

FILED
Court of Appeals
Division II
State of Washington
5/6/2020 12:08 PM

No. 53913-6-II

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF
GREGORY ALLEN SCHIRATO,
Petitioner.

REPLY BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION

ALLEN, HANSEN, MAYBROWN & OFFENBECHER, P.S.
Attorneys for Petitioner

David Allen
Todd Maybrown
Cooper Offenbecher
Danielle Smith
600 University Street
Suite 3020
Seattle, WA 98101
(206) 447-9681

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

A. PETITIONER HAS ESTABLISHED A *PRIMA FACIE* CASE OF CONSTITUTIONAL ERROR 1

B. TRIAL COUNSEL’S SELF-SERVING “CLAIMS” CANNOT BE SQUARED WITH THE RECORD; AT A MINIMUM, THIS MATTER SHOULD BE TRANSFERRED FOR A REFERENCE HEARING 2

C. FAILURE TO FILE SUPPRESSION MOTION 5

 1. There Was No Strategic Reason to Not File a Suppression Motion..... 5

 2. The Detective’s Intentional Misstatements and Material Omissions..... 7

 3. After Removing the Offending Statements, the Remaining Information is Insufficient to Establish Probable Cause 10

D. COUNSEL MISHANDLED THE GLASS EVIDENCE..... 16

 1. Failure to Request a *Frye* Hearing 16

 2. The Defense Expert..... 19

 3. Counsel’s Statements Betray a Disturbing Unfamiliarity with the Record and Lack of Sophistication 22

 4. Failure to Call the FBI Scientist..... 24

 5. Failure to Object to Prosecutorial Misconduct During Closing Argument 25

 6. The Scientific Article Demonstrating the Prevalence of Small Glass Particles on Men’s Dress Clothing..... 26

 7. Counsel’s Handling of the Glass in Total 28

D. COUNSEL’S ERRORS PREJUDICED PETITIONER..... 29

E. CONCLUSION 30

DECLARATION OF DOCUMENT FILING AND E-SERVICE

TABLE OF AUTHORITIES

Federal Cases

<i>Bloom v. Calderon</i> , 132 F.3d 1267 (9th Cir. 1997)	22
<i>Correll v. Ryan</i> , 465 F.3d 1006 (9th Cir. 2006).....	2
<i>Franks v. Delaware</i> , 438 U.S. 154 (1978).....	6
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011).....	2
<i>Sanders v. Ratelle</i> , 21 F.3d 1446 (9th Cir. 1994)	22
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).	29
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	2

State Cases

<i>In re Brett</i> , 142 Wn.2d 868 (2001)	6
<i>In re Hubert</i> , 138 Wn.App. 924 (2007)	1
<i>In re Personal Restraint of Ruiz-Sanabria</i> , 184 Wn.2d 632 (2015).....	1
<i>In re Personal Restraint of Yates</i> , 177 Wn.2d 1 (2013).....	5, 30
<i>In re Rice</i> , 118 Wn.2d 876 (1992)	1, 4
<i>In re Stenson</i> , 142 Wn.2d 710 (2001).....	22
<i>Lewis v. Bours</i> , 119 Wn.2d 667 (1992)	1, 2
<i>Matter of Burlingame</i> , 3 Wn.App.2d 600 (2018)	6
<i>State v. Cauthron</i> , 120 Wn.2d 879 (1993).....	19
<i>State v. Chenoweth</i> , 160 Wn.2d 454 (2007)	9
<i>State v. Chetty</i> , 184 Wn.App. 607 (2014).....	6

<i>State v. Clark</i> , 143 Wn.2d 731 (2001)	10
<i>State v. Copeland</i> , 130 Wn.2d 244 (1996).....	18, 19
<i>State v. Cross</i> , 156 Wn.App. 568 (2010)	5
<i>State v. Grier</i> , 171 Wn.2d 17 (2011)	26
<i>State v. Hamilton</i> , 179 Wn.App. 870 (2014)	5
<i>State v. Jones</i> , 183 Wn.2d 327 (2015)	6
<i>State v. Kyllo</i> , 166 Wn.2d 856 (2009).....	29
<i>State v. McFarland</i> , 127 Wn.App.2d 322 (1995)	29
<i>State v. Rakosky</i> , 79 Wn.App. 229 (1995)	12, 13
<i>State v. Reichenbach</i> , 153 Wn.2d 126 (2004).....	1
<i>State v. Thomas</i> , 109 Wn.2d 222 (1987).....	22

A. PETITIONER HAS ESTABLISHED A PRIMA FACIE CASE OF CONSTITUTIONAL ERROR

In *In re Rice*, 118 Wn.2d 876 (1992), the Washington Supreme Court announced guidelines for consideration of personal restraint cases. To make out a *prima facie* case of constitutional error, the petitioner must submit sufficient factual support for his claims. *See id.* at 886. When examining this threshold question, this Court must treat Petitioner’s factual allegations as true. *See, e.g., Lewis v. Bours*, 119 Wn.2d 667, 670 (1992). Here, although Petitioner has had no opportunity to conduct discovery,¹ he has satisfied the *Rice* standard by submitting detailed declarations.

Petitioner is familiar with the “presumption” that defense counsel’s conduct is competent. “However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130 (2004). “[S]trategy must be based on reasoned decision-making.” *In re Hubert*, 138 Wn.App. 924, 928 (2007) (trial counsel’s failure to request a necessary jury instruction demonstrated both deficient performance and

¹ Unlike all other civil proceedings, a PRP petitioner may not conduct discovery unless and until the appellate court transfers the case to the superior court for a reference hearing. *See* RAP 16.12. In recent years, the Washington Supreme Court has clarified that “the rules applicable to personal restraint petitions do not explicitly require that the petitioner submit evidence but rather the petition must identify the existence of evidence and where it may be found.” *In re Personal Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 641-42 (2015)(citing RAP 16.7(a)(2)).

prejudice). A reviewing court is not at liberty to “indulge ‘*post hoc* rationalization’ for counsel’s decision-making that contradicts the available evidence of counsel’s actions.” *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (quoting *Wiggins v. Smith*, 539 U.S. 510, 526 (2003)). Rather, the critical question is “whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms.’” *Id.* at 690. “An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all.” *Correll v. Ryan*, 465 F.3d 1006, 1015-16 (9th Cir. 2006).

Petitioner has presented the declaration of experienced defense attorney Wayne Fricke to support his contention that trial counsel’s representation was deficient under prevailing professional norms. The State has presented no similar testimony in response. Rather, it has offered a declaration from Richard Woodrow, Petitioner’s trial counsel, in which Woodrow attempts to provide *post hoc* rationalizations for his failings. As discussed below, Mr. Woodrow cannot demonstrate that his decisions were reasonable in light of the undisputed facts.

B. TRIAL COUNSEL’S SELF-SERVING “CLAIMS” CANNOT BE SQUARED WITH THE RECORD; AT A MINIMUM, THIS MATTER SHOULD BE TRANSFERRED FOR A REFERENCE HEARING

Before filing this PRP, Petitioner’s new counsel did everything in his power to investigate this case. Unfortunately, Petitioner received only

meager cooperation from Woodrow. *See* Maybrown Dec. ¶¶ 6-11. Woodrow agreed to discuss some details of his representation, but Petitioner was unable to obtain detailed information – no less a declaration – regarding his handling of this case. *See id.* ¶ 11. However, as Petitioner has explained, there is nothing in Woodrow’s files that would support his claim that he made reasoned strategic decisions regarding the critical matters that are the subject of this PRP. *See id.* ¶ 16.

Petitioner further maintains that many of Woodrow’s claims are unreliable – and in some instances unbelievable. *See* Supplemental Declaration of Greg Schirato (“Schirato Supp. Dec.”). Woodrow’s declaration is replete with self-serving claims that are not supported by the record.

Perhaps there is nothing more concerning than Woodrow’s recent attempts to explain away his failure to file a suppression motion. Before filing this PRP, Petitioner’s counsel asked Woodrow to explain (1) why he failed to challenge the search warrant and (2) whether he had ever investigated any of the factual claims in the warrant. Woodrow offered the following answer: “I looked at the affidavit in support of the warrant. I didn’t notice anything at issue in it.” *See* Maybrown Dec. ¶ 10.

While it may be true that Woodrow “looked at” the warrant affidavit during the course of the representation, there is nothing in his file to suggest

that he gave it more than a passing glance or that he ever considered this legal issue in a serious way. He did not interview the affiant (or any of the police investigators for that matter) or research any of these legal issues. *See id.* at ¶ 16. Woodrow made only minimal inquiries regarding the potential other suspects that were purportedly “cleared” by the detective. Woodrow made no inquiries into Mr. Kirkpatrick’s claims regarding the vehicle that was seen nearby the complainant’s home, even though Petitioner had told him that he did not drive an SUV or any similar vehicle and denied he had told detectives. *See Schirato Dec.* ¶¶ 17-20. Simply put, Woodrow’s “do nothing strategy” was no strategy at all.

Woodrow makes the outlandish assertion that there was “overwhelming evidence showing the nexus between the crime and Schirato and Schirato and the items to be seized.” *Woodrow Dec.* ¶ 7. Neither the police investigator nor the prosecutor has ever made such a claim. In fact, absent the supposed identification of Schirato’s car, there was **ZERO** evidence to tie him to the scene of the offense. Also, Petitioner denies that he was ever informed that his glass expert, Mr. Palenik, agreed with the State’s expert. *See Schirato Supp. Dec.* ¶ 9.

Nevertheless, insofar as Woodrow’s declaration could be seen to controvert some of Petitioner’s factual claims, this matter must be transferred for a reference hearing. *See Rice*, 118 Wn.2d at 886-87 (“If the

parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.”). *See also In re Personal Restraint of Yates*, 177 Wn.2d 1, 18 (2013) (reference “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”).

C. FAILURE TO FILE SUPPRESSION MOTION

1. There Was No Strategic Reason to Not File a Suppression Motion

The State argues that defense counsel “strategically elected to not file a suppression motion.” Response at 19. But this cannot be strategic, since there would have been no prejudice if the motion had been filed and denied. Moreover, counsel’s failings may be seen as a “waiver” of this important legal claim. *See, e.g., State v. Cross*, 156 Wn.App. 568, 578 (2010). In addition, the filing itself would have at least perfected the issue for direct appeal. *See also State v. Hamilton*, 179 Wn.App. 870, 879 (2014) (“We hold that there was no conceivable legitimate tactical reason explaining counsel’s failure to move to suppress crucial evidence based on an unlawful search”).

The State argues that in order to demonstrate a valid claim of ineffective assistance on the failure to suppress evidence, Petitioner must show that a reasonably competent attorney would have filed the motion and that the

trial court would have granted it. Response at 14. However, the State asks this Court to disregard the Declaration of Wayne Fricke, a very experienced defense attorney. In his declaration, Fricke explained why competent counsel was obliged to file a motion to suppress along with a request for a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). See Fricke Dec. at 5.

The State argues that this Court should disregard Fricke's declaration because, in the State's view, he "does not have specialized knowledge that this Court lacks; therefore, his opinion is improper under ER 702 and irrelevant to this Court's analysis of the issues raised." Response at 44. Contrary to the State's assertion, Washington courts routinely allow the use of outside defense counsel as expert witnesses. See *State v. Jones*, 183 Wn.2d 327 (2015) (defense attorney expert testified trial counsel's performance was deficient); *State v. Chetty*, 184 Wn.App. 607 (2014) (three defense attorneys testified on behalf of Petitioner as experts at evidentiary hearing); *Matter of Burlingame*, 3 Wn.App.2d 600 (2018) (declaration of defense attorney expert accepted by court); *In re Brett*, 142 Wn.2d 868 (2001) (testimony of legal experts established that trial counsel was ineffective during the pretrial stage of proceedings).

2. The Detective's Intentional Misstatements and Material Omissions

The State argues that the portion of the Search Warrant Affidavit relating to a small, silver SUV seen several times at or near A.L.'s house at or near the time of the incident, coupled with the now shown to be false claim by the detective that Petitioner admitted he owned a small silver SUV, was inconsequential given the other facts presented. *See* Response at 15-18. This claim is erroneous.

The State blithely contends that it would be "easy to mistake a description of a Mazda 3 as an SUV because it is available in a hatchback version." Response at 17. The State ignores that Schirato's vehicle was a sedan, not a hatchback, which the detective could easily have seen when Schirato voluntarily appeared at OPD for an interview. As shown by the photograph of Petitioner's actual car (*see* Opening Brief at 28), it looks nothing like an SUV or a Subaru Outback. It is clearly a four-door sedan.

This cannot be characterized as "an innocent misunderstanding" as the State argues. Response at 17. The detective wrote in the Affidavit that he checked the Department of Licensing records in order to determine that Petitioner was the registered owner of a Mazda M3S with the license plate of 948-XYR. These same records describe this vehicle as a "sedan." Opening Brief at 29. Rather than an "innocent" misunderstanding," it was instead

either an intentional falsehood or, at the very least, a “reckless disregard for the truth,” as those terms are used in *Franks*.

The fact that the detective relied upon A.L.’s neighbor, Mr. Kirkpatrick, with regard to his identification of an Outback, yet did not include in the Affidavit that Mr. Kirkpatrick also identified other suspicious automobiles, including a gray Prius style car and a “Nova,”² neither of which could be connected to Petitioner, undercuts any claim of good faith by the detective. *See* Opening Brief at 25-26. Additionally, although Mr. Kirkpatrick identified several men in the neighborhood, as well as one of A.L.’s former boyfriends, who were acting suspiciously, or who A.L. expressed concern about, this too was also not included in the Affidavit. *See* Opening Brief at 33.

Regarding the Outback that was supposedly identified by Mr. Kirkpatrick, the detective did not explain in his Affidavit that it was seen by Mr. Kirkpatrick at or around noon, which would have been during the time that A.L. would be working at her office which was only a few doors from Petitioner’s office, which rebuts any suggestion he was stalking her or casing her house at night to break in. This, too, undercuts a claim of innocent mistake. *See* Opening Brief at 30.

² A Chevrolet Nova was a sedan manufactured from 1962 to 1988. https://en.wikipedia.org/wiki/Chevrolet_Chevy_II/_Nova

The State's argument that Mr. Kirkpatrick's description of a suspicious vehicle, which the detective attributed to the Petitioner, was not important to establish probable cause is patently wrong. There were absolutely no other facts in the Affidavit to suggest that Schirato was at A.L.'s house, other than the one time when A.L. invited him for lunch more than three months prior to the incident, which was clearly an innocent episode. (SW at 9). On the other hand, it would be inferred from the detective's false narrative regarding the small silver SUV that Petitioner was stalking A.L. and surveilling her house just days prior to the incident.

While "Washington courts have consistently applied the *Franks* standard, requiring a showing of reckless or intentional misstatements or omissions of material facts," *State v. Chenoweth*, 160 Wn.2d 454, 470 (2007), this threshold has been met. Here, the detective made both an intentional misstatement about Schirato owning an SUV and omissions of material facts by failing to include the other suspicious vehicles described by Mr. Kirkpatrick and the information about suspicious men in the neighborhood and A.L.'s fear of an ex-boyfriend. These misstatements and omissions would lead one to the conclusion that Schirato was the only viable suspect, which was categorically untrue. When the misstatement regarding the SUV is removed from the affidavit, and the information about the other vehicles and A.L.'s ex-boyfriend and other suspicious men in the neighborhood are added,

the remainder of the information in the warrant is insufficient to establish probable cause. *See State v. Clark*, 143 Wn.2d 731, 753 (2001) (“the test is to add the omitted facts to the affidavit and subtract the misstatements.”).

3. After Removing the Offending Statements, the Remaining Information is Insufficient to Establish Probable Cause

In order to put the allegations contained in the search warrant in context, it will be helpful to analyze each of the allegations and discuss their relative importance.³ The allegations contained in the search warrant relating to Petitioner were the following:

- On the evening of the incident, Schirato had been at a party and a post-party gathering with A.L. and two other employees. SW at 3.
- A.L. told the detective that she was involved in a foursome with Petitioner and his wife. SW at 6.
- Petitioner told A.L. a few weeks before the incident that he was too drunk to drive home from a tavern where he and A.L. were drinking and asked if he could sleep on her couch, which she refused. SW at 6.
- On July 4, 2014, A.L. was at Petitioner’s and his wife’s residence for a 4th of July party, she stayed the night, she awoke with Schirato caressing her body and he gave her oral sex. SW at 7.⁴
- When Schirato was first interviewed by the police, he admitted he had had prior sexual contact with A.L. SW at 8.⁵

³ The information regarding the suspicious vehicle seen by Mr. Kirkpatrick in the two weeks prior to the incident, as well as Petitioner’s “admission” that he owned an SUV has been discussed, *supra*, and will accordingly not be discussed in detail further in this section, because these intentional misstatements must be removed from the affidavit and the remaining information evaluated as to whether it supports probable cause.

⁴ Yet she told the detectives that a few months later she invited him to her home for lunch.

⁵ This ‘admission’ was in the context of answering a question by the detective, and was not inculpatory because A.L. stated they had a consensual “swinger” relationship.

- Ms. Quan, who was a co-worker of A.L. and Petitioner, went to a tavern after the holiday party and was familiar with A.L. being involved in a foursome with Petitioner. She said that Petitioner was inappropriate at work and often made sexual jokes. SW at 8.
- Schirato wore dress shoes the night of the party. SW at 6.
- The detective reviewed photographs of the shoes worn by Petitioner on the night of the incident. Although there is nothing indicating he had been trained in analyzing footprints, he wrote that the dress shoe could have made the imprint located at the scene. SW at 9.
- On September 14, 2014 Petitioner went to A.L.'s house for lunch and to see her vacation photos showing her in a bikini. Schirato made comments about her body saying she is the perfect woman and he was jealous of her current boyfriend. SW at 9.⁶
- Eleven years previously, Petitioner was accused of having fondled a 16 year old babysitter. The Mason County Prosecuting Attorney's Office declined to prosecute the case. SW at 9.
- Ms. Quan told the Detective that Petitioner was staring at A.L.'s legs and asked her to put her hands in between A.L.'s leg. She refused and told him to do it himself. She did not believe that Petitioner actually put his hands between A.L.'s legs. SW at 10.

On the final page of the Affidavit (SW at 10), the detective summarized his probable cause points and wrote that:

- It was "possible" that Petitioner's dress shoes had left the prints around the residence;
- Petitioner knew that A.L. was intoxicated;⁷

⁶ In fact, A.L. admitted she 'invited' Petitioner to her house for the lunch.

⁷ This was rebutted by Ms. Quan and Mr. Cunningham, the two co-workers who accompanied Petitioner and A.L. to the tavern, who told the Detective they did not think that A.L. was intoxicated. See SW at 7.

- There was a prior incident where A.L. went to sleep intoxicated and awoke with him caressing her vagina and giving her oral sex;⁸
- That Petitioner has made many comments calling her the perfect woman;
- Petitioner attempted to go home with her two weeks prior to the incident;
- Petitioner was investigated, though not prosecuted, by the Mason County Sheriff's Office for a similar sex offense involving 16-year-old female;⁹
- Petitioner drove a similar vehicle to the suspicious vehicle seen in A.L.'s driveway two weeks before the incident.¹⁰

With the understanding that Petitioner and A.L. had been engaged in a consensual sexual relationship previously and that, according to A.L., Schirato was last at her house when she invited there three months earlier, there were insufficient facts to establish probable cause.

State v. Rakosky, 79 Wn.App. 229 (1995), is instructive, as the facts are similar to those in the instant case. In *Rakosky*, officers searched, pursuant to a warrant, a property and found an illegal marijuana growing operation. *See id.* at 231. Rakosky challenged the sufficiency of the search warrant affidavit. *Id.* The court found that the affidavit was insufficient to establish probable cause because numerous innocuous facts, though corroborated, did not

⁸ This would have allegedly occurred when she was spending the night at the Schirato residence after engaging in group sex.

⁹ This would have been in 2003, 11 years prior. *See* SW at 9.

¹⁰ As has been shown, this statement is false.

provide probable cause, despite allegations of past criminal behavior. *Id.* at 239.

Similarly, in the instant case, the facts do not permit a reasonable inference that Schirato committed the crime. Once the offending facts are removed, the remaining facts consist of allegations that Mr. Schirato previously behaved inappropriately towards A.L. as well as others; Mr. Schirato was attracted to A.L. and had been consensually sexually intimate with her in the past; Mr. Schirato had worn a very common type of men's shoes at a party that had a very common smooth sole not dissimilar to shoe prints, of unknown age, located outside of A.L.'s home; that he was present with A.L. and others earlier on the night of the incident; and that he was investigated in an unrelated incident eleven years earlier but never charged.

The State argues that the fact that the detective described footprints outside of the complainant's house as "dress shoes" and that Schirato was wearing "dress shoes" earlier on the night of the incident, provides probable cause. SW 10. A "dress shoe" is a common type of shoe worn by many men.¹¹ There is no explanation in the Affidavit as to what determines that a footprint is from a "dress shoe." Commonsense tells us that the only distinguishing feature is that it usually has a smooth sole, which even a boot might have. As

¹¹ Wikipedia describes a dress shoe as a shoe to be worn "at smart, casual or more formal events," and "is typically contrasted to an athletic shoe." Although there is a description of the typical color and material, the sole is not described. [Wikipedia.org/wiki/Dress_shoe](https://en.wikipedia.org/wiki/Dress_shoe).

such, it could encompass any smooth sole shoe. Unlike other types of shoes that have a distinct and identifiable tread pattern, dress shoe footprints from different types and styles of “dress shoes” would be virtually indistinguishable. Additionally, there is nothing in the Affidavit indicating that the footprints were fresh, as opposed to days or weeks old.

Had the Detective included the information that there had been other suspicious men in the neighborhood and that A.L. had an ex-boyfriend who she was afraid of, an inference could be drawn that these footprints could have been from any number of men and made at any time in previous weeks. Further, considering the prevalence of men who own smooth sole shoes, these prints could have been from a countless number of individuals.

With regard to the claim involving the “prior incident” where A.L. stated that she awoke at Petitioner’s house with him caressing her, this must be put into context with the admission by both A.L. and Petitioner that they were engaged in consensual sex prior to the incident. Not only were they engaged in consensual sex, they were also engaged in group sex. At the time of the alleged prior sexual incident on July 4, 2014 (5-1/2 months prior to the charged incident), A.L., her then boyfriend, Schirato and his wife had been involved in group sex earlier that evening. As such, it does not provide a connection to the intentional crime involving a nighttime burglary at A.L.’s home which required breaking and entering as well as sexual intercourse.

Sexual contact in the course of a consensual sexual relationship is a far cry from breaking into a person's home in the middle of the night. Moreover, the fact that A.L. invited Petitioner over to her house for lunch two months later, demonstrates that she was not afraid of Petitioner.

As for Petitioner making a comment about his opinion that A.L. was the "perfect woman," in the context of their relationship which included consensual sex and group sex, this does not add to probable cause. While it shows that Petitioner was attracted to A.L., given their prior consensual sexual relationship, this adds nothing to the probable cause equation.

The investigation by Mason County more than eleven years prior to this alleged incident also does not add to the probable cause calculus. This alleged incident did not involve a burglary or any sort of breaking and entering. The fact that Mason County declined prosecution indicates that it did not view the evidence as justifying a criminal case.

Overall, when the intentional misstatements about Schirato driving an SUV are removed and the material omissions about Mr. Kirkpatrick's statements regarding other suspicious cars at A.L.s' house; other suspicious men seen in the neighborhood; and, A.L.'s former boyfriend who she was afraid of are added, the Affidavit fails to establish probable cause.

D. COUNSEL MISHANDLED THE GLASS EVIDENCE

1. Failure to Request a *Frye* Hearing

The State argues “[t]here is absolutely no indication that the methods used by Van Wyk in analyzing the glass evidence in this case were not conducted using methods generally accepted in the scientific community.” Response at 23. This is an outrageous claim because:

- The scientist at the Washington State Patrol (“WSP”) crime lab originally assigned to review the glass evidence was not qualified to test glass;¹²
- At the time the evidence was submitted in 2015, *no scientist* on the entire staff of the WSP lab was qualified to test glass;¹³
- The FBI lab at Quantico, Virginia refused to test or analyze the glass because the particles were too small;
- The State has failed to cite a single case – in Washington or elsewhere – to support its argument that this testimony is admissible under the *Frye* standard.

The proffered glass testimony should never have been admitted without a hearing pursuant to *United States v. Frye*, 293 F.1012 (D.C. Cir. 1923).

After the FBI refused to test the glass, it was returned to Washington, where it was tested by newly-minted “expert” Daniel Van Wyk. Incredibly, the State suggests that when Van Wyk ultimately tested

¹² WSP scientist Susan Wilson: “I was not qualified at that time to do comparisons of glass.” RP 299.

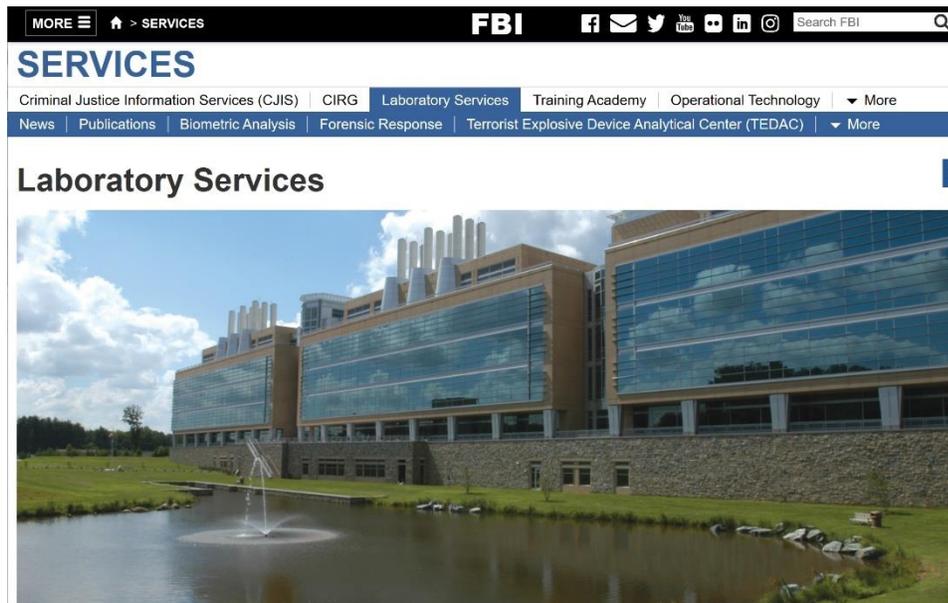
¹³ “[T]he State of Washington in 2015 was not doing glass comparisons.” RP 300.

the glass, the WSP lab had *better* testing capabilities than the FBI lab. Response at 22 (“[t]he difference between the two instruments is the instrument used in Washington State is non-destructive. The one that’s used by the FBI is. The sample size required for the instrument in Washington is smaller”)(*quoting* RP 304). But this is unbelievable, given that the WSP’s inexperience was *the reason the particles were sent to the FBI in the first place*. RP 300. Moreover, Susan Wilson admitted that her knowledge of FBI glass testing was very limited and conceded she didn’t know what machines the FBI lab was then currently using. RP. 303; 343-44.¹⁴

It strains credulity to believe that the WSP lab – which months earlier had never tested glass before and sought to rely on the FBI – suddenly was: (1) an expert in this field; and (2) able to opine on the widespread acceptance of this technique.¹⁵ The FBI Lab at Quantico is the largest, most-well funded, and most technologically advanced crime lab in the United States, if not the world:

¹⁴ WSP’s understanding of the testing equipment and methodology is confusing, because the evidence appears to confirm that both the FBI and the WSP were using the same equipment. *Compare* Schirato Dec. App. A at 3 (FBI report confirming use of “GRIM3”) *with* VRP 688 (Van Wyk testifying on direct examination that he used the “GRIM...instrument”). If it is true that both labs used the same equipment, trial counsel never questioned how the WSP was able to obtain valid test results, when the FBI deemed the particles too small to test.

¹⁵ During trial, the State attempted to establish the acceptance of the glass testing techniques: “Q: And is the glass technique that’s now used by the Washington State Patrol generally accepted in the scientific community? A: Yes.” RP 305. No foundation was laid for this bare assertion. Trial counsel did not object or cross examine.



Federal Bureau of Investigations, “Laboratory Services,” <https://www.fbi.gov/services/laboratory>.¹⁶

Washington has routinely accepted the FBI lab as the gold standard criminal forensic laboratory. For example, the acceptance of DNA expert testimony – arguably the biggest development in criminal forensic lab science in the 20th century – was based on the work of the FBI lab. In *State v. Copeland*, 130 Wn.2d 244 (1996), our State Supreme Court considered the admissibility, under *Frye*, of the testimony of an FBI lab scientist regarding DNA testing and related statistical probabilities calculated using

¹⁶ See also *id.* (“[c]reated in 1932, the FBI Laboratory is today one of the largest and most comprehensive crime labs in the world. Operating out of a state-of-the-art facility in Quantico, Virginia, the Lab’s scientific experts and special agents travel the world on assignment, using science and technology to protect the nation and support law enforcement, intelligence, military, and forensic science partners”).

an FBI database. *Id.* at 253-54. The *Copeland* Court reviewed how the FBI crime lab led the way in establishing universal acceptance of DNA testing and population probability calculations in the scientific community and court system,¹⁷ holding that “a significant dispute no longer exists on this matter.” *Id.* at 270. Today, we take for granted these fundamental DNA principles because of the FBI’s work.

It is illogical to think that, in a matter of months, Mr. Van Wyk, working on his second glass case, was suddenly better qualified and equipped than the FBI. As with DNA testing, this novel science should have been subjected to a *Frye* hearing.

2. The Defense Expert

The State argues that “Schirato’s defense counsel retained Palenik’s testimony for the very specific purpose of arguing that Van Wyk’s work could have been done better.” Response at 25. The State emphasizes Mr. Palenik’s efforts to point out “apparent discrepancies.” Response at 26 (“[t]he central theme of Palenik’s testimony was the possibility of error and

¹⁷ See *id.* at 267-68 (recognizing, with approval, that “the FBI conducted a worldwide study of VNTR frequency data from around the world”) (*citing* Laboratory Div., FBI, U.S. Dep’t of Justice, *VNTR Population Data: A Worldwide Study* (Feb.1993)); *id.* at 267 (“since [*State v. Cauthron*, 120 Wn.2d 879 (1993)] was decided additional empirical studies have been conducted, the FBI has collected data from around the world, and one of the most vociferous opponents of use of the product rule has joined with an FBI scientist in declaring that the DNA wars are over”); *id.* at 269 (“[o]ther courts have begun to take notice of the FBI’s worldwide study the numerous empirical studies reported, and the Lander & Budowle article, and have recognized, as we do, that the significant challenges to use of the product rule have been sufficiently resolved”).

the relatively high standard deviation of some of the tests that Van Wyk ran”)(*citing* RP 1010-1011); *id.* at 27 (Palenik “maintained that the work could have been done better”) (*citing* RP 1057-58).

But Mr. Palenik’s minor quarrels with the State expert’s methods evaporated when he was cross examined. *See* Opening Brief at 39. None of it mattered because Mr. Palenik agreed with the State’s conclusions. *See id.* at 39-41 (highlighting Palenik’s concurrence with State’s expert). Incredibly, counsel has now conceded that Mr. Palenik told him in advance that he would agree with the State’s expert:

Before the report was produced, I was advised by Skip that he wanted to talk with me on the phone. On the phone Skip told me that there were a lot of issues with the methodology of the state’s expert, **but the conclusion reached were [sic] accurate** but weak.

Woodrow Dec. ¶ 22 (emphasis supplied). Trial counsel further admitted:

After the report was prepared Skip wanted to make sure that we were aware that his conclusions if asked were that he concurred with the results from the state’s expert.

Id. (emphasis supplied).

The emails submitted by trial counsel confirm that Mr. Palenik tried to warn trial counsel regarding his opinions. On December 21, 2017, a few weeks before trial, trial counsel’s assistant Megan wrote to Mr. Palenik: “Hi Skip, Can you tell me how much we will need to send you to have you come to Washington and testify.” Woodrow Dec. App. C. Mr. Palenik replied:

From: Skip Palenik [mailto:SPalenik@microtracellc.com]
Sent: Thursday, December 21, 2017 3:50 PM
To: Megan Schuyler <megankerlee@outlook.com>
Cc: Richard Woodrow <richard@woodrowlaw.net>
Subject: RE: GREG SCHIRATO

Hi Megan,

I'm happy to provide this information but I think it would really be of value if I could speak with Richard before we confirm my travel to Washington. If he has read our report, I would be available to speak with him tomorrow. I could do this almost anytime with a little notice.

Best regards,
Skip

Id. Mr. Palenik's resistance to confirming travel plans and his statement that he thinks "**it would really be of value if I could speak with Richard**" betrays his obvious unease. Mr. Palenik wanted to talk with trial counsel on the phone to ensure he understood that Mr. Palenik would ultimately agree with the State's expert's conclusion. *See* Woodrow Dec. ¶ 26 ("Palenik told me that if he tested the same pieces of glass, he would probably come up with the same conclusions"); *id.* ¶ 37; (trial counsel acknowledging that he discussed testing with Palenik, who "advised that the results would be the same").

The State concludes: "[Palenik] was a good choice for a defense expert." Response at 25. This could not be further from the truth and is directly contradicted by the record. Mr. Palenik was a terrible choice because he agreed with the State's expert. Even worse, Mr. Woodrow was on notice because Mr. Palenik repeatedly warned him.

Trial counsel attempts to blame Mr. Schirato for his decision to call Mr. Palenik. Woodrow Dec. ¶ 23 ("...I talked with Schirato about the

concerns raised by Palenik and Schirato wanted Palenik to testify”).¹⁸ But the decision to call a witness rests solely with the attorney. *See In re Stenson*, 142 Wn.2d 710, 741 (2001) (“the decision to calls witnesses rests with counsel, not with the defendant”).

As in *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997), “[p]resenting the witness at trial was a disaster. ‘Describing [counsel’s] conduct as ‘strategic’ strips that term of all substance’ ” *Id.* at 1273 (“quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994)). Mr. Palenik’s testimony, and the State’s use of it in closing argument, was “devastating.” *Bloom*, 132 F.3d at 1272.¹⁹

3. Counsel’s Statements Betray a Disturbing Unfamiliarity with the Record and Lack of Sophistication

The glass evidence comprised a significant portion of the trial testimony and factored heavily into the State’s case. Yet counsel’s declaration exhibits a disturbing misunderstanding of the evidence:

¹⁸ However, Petitioner in his first supplemental declaration contradicts Mr. Woodrow and states that Woodrow never informed Petitioner of this and if he had, Petitioner would never have agreed to pay for Palenik to travel. *See* Schirato First Supp. Dec. ¶¶ 9-12.

¹⁹ The State quotes *State v. Thomas*, 109 Wn.2d 222, 230 (1987) for the proposition that, “[g]enerally, the decision to call a witness will not support a claim of ineffective assistance of counsel.” Response at 24. The State omitted the next sentence in *Thomas*: “However, the presumption of counsel’s competence can be overcome by a showing, among other things, that counsel failed to conduct appropriate investigations.” *Id.* at 230-31 (where trial counsel “fail[ed] to discover the alcohol counselor trainee’s total lack of qualifications, trial counsel’s performance was deficient. Had he conducted *any* investigation into [the witness’s] qualifications he would have discovered she was only a trainee with minimal experience”). Here, counsel’s decision to call an expert who agreed with the State’s expert is similarly objectively unreasonable.

29. Glass is glass. It could come from same source.

Woodrow Dec. ¶ 29. These shocking comments reflect his incompetence.

In addressing the failure to present the study demonstrating the prevalence of glass in men's suits, counsel offers a bizarre response:

This article is from England. Those results might not even be transferrable to the United States. The English wear a lot of wool and tweed. These garments readily retain glass and other particles. Both defense experts indicated that dry cleaners usually would be cleaning wool garments and wool is much more likely to collect glass.

Woodrow Dec. ¶ 27. Trial counsel's suggestion is that the results of the study do not apply because Mr. Schirato's clothing was not wool.

Counsel's assertions betray his unfamiliarity with the facts and his cavalier handling of the glass, because *Mr. Schirato's suit was 100% wool*:



Maybrown Dec. App. B. See also RP 331 (WSP scientist Susan Wilson: the yarns of the suit “happen to be colorless wool. They’re wool fibers. The

gray yarns showed different colors of gray wool... The brown yarns showed different shades of brown, again all wool”).

Because Mr. Schirato’s suit was wool, contrary to trial counsel’s declaration, it was more likely to retain small glass particles, consistent with the scientific study. Most significantly, counsel’s lack of familiarity with the facts confirms his failure to understand this critical aspect of the case.

4. Failure to Call the FBI Scientist

The State suggests that calling the FBI scientist would have undermined trial counsel’s chain of custody argument. *See* Response at 33. But the chain of custody arguments in defense counsel’s closing were very brief, unfocused and ineffective. *See* RP 1246 (“Who touches it? Who knows? Was it left on the table? Was it bring your kid to, you know, work on that day?”). Counsel never offered any reasonable, cogent argument for how any chain of custody issues could have resulted in a contamination of the particles.

As discussed *supra*, the FBI is the pre-eminent authority on criminal forensic laboratory science. The FBI witness would have confirmed that the glass particles were too small to even test with the FBI’s sophisticated

equipment, which would have completely undermined the credibility of Mr. Van Wyk, a glass neophyte working on his second glass case ever.²⁰

5. Failure to Object to Prosecutorial Misconduct During Closing Argument

During closing argument, the prosecutor committed prosecutorial misconduct by repeatedly arguing that the glass on the suit was a “match” with the glass from A.L.’s window. RP 1261-62. “[State]: “They found glass on his suit...that **matches** the glass...elementally **matches**...atomically **matches**...”); RP 1264 (State characterizing Palenik’s testimony: “the State’s expert was correct, the glass **matched**”). No witness had testified that the glass “matched.”

Trial counsel now concedes that “perhaps he should have objected to the State’s closing arguments about the glass.” Woodrow Dec. ¶ 41. But he claims “at the time I felt it was a better trial tactic not to [object].” *Id.*²¹ Counsel’s suggestion that this was a planned “tactic” is simply absurd.

²⁰ Contrary to the State’s assertion in its Answer (p. 33-34), the FBI scientist conducted a thorough examination of the unknown glass particles before concluding they were of “insufficient size or condition” to make a comparison. See Schirato (First) Dec. App. A (FBI Laboratory Report), at 3. In fact, the FBI conducted several different microscopic analyses; it measured refractive indices using the GRIM 3 system (the same system used by the WSP Lab); and examined concentrations of minerals in the glass particles using an “inductively coupled-plasma optical emission spectrometer.” *Id.* at 2.

²¹ Trial counsel cannot explain why, more than two years later, he unequivocally remembers his decision to not object to this specific part of the State’s closing argument was a “trial tactic.”

Washington courts have long recognized that a claim that counsel's conduct was a tactic is rebutted by a showing that the conduct was not reasonable:

a criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."

State v. Grier, 171 Wn.2d 17, 33–34 (2011)(internal citations omitted).

Trial counsel and the State offer no explanation for why not objecting was strategic.²² The failure to object was objectively unreasonable.

6. The Scientific Article Demonstrating the Prevalence of Small Glass Particles on Men's Dress Clothing

The State minimizes the Journal of Forensic Sciences article which demonstrated a high prevalence of glass in men's suits. Response at 29-32. Mr. Woodrow acknowledges that he was aware of this article. *See* Woodrow Dec. ¶ 27.²³ The State argues that a 1997 study of the clothing of high school students in Canada and a 2001 study from New Zealand are more persuasive. *See* Response at 30-31.

²² In discussing his decision not to object, trial counsel boldly asserts: "[t]he defense was strong." Woodrow Dec. ¶ 41. This borders on the absurd. Counsel called an expert who had warned him that he would agree with the State's expert, which is precisely what occurred.

²³ *See* Schirato Dec. ¶ 15.; App. B (attaching "Glass and Paint Fragments Found in Men's Outer Clothing – Report of a Survey," Pearson, E.F., May, R.W., Dobbs, M.D.G., The Journal of Forensic Sciences, Vol. 16, N.3 July 1971).

The studies cited by the State are quite different. For example, the article from Canada criticized the Journal of Forensic Sciences article specifically because it focused on dress clothes: “However, suits, dress pants and blouses received at dry cleaners are not representative of clothing worn by people committing crimes such as ‘break and enter’ which commonly give rise to paint and glass evidence.” Lau, L., Beveridge, A.D., Callowhill, B.C., Conners, N., etc., “The Frequency of Occurrence of Paint and Glass on the Clothing of High School Students,” Can. Soc. Forens. Sci. J., Vol. 30, No. 4 at 233 (1997). Accordingly, the Lau study focused on clothing worn by high school students in Vancouver, Canada in 1997.

That study has little bearing on Schirato’s case, where the specific question was the significance of small glass particles on his *100% wool dress suit*. The Journal of Forensic Sciences study was particularly applicable to Schirato’s case because it analyzed 100 men’s *dress suits*. See Pearson at 285. The findings were significant because glass fragments were found on “63 of the 100 suits examined.” *Id.* This critical evidence would have provided an innocent explanation for the small glass particles.

The State correctly points out (Response at 31) that at trial, counsel asked Mr. Palenik about studies regarding glass on clothes:

Q. Is there any studies out there, tests that have been performed, to determine how long glass fragments can stay on clothes?

A. There may have been, not as such, but I think in conjunction with glass -- although there are persistent studies for fibers, I don't specifically know of one for glass. But even then, they are case by case.

RP 1021. This response was befuddling – and arguably false – because Mr. Palenik *did* know about the Journal of Forensic Sciences study because trial counsel had sent it to him:

From: Richard Woodrow <richard@woodrowlaw.net>
Sent: Friday, December 22, 2017 10:40 AM
To: 'Skip Palenik'
Subject: schirato

Are you ok testifying about this article.

53.Pearson E., May R., Dabbs M. (1971). Glass and paint fragments found in men's outer clothing. Report of a survey. *Journal of Forensic Sciences* 16:283–300.53.Pearson E., May R., Dabbs M. (1971). Glass and paint fragments found in men's outer clothing. Report of a survey. *Journal of Forensic Sciences* 16:283–300.

[53] examined 100 suits submitted to a dry-cleaning establishment, and found glass fragments in 63 of them. A total of 551 fragments was recovered from the 100 suits. The greatest number of fragments (291) were found in trouser pockets, with the second greatest number (182) found in the jacket pockets. Seventy-eight fragments were found in the trouser cuffs (turn-ups), but only 70 per cent of the suits had cuffs on the trousers. Eighteen fragments were longer than 1mm and 128 were longer than 0.5mm. The mode of the size distribution was about 0.3mm. The distribution of particles within the population of 100 suits is of considerable interest, however. Two suits contained 46 per cent of all of the glass recovered, and 50 per cent of the suits contained from one to five fragments.

Woodrow Dec. App. D. There was no strategic reason for failing to utilize the study.

7. Counsel's Handling of the Glass in Total

The State was desperate to offer “scientific” testimony to connect the glass found on Schirato's suit to A.L.'s home. On September 20, 2016, Olympia Police Department personnel emailed Daniel Van Wyk:

We need the glass fragments collected from the suit and/or shirt compared to the glass from the basement window to see if they originated from the window. Our suspect has had access to the victim's home previous to the incident. Matching the glass in his suit to the broken basement window proves he was there on the night of the crime and was most likely responsible for breaking the window to gain entry into the victim's home.

Maybrown Dec. App. C (highlighting supplied).

The FBI lab concluded that these minute glass particles were not testable, and the WSP crime lab had never previously tested glass. But as directed, Mr. Van Wyk – recently “qualified” and working on his second glass case – delivered on the directive. The State presented questionable expert testimony without the traditional scrutiny of a *Frye* hearing. Van Wyk’s testimony was the first of its kind in Washington and was based on methodology different than that used by the FBI lab. From failing to request a *Frye* hearing, to calling an expert witness who agreed with the State’s expert, to failing to introduce an exculpatory scientific study, to exhibiting a dangerously cavalier attitude toward the evidence (“Glass is glass”), trial counsel badly mishandled the glass evidence.

D. COUNSEL’S ERRORS PREJUDICED PETITIONER

Performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wn.App.2d 322, 334-35 (1995). Prejudice exists if there is a reasonable probability that “but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *State v. Kyлло*, 166 Wn.2d 856, 862 (2009). A “reasonable probability” is lower than a preponderance standard. *See Strickland v. Washington*, 466 U.S. 668, 694

(1984). It is a probability sufficient to undermine confidence in the outcome. *Id.*

Petitioner was badly harmed on account of each of the errors that have been outlined in this Petition. Absent the evidence obtained pursuant to the unlawful search, Petitioner would never have been tried (no less convicted) of any criminal offense. Moreover, although the glass evidence was a centerpiece of the State's case against Schirato, Petitioner's counsel's failings served to enhance this evidence in the eyes of the jury. Once this Court accumulates the harm that flowed from counsel's several errors, it is apparent that Petitioner has suffered substantial prejudice.

Petitioner must present at least a *prima facie* case that he was prejudiced by the error(s). *See, e.g., Yates*, 177 Wn.2d at 17. Petitioner has satisfied that burden here. At a minimum, the petition should be transferred for a full hearing on the merits or a reference hearing pursuant to RAP 16.11(a) and RAP 16.12.

E. CONCLUSION

For the foregoing reasons, Petitioner's conviction must be vacated and reversed. Alternatively, this Court should remand for a reference hearing.

RESPECTFULLY SUBMITTED this 6th day of May, 2020.

/s/David Allen
WSBA #500

/s/Todd Maybrown
WSBA #18557

/s/Cooper Offenbecher
WSBA #40690

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

In re the Personal Restraint Petition of

GREGORY ALLEN SCHIRATO,

Petitioner.

NO. 53913-6-II

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 6th day of May, 2020, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

REPLY BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, which will provide service of this document to Joseph James Anthony Jackson (jacksoj@co.thurston.wa.us); David Allen (david@ahmlawyers.com); Todd Maybrown (todd@ahmlawyers.com); Cooper Offenbecher (cooper@ahmlawyers.com) and Danielle Smith (danielle@ahmlawyers.com).

I certify that I sent a copy of the foregoing document to the Petitioner via United States Mail, postage prepaid.

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

Dated this 6th day of May, 2020, at Seattle, Washington.

/s/ Sarah Conger
SARAH CONGER
Legal Assistant

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

May 06, 2020 - 12:08 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53913-6
Appellate Court Case Title: Personal Restraint Petition of Gregory Allen Schirato
Superior Court Case Number: 15-1-00520-4

The following documents have been uploaded:

- 539136_Affidavit_Declaration_20200506120304D2851502_6275.pdf
This File Contains:
Affidavit/Declaration - Other
The Original File Name was DECLARATION OF TODD MAYBROWN Schirato PRP.pdf
- 539136_Briefs_20200506120304D2851502_8488.pdf
This File Contains:
Briefs - Petitioners Reply
The Original File Name was REPLY BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION.pdf
- 539136_Motion_20200506120304D2851502_3868.pdf
This File Contains:
Motion 1 - Other
The Original File Name was MOTION FOR OVERLENGTH BRIEF.pdf
- 539136_Other_Filings_20200506120304D2851502_0628.pdf
This File Contains:
Other Filings - Other
The Original File Name was Supplemental Declaration of Schirato.pdf

A copy of the uploaded files will be sent to:

- Alex@ahmlawyers.com
- PAOAppeals@co.thurston.wa.us
- cooper@ahmlawyers.com
- danielle@ahmlawyers.com
- jacksoj@co.thurston.wa.us
- todd@ahmlawyers.com

Comments:

Being filed today are (1) Motion for Overlength Brief; (2) Reply Brief of Petitioner; (3) Declaration of Todd Maybrown; and (4) First Supplemental Declaration of Petitioner

Sender Name: Sarah Conger - Email: sarah@ahmlawyers.com

Filing on Behalf of: David Allen - Email: david@ahmlawyers.com (Alternate Email: sarah@ahmlawyers.com)

Address:
600 University Street
Suite 3020
Seattle, WA, 98101
Phone: (206) 447-9681

Note: The Filing Id is 20200506120304D2851502

FILED
Court of Appeals
Division II
State of Washington
5/6/2020 12:08 PM

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

In re the Personal Restraint Petition of
GREGORY SCHIRATO,
Petitioner

NO. 53913-6-II

FIRST SUPPLEMENTAL
DECLARATION OF PETITIONER
GREGORY SCHIRATO IN SUPPORT OF
PERSONAL RESTRAINT PETITION

I, Gregory Schirato, do hereby declare:

1. I have reviewed the Declaration of Richard Woodrow, which was filed in this matter.

2. Mr. Woodrow falsely claims at page 6, § 17, of his declaration that I told the detective I owned a small silver Mazda SUV.

3. As I stated in my first declaration, I informed Mr. Woodrow that I never told the detective this. I told Mr. Woodrow that this was a lie and that I told the Detective I owned a Mazda 3 sedan, which did not look like an SUV.

4. This conversation took place in the context of my asking Mr. Woodrow to challenge the search warrant, which he never did.

5. Mr. Woodrow claims at page 7, § 19 that I was aware of Mr. Palenik's anticipated testimony which agreed with the State's expert. This is untrue.

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

May 06, 2020 - 12:08 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53913-6
Appellate Court Case Title: Personal Restraint Petition of Gregory Allen Schirato
Superior Court Case Number: 15-1-00520-4

The following documents have been uploaded:

- 539136_Affidavit_Declaration_20200506120304D2851502_6275.pdf
This File Contains:
Affidavit/Declaration - Other
The Original File Name was DECLARATION OF TODD MAYBROWN Schirato PRP.pdf
- 539136_Briefs_20200506120304D2851502_8488.pdf
This File Contains:
Briefs - Petitioners Reply
The Original File Name was REPLY BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION.pdf
- 539136_Motion_20200506120304D2851502_3868.pdf
This File Contains:
Motion 1 - Other
The Original File Name was MOTION FOR OVERLENGTH BRIEF.pdf
- 539136_Other_Filings_20200506120304D2851502_0628.pdf
This File Contains:
Other Filings - Other
The Original File Name was Supplemental Declaration of Schirato.pdf

A copy of the uploaded files will be sent to:

- Alex@ahmlawyers.com
- PAOAppeals@co.thurston.wa.us
- cooper@ahmlawyers.com
- danielle@ahmlawyers.com
- jacksoj@co.thurston.wa.us
- todd@ahmlawyers.com

Comments:

Being filed today are (1) Motion for Overlength Brief; (2) Reply Brief of Petitioner; (3) Declaration of Todd Maybrown; and (4) First Supplemental Declaration of Petitioner

Sender Name: Sarah Conger - Email: sarah@ahmlawyers.com

Filing on Behalf of: David Allen - Email: david@ahmlawyers.com (Alternate Email: sarah@ahmlawyers.com)

Address:
600 University Street
Suite 3020
Seattle, WA, 98101
Phone: (206) 447-9681

Note: The Filing Id is 20200506120304D2851502

FILED
Court of Appeals
Division II
State of Washington
5/6/2020 12:08 PM

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

In re the Personal Restraint Petition of
GREGORY SCHIRATO,
Petitioner.

NO. 53913-6-II
DECLARATION OF TODD MAYBROWN

I, Todd Maybrown, do hereby declare:

1. I am an attorney licensed to practice law in the state of Washington.

2. My office has been retained to represent the Petitioner, Gregory Schirato, in this matter. I am familiar with the record from the pretrial proceedings and trial in the underlying matter (*State v. Schirato*, Thurston County Cause No. 15-1-00520-4). In addition, I have carefully reviewed all files and records that were transferred to our office by Petitioner's trial counsel, Richard Woodrow.

3. This declaration is filed by way of support of the Personal Restraint Petition of Gregory Schirato. It is also intended to reply to the claims presented in the Declaration of Richard Woodrow.

4. Before filing this PRP, the lawyers in our office did everything in our power to investigate this case. However, unlike all other civil proceedings, a PRP petitioner may not conduct discovery unless and until the appellate court transfers the case to the superior court for a reference hearing. *See* RAP 16.12. Thus, we were dependent upon the cooperation of any witnesses who might have pertinent information regarding Petitioner's claims.

DECLARATION OF TODD MAYBROWN – 1

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

1 5. Pursuant to the guidelines promulgated by the American Bar Association for
2 defense counsel handling criminal matters, every attorney is expected to make reasonable
3 efforts to “maintain a cooperative relationship with any prior, or successor, defense counsel in
4 the representation.” ABA Guidelines, The Defense Function, Standard 4.3.10(b).
5 Unfortunately, our office received only meager cooperation from Richard Woodrow during our
6 investigation and preparation of this matter.
7

8 6. Shortly after our office was retained, Mr. Woodrow accepted a telephone call
9 from my partner, David Allen, and agreed to discuss a few details of his representation of
10 Gregory Schirato. During that conversation, Mr. Woodrow described some of the difficulties
11 he faced during the representation. Mr. Woodrow then emphasized that he was surprised that
12 the *Schirato* case was sent out to trial on the scheduled date. According to Mr. Woodrow, he
13 had believed the case would not commence on that date because the prosecutor had a conflict
14 with a murder case, *State v. Bolton*, which was scheduled to commence on the same date.
15 However, approximately two weeks before trial, Mr. Woodrow was told that the *Schirato* case
16 would proceed as scheduled. Woodrow then tried, unsuccessfully, to obtain a continuance of
17 the trial date. Woodrow indicated that he was not fully prepared for trial on the scheduled date
18 and it was his opinion that our office could raise this as a legal issue on appeal.
19
20

21 7. Our office investigated this potential issue after speaking with Mr. Woodrow,
22 and reviewed the motion he had filed. *See Appendix A* (Motion and Declaration to Continue
23 Trial Date, dated January 2, 2018). We quickly determined that it was not a viable legal claim
24 insofar as the case was commenced on April 14, 2015 and that Mr. Woodrow had filed his
25 appearance just a week later, on April 21, 2015. Given the fact that the *Schirato* case had been
26 pending for nearly 3 years – and given the paucity of information contained in the defense

1 motion to continue – it would be unreasonable to argue that the trial judge abused his discretion
2 in denying the 11th hour motion to continue.

3 8. Thereafter, as required by law, Mr. Woodrow subsequently produced what was
4 purported to be his “entire file” relating to the representation of Petitioner during the pretrial
5 and trial proceedings. The lawyers in our office carefully reviewed the trial court record and
6 all of Mr. Woodrow’s materials over the subsequent months.
7

8 9. During March 2019, David Allen contacted Mr. Woodrow in an effort to set up
9 a face-to-face meeting at Mr. Woodrow’s office (or any other convenient location) to discuss
10 some of the issues regarding Schirato’s case. Allen explained that the meeting would last about
11 one hour. Mr. Woodrow refused to participate in such a meeting, claiming that he was too busy
12 handling other matters. Instead, Mr. Woodrow asked our office to submit any questions we
13 might have in writing.
14

15 10. David Allen subsequently sent Mr. Woodrow a letter in which he set forth
16 several questions relating to Petitioner’s case. In particular, Allen posed the following
17 questions relating to the search issues:

- 18 - Why didn’t you challenge the search warrant?
19
20 - Did you investigate any of the claims made by the detective in the search
21 warrant affidavit to determine the viability of a motion to exclude facts which were
22 either knowingly and intentionally false or recklessly
23 inaccurate pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978)?

24 In response to these questions, Mr. Woodrow responded by email and explained: “I looked at
25 the affidavit in support of the warrant. I didn’t notice anything at issue in it.”

26 11. We filed the Personal Restraint Petition on behalf of Gregory Schirato on or
about October 11, 2019. Mr. Woodrow never agreed to meet with any of the attorneys in our

1 office before we filed that Petition. Moreover, Mr. Woodrow never agreed to prepare a
2 declaration relating to these matters before we filed that Petition.

3 12. We received the State’s Response to Personal Restraint Petition on February 25,
4 2020. We were very surprised to see that Petitioner’s trial counsel, Richard Woodrow, had
5 provided a declaration in support of the prosecutor’s office. This was the first that we heard
6 that Mr. Woodrow had agreed to affirmatively assist the prosecutors in their efforts to uphold
7 Petitioner’s conviction. To this date, we have no information regarding Mr. Woodrow’s
8 communications with the prosecutor’s office and the process by which he prepared this
9 declaration.
10

11 13. Mr. Woodrow’s declaration includes 42 separate paragraphs – spanning more
12 than 15 pages – in which he offers little more than *post hoc* justifications for his handling of the
13 *Schirato* case. Suffice it to say, this declaration is substantially lengthier than any pleading that
14 Mr. Woodrow had prepared during his representation of Petitioner at trial.
15

16 14. Mr. Woodrow’s declaration is replete with self-serving claims that are not
17 supported by the record. Petitioner further maintains that many of the assertions in Woodrow’s
18 declaration are unreliable – and in some instances unbelievable.
19

20 15. Perhaps there is nothing more concerning that Mr. Woodrow’s attempts to
21 explain away his failure to file a suppression motion as if he had carefully considered the issue
22 before deciding to forego that effort. *See Woodrow Dec.* ¶¶ 3-28, 33-34.

23 16. As a threshold matter, Mr. Woodrow’s recent diatribe cannot be squared with
24 his previous explanation to counsel – in which he simply noted that he had “looked at” the
25 affidavit. While it may be true that Woodrow “looked at” the affidavit at some point during the
26 course of the representation, there is nothing in his file to suggest that he gave it more than a

1 passing glance or that he ever considered this legal issue in a serious way. Based on his file,
2 Mr. Woodrow did not interview the affiant (or any of the police investigators for that matter).
3 Mr. Woodrow did not carefully review the warrant affidavit or conduct research on any of the
4 legal issues related to the search. Woodrow made no inquiries into Mr. Kirkpatrick’s claims
5 regarding the vehicle that was seen nearby the complainant’s home, even though Petitioner had
6 told him that he did not drive an SUV or any similar vehicle. Simply put, Mr. Woodrow never
7 considered the possibility that he might be able to raise a challenge to the search.
8

9 17. Mr. Woodrow goes so far as to make the outlandish assertion that there was
10 “overwhelming evidence showing the nexus between the crime and Schirato and Schirato and
11 the items to be seized.” Woodrow Dec. ¶ 7. Neither the police investigator nor the prosecutor
12 has ever made such a claim. In fact, absent the supposed identification of Schirato’s car, there
13 was absolutely no evidence to tie him to the scene of the offense. Had Mr. Woodrow considered
14 the issue he would have realized that Mr. Kirkpatrick saw a car (or cars) that were driven by
15 someone other than Schirato. It is noteworthy that the prosecutor chose not to present the
16 testimony regarding these cars at the trial.¹
17

18 18. But Mr. Woodrow’s self-serving justifications don’t end there. He also makes
19 the following claim: “Counsel reviewed the affidavit in support of the search warrant numerous
20 times with and without the input of Schirato and to this day Counsel believes there is no basis
21 to bring a frivolous motion to suppress.” Woodrow Dec. ¶ 18. This is flabbergasting. Not only
22 is this claim untrue, but Schirato actually advised Mr. Woodrow there was reason to challenge
23 the affidavit. See Schirato Supp. Dec. ¶¶ 3-4.. But no competent criminal defense attorney
24
25

26 ¹ Mr. Kirkpatrick was called to testify at the trial on behalf of the defense, but he was asked no questions regarding these cars.

1 would claim that a motion to suppress would have been frivolous. Only an attorney who has
2 chosen to join the prosecutorial team would make such a remarkable claim.²

3 19. In addition, Mr. Woodrow also claims that Schirato was a “disgruntled ex-lover
4 who had motive” to commit this offense. *See Woodrow Dec. ¶ 9*. But there is no evidence to
5 support such a claim. Rather, the affidavit suggests that the complainant had a “bad breakup”
6 with a former boyfriend (Nathan Hockenson) and that led her to change her locks. *See SW 5*.
7 The complainant also mentioned some other “suspicious circumstances” at her home –
8 circumstances which seemingly had nothing to do with Schirato.
9

10 20. The complainant did not initially single out Schirato as a possible suspect.
11 Rather, it seems that the detective chose to focus his attention on Schirato because the
12 complainant’s then-current boyfriend, Steve Anderson, claimed that Shirato had “made passes”
13 at the complainant. Mr. Woodrow never interviewed Anderson before the Schirato trial. And,
14 once again, it is noteworthy that the prosecutor chose not to present Anderson’s testimony at
15 the trial.
16

17 21. Finally, Mr. Woodrow’s declaration suggests his animus towards his former
18 client. Mr. Woodrow never refers to his client by his full name, and instead repeatedly describes
19 him as “Schirato.” Mr. Woodrow demonstrates his personal views when he notes: “Schirato
20 had a reputation as a swinger . . .” *Woodrow Dec. ¶ 34*. Then, without citation to anything
21 from the record, Mr. Woodrow concludes: “The victim told the detective she thought it was
22 Schirato.” *Id.* To the contrary, the complainant initially claimed that she had, in fact, believed
23 that she had sexual contact with her boyfriend (Steve Anderson) on the night in question. The
24
25

26 ² It is startling that a defense attorney would make the claim that: “[a] magistrate would not be doing his job if he or she didn’t grant a search warrant.” *Woodrow Dec. ¶ 34*.

1 complainant only pointed toward Schirato several days after the incident – and after she had
2 presumably spoken with Anderson on numerous occasions.

3 22. Mr. Woodrow’s comments regarding the forensic evidence and testimony in this
4 case are similarly concerning. At the outset he claims: “Glass is glass. It could come from
5 same source.” *Woodrow Dec. ¶29*.³ These comments reflect a shocking level of incompetence.
6

7 23. In addressing the failure to present the scientific study demonstrating the
8 prevalence of glass particles in men’s suits, trial counsel offers the following bizarre response:

9 This article is from England. Those results might not even be transferrable to
10 the United States. The English wear a lot of wool and tweed. These garments
11 readily retain glass and other particles. Both defense experts indicated that dry
cleaners usually would be cleaning wool garments and wool is much more
likely to collect glass.

12 *Woodrow Dec. ¶ 27*. Mr. Woodrow now seems to claim that the results of the Journal of
13 Forensic Sciences study do not apply because Schirato’s clothing was not wool.

14 24. Mr. Woodrow’s assertions betray his unfamiliarity with the facts and his cavalier
15 handling of the glass issue, because *Mr. Schirato’s suit was 100% wool. See Appendix B*
16 *(photos of Evidence Item 35, Schirato’s grey suit seized by police). See also RP 331 (WSP*
17 *scientist Susan Wilson, observing on direct examination, that the yarns of the suit “happen to*
18 *be colorless wool. They’re wool fibers. The gray yarns showed different colors of gray*
19 *wool...The brown yarns showed different shades of brown, again all wool”)*.

20 25. Because Schirato’s suit was wool, contrary to Mr. Woodrow’s declaration, it
21 was more likely to maintain small glass particles, consistent with the scientific study. Most
22 significantly, Mr. Woodrow’s lack of familiarity with the facts confirms his failure to
23 understand and appreciate this critical aspect of the case.
24
25

26 _____
³ The above quote is verbatim; it is a complete recitation of Mr. Woodrow’s claims in paragraph 29.

APPENDIX A



FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2018 JAN -3 AM 9:41

Linda Myhre Enlow
Thurston County Clerk

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON

Plaintiff,

v.

GREGORY SCHIRATO,

Defendant.

No. 15-1-00520-4

**MOTION AND DECLARATION
TO CONTINUE TRIAL DATE**

The defendant, through undersigned counsel, moves this Court to continue trial. This motion is based upon CrR 3.3 and the attached declaration of counsel.

FACTS AND DECLARATION OF COUNSEL

I, Richard Woodrow, declare under penalty of perjury pursuant to the laws of the State of Washington that the following is true and correct:

I am the counsel of the record for the above-named defendant, and am

Richard Woodrow
Attorney at Law
3732 Pacific Ave. SE
Olympia, WA 98501
360 352 9911
360 352 9955 fax
richard@woodrowlaw.net
woodrowlaw.net

1 over 18 years of age and competent to testify in the court of law. I have reviewed the
2 police reports and the state's motion.

3 Attached is an email from one of the defense's experts indicating he is not
4 available for trial.

5 A witness, Josh Mendoza, who is under subpoena called my office on
6 Tuesday and indicated he is out of state for the next three weeks.

7 The state gave to the defense a new lab report on Friday December 29, 2017.
8 This lab report is over a year old but was not given to the defense until counsel
9 interviewed the lab scientist and was provided the report. The bench notes have still
10 not been sent to the defense. The state is in violation of the omnibus order.

11 All of the other reasons outline in the defenses previous motion to continue
12 still apply and are incorporated by reference.

13 The state has filed a motion to suppress the testimony of witnesses. Counsel
14 indicated that he is not ready for trial due to the state's assurance that this case would
15 be continued and the Bolton case would proceed to trial. It seems unfair for the state
16 to complain of a situation that they helped to produce.

17 **STATUTE OR CRIMINAL RULE**

18 CrR 3.3 states as follows in pertinent part:

19 **TIME FOR TRIAL**

20 (f) Continuances. Continuances or other delays may be granted as follows:

21 (1) Written Agreement. Upon written agreement of the
22 parties, which must be signed by the defendant or all defendants,
23 the court may continue the trial date to a specified date.

24
25 **RICHARD WOODROW**
Attorney at Law
3732 Pacific Ave. SE
Olympia, WA 98501
360 352 9911
360 352 9955 fax
richard@woodrowlaw.net
woodrowlaw.net

1 (2) Motion by the Court or a Party. On motion of the court or
2 a party, the court may continue the trial date to a specified
3 date when such continuance is required in the administration of
4 justice and the defendant will not be prejudiced in the
5 presentation of his or her defense. The motion must be made
6 before the time for trial has expired. The court must state on
7 the record or in writing the reasons for the continuance. The
8 bringing of such motion by or on behalf of any party waives that
9 party's objection to the requested delay.

10
11 LAW AND ARGUMENT

12 "[T]he decision to grant or deny a motion for a continuance rests within the
13 sound discretion of the trial court." An appellate court will disturb a trial court's
14 decision to deny a defendant's request for a continuance only if she shows that she
15 was prejudiced or that the result would have likely been different had the motion
16 been granted. No mechanical test exists for determining "when the denial of a
17 continuance violates due process, inhibits a defense, or conceivably projects a
18 different result." The court must decide on a case-by-case basis. Appellate courts
19 look at the totality of the circumstances, particularly the reasons presented to the
20 trial judge at the time the request is denied. "In exercising discretion to grant or
21 deny a continuance, trial courts may consider many factors, including surprise,
22 diligence, redundancy, due process, materiality, and maintenance of orderly
23 procedure. Additionally, good faith is an essential component of an application for
24 a continuance. *State v. Edwards*, 68 Wn.2d 246, 258, 412 P.2d 747 (1966). "If it is

25 Richard Woodrow
Attorney at Law
3732 Pacific Ave. SE
Olympia, WA 98501
360 352 9911
360 352 9955 fax
richard@woodrowlaw.net
woodrowlaw.net

1 manifest that the request for recess or continuance is designed to delay, hARRY, or
2 obstruct the orderly process of the trial, or to take the prosecution by surprise, then
3 the court can justifiably in the exercise of its discretion deny it." Edwards, 68
4 Wn.2d at 258.

5 Appellate Courts, review a decision to deny a continuance for a manifest
6 abuse of discretion. *In re Dependency of V.R.R.*, 134 Wn.App. 573, 580-81, 141
7 P.3d 85 (2006). A court abuses its discretion when its decision is manifestly
8 unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79
9 Wn.2d 12, 26, 482 P.2d 775 (1971). " In deciding a motion to continue, the trial
10 court takes into account a number of factors, including diligence, due process, the
11 need for an orderly procedure, the possible effect on the trial, and whether prior
12 continuances were granted." *Dependency of V.R.R.*, 134 Wn.App. at 581 (citing
13 *City of Tacoma v. Bishop*, 82 Wn.App. 850, 861, 920 P.2d 214 (1996)). When
14 denial of a continuance request allegedly violates due process rights, the appellant
15 must show either prejudice from the denial or that the trial result would have been
16 different had the continuance been granted. *State v. Tatum*, 74 Wn.App. 81, 86,
17 871 P.2d 1123 (1994).

18 In Schirato's case three witnesses will be unavailable for trial.
19 Lahmen examined the alleged victim's cell phone. A report has been given to the
20 state. This report contradicts some of the facts the alleged victim claimed in her
21 statements to law enforcement and to the defense. The glass expert will show that
22 the glass analysis performed by the WSP crime lab was conducted in a faulty and
23 unprofessional manner. The results are not justified by the analysis. Fred
24 Doughty investigated this case. He will be used to impeach the alleged victim's

25 Richard Woodrow
Attorney at Law
3732 Pacific Ave. SE
Olympia, WA 98501
360 352 9911
360 352 9955 fax
richard@woodrowlaw.net
woodrowlaw.net

1 testimony if necessary. He has also interviewed witnesses for the state. Counsel
2 relies on the investigator's assistance during trial.

3 Josh Mendoza is a prior boyfriend of the av and can testified that the av is
4 untruthful regarding her prior sexual contact with the defendant.

5 If these witnesses do not testify, then Schirato will be denied a fair and
6 adequate defense. The outcome of the trial will be different. Schirato will be
7 found guilty if these witnesses are not allowed to testify.

8 In the past two weeks counsel or his private detective has interview all of
9 the lay witnesses and scientists for the state. Counsel is trying to prepare for trial.

10 The state has not tried to interview any defense witness civilian or
11 scientist.

12 Counsel is stating that he will be ineffective as Schirato's trial counsel.

13 **CONCLUSION**

14 The defense respectfully requests that this trial be continued.

15 DATED this 2nd day of January 2018

16
17 

18 Richard Woodrow
19 Attorney at Law WSBA #18680

20
21
22
23
24

25 Richard Woodrow
Attorney at Law
3732 Pacific Ave. SE
Olympia, WA 98501
360 352 9911
360 352 9955 fax
richard@woodrowlaw.net
woodrowlaw.net

Richard Woodrow

From: Terry Lahman <terry@eforensicspro.com>
Sent: Thursday, December 28, 2017 1:39 PM
To: Megan Schuyler
Cc: George Chan; Skip Palenik; Richard Woodrow (richard@woodrowlaw.net)
Subject: Re: GREG SCHIRATO

I'm currently only available Jan 2nd.

Terry Lahman
Chief Digital Forensics Analyst
(425) 200-4271
<http://eforensicspro.com>

On Dec 28, 2017, at 10:50 AM, Megan Schuyler <megankerlee@outlook.com> wrote:

Hi All,
Greg's case is the second back up trial. We will know more about if it will be going to trial for sure on Monday. Please keep in contact with me on when your testimony will be needed.

Thank you,

Megan Kerlee
Legal Assistant
3732 Pacific Ave SE
Olympia, WA 98501
P: 360-352-9911
F: 360-352-9955
Megankerlee@outlook.com

APPENDIX B

315-65-10
09/30/2016
Item 35

Slacks
Scale in inches



23



1 2 3 4 5 6 7 8 9 10 11 12 1 2 3 4 5 6 7 8 9 10 11 12 1 2 3 4 5 6 7 8 9 10 11 12

48 R W 42
ML134
100% WOOL

-KENA

MADE IN INDIA
WPL 8709 MW15
DRY CLEAN ONLY

NEW YORK

48 R W 42

ML134

100% WOOL

MADE IN INDIA

WPL 8709 MW20

DRY CLEAN ONLY

APPENDIX C

315-65-10
p.w.

VanWyk, Daniel (WSP)

From: Kristy Jack <kjack@ci.olympia.wa.us>
Sent: Friday, September 30, 2016 10:11 AM
To: VanWyk, Daniel (WSP)
Subject: RE: Gregory Schirato/Ann Larson case 2014-8123

Hi Daniel,

On a previous trip to the lab, Susan Wilson recovered small pieces of glass from the bottom cuff of the pants of the grey suit and some small fragments from the dress shirt. The glass pieces were put into a small envelope and then placed back in with the respective item they were recovered from.

Item 38 is glass from the basement window. It is a single pane window believed to be original to the house that was built in 1941. Item 37 contains larger sized pieces of glass collected from the floor just inside the basement door that fell from the window when it was broken. I wasn't sure what sized pieces of glass you would need to perform your analysis, so I sent both items to provide options of what would work best.

We need the glass fragments collected from the suit and/or shirt compared to the glass from the basement window to see if they originated from the window. Our suspect has had access to the victim's home previous to the incident. Matching the glass in his suit to the broken basement window proves he was there on the night of the crime and was most likely responsible for breaking the window to gain entry into the victim's home.

Let me know if you need anything else. Thanks for your help with this case.

Kristy Jack

Evidence Custodian
Olympia Police Dept
(360)753-8234

From: VanWyk, Daniel (WSP) [<mailto:Daniel.VanWyk@wsp.wa.gov>]
Sent: Friday, September 30, 2016 9:17 AM
To: Kristy Jack
Cc: winderm@co.thurston.wa.us
Subject: Gregory Schirato/Ann Larson case 2014-8123

Hello,

The glass evidence in this case has been transferred to me, as Susan Wilson will not be able to get to it soon. I want to make sure there I understand what is wanted.

The note on the RFLC says to compare glass collected from the suspect's suit with glass from the broken basement window. I have four items:

- Item 34 "men's pink dress shirt"
- Item 35 "men's grey suit"
- Item 37 "(RF38) big pieces of glass from inside"
- Item 38 "glass from door (still in pane)"

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

May 06, 2020 - 12:08 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53913-6
Appellate Court Case Title: Personal Restraint Petition of Gregory Allen Schirato
Superior Court Case Number: 15-1-00520-4

The following documents have been uploaded:

- 539136_Affidavit_Declaration_20200506120304D2851502_6275.pdf
This File Contains:
Affidavit/Declaration - Other
The Original File Name was DECLARATION OF TODD MAYBROWN Schirato PRP.pdf
- 539136_Briefs_20200506120304D2851502_8488.pdf
This File Contains:
Briefs - Petitioners Reply
The Original File Name was REPLY BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION.pdf
- 539136_Motion_20200506120304D2851502_3868.pdf
This File Contains:
Motion 1 - Other
The Original File Name was MOTION FOR OVERLENGTH BRIEF.pdf
- 539136_Other_Filings_20200506120304D2851502_0628.pdf
This File Contains:
Other Filings - Other
The Original File Name was Supplemental Declaration of Schirato.pdf

A copy of the uploaded files will be sent to:

- Alex@ahmlawyers.com
- PAOAppeals@co.thurston.wa.us
- cooper@ahmlawyers.com
- danielle@ahmlawyers.com
- jacksoj@co.thurston.wa.us
- todd@ahmlawyers.com

Comments:

Being filed today are (1) Motion for Overlength Brief; (2) Reply Brief of Petitioner; (3) Declaration of Todd Maybrown; and (4) First Supplemental Declaration of Petitioner

Sender Name: Sarah Conger - Email: sarah@ahmlawyers.com

Filing on Behalf of: David Allen - Email: david@ahmlawyers.com (Alternate Email: sarah@ahmlawyers.com)

Address:
600 University Street
Suite 3020
Seattle, WA, 98101
Phone: (206) 447-9681

Note: The Filing Id is 20200506120304D2851502