residence was when he had lunch with AL before Thanksgiving. *Id.* at 8.

g. Prior Unfounded Allegations Against Petitioner

The detective checked Schirato through law enforcement databases and found that in 2003, approximately 11 years before, he was investigated for fondling a 16-year-old female babysitter who had been hired to provide childcare for his two children. The prosecutor's office declined to prosecute. *Id.* at 9.

h. Statement by Victim's Next-Door Neighbor as to Recent Suspicious Automobiles in Neighborhood

Detective Johnson wrote in his Affidavit that Detective Lindros interviewed Wesley Kirkpatrick, AL's neighbor directly to the north of her

residence. According to the Affidavit, Mr. Kirpatrick told Detective Lindros about a “suspicious vehicle” that had been in the area of AL’s residence three times in the two weeks prior to the sexual assault, in that it would pull into AL’s driveway, turn around, and leave the area. *Id.* at 9.¹⁸

The detective wrote in the SW Affidavit that:

Kirkpatrick described the vehicle as a **silver small SUV style**. During the interview with Schirato he stated he drove a small silver **Mazda SUV**. I checked Schirato’s name through the Department of Licensing (DOL) and found he was the registered owner of a 2008 Mazda M3S bearing Washington license 948-XYR. (Emphasis added.)

Id. at 9.¹⁹

i. Conclusion of Affidavit

The detective concluded in the Affidavit by falsely stating that “**Schirato drives a similar vehicle to the suspicious vehicle seen in AL’s driveway two weeks prior to the assault.**” *Id.* at 10 (emphasis supplied).

j. Items Seized During Execution of the Warrant

Relying upon the Affidavit, the Superior Court issued a warrant that authorized the police to search Schirato’s home and to seize items of

¹⁸ While Mr. Kirpatrick was called as a prosecutorial witness at Trial, he was not asked any questions about his seeing or identifying the car at AL’s home that was mentioned in the Affidavit. VRP 968-981.

¹⁹ As will be shown *infra*, this is materially false and in fact the DOL records showed that Schirato owned a 2008 Mazda sedan, rather than an SUV. The particular Mazda model Schirato owned had a trunk and could never be confused with an SUV. Also, Mr. Kirpatrick described 3 different suspicious vehicles, none of which he called an “SUV”. *See* Allen Dec., App. D.

clothing. Police officers executed that search warrant on January 13, 2015. It was the suit and shirt and the DNA obtained from the search that proved to be central to the prosecution in this case.

C. The Search Warrant Violated Petitioner’s Rights under Article 1, § 7 of the Washington Constitution, and under the Fourth Amendment, to be Free from Warrantless Searches and Seizures

1. Legal Principles

The Fourth Amendment of the United States Constitution requires a showing of probable cause:

“[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation”

Article I, § 7 of the Washington State Constitution provides that all citizens are to be free from unreasonable searches and seizures, and not disturbed in their private affairs. When violations of both the Fourth Amendment and Article 1, Section 7 are alleged, it is appropriate “to examine the state constitutional claim first” because of its greater protections. *See, e.g., State v. Young*, 123 Wn2d 173, 178-9 (1994).

Under both the federal and state constitution, factual inaccuracies and omissions in a warrant Affidavit must be redacted from the warrant if the defendant establishes that they are material and either intentional or made in reckless disregard. *See generally; Franks v. Delaware*, 484 U.S. 154 (1978); *State v. Chenoweth*, 160 Wn.2d 454, 478-79 (2007); *State v.*

Casal, 103 Wn.2d 812, 820 (1985). An omission or misrepresentation of a fact contained in a search warrant application is material if it was necessary to the finding of probable cause. *Id.* See *State v. Jones*, 55 Wn.App. 343, 345 (1989). If the Affidavit as modified then fails to support a finding of probable cause, the warrant is void and the evidence excluded. *Id.*

2. The Warrant Affidavit Failed to Establish Probable Cause

Here, Detective Johnson's search warrant application is lengthy and contains many factual claims. But when critically analyzed it is clear that the Affidavit does not establish probable cause to authorize the search of Petitioner's home or the seizure of his property. While there was a great deal of information regarding AL's dating relationships and her consensual group sex with her then boyfriends and Petitioner and his wife, there were insufficient facts to establish probable cause he was involved in the burglary and rape on December 18, 2018. See *State v. Perrone*, 119 Wn.2d 538, 551 (1992).

As far as the complainant's description of the event, AL told the police officers that no one at the tavern took an interest in her or attempted to follow her. Affidavit at 3. She also stated – on several occasions – that she believed it was her then boyfriend, Steve Anderson, who had entered her bed and fondled her that evening. *Id.* at 4. Nothing in the Affidavit suggested that

Schirato might have been involved in the alleged incident, except for the false statements about his vehicle being seen at AL's house. *Id.* at 9.

In fact, rather than establishing probable cause for a search, AL's statements as reported in the Affidavit suggested several other more likely suspects. For example, AL told the officers that she thought that Anderson was the one who fondled her that evening. *Id.* at 2-3. She also identified several boyfriends, and noted that she had been very active on a dating website. *Id.* at 4. AL explained that she had recent sexual relationships with seven men who had visited her home and she provided their identifying information to the detective. *Id.* at 6. AL also described a "bad break up" with a boyfriend that had alarmed her to the point that she needed to change her locks. She noted several suspicious circumstances at and around her residence in the months prior to the alleged incident without implicating Petitioner. *Id.* at 5.

The detective claimed that he had "contacted" each of the persons who had sexual contact with AL in the last two years prior to the incident. *Id.* at 10. But there is nothing in the Affidavit as to whether these individuals had actually been actively investigated; whether the 'contact' was by phone, rather than in person; whether they had presented an alibi; whether they had been ruled out as potential suspects; and if so, why? *See* Allen Dec. at §11. Moreover, although AL told the officers that she recalled being in bed with

Anderson during the incident, there is nothing in the Affidavit that would have cleared Anderson as a suspect, other than his simple denial to the detective.

Schirato's name initially came up innocently when AL stated that she had been drinking with some of her work colleagues, including Schirato, that evening. It was AL's then boyfriend, Steve Anderson, who first mentioned to the detective that he had learned from AL that Schirato had made "passes at her and hit on her often." *Id.* at 5.²⁰ After a short interview with Anderson, which occurred in the waiting room of the emergency room while AL was being examined, the detective apparently cleared him and focused all of his attention on Schirato.

The detective's interview of Schirato was noteworthy, not because it suggested any apprehension or guilt, but rather because Schirato freely admitted he had prior consensual sexual contacts with AL. He also volunteered that he had recently been invited to AL's residence to view her bikini photos. *Id.* at 8.²¹

²⁰ AL, Petitioner, his wife and various boyfriends of AL had been involved in group sex. It was not clear whether Anderson knew of this. In this context, Anderson's statement that Petitioner made passes at AL is not worthy of much weight.

²¹ This would have been approximately three months before the incident. There was no claim that Schirato acted inappropriately during that visit. AL corroborated this.

The comments of AL's current boyfriend presented in the Affidavit provide no basis for a person of reasonable caution to conclude that Schirato was probably involved in the burglary and rape on the night in question.

3. In an Attempt to Link Schirato to AL's Residence, the Detective Presented False Evidence About a Car Similar to Petitioner's Car Suspiciously Seen at AL's Residence Before the Incident

Nevertheless, in an attempt to create the necessary link between Schirato and the alleged incident, Detective Johnson invited the issuing judge to conclude that Schirato had been casing AL's home just prior to the incident. As will be shown, this information was materially false or made with reckless disregard for the truth.

In his Affidavit, the detective wrote that Detective Lindros had interviewed AL's neighbor, Wesley Kirkpatrick, who had described a suspicious vehicle that had been in the area of AL's residence "three times in the two weeks prior to the sexual assault." Affidavit at 9. The detective also emphasized in the Affidavit that Kirkpatrick described that vehicle "**as a silver small SUV style.**" *Id.* at 9. The detective then claimed that Schirato had acknowledged that "**he drove a small Mazda SUV.**" *Id.* at 9. Finally, **the detective noted that he checked the Department of Licensing records** which showed the Petitioner was the registered owner of "a 2008 Mazda M3S bearing Washington license 948-XYR." *Id.* at 9. But, as discussed below, this information was both false and misleading.

The neighbor, Mr. Kirkpatrick, was interviewed by Detective Lindros the day of the incident. *See* Allen Dec. at App C (Kirkpatrick Transcript at p. 2-3). Detective Lindros, who had already interviewed Kirkpatrick prior to turning on his recorder, reminded him on tape of a suspicious automobile: “you said two days ago you saw a gray Prius style car parked on the corner by some . . . hedges over here.” Kirkpatrick Transcript at 6.

In response, Kirkpatrick asked the detective “what was the kind of car you mentioned, a Subaru?” *Id* at pg. 6, line 36. Officer Glen, who was with Detective Lindros, answered, “Outback,” to which Mr. Kirkpatrick agreed. *Id* at pg. 6, lines 35-38.

Detective Lindros further reminded Kirkpatrick that he said in the unrecorded portion of the interview that it was unusual for the car to be parked in front of the garage, to which Kirkpatrick non-responsively answered: “No, it was like a Nova or something over there.” *Id.* at 7. Kirkpatrick added it was “an older car.” The detective again reminded him that it was a “Nova style” and he agreed it was. *Id.*²²

Then the detective once again reminded Mr. Kirkpatrick that he said there was another car “a silver car, like an Outback style” to which Mr.

²² A “Nova” was a Chevrolet sedan last produced in the 1980s. *See* https://en.wikipedia.org/wiki/Chevrolet_Chevy_II/_Nova

Kirkpatrick replied “Yes.” *Id.* He said he saw it three times within the last two weeks pull along the curb. *Id.* A third time the detective again reminded Kirkpatrick that he, “remember[ed] a silver car Outback style,” to which he said yes. *Id.* at 8. Kirkpatrick also added that “the Outback, he went, they went around and went down the other street over there.” *Id.*

Therefore, during the recorded police interview of Kirkpatrick, upon which Detective Johnson heavily relied in his warrant Affidavit, Kirkpatrick described three different suspicious cars: a Prius, a Nova and a Subaru Outback. While Detective Lindros suggested, and Kirkpatrick agreed, that one of the cars was an Outback-style car, nowhere in his interview does Kirkpatrick ever describe the vehicle as an SUV, as Detective Johnson wrote in the Affidavit.

Also, although Kirkpatrick stated that he saw the Subaru Outback at “about lunchtime,” [*Id.* at 8] this was likewise not included in the warrant Affidavit, and instead the suggestion was that this occurred at night when Schirato was casing AL’s house in order to break in when she was home to rape her.

Making this even more troublesome is the fact that the detective wrote in the Search Warrant Affidavit that during Schirato’s interview, he admitted he owned a small SUV and that the Detective confirmed this with the DOL records:

During the interview with Schirato **he stated he drove a small silver Mazda SUV**. I checked Schirato's name through the Department of Licensing (DOL) and found he was the registered owner of a 2008 Mazda M3S baring Washington license 948-XYR. (Emphasis supplied.)

See Affidavit 9.

As is demonstrated not only through the Declaration of Petitioner but also established by the Department of Licensing (DOL) records, at the time Schirato owned a compact, silver Mazda **sedan**, not an SUV. *See* Schirato Dec. at ¶18. Petitioner's Mazda M3 is a typical small sedan with a trunk. It could not be confused with an SUV, which would have a distinctive look with a squared off back end:



(This a photograph of Petitioner's Mazda. *See* Schirato Dec. at ¶18 and App. C thereto.)

Even if the detective did not do this intentionally, it was at least done with the reckless disregard for the truth because the detective affirmatively stated in his Affidavit that he reviewed the DOL records. However, the DOL records stated that **the Mazda was a sedan style car, not an SUV:**

WASHINGTON STATE DEPARTMENT OF LICENSING Certified: 03/06/2019 09:11:14
 Vehicle/Vessel Inquiry Request

record on file with the Department of Licensing of the State of Washington.
 Kelly Paterson, Custodian of Records
 Place: Tumwater, Washington

The vehicle information displayed below is from the current vehicle record as of 06-Mar-2019. For titling questions, please call Customer Service at (360)-902-3770, option 5.

Vehicle information			
VIN JM1BK12F681131689	Model year 2008	Make MAZD	Model 3
Use type Passenger Vehicle	Body style Sedan	Value Year 2008	Value Code \$14,350
Odometer 22	Previous Odometer 0	Color 1	Color 2
Scale weight 2634	GVWR	Gross weight 0	Equipment # 0
Fleet # 0			

Registered owner		
Registered : GREGORY SCHIRATO	Mailing address 281 W LAKE ISABELLA LOOP SHELTON WA 98584-8730 Location Code: 2300	Residential address 281 W LAKE ISABELLA LOOP SHELTON WA 98584-8730 Location Code: 2300
Additional Registered : JULIE HENNING		

Legal owner

Schirato Dec. at ¶19 App. D.

It is inconceivable that Schirato would have falsely told the detectives that he owned an SUV. Schirato would not have known on December 19, 2014 that the police claimed that Mr. Kirkpatrick described a Subaru Outback, which Detective Johnson rebranded in his Affidavit as a small silver SUV, driving into AL's driveway. And, assuming *arguendo*, that Schirato was aware that Mr. Kirkpatrick described this, why would he falsely tell the police he owned an SUV, thereby implicating himself.

Anyone in Schirato's situation would have known that the detectives could easily verify his vehicle through the DOL or by simply walking outside the police station where he was being interviewed and looking at his car, or going to his home or place of work, and observing it. The detective fabricated the story that Schirato admitted he owned an SUV type vehicle to fit with the detective's false narrative in his Affidavit that "Kirkpatrick described the vehicle as a small SUV style [sic]." Affidavit at 9.

Moreover, the fact that Petitioner did **not** own an SUV type vehicle (or an Outback) would have been an exculpatory fact that the detective should have included in his Affidavit. Instead, the detective included false information which implicated Petitioner by inferring Petitioner was casing AL's home in order to break in. A more reasonable interpretation of the evidence is that **someone else** was casing her house in order to commit a break in.

The suggestion in the Affidavit is that Schirato's "small silver SUV" was casing AL's house **at night** in order to execute a break-in in order to sexually assault her. However, as Mr. Kirkpatrick stated during his interview with Detective Lindros, but conveniently not included in the search warrant, he saw this vehicle "**about lunchtime.**" Allen Dec. App. C (Lindros Interview of Kirkpatrick at p. 7-8).

AL and Schirato both worked full time for the Department of Fish and Wildlife. They had offices a few doors away from each other in the same office building. He would've known when she was in her office during office hours. *See* Schirato Dec. ¶27. While the Affidavit strongly suggests that Schirato was casing AL's house with his vehicle at night in order to break in when she was home and asleep in order to sexually assault her, similar to what is claimed on the night of the incident, this was a false narrative.

Given the undisputed evidence, these false statements were either intentional or made with reckless disregard of the truth. These statements were also clearly material in that they are only "evidence" at the time of the execution of the search warrant that linked Schirato in any suspicious way to AL's residence.

The Affidavit must therefore be redacted to exclude any mention by Mr. Kirkpatrick of the suspicious small silver SUV vehicle as well as the detective's averment in his Affidavit that Schirato owned a small silver Mazda SUV. *Franks v. Delaware, supra.*

Once this information is redacted from the warrant, there is absolutely nothing connecting Greg Schirato to any suspicious or illegal activity at AL's residence either on the night of the incident or at any other

time. While the Affidavit demonstrates that Schirato had prior sexual contact with AL, it also demonstrated that all of this contact was consensual.

The fact that AL invited Schirato to lunch at her house a few months before and showed him “a lot of photos of her in a bikini,” and where nothing improper occurred, also militates strongly against a finding of probable cause. The fact that Schirato asked AL to let him stay at her house when he was too intoxicated to drive a few weeks prior does not support the claim that he broke into her house on the night of the incident. This is especially the case given that the warrant Affidavit also demonstrated that AL felt comfortable enough to have him over to her house for lunch a few months before to show him her bikini photos.

With that, Schirato was no more of a suspect than Mr. Anderson or any other past boyfriends, with whom she was intimate, including a Mr. Hokanson, who angrily came to her house, uninvited, after their recent breakup which caused her to change her locks. Affidavit at 5.

4. The Affidavit Also Contained Material Omissions

Omitted from the Affidavit was information provided by Mr. Kirkpatrick in his recorded statement that two men in the neighborhood made AL feel “uncomfortable” and that one of her past boyfriends who lived up the street seemed “odd.” He told Detective Lindros that AL had an “extremely volatile relationship with her boyfriend Nate,” and AL changed

her locks and coached Mr. Kirkpatrick to be on the lookout for him or his vehicle. Also omitted was that the suspicious vehicle was recently outside AL's house at lunch time, not in the evening, as well as the suspicious Prius and Nova automobiles.

Not mentioned in the warrant, although contained in Detective Lindros's officers report, was that Mr. Kirkpatrick stated during the portion of his police interview that was not recorded that in addition to the foregoing facts, AL told him that she was uncomfortable with a man who lived directly behind her who looked into her bedroom window. She was also uncomfortable with a dog walker who often would stop in front of her house and try to get her attention by waving at her. *See* Allen Dec., ¶7, App. D (Lindross Report).

All this information regarding suspicious men was material, and suggested other suspects, none of whom were mentioned in the Affidavit.

D. Trial Counsel was Deficient in Dealing with Glass Evidence

1. Background

The State presented "glass evidence" at trial. The evidence related to several minute particles that were identified by the WSP Crime Lab in its report as follows:

Item 34 – three colorless glass fragments (.3 millimeter and .2 millimeter in their largest dimensions) located on a shirt;

Item 35 – two colorless glass fragments; (.5 millimeter in their largest dimensions) located on a suit;

The first WSP forensic scientist that was assigned to review the case, Susan Wilson, was unable to conduct an examination of these fragments with the broken glass from the windows because she was not then qualified to do comparisons of glass. VRP 299. Instead, the evidence was sent to the FBI Crime Laboratory in Quantico, Virginia.

Following a thorough analysis, the FBI scientist concluded:

“No glass suitable for refractive index analysis and comparison by GRIM3 was detected” in the glass fragments obtained for the Schirato’s suit coat or shirt.

The examiner explained:

A suitable glass fragment is one that is of sufficient size and condition such that it can be used to generate repeatable, reproducible measurements using the GRIM3 instrument. (Emphasis added.)

The examiner also invited questions and provided her direct phone number.

Allen Dec., Appendix E (FBI Laboratory Report).

Undaunted, the police investigators asked a second WSP laboratory forensic scientist, Daniel Van Wyk, to attempt to conduct a glass comparison of this same evidence. According to Mr. Van Wyck, he received one week of training at the California Criminalistics Institute and later additional training at the Oregon State Police Crime Laboratory. This was

only his second glass case. VRP 673. As he ultimately claimed: “My conclusion is that the glass found on the clothing could have come from the same broken object as the glass from the door.” VRP at 692.

2. Trial Counsel Was Deficient in Not Filing a *Frye* Motion to Exclude Mr. Van Wyck’s Opinion Testimony

Washington courts apply the *Frye* standard (*See Frye v. U.S.*, 293F. 1013 (DC Cir., 1923)) to determine if scientific evidence is admissible in criminal cases. *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996).

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

State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993) overruled in part on other grounds by *State v. Buckner*, 133 Wash.2d 63, 941 P.2d 667 (1997).

Undersigned counsel have been unable to find any Washington appellate decisions that address the admissibility under *Frye* of the type of questionable expert testimony on glass that was presented by Mr. Van Wyck.

Here, there was an obvious dispute between the FBI examiner, a highly qualified expert, and Mr. Van Wyk regarding the validity of this scientific evidence. As noted by Professor Clifford Spiegelman:

For forensics examinations, repeatable results mean that the same examiner on different days would reach the same conclusion. Reproducible results mean that different examiners would reach the same conclusions. If a methodology does not have these features, the methodology cannot be relied on to reach accurate results. Here, the FBI Laboratory examiner concluded that the glass particles were not suitable for refractive index analysis and comparison by GRIM3 since they were not of “sufficient size and condition such that [they] can be used to generate repeatable, reproducible measurement using the GRIM3 instrument.” *Id.* This should have ended the forensics analysis in this case.

Regarding the reputation of the FBI laboratory:

The FBI Laboratory is a division within the United States Federal Bureau of Investigation that provides forensic analysis support services to the FBI, as well as to state and local law enforcement agencies...The FBI Laboratory currently staffs more than 600 scientific experts and special agents. While I have challenged some aspects of the FBI Laboratory’s protocols in the past, the lab generally enjoys the reputation as the premier crime laboratory in the United States.

Regarding the conclusions of the FBI, he wrote:

In reviewing the evidence presented during the *Schirato* trial, I have seen no reasonable explanation for why an examiner with the Washington State Patrol Crime Lab would be able to complete a reliable glass comparison with a GRIM3 when an examiner with the FBI Laboratory had concluded that the glass particles were not suitable for refractive index analysis and comparison by GRIM3.

Declaration and CV of Dr. Spiegelman at ¶19-21.

Nevertheless, trial counsel failed to file a motion to exclude this evidence under the *Frye* standard. Van Wyk's opinion should never have presented to the jury at trial.

3. Trial Counsel's Handling of the Glass Witnesses was Deficient

Trial counsel's strategy with regard to the glass evidence was incomprehensible.

An expert from the FBI crime lab at Quantico, Virginia, generally recognized as the most sophisticated crime lab in the country, if not the world, deemed the pieces of glass too small for comparison testing. *See Spiegelman Dec. at ¶13-21.* This testimony would have been devastating to the State's case if trial counsel had properly presented it. But trial counsel failed to interview or call as a witness the expert from the FBI. Instead, trial counsel presented the testimony of his own purported expert **who actually agreed with the conclusions of the State's expert.**²³

Trial counsel's handling of these witnesses severely prejudiced Schirato's trial.

²³ *See Fricke Dec. at ¶19-21.*

a. Trial Counsel’s Failure to Call FBI Scientist as a Witness

Defense counsel’s fundamental duty to provide effective assistance of counsel requires that “trial counsel must investigate the case, and investigation includes witness interviews.” *State v. Jones*, 183 Wn.2d 327, 339 (2015). The “failure to interview a particular witness can certainly constitute deficient performance.” *Id.* at 340.

Trial counsel did not even attempt to contact the FBI scientist in order to discuss her conclusion that these small fragments could not be tested because of size, even though she invited inquiry and included her phone number in her report. Had this witness been called to testify, the jury would have learned that a highly credible expert – a forensic scientist with considerable experience handling glass evidence – had concluded that the glass particles were not suitable for refractive index analysis and comparison by GRIM3, the same instrument used by Mr. Van Wyk. This would have raised grave questions regarding the reliability and credibility of Van Wyk’s claims.²⁴ There was no conceivable strategic

²⁴ Likewise, defense counsel did not attempt to have a defense expert rely on this report and offer a similar opinion that the items in question were not of sufficient size to test, even though the law of evidence is clear that one expert can rely upon the opinions of another expert. Tegland, *supra*, § 1200.18 “Testimonial Hearsay, Expert Opinion based on Opinion of Nontestifying Witness.” Nor, did the defense attorney even try to cross-examine the State’s experts by using the FBI report, other than just asking them if they were aware of it, which opened the door for them to claim, over objections, that their testing methods were superior. *See supra* p. 6; VRP 688; 704; 303; 343-44.

reason for failing to do so and as such constitutes ineffective assistance of counsel. *See* Fricke Dec. at ¶21.

b. Trial Counsel was Deficient in Presenting the Testimony of a Defense Expert Who Agreed with the State's Expert

The defense called Samuel "Skip" Palenik from Ohio as its expert on glass comparisons. Mr. Palenik reviewed the State's reports but did not examine the glass fragments in question nor do any testing. Instead his only criticism of Mr. Van Wyk, the State's expert, was that they did not sufficiently test the glass fragments. VRP 1014-15.

During the State's cross examination of Mr. Palenik, his criticism was quickly erased when the prosecutor told him that the State's expert actually used eight data points for comparison, which Mr. Palenik said was "good." Mr. Palenik also agreed with the prosecutor that if the standards only required that anything outside the standard of deviation of 15% be discounted, "he would take her word for it." VRP 1043.

Mr. Palenik agreed on cross that while he has a laboratory that could do independent testing (VRP 1024-25), at no time did he do any testing. VRP 1055. And, he had not even looked at the disputed glass fragments before testifying. VRP 1044-45.

Finally, as a parting shot, he agreed with Mr. Van Wyk:

Q But as you sit here today, you can't actually testify that he [Mr. Van Wyk] was wrong?

A **No, not at all.**

Q MS. WINDER: I don't have additional questions at this time, Your Honor. Thank you.

VRP 1056-57 (emphasis added).

As expected, in closing argument the prosecutor wholeheartedly embraced Mr. Palenik's agreement:

[By Prosecutor] What did his expert testify about yesterday, ladies and gentlemen? He testified that once he learned about the relative standard deviations, **the State's expert was correct, the glass matched. Not only that, ladies and gentlemen, but he said if he'd been allowed to talk to the State's expert or allowed to do his own testing, he could, in fact, make it repeatable.** But that didn't happen. That didn't happen.

VRP 1264 (emphasis supplied).²⁵

c. Presentation of an Unprepared Defense Expert Who Supported the Prosecution's Case Constitutes Ineffective Assistance

It is axiomatic that the defense should not present the testimony of an expert witness that bolsters the prosecution's case. For example, in *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997), where Bloom was accused of killing his father, stepmother, and stepsister, the Ninth Circuit reversed a murder conviction and death sentence because trial counsel similarly called an unprepared expert witness who ended up supporting the State's case.

²⁵ The prosecutor misstated the state's expert opinion by claiming a "match." See § IV(E), *infra*. Nor did Palenik ever testify that the testing was "repeatable," as claimed.

In furtherance of a mental defense, his trial counsel engaged a forensic psychiatrist to write a report and testify concerning Bloom's mental state at the time of the killings. *Id.* at 1271. The psychiatrist then prepared a report, which the Ninth Circuit bluntly observed: "It was devastating." *Id.* at 1272. The psychiatrist wrote that Bloom was not insane at the time of the murders and would not benefit from "treatment at a mental facility." *Id.* at 1272-73.

As the prosecutor did with Mr. Palenik in the *Schirato* case, the *Bloom* prosecutor embraced the expert as his own witness:

This cross-examination not only negated Dr. Kling's testimony for the defense, it turned that testimony against Bloom with devastating effect. Then, in closing argument, the prosecutor returned to Kling's first report. The prosecutor read parts of the report to the jury and emphasized that Bloom's "own doctor says he was sane and that he could form the malice and premeditation and deliberation necessary for murder in the first degree." And that's what the jury convicted Bloom of, on all three counts.

Id. at 1273. The *Bloom* Court called this a "disaster" and reversed. *Id.*

In *Schirato*, trial counsel's presentation of Mr. Palenik as a witness was similarly "a disaster." *Id.* Mr. Palenik was unprepared. He failed to complete any testing, was unfamiliar with the specifics regarding the glass evidence, and agreed with the State's expert's ultimate conclusions. Mr. Palenik's testimony, which was emphasized by the State during its closing

argument, likewise was “devastating” to Schirato and certainly affected the outcome of the case.

4. Trial Counsel Failed to Utilize a Scientific Journal Article that Discussed the Prevalence of Glass on Dry-Cleaned Men’s Outer Clothing

The State placed great weight on the fact that Schirato’s clothing was found to contain a few miniscule glass particles. For example, the prosecutor asked the defense glass expert:

[By Prosecutor] Now, as you sit here testifying today, you don't actually have an explanation as to why glass was found on the suit in question, correct?

[By Mr. Palenik] Do I have an explanation? No.

VRP 1056.

Trial counsel never presented a plausible innocent explanation for the glass, and the jury was led to believe that this amounted to highly incriminating evidence of Schirato’s involvement in the crime, regardless of whether it was a match. In fact, had trial counsel utilized a scientific article provided by Petitioner, he would have had a basis to argue that glass fragments are commonly found on garments after being dry cleaned.

Schirato has a scientific background by education and training. He located a peer reviewed article in the *Journal of Forensic Sciences*, which

is the official publication of the American Academy of Forensic Sciences.²⁶ See Schirato Dec., ¶15, App. B. This study, entitled *Glass Paint Fragments Found in Men's Outer Clothing – Report of a Survey*, published in the July 1971 Edition, in its introduction notes that there had been no prior studies as to the natural occurrence of glass on clothing that was not associated with a crime involving broken glass:

In the investigation of many crimes fragments of glass and paint are removed from clothing and after comparison with controlled samples evidence is presented in court. **There is, however, a complete absence of data relating to the relative frequency of occurrence of glass and paint on clothing not known to be related to crime. It is this lack of information which prompted the work described in this paper.** *Id* at 283.

In order to conduct this study, the researcher wrote that the garments “most frequently examined for glass” in forensic science laboratories were “men’s outer garments in particular men’s jackets and trousers”, and the survey was limited to those items.²⁷ *Id* at 283. The scientists examined outer clothing at a “large dry cleaning establishment” which was clothing that was

²⁶ The American Academy of Forensic Science is a society for forensic professionals founded in 1948 and based in Colorado Springs, CO. The Academy publishes the Journal of Forensic Sciences. It has over 6500 members and includes physicians, dentists, toxicologists, anthropologists, document examiners, physicists, engineers, others representing all 50 United States, Canada and over 60 other countries worldwide. <https://forensicstats.org/event/american-academy-of-forensic-sciences-aafs-2019-annual-scientific-meeting/>.

²⁷ The scientist conducting the study worked for the home office of the Central Research establishment in Berkshire, England, a government funded operation. Schirato Dec., App. B, p. 300.

not in any way connected to a crime. The clothing was scraped for debris in a manner similar to that used by WSP scientist Wilson in the instant case. *Id* at 283.

The scientists located 551 fragments of glass and the debris from 63 of the 100 suits examined. The scientist wrote that a majority of the clothes examined contained glass fragments:

Glass: The results show that on average approximately 2 men's suits out of every 3 received for dry cleaning contained one or more glass fragments. *Id* at 296.

The defense attorney never utilized this study, either with his own expert or in cross examining the State's expert, although Petitioner urged him to use it. *See* Schirato Dec., ¶16

The fact that glass that was found on Petitioner's clothes, regardless of whether it could be matched or connected to AL's residence, was devastatingly strong evidence for the State. The prosecutor very effectively emphasized this in her cross-examination of the defense expert, Mr. Palenik.

What this article demonstrates is that glass is prevalent on the majority of pieces of men's outside clothing after they were dry cleaned. This is especially relevant because the detective testified that both these items of evidence, the suit and the shirt, were in dry-clean type plastic bags when seized and that the Defendant told the detective during the execution

of the search warrant that both the suit and shirt had “been freshly dry cleaned.” VRP 1220.

There can be no excuse or strategic reason for the defense attorney to fail to utilize this article not only on cross-examination, but also on direct examination with an expert of his own. This is especially the case given the very small size of the glass fragments found on the suit and shirt worn by Petitioner. *See ER 803 (a)(18)* (regarding the use of published studies either in cross examination of opposing experts or to support one’s own expert.) *See Fricke Dec. at ¶19.*

Had defense attorney utilized this scientific study, there would have been an alternative, innocent explanation for glass to be on his clothing.

E. Trial Counsel was Ineffective for Failing to Object to the State’s Improper Argument that the Glass “Matched”

During trial, the State’s expert never testified that there was “match” between the found and known glass fragments. VRP 685; 688; 740. Nevertheless, the prosecutor made the following improper argument during her closing:

They found glass. **They found glass on his suit -- no evidence of tampering -- that matches the glass from [AL’s] house. Elementally matches** the glass from [AL’s] house. **Atomically matches** the glass from [AL’s] house, a 1941 bungalow.

VRP 1261-62 (emphasis added). Then, when describing the defense expert’s testimony, she made the following false claim:

What did his expert testify about yesterday, ladies and gentlemen? He testified that once he learned about the relative standard deviations, **the State's expert was correct, the glass matched.**

VRP 1264 (emphasis added).

All of the prosecutor's claims of **matches** were false and intentionally misleading. Claiming a "match" is tantamount to individualizing the unknown glass with a single source with complete certainty, which never occurred. Nevertheless, trial counsel made no objection.

F. Trial Counsel was Ineffective Because He Committed a Series of Other Errors that Prejudiced Petitioner at Trial

1. Trial Counsel Failed to Object to Improper Hearsay Evidence Regarding Steven Anderson

As noted above, AL initially told the police investigators that she believed her boyfriend, Steven Anderson, was in bed with her at the time of the incident. Anderson was not considered a witness. Nevertheless, the State presented the following testimony from AL that Anderson told her he was not there, effectively giving him an alibi:

[AL]: He didn't text back right away, and so I immediately picked up the phone, and I called him and asked him, **I said I think somebody has been in my house and I was freaking out. And I said, "Had you been here?" And he said no. And he initially said, "Did you bring someone home last night?" And I said, "No."**

VRP 140-41 (emphasis added).

AL's boyfriend, Steve Anderson, never testified at trial. The statement attributed to him through AL that he had not been at the home that night was clearly hearsay. *See* ER801(b) and (c). It was very material in that it excluded him as a suspect. There are no exceptions under ER 803 or established case law that would allow this testimony.

This is not just a technical point. AL was involved with many men over the past six months, especially given her internet dating, it was crucial for the State to rule out Mr. Anderson as the person who was in bed with AL the night in question, especially because she told the detective she initially thought it was him.

There was no strategic reason for the defense to not object to this testimony. The introduction of this very material testimony, without objection, was error.

2. Trial Counsel Failed to Object to Improper Vouching by the State During Closing Argument

During the State's rebuttal closing argument, the prosecutor argued:

[AL] was telling you what happened. That was her only job. Counsel is right, if we wanted an open-and-shut case, [AL] could have got on the stand, and said, yep, he did it, Greg did it, Mr. Schirato did this. It's not what happened, ladies and gentlemen. She got up there and told you what happened, told you what she remembered and did so to the best of her ability. **She swore to tell the truth and she did so.**

VRP 1262 (emphasis supplied). The prosecutor clearly vouched for the witness' truthfulness. Defense counsel did not object.

Counsel is never permitted to give a personal opinion on the credibility of a witness. *See* Tegland on Evidence, 5A Wash. Prac., *Evidence Law and Practice* § 608.13 (6th ed.); *State v. Sargent*, 40 Wn. App 340, 343-44 (1985).

V. CONCLUSION

For all of the foregoing reasons, and in the interests of justice this Court should grant Petitioner's PRP. In the alternative, and at a minimum, this Court should remand the case for a reference hearing pursuant to RAP 16.12.

RESPECTFULLY SUBMITTED this 11th day of October, 2019.

/s/ David Allen

David Allen, WSBA # 500

Todd Maybrown, WSBA #18557

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Allen, Hansen, Maybrown & Offenbecher, PS

Attorneys for Petitioner

PROOF OF SERVICE

Alexandra Rosenthal swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 11th day of October, 2019, I sent by U.S. Mail, postage prepaid, one true copy of Opening Brief in Support of Personal Restraint Petition directed to attorney for Respondent:

Joe Jackson
Deputy Prosecuting Attorney
Thurston County Prosecutor's Office
2000 Lakeridge Dr S.W. Building 2
Olympia, WA 98502

One true copy of Opening Brief in Support of Personal Restraint Petition was delivered to Petitioner.

DATED at Seattle, Washington this 11th day of October, 2019.

/s/ Alexandra Rosenthal
Alexandra Rosenthal
Legal Assistant

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

October 11, 2019 - 4:16 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 of Washington Vs Schirato, Gregory Allen
Trial Court Case Number: 15-1-00520-4
Trial Court County: Thurston Superior Court
Signing Judge: James Dixon
Judgment Date: 03/14/2018

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