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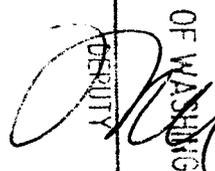
No. 29965-8-II

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

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STATE OF WASHINGTON,  
Respondent,  
Vs.  
NICHOLAS D HACHENEY,  
Appellant.

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COURT OF APPEALS  
DIVISION II

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Anna M. Laurie, Judge

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STATEMENT OF ADDITIONAL GROUNDS

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Nick Hacheney #851884  
Pro Se Petitioner  
Washington State Reformatory  
Po Box 777  
Monroe, WA 98272

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

**STATE OF WASHINGTON,**  
**Respondent,**  
**Vs.**  
**NICHOLAS D HACHENEY,**  
**Appellant.**

**CASE NO.: 29965-8-II**  
**STATEMENT OF ADDITIONAL**  
**GROUND PURSUANT TO**  
**RAP 10.10**

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In addition to the issues raised by appellate counsel the appellant would like to bring to the courts attention the following grounds for review. It is the contention of this defendant that the accumulation of numerous errors by the trial court deprived him of a fair trial.<sup>1</sup> This Court has the authority under RAP 2.5(a)(3) to review error claims whether they be properly preserved or not, if the cumulative effect of all errors denies the defendant the constitutional right to a fair trial.<sup>2</sup> Although it is my contention that many of the errors listed warrant reversal on their own merit, this appellant would ask this court to also view all of the errors in light of, "the total effect of a series of incidents creating a trial atmosphere which threatens to deprive the accused of the fundamentals of due process."<sup>3</sup> "The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible errors materially affects the outcome of a trial."<sup>4</sup>

Following is a list of the issues this defendant wishes to raise before this Court:

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<sup>1</sup> US Constitution 5<sup>th</sup> and 14<sup>th</sup> Amendments

<sup>2</sup> St. v. Alexander 64 Wn. App 147 @150-151, 822 P.2d 1019 (1992)

<sup>3</sup> St. v. Swenson 62 Wn. 2d 259, 382 P.2d 614 (1963)

<sup>4</sup> St. v. Newbern 95 Wn. App. 277 @297, 975 P.2d 721 (1999)

## Additional Ground # 1

The State did not produce evidence that the blood and lung samples tested by the State toxicology lab were properly preserved or that the proper protocol and appropriate techniques were used.

In addition to the chain of custody argument in issues 14, 15, and 16 of the Brief of Appellant, this appellant would also like to address the States failure to establish that Ted Zink properly preserved and prepared the blood samples for testing, that Dr. Lacsina properly prepared and stored the lung tissue or that Eigley Weis used the proper procedure and protocol to test the samples. Dr. Lacsina, who performed the autopsy, testified on direct examination that he had no direct recollection of the handling of the blood samples. **"I believe it might have been Ted Zink. I am not sure."** VRP 903. Ted Zink was not called to testify.

The samples were then supposedly transported to the State toxicology lab by Ted Zink, VRP 907. They were then tested for alcohol, drugs and propane. There is no showing by the State that Ted Zink properly handled and preserved the blood samples. WAC 448-14-020 (3)(b) states:

"Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration.."

The State failed to establish that even this minimum requirement was met.

"The reliability of evidence derived from scientific methods depends on three factors: '(1) the validity of the underlying principle, (2) the validity of the technique applying that principle, and (3) the proper application of the technique *on a particular occasion.*'<sup>5</sup>

There was no testimony or documentation to establish that Ted Zink applied the proper technique in drawing, preparing or preserving the blood samples on this particular occasion.

The same is true with the preservation of the lung sample. Dr. Lacsina testified that he had no specific recollection of how he collected or stored the lung tissue. VRP 904. He was allowed to testify over the defense objection to what he "probably" did.

The techniques applied in the testing and handling of both samples by Eigley Weis is also completely unknown. Dr. Logan was only able to testify as to what procedures Eigley Weis should have used. He had no direct knowledge of what procedures she actually used and no

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<sup>5</sup> State v. Huynh 49 Wn. App. 192 @ page 194, 742 P.2d 160 (1987). (Quoting from Gianelli, The Admissibility of Novel Scientific Evidence : Frye v. United States, a half Century Later. 80 Column. L. Rev. 1197, 1201 1980)

bench notes existed. VRP 1548-1550. The final question posed to Dr. Logan during the State's offer of proof was the most telling:

**Q- "Other than your personal opinion of Miss Weiss, I take it there is no documentation showing the exact procedure that she followed, in your laboratory?"**

**A- "On that day? On that particular sample? No." VRP 1550**

Without a showing that Ms. Weis followed the appropriate procedures the evidence should not have been admitted.

"The probative value of scientific evidence however, is connected inextricably with its reliability. If the technique is not reliable, evidence derived from the technique is not relevant."<sup>6</sup>

"To determine whether testimony is reliable, the court must conclude that it was derived from application of reliable methodology in the particular case, and thus the court should require a testifying expert to provide affidavits attesting that he properly performed protocol."<sup>7</sup>

In U.S. v. Two Bulls the Court held that:

"It was error for the trial court to determine the admissibility of the DNA evidence without determining whether the testing procedures used by the FBI lab in this case were conducted properly."<sup>8</sup>

It is clear from the record that the specific techniques employed by Ted Zink to extract, preserve and store the blood samples is unknown. It is also clear that Dr. Lacsina had no independent recollection of the techniques he used to prepare and store the lung tissue. Eigley Weis was obviously unavailable for trial and no bench notes exist to establish what techniques she employed or whether she followed the appropriate protocol. The assumption of Dr. Logan that she would have followed the proper protocol is not sufficient to establish the fact. The State did not establish the proper foundation for the admittance of test reports and expert opinions based upon those reports. The Trial Court erroneously made its decision to allow the evidence in on the assumption that the handling and testing of the samples was done appropriately and according to protocol. The memorandum opinion states: "**Ms. Weis performed the applications in the acceptable way, following accepted and appropriate protocol.**"<sup>9</sup> CP190. This assumption was not established by any testimony or evidence

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<sup>6</sup> Gianelli, The Admissibility of Novel Scientific Evidence : Frye v. United States, a half Century Later. 80 Column. L. Rev. 1197, 1201 (1980)

<sup>7</sup> U.S. v. Martinez 3 F.3d (8<sup>th</sup> Cir. 1990)

<sup>8</sup> U.S. v. Two Bulls 918 F.2d 56 (8<sup>th</sup> Cir. 1990)

<sup>9</sup> Memorandum Opinion RE Admissibility of State Toxicologist Testimony. Date Oct. 3, 2002 Page 4.

produced at trial. The trial court apparently based the assumption on the fact that the State continually alleged that Dr. Logan would testify that the lung tissue testing and blood sample test were conducted appropriately,<sup>10</sup> CP 199, but given the fact that Dr. Logan testified that there are no bench notes and that he did not personally observe her performing this testing, (Pre-trial hearing October 1, 2002 page 519 and VRP 1548-1550), it was impossible for Dr. Logan to establish these facts. The State used the opinions drawn from these reports to establish it's theory of the case and to discredit the defense theory of a propane leak. Because no witness was able to testify as to the procedures or protocol used to take the blood and lung tissue samples or what techniques or protocol was followed to test the samples, the reports should not have been admitted and the expert testimony of Dr. Logan, Dr Lacsina and Dr. Selove should not have been allowed concerning those reports.

### **Additional Ground # 2**

The Trial Court committed error by allowing the State to present volumes of phone records and summary charts that were not authenticated.

ER 901 provides in part:

**(a) General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what it's proponent claims.

**(6) Telephone Conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification show the person answering the phone to be the one called."<sup>11</sup>

During trial the State sought to admit volumes of phone records, charts and graphs alleging phone conversations between the defendant and four women. VRP 3751. The State contended that the relevance of this evidence was that it "**corroborates the time line of the relationships, corroborates the existence of the relationships.**" VRP 3752. The problem with this argument is that there is nothing to corroborate. Ms. Matheson, Ms. Anderson and Ms. Smith (Latsbaugh) all testified that there was no romantic relationship prior to Dawn Hacheney's death. This evidence of alleged phone conversations is pure speculation and innuendo. Furthermore, the phone calls were never properly authenticated as having taken place between the parties in question, no witnesses were ever asked if they

<sup>10</sup> Memorandum of Authorities Re: Toxicology page 2.

<sup>11</sup> Washington Court Rules, 2004, Thomson West. Page 179

had received numerous phone calls from the defendant during the time frames that these records cover. The defense objected to the admission of these records and charts and argued this very point.

**“There’s been no testimony about telephone calls from these specific individuals.”** VRP 3757.

**“All it does is add confusion to the jury and allow for conjecture, and certainly they can’t be authenticated, and no attempts have been made to authenticate any phone contacts between Mr. Hacheny and any of these other alleged individuals.”** VRP 3759

The State responded that these records and charts **“Show us patterns. Those show us where Mr. Hacheny’s attention is.”** and that they were, **“highly material to the very core issues of this case, namely establishing the particulars of these relationships.”** VRP 3764

The defense then points out that during 1997 there were numerous other people living at the residence. VRP 3765-3766. After much argument the Court stated:

**“Mr. Talney argues they are not relevant unless they can be authenticated as phone calls between Mr. Hacheny and the person identified. That’s not the test. The test is whether from those records an argument can be made, and a reasonable inference can be made, that the phone calls occurred. The State does not need to show authentication of each and every call listed on Exhibits 440 and 441.”** VRP 3773

**“The argument will come from asking the jury to make those inferences. The documents themselves are not argument.”** VRP 3774.

The phone records were admitted as exhibits 440 and 441 and the summary charts were admitted as exhibits 448 and 449. VRP 4024. The Washington Supreme Court has ruled:

**“Because a summary chart submitted by the prosecution can be a very persuasive and powerful tool, the court must make certain that the summary is based upon and fairly represents, competent evidence already before the jury.”<sup>12</sup>**

The Court’s decision to allow these records and charts into evidence is not consistent with the Washington State Rules of Evidence, or the applicable case law. Nowhere in ER 901 is the language of argument and reasonable inference made. The State was asserting that these records represented calls between certain individuals.

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<sup>12</sup>State v. Lord 117 WN 2d 829, @ page 855, 822 P.2d 177 (1991).

"Testimony about a telephone conversation will normally be irrelevant unless the person at the other end of the line is identified."<sup>13</sup>

In the case at hand there was no testimony from anyone stating they had made any of these calls or received any of these specific calls. The purpose that the State identified is to show relationship but without a showing of who talked on the phone in these conversations it is pure speculation.

"To be admissible into evidence, telephone conversations must be authenticated."<sup>14</sup>

"The identity of the person or persons holding the conversation, in order to fix a liability upon them or their principals, must in some manner be shown"<sup>15</sup>

This Court recently ruled in *State v. Jackson*<sup>16</sup> that ,

"The proponent of tangible evidence...must authenticate it."<sup>17</sup>

This is the standard in Washington and it clearly was not met in this case. The Trial Court abused it's discretion by reducing that standard to one of reasonable inferences and argument. Prior to closing arguments the defense again argued that the phone records were not authenticated: **"There is no evidence whatsoever as to who those phone calls were with."** VRP 4994. The defense was trying to prevent the State from being able to argue the theory of **"grooming"**. VRP 4988. The State responded that the phone records **"also suggest that there is a heightened level of intimacy, a heightened level of relationship in the fall of 1997."** VRP 4991 The defense responded. **"I don't understand how phone records can draw a conclusion that because you have a fair number of phone calls that there is some form of intimacy. There is no evidence whatsoever as to who those phone calls were with."** VRP 4994. The court ruled that the State would be allowed to argue the theory of "grooming". VRP 4995.

In closing arguments the State said:

**"He's grooming would-be partners. He's grooming people for after his wife's death....you just need to look at the telephone records to determine what –the frequency with which these phone calls were being made to these would-be partners. Look at these records. You'll have these records back there with you."** VRP 5158-5159

<sup>13</sup> Washington Practice, Court room Hand book on Washington Evidence, 2004, Karl B. Tegland. Page 440

<sup>14</sup> *State v. Philips* 108 Wn. 2d 627, @ page 638, 741 P.2D 224 (1987) See also *U.S. v. Dhinsa* 243 F. 3d. 635.

<sup>15</sup> *State v. Deaver*, 6 Wn. App. 216, @ page 218, 491 P.2D 1363 (1971).

<sup>16</sup> *State v. Jackson* 113 Wn. App. 762, 54 P.3D 739 (2002)

<sup>17</sup> *Id.* @ page 765

This is precisely why the State wanted to get this evidence in. It allows them to argue speculation and innuendo and distract the jury from the actual facts of the case. This type of speculation evidence is highly prejudicial. It allows the State to argue this theme of "grooming" without any actual proof. The phone records and charts should not have been allowed into evidence. They were never authenticated in accordance with ER 901. They are not relevant as outlined by ER 401. They are misleading to the jury as prohibited by ER 403. They are highly prejudicial and have no probative value.

### **Additional Ground # 3**

The Trial Court committed error by allowing the State's investigator Richard Kitchens to testify as an "expert" on analyzing phone records.

The State was allowed to call their investigator, Richard Kitchens and have him analyze the phone records and summaries discussed in Additional Ground # 2. During direct examination he testified that he had been an investigator for the Department of Revenue as an enforcement officer for delinquent taxes. He testified that he would analyze phone records in that capacity. VRP 4020. He stated:

**"I again gleaned from the telephone records the number of telephone calls to each respective person and listed those in graph form, a bar graph form, for the number of calls, and then that was for each month from January 1997 through December 1997."**

VRP 4022 (Emphasis added)

During cross-examination he testified that:

- Many calls were 1 minute or less and could have been an answering machine. VRP 4030.
- He had no idea who actually made the phone calls or answered the phone calls VRP 4034.
- He was aware that other people were living in the Hachenev residence in 1997. VRP 4035.
- He did not know if the number attributed to Lindsey Smith was her residence. VRP 4037.

On re-direct he was asked if in his experience of analyzing telephone records, if it was unusual that he didn't know all of the possible parties at either end. VRP 4038. The defense objected to him being able to testify as an expert on phone records and was overruled. VRP 4038

It was improper to allow the jury to assume that Richard Kitchens was an expert on analyzing phone records. Kitchens was never qualified as an expert as required.

“No expert opinion is admissible unless the witness has first been qualified by a showing that he or she has sufficient expertise to state a helpful and meaningful opinion.”<sup>18</sup>

Furthermore, the information Kitchens used to formulate these opinions and summaries are not the type “reasonably relied upon by experts in the particular field.” (ER 703). For the State to bring in an “expert” on analyzing phone records to infer that these conversations actually took place is completely untenable. The prejudice of this testimony is great because it allowed the State to argue that it had established the fact of these calls actually occurring between the individuals the State contended. In closing argument the State placed the charts and graphs on a video projector and said:

**“When we see the trends, we can conclude that Mr. Hacheney places a lot of these calls. Significantly they do not include calls to Mr. Hacheney. These calls are from Mr. Hacheney.”** VRP 5019-5020

**“Where’s Mr. Hacheney’s attention? It’s on these women.”** VRP 5020

Not only are these remarks intended to inflame the passions of the jury, they are completely unsupported by the evidence. The State called all the people listed on these charts to testify and they did not ask one of them “Did Mr. Hacheney call you numerous times during the time span of January 1997 through December 1997?” The testimony of Lindsey Smith, Annette Anderson and Nicole Matheson was that no romantic relationship existed prior to Dawn Hacheney’s death. The State is not drawing reasonable inferences from the evidence. Instead they are purely speculating as to who made these phone calls and what conversations took place.

Black’s Law defines speculation as:

“The act or practice of theorizing about matters over which there is no certain knowledge.”<sup>19</sup>

This is precisely what happened in the case at hand. It is well established that no knowledge existed concerning who made or received the phone calls in question.

“The existence of a fact cannot rest upon guess, speculation or conjecture.”<sup>20</sup>

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<sup>18</sup> Washington Practice, Court room Hand book on Washington Evidence, 2003, Karl B. Tegland. Page 317

<sup>19</sup> Black Law Dictionary, 7<sup>th</sup> Edition page 1407

<sup>20</sup> State v. Hutton 7 Wn. App. 726 @ page 728, 502 P.2d 1037 (1972).

For the State to go on to use these records to show "trends" that "corroborates the existence of the relationships" is clearly misleading and not a proper application of the rules of evidence.

"Expert testimony may not be admitted unless it is supported by an adequate foundation; conclusory or speculative expert opinion lacking an adequate foundation will not be admitted."<sup>21</sup>

"It is well established that the existence of a fact cannot rest in guess, speculation, or conjecture....This rule is even more essential in criminal cases where the evidence is entirely circumstantial."<sup>22</sup>

The testimony of Richard Kitchens regarding phone calls that no witness ever testified to placing or receiving was purely speculative. The graphs and charts showing "trends" had no foundation in reality. The State based their case on the erroneous theory of the defendant "grooming" multiple partners for sex after his wife died. The speculation testimony and argument about hundreds of phone calls was clearly prejudicial.

#### **Additional Ground #4**

The Trial Court committed error by allowing the phone record charts into the jury room.

At the conclusion of the trial the State again presented the graphs and charts of alleged phone conversations to the jury during closing arguments. The records and charts were then sent into the jury room for deliberations. The summary charts were admitted as exhibits 448 and 449. VRP 4024. The State directed the jury that they would have the charts in the jury room. VRP 5159. These charts should not have been allowed into the jury room.

"Generally charts should not be sent to the jury room."<sup>23</sup>

As has been outlined in the previous grounds the charts are purely speculating as to the phone calls and who made them. To present them to the jury as evidence and then allow them to go to the jury room further compounded the prejudicial value of this evidence.

"The trial court then compounded the error by sending the chart to the jury room. Inaccurate summary charts should not be sent to the jury room."<sup>24</sup>

<sup>21</sup> State v. Pittman 88 Wn. App. 188. @ page 189.

<sup>22</sup> State v Golladay 78 Wn. 2d, 121 @page 129-130, 470 P.2d 191 (1970)

<sup>23</sup> State v. Lord 117 WN 2d 829, 822 P.2d 177 (1991).

<sup>24</sup> Id. @page 922

It was clearly prejudicial to the defendant to allow inaccurate charts into the jury room for deliberations. This error is further compounded by the courts decision to refuse to allow the defense evidence into the jury room during deliberations. This issue will be discussed in the following additional grounds.

**Conclusion of phone records and charts issues.**

The accumulation of errors in allowing the phone records and charts to be admitted as evidence without authentication, allowing Richard Kitchens to testify as an expert on phone record analysis and allowing the charts into the jury room during deliberations was highly prejudicial. The effect was to distract the jury from it's task of evaluating the facts of this case and to focus the jurors attention on completely extraneous information. It is obviously the contention of the State that these phones calls represented something inappropriate.

“Introduction of other acts of misconduct inevitably shift's the jury's attention to the defendant's general propensity for criminality, the forbidden inference;”<sup>25</sup>

The record is clear that volumes upon volumes of irrelevant prejudicial information was admitted as evidence in this trial and the probability of confusion is great. It was an abuse of discretion to allow unauthenticated phone records and charts into evidence. It was also an abuse of discretion for the court to change the standard for the admittance of this type of evidence by ruling, **“The test is whether from the records a reasonable argument can be made.”** VRP 3773. This ruling is completely contrary to the law and decisions of the higher Courts of Washington. The State is clearly guessing as to who made the phone calls. The prejudice is clearly seen in the words of the prosecutor in closing argument when he said: **“It's not about proving all the facts, but this case is proven by strong motives.”** VRP 5054 The phone record charade went right to the heart of the States theory of motive. It was an abuse of discretion to admit unauthenticated records and charts as evidence, to allow “expert” testimony on these charts, and to then send the charts to the jury room.

**Additional Ground # 5**

**The Trial Court committed error by refusing to allow CD ROMs entered as evidence by the defense into the jury room during deliberations.**

After 10 weeks of trial, the defense presented it's case on December 17<sup>th</sup> , 2002. The defense called three witnesses, Jim White and Brian Kline from Western Fire Center, and

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<sup>25</sup> State v. Bowen 48 Wn. App. 187, @ page 196, 738 P.2d 316 (1987).

Doug Tomaso, the investigator for the defense. Mr. Kline and Mr. White both testified about full scale fire testing and extensive computer modeling that they had conducted. Their conclusions were that:

1. A flash fire was definitely a possibility as a cause of the fire.-VRP 4595-4596
2. That "given the physics of this universe", the theory of ATF agent Dane Wetzel as to the cause of the fire was not a possibility. VRP 4562-4563 and 4599
3. That the fire probably lasted about 20 minutes from the time it began to the time the fire department arrived to begin putting it out. VRP 4598-99
4. The burn patterns found in the house were consistent with a flash fire and matched the fire patterns that the computer modeling projected. VRP 4594

These conclusions were paramount to the defense case. The fire simulations showed how fast a fire could spread in the room in question. The State's case was dependent upon the premise that this fire lasted for over an hour and a half.

The full scale fire testing was shown to the jury on video. The computer modeling was put onto a series of 7 CD-ROMs and shown to the jury on a laptop computer connected to a projection unit. The Program used to simulate the fire was Fire Dynamics Simulator (FDS). This is a program developed by the National Institute for Science and Technology. (NIST) The validity of this program was a contested issue. Mr. Kline and Mr. White presented the fire modeling to the jury and the CD-ROMs were entered into evidence. VRP 4707 Prior to the jury deliberating the defense asked for the CD-ROMs to be sent to the jury room. VRP 5185-5186. The argument by the defense was that if the jury wanted to view the CD-ROMs, arrangements could be made to accommodate them. The Trial Court refused to send the CD-ROMs to the jury room. VRP 5186.

In State v. Oughton this Court said,

"a review of Washington cases dealing with the issue, however indicates that because the tape was an exhibit, it should have been available to the jury to review, at least on request. CrR 6.15 (e) requires that the jury take all exhibits received into evidence into the jury room for deliberation."<sup>26</sup>

By not sending the CD-ROMs to the jury room during deliberations the Trial Court diminished the importance of the evidence in the minds of the jury. The CD-ROMs comprised the entire effort of the defense, which was to establish that a flash fire was a possibility and that the length and pattern of the fire was completely contrary to the State's theory. The Court gave

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<sup>26</sup> State v. Oughton 26 Wn App 74 @ pg. 82, 612 P.2d 812 (1980).

no instruction telling the jury that they could view the CD-ROMs if they so desired. The logical assumption for the jury to make would be that if the CD-ROMs were not sent to the jury room for deliberations then it was not the job of the jury to deliberate on them. The State made a rebuttal case that the results of the FDS testing were faulty because the Western Fire Center did not do exhaustive testing of numerous parameters. By refusing to allow the jury access to the CD-ROMs containing the results of those tests the Court in effect created the insinuation that they were not "real" evidence. The Washington Court Rules required the CD-ROMs to be sent to the jury room and the defense requested that they be sent. It was an abuse of discretion to refuse to allow the CD-ROMs into the jury room during deliberations.

#### **ADDITIONAL GROUND #6**

The Trial Court committed error by allowing communication between the bailiff and jury.

During the trial juror # 8, who later became the jury foreperson, made inquiries of the court. Both times the Judge determined that the Court would not respond to the inquiries. The Judge instructed the bailiff to **"Take the opportunity to talk with her in a discreet manner outside the hearing of the other jurors."** VRP 4177. This established a precedent that the bailiff was basically speaking for the Judge in responding to these inquiries. At the end of the trial and prior to jury deliberations the same juror requested a list of the exhibits and asked the bailiff if they had received all of the admitted exhibits. The bailiff supposedly responded, **"You have everything you're supposed to have"** VRP 5190.

**RCW 4.44.300** Provides for the "Care of jury while deliberating," And reads in part:

"The officer shall, to the best of his ability, keep the jury thus separate from other persons..... He must not suffer any communication to be made to them, nor make any himself, unless by order of the court, except to ask them if they have agreed upon their verdict...."

In State v. Bourgeois the Supreme Court said:

"As a general rule, a trial court should not communicate with the jury in the absence of the defendant....The bailiff is in a sense the 'alter-ego' of the judge, and is therefore bound by the same constraints....an improper communication between the court and the jury is an error of constitutional dimensions....Once a defendant raises the possibility that he or she was prejudiced by an improper communication between the court and the jury, the State bears the burden of showing that the error was harmless beyond a reasonable doubt."<sup>27</sup>

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<sup>27</sup> State v. Bourgeois 133 Wn 2d 389 @407, 945 P.2d 1120 (1997)

In Bourgeois it was a situation where the juror brought an issue to the attention of the bailiff. The Washington Supreme Court found the communication to be improper but ruled it did not prejudice the defendant. The improper communication here is directly related to the Trial Courts' failure to allow defense evidence into the jury room. The jury was in essence told that they were not "supposed" to have the CD-ROMs produced by Western Fire Center. The logical conclusion for the jury to draw is that even if they had wanted to view them they would not be available. The Trial Court should not have allowed ex-parte communication to the jury to go uncorrected. Any concern of jury tampering mandates an evidentiary hearing to determine "what transpired, the impact of the jurors, and whether or not it was prejudicial."<sup>28</sup> "The bias or prejudice of even a single juror would violate the right to a fair trial."<sup>29</sup>

### **Conclusion of CD-ROMs grounds**

The prejudice of not allowing the CD's into the jury room and telling the jury that they had everything they were supposed to have is seen when looked at in conjunction with the fact that the jury was erroneously given charts and graphs depicting alleged phone conversations between the defendant and various women (Additional Grounds #4). In essence, the message is that evidence of unsubstantiated phone conversations that no witness ever testified to, is "real" evidence and should be deliberated on but scientific data developed and presented by fire scientists was not "real" evidence. The States case was dependant upon the jury finding that the conclusions of Western Fire Center were unreasonable. The CD-ROMs represented the lion's share of the defense case. To diminish the value of the defense evidence in the minds of the jury while endorsing charts and graphs that were presented without any substantial foundation was clearly prejudicial to the defendant.

### **Additional Ground # 7**

The Trial Court committed error when it allowed a photo of a plastic bag into evidence and allowed ATF agent Dane Wetzel to infer that it was significant and then allowed the State to argue that it was instrumental.

During trial ATF agent Dane Wetzel was allowed to testify concerning a picture of a plastic bag that was in a room adjacent to the room that was burned. VRP 4211-4212 (Exhibit 89). During closing argument the State said:

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<sup>28</sup> U.S. v. Angulo, 4 F.3d 843, 847 (9<sup>th</sup> Cir. 1993) also Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L.Ed. 654 (1954)

<sup>29</sup> U.S. v. Brande 329 F. 3d 1173, 1178.(9<sup>th</sup> cir. 2003)

**"Agent Whetzel testified also that he believed also he could see a plastic bag. Exhibits 88 and 89 are photos of the northeast bedroom. Agent Whetzel is referring to what appears to be a shiny object, a clear plastic bag, can be seen amongst a number of items in Exhibit 88. Now, why is that important? Well, it may just be happenstance, obviously, but Sandy Glass tells us about the confession, she tells us that Mr. Hacheney used a plastic bag.....There's a plastic bag; the instrumentality is there." VRP 5051.**

There was never any testimony or reference to tie that plastic bag to any crime charged. In *State v. Oughton*<sup>30</sup> a similar situation occurred where a knife was admitted into evidence without establishing any connection or relevancy. This Court ruled it was error to admit the knife without a clear connection between the knife found and the crime charged.

"There must be a logical nexus between the evidence and the fact to be established."<sup>31</sup>

In the present case there was absolutely no connection ever established to this bag, The prejudice to the defendant is that it places an "element" before the jury and seems to substantiate the State's claim. There is probably not a home in America that does not have a plastic bag laying around somewhere on the day after Christmas. No objection was made at the time of Agent Whetzel's testimony or the statements of prosecutor in closing argument. This Court has the authority under RAP 2.5(a)(3) to review error claims whether they be properly preserved or not, if the cumulative effect of all errors denies the defendant the constitutional right to a fair trial.<sup>32</sup>

#### **Additional Ground # 8**

**The Trial Court committed error when it allowed testimony regarding a disciplinary meeting that took place 3 months after the death.**

During the testimony of Robert Bily the State sought to admit evidence of a meeting that took place at Ron McClung's house sometime in February or March. VRP 1842. (There was discrepancy between the witnesses as to the date but it was eventually cleared up). This meeting was allegedly about, "**Consistent failure to obey leadership, insubordination issues.**" VRP 1843 The defense objected on the grounds of relevancy and 404(b). The objection was sustained eventually but not before Bily was allowed to give the basic purpose of the meeting. No instruction was given to disregard any portion of his testimony. During

<sup>30</sup> *State v. Oughton* 26 Wn. App. 74, 612 P.2d 812 (1980).

<sup>31</sup> *State v. Cochran* 102 Wn. App. 480 @page 486, 8. P.3d 313 (2000)

<sup>32</sup> *St. v. Alexander* 64 Wn. App 147 @150-151, 822 P.2d 1019 (1992)

the testimony of Bob Smith the State again sought to admit testimony about this meeting. VRP 2111 The defense contended that this meeting has no relevancy to any crime being charged. **“Your honor, how is the leadership meeting in 1998 relevant to whether or not Mr. Hacheny murdered his wife?” It’s not relevant.”** VRP 2113. The State argued that the defense had “opened the door” to this issue when it cross examined Bily. This is not a proper application of the “open door rule.”

“By contrast the open door rule rarely justifies the admission of otherwise inadmissible evidence to contradict statements elicited from an adverse witness on cross- examination.”<sup>33</sup>

The trial court ruled that it was the defense who had made **“the bias of Mr. Bily a part of this case.”** VRP 2114. Testimony about the meeting was allowed over the objection of the defense. Later on in the trial Carol McClung was allowed to testify over objection about this same meeting. VRP 2869. The defense objected and the fact came out that this meeting took place in late March or early April. VRP 2874-2875. The Court finally excluded the testimony as cumulative but not before Ms. McClung was allowed to testify, **“There was concern about Nick’s behavior- the way he was behaving with women and so they wanted to come up with a plan to discipline or help him kind of get to a point of behaving more correctly.”** VRP 2869-2870 Then Ron McClung testified and the State again sought to enter evidence of this meeting. The defense again objected. VRP 3064. The State responded that there was “slightly different information about the timeline.” VRP 3065. The testimony was allowed in.

In the end the jury heard from 4 separate people about a disciplinary meeting that took place 3 months after the defendants wife had died. No clear relevance to any issue was ever established or even asserted by the State except that it was now rebuttal because the defense had opened some door.

The admission of this disciplinary meeting is clearly 404(b) material as the defense outlined. VRP 2870-2873. The court did not conduct an analysis of the probative value of this meeting to any relevant fact. The Washington Supreme Court has held that:

“Evidence of prior crimes, wrongs acts must be closely scrutinized and admitted only if it meets two distinct criteria. First, the evidence must be shown to be logically relevant to a material issue before the jury. We have expressed the test as to whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime

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<sup>33</sup> Washington Practice, Volume 5, 4<sup>th</sup> edition. Page 57.

charged.....Second, if the evidence is relevant, it's probative value must be shown to outweigh it's potential for prejudice....If the evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted and the court should give a cautionary instruction that it is to be considered for no other purpose or purposes."<sup>34</sup>

The trial court did not establish any clear connection between the admission of the testimony about a disciplinary meeting and an essential ingredient of the crime charged. The evidence of other relationships had already been presented to the jury in extreme graphic detail. The trial court did not conduct any analysis of the prejudicial potential of the evidence. The trial court gave no instruction to the jury as to how they were supposed to use the evidence. The only instruction given to the jury regarding this type of evidence was that they could use it to show evidence of "consciousness of guilt." (Jury Instruction #12). This allowed the State to argue:

**"What behavior demonstrated by Mr. Hacheny is inconsistent with that of a grieving man, inconsistent with innocence?" VRP 5107**

When viewed in the light of the jury instruction, the prejudice of allowing this type of testimony is clearly seen. The State amassed mountains of this type of evidence and then pointed to this erroneous theory of consciousness of guilt. This is contrary to Washington case law.

"The circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural and fanciful."<sup>35</sup>

The State clearly did not meet this standard. There is no logical connection between a meeting in March of 1998 regarding pastoral discipline and any crime the State is alleging. In *Saltarelli* the Supreme Court stated:

"No explanation of the logical relevance of the evidence to motive was offered by the trial court."<sup>36</sup>

This is an parallel situation to the case at hand. No logical relevant explanation was ever given for admitting these statements. It is highly prejudicial and it had no probative value. There was no weighing of the probative value against the prejudicial value as required by the Court of Appeals and the Washington Supreme Court.:

"Evidence of a criminal defendant's prior crime or misconduct is admissible under ER 404(b) only if (1) the trial court identifies the purpose for which the

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<sup>34</sup> State v. Saltarelli 98 Wn. 2d. 358 @page 362, 655 P.2d 697 (1982) (citations omitted)

<sup>35</sup> State v. Freeburg 105 Wn. App. 492 @page 498, 20 P.3d 984 (2001)

<sup>36</sup> State v. Saltarelli supra @ page 365.

evidence is admitted, (2) the evidence is relevant to prove an element of the crime charged, and (3) the probative value of the evidence outweighs its prejudicial effect.”<sup>37</sup>

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible.”<sup>38</sup>

This balancing test was never conducted on the record in regards to this evidence. It was an abuse of discretion to allow evidence of a disciplinary meeting that took place 3 months after the defendants wife died.

### **Additional Ground #9**

The Trial Court committed error by allowing the State to admit an “In Life Photo” after a stipulation as to identity had been accepted.

During pre-trial the State sought to admit into evidence an “In Life Photo” of the deceased. (Entered as exhibit #3) The defense objected and offered to stipulate to the identity. The State declined to accept the stipulation. Jury Voir Dire, Volume #1 Oct. 16<sup>th</sup>. Page 50 –55. Later, during the States case in chief the defense once again offered to stipulate as to identity. The Sate accepted this stipulation. VRP 916. It was signed and read to the jury. During closing argument the State was still allowed to present to the jury the “In Life Photo.” VRP 4998 This photo was also sent with the other exhibits to the jury room.

The Supreme Court has recognized that “In Life Photo’s” have “potential for inflaming the jury against the defendant.”<sup>39</sup> They are admissible however, if they are used for the purpose of proving the identity of the deceased.

“If the State does not agree to the stipulation, the issue remains open and the State can proceed to prove it’s case in the manner that it sees fit.”<sup>40</sup>

In Rice the issue was whether it was error because the State refused to accept the stipulation. In the present case, the State accepted the stipulation and received the full benefit of the stipulation and then was also allowed to present the “In Life Photo” to the jury and contrast it with gruesome autopsy and fire scene photos. This is precisely what the defense originally argued that they would do.

**“Your Honor, we believe the only reason this is being offered is to sway the jury. Once again, there is no objection to identification. State**

<sup>37</sup> State v. Dewey 93 Wn App. 50, 966 P.2d 414 (1998) See also State v. Smith 106 Wn 2d. 772, 725 P.2d 951 (1986).

<sup>38</sup> State v. Devincentes 150 Wn. 2d 11, 17, 74 P.3d 119 (2003)

<sup>39</sup> State v. Rice 110 Wn. @d. 577 @page 600, 757 P.2d 899 (1988) (Emphasis added.)

<sup>40</sup> Rice @page 599.

wishes to use this as a counterpoint. You have a gruesomely-burned body and 'It's this lovely young woman who died gruesomely, and we want to inflame the jury so we get our conviction.' That's the only purpose for this photograph." Jury Voir Dire, Volume #1 Oct. 16<sup>th</sup>. Page 51

To be relevant, evidence must have the tendency to prove something. ER 401. The "In Life Photo" was not used to prove any fact. It's only function was to prejudice the defendant. The admission of evidence that has the power to be prejudicial is supposed to be subject to a balance of it's probative value against it's prejudicial value. ER 403.<sup>41</sup> The picture in question had no probative value whatsoever. The fact of identity was already stipulated to. The defendant would ask this Court to consider the additional prejudice of the use of an "In Life Photo."

#### **Additional Ground # 10**

The Trial Court allowed Sandy Glass to state her opinion as to what an alleged "prophecy" that she had, meant to the defendant. This testimony was also in direct contradiction to her pre-trial interviews.

Sandy Glass was allowed to testify about a "prophecy" that she had allegedly told the defendant that God was saying **"your hands are no longer tied."** VRP 2299. This was allowed in over the defense objection that it was contrary to the pre-trial interview where the State investigator reported the statement as, **"Miss Glass indicates that her hands were no longer tied."** VRP 2167. The defense pointed out that the report also said, **"Glass said this prayer thought meant nothing to her."** VRP 2168. The State then went on to theorize what this "prayer thought" would have meant to the defendant and it contended it went to the state of mind of the defendant. VRP 2169. The defense responded from the report,

**"Glass said she had a sense of resolution of her hands were no longer being tied. And then, interestingly enough, it then goes on to talk about what her role was in the death. As she sits here today she feels guilt about it, guilt and shame....they asked her again whether or not she had anything to do with Dawn Hacheny's death.....Glass again stated she did not have anything to do with Dawn Hacheny's death. Clearly it's about her resolution. It's about her belief that her hands were no longer tied."** VRP 2170.

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<sup>41</sup> State v. Dewey 93 Wn App. 50, 966 P.2d 414 (1998) See also State v. Smith 106 Wn 2d. 772, 725 P.2d 951 (1986).

The trial court eventually ruled that, **"The critical consequence is what was in Mr. Hachenev's mind, and that hopefully will be somewhat revealed by this inquiry."** VRP 2172. On direct examination Glass was allowed to testify that she had received a thought in her head, **"Your hands are no longer tied."** VRP 2298. She stated that she then told the defendant, and that even though there was no verbal response that there was some kind of movement that meant to her that, **"Mr. Hachenev had a choice as to what to do next."** VRP 2299. On cross-examination she actually testified twice that this "prayer thought" and conversation took place after Dawn Hachenev's death. VRP 2463-2464. The State then attempted to clean it up by asking her a very leading question, but she still said this statement was after the death of Dawn Hachenev:

**Q- "Now I believe on direct examination you indicated that these two prophecies that occurred in the fall of 1997, that occurred in the sanctuary, specifically being, 'your hands are tied' prophecy, and then later, 'your hands are no longer tied' prophecy. Calling your attention to those. Did those two prophecies occur before December 18<sup>th</sup> of 1997 or after December 18<sup>th</sup> of 1997?"**

**A- "After"**

**Q- "And were these prophecies before Dawn Hachenev's death?"**

**A- "NO" VRP 2481**

The State then goes on to tell her that she previously testified differently and she recants her timeline and says it was before. VRP 2481-2482.

The importance of this line of questioning is that the State was allowed to extract bits and pieces of a very convoluted testimony which was completely contrary to pre-trial statements and use it to argue that this "prophecy" was some sort of call to arms for the defendant. Sandy Glass was allowed to testify as to what she believed a "prophecy" she had received meant to the defendant, despite the fact that she stated that it meant nothing to her.

VRP 2299.

"It is well established that the existence of a fact cannot rest in guess, speculation, or conjecture.....This rule is even more essential in criminal cases where the evidence is entirely circumstantial."<sup>42</sup>

"Every opinion must be based on knowledge. Proper lay opinion is based on personal knowledge."<sup>43</sup>

<sup>42</sup> State v Golladay 78 Wn. 2d, 121 @page 129-130, 470 P.2d 191 (1970).

<sup>43</sup> State v. Dolan 118 Wn. App. 323, @ page 329, 73. P.3d 1011 (2003) (citing Davis v. Alaska supra.)

It is clear from the record that Glass was somewhat uncertain as to whether this conversation took place before or after the death of the appellants wife. It is equally clear that she stated that she did not recall the defendant having a verbal response but that some sort of "movement that he did" meant that he "had a choice what to do next."

"Lay witnesses are normally not permitted to testify about their subjective interpretations or conclusions as to what has been said."<sup>44</sup>

The statement, "**Mr. Hachenev had a choice as to what to do next**", is a subjective interpretation by Sandy Glass. There is no basis for this conclusion other than some alleged head movement. Furthermore, her trial testimony was inconsistent with her pre-trial testimony and was used in a highly prejudicial way. This testimony was clearly mischaracterized and made to appear as some sort of call to arms for the defendant.

In light of the trial courts rulings of limiting the cross-examination of Sandy Glass, as will be addressed in the following ground, this testimony was highly prejudicial. It was an abuse of discretion to allow Sandy Glass to speculate about what a "prophecy" she had would mean to the defendant.

#### **Additional Ground # 11**

The trial court violated this defendants right of confrontation of witnesses against him, when it granted the State's Motion in Limine to prevent the defense from questioning Sandy Glass about her "revelation from God" and subsequent plan to murder her husband. This is a violation of the confrontation clause of the 6<sup>th</sup> amendment of the United States Constitution.

Prior to trial, the State's key witness disclosed the fact that after the death of the defendant's wife, she had received a "Prophecy from God" about a specific way in which she would kill her husband. She also told the prosecutors that she had actually started to go through with her plan but finally did not.

The defense first sought to present this information in opening statements.

**"The evidence will show and it will come from Sandy's mouth, that she went so far as planning the death of her husband."** VRP 69

The State objected and the information was eventually ruled inadmissible. VRP 69.

Prior to the cross-examination of Sandy Glass the State sought to prevent the defense from asking Glass any questions about the "prophecies" that she had felt she received from God

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<sup>44</sup> 633 F.2d 871 (9<sup>th</sup> Cir. 1980) @ page 875.

instructing her to kill her husband. VRP 2155. The State represented it as a **“thought about how her husband would be dying.”** VRP 2156. This is contrary to the defense attorney’s version of Ms. Glass’s pre-trial interview.<sup>45</sup> The State also argued that this “thought” happened well after Dawn Hachene’s death and it was only being used to tarnish Sandy Glass as a witness. VRP 2157. The defense argued that it certainly does tarnish her as a witness and, **“It was more than just a thought. She actually had a specific plan in which to kill her husband.”** VRP 2157. The trial court ruled that there would be no reference to this “prophecy.” VRP 2158. The trial court renewed the ruling that no reference to Sandy Glass’ plan to murder her husband would be allowed. VRP 2173

It is clear from the record that the entire case for the State relied upon statements made by Sandy Glass alleging that the defendant confessed murder to her. Her credibility and veracity were critical issues. Her frame of mind and mental state at the time of the alleged confession are also critical. For the trial court to prevent the defense from effectively cross-examining her on these issues was very prejudicial. The defense was prevented from bringing out the fact on cross-examination that this very same witness was receiving “prophecies” to kill her husband. The defense’s case was based upon the theory that Sandy Glass is an unbalanced person who hears many messages and cannot be trusted to separate fact from fiction. The trial court seriously hampered the defense from establishing a key element of that theory by allowing some of her “prophecies” in and not others. If Sandy Glass was “hearing from God” that she was supposed to kill her husband, it is arguable that she would attribute those types of thoughts to others as well. By not being able to go into key areas of Sandy Glass’ credibility and mental state at the time of the alleged confession, this defendant was deprived of his constitutional right to confront his accusers as guaranteed by the 6<sup>th</sup> amendment of the U.S. Constitution.

“A denial of cross-examination without waiver...would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.”<sup>46</sup>

“The denial of a criminal defendant’s right to adequately cross-examine an essential prosecution witness as to relevant matters tending to establish bias or motive violates his 6<sup>th</sup> Amendment right to confront the witness against him.”<sup>47</sup>

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<sup>45</sup> Response to State’s notice of Additional Potential 404(b) Evidence. Clerks Papers 104 @ page 3.

<sup>46</sup> Smith v Illinois 390 U.S 129, 88 S. Ct 748, 19 L.Ed. 2d. 956.

<sup>47</sup> State v. Roberts 25 Wn. App. 830, 611, P.2d 1297 (1980).

Sandy Glass was the States key witness. No greater prejudice to the defendant could occur then to limit the defense from the opportunity to, "expose to the jury, the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness."<sup>48</sup>

"Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny."<sup>49</sup>

"The right to cross-examine includes the opportunity to show that a witness is biased or that the testimony is exaggerated or unbelievable."<sup>50</sup>

This Court of Appeals has held this position and stated,

"The Sixth Amendment's confrontation clause requires that an accused be permitted to cross-examine a witness for bias. The rules of evidence do also. Bias can arise from a variety of circumstance"<sup>51</sup>

"Any error in excluding evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place."<sup>52</sup>

In the case at hand the States evidence was completely dependant upon the testimony of Sandy Glass. The prejudice of limiting the defense from cross-examining her about "prophecies" that would tend to discredit her, while at the same time allowing bits and pieces of "prophecies" that were used to infer guilt to the defendant, is tremendous.. The Washington Supreme Court has stated,

"It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth."<sup>53</sup>

It was a constitutional error to prevent the defense from fully cross-examining Sandy Glass.

### **Additional Ground # 12**

This defendant was deprived of his right to due process as guaranteed under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution by numerous

<sup>48</sup> Davis v. Alaska 415 U.S. 308, 39 L Ed. 2d. 347, 94 S. Ct. 1105

<sup>49</sup> State v. Roberts supra @ page 834.

<sup>50</sup> Pennsylvania v. Ritchie 480 U.S. 39, 94 L Ed. 2d. 40, 107 S. Ct. 989.

<sup>51</sup> State v. Dolan 118 Wn. App. 323, @ page 327, 73 P.3d 1011 (2003) (citing Davis v. Alaska supra.)

<sup>52</sup> State v. Johnson 90 Wn. App. 54 @ page 69. 950 P.2d 981 (1998)

<sup>53</sup> State v. Gefeller 76 Wn. 2d 449 @ page 455, 458 P.2d 17 (1969)

incidents of Prosecutorial Misconduct during Opening Statements and Closing Arguments.

1) The State misstated key scientific and medical facts during opening statements and closing argument.

In order to understand the full impact of these misstatements it is necessary to give a brief overview of the facts of the case. In January 1998 Dr. Lacsina conducted an autopsy and determined the cause of death to be laryngospasm, possibly caused by a flash fire. The death was ruled accidental. VRP 961 Also in January 1998 Safeco Insurance hired Scott Roberts to conduct a fire scene investigation of the burned house. After a thorough investigation arson was ruled out as a cause of the fire and a possible cause of the fire was determined as a faulty electrical cord. These reports stood undisputed for three and a half years until in April of 2001 Sandy Glass came forward with allegations of a confession. VRP 963 No new medical evidence was developed. VRP 962 Dr. Lacsina did not change his determination as to the cause of death until 1 month after the defendant had been arrested and charged. VRP 1441 Dr. Lacsina testified that all of the medical evidence was consistent with a laryngospasm and if a flash fire were a possibility he would stand by his initial findings as to cause of death. VRP 964 Dr. Selove, another pathologist hired by the State after the defendant was arrested in 2001, VRP 1440, testified that without the testimony of Sandy Glass he would have no medical reason to rule homicide as a cause of death. VRP 1493-1494 He also testified that the basis for his opinion of suffocation by plastic bag **"relies completely and solely on the statements of Sandy Glass."** VRP 1467 Dr. Selove also testified that all the medical evidence was consistent with a flash fire death. VRP 1490-1491. The State's case was entirely dependant on trying to establish that the medical and scientific evidence ruled out a flash fire and laryngospasm, and that Sandy Glass was a credible witness. The defense theory of the case was that the initial findings were consistent with the evidence and that the fire was accidental and that Dawn Hachenedy died as a result of a flash fire. During opening statements and closing arguments the State summarized key medical and scientific principles in a manner completely contrary to the truth and the testimony of the witnesses. Following is a list of those incidents:

- a) During opening statements and closing arguments, the State introduced a concept that the "Cardinal Rule" of fire deaths is that a lack of carbon monoxide and soot means the person was dead prior to the fire.  
**"so the cardinal rule is if you don't have carbon monoxide in your system, you are dead before the fire."** VRP 20

This is contrary to the testimony of the State's two pathologists Dr. Lacsina and Dr. Selove and the State toxicologist Dr. Logan, who all testified on this issue. No mention was ever made of a "Cardinal Rule." In fact just the opposite was testified to.

Dr. Lacsina was asked the question from a leading manual on forensic pathology.

**Q- "While the presence of carbon monoxide in the blood is proof of life when the fire started, it's absence does not imply that death occurred before the fire?"**

**A- "That is correct." VRP 959**

Dr. Selove, was asked the same question by the defense:

**Q- "It is not necessarily true that the absence of carbon monoxide means that the person was not alive?"**

**A- "The absence of carbon monoxide alone does not prove the person was dead before the fire. You are correct." VRP 1484-1485**

Dr. Logan was also asked about carbon monoxide and he stated:

**"We have certainly experienced cases where people have died in fires with low carbon monoxide levels." VRP 1641**

Dr. Selove testified that:

**"Yes as to your earlier exhibit from Dimaio stated, soot may be absent though the person was alive when fire started." VRP 1483**

No mention of a "Cardinal Rule" was ever made by any witness. The State put this notion into the minds of the jury during opening statement. During closing argument, after the defense had presented it's closing, the State again picked up this theme of a "Cardinal Rule":

**'The objective findings as I have said, is there's no carbon monoxide in Dawn's blood, there's no soot in her airways....but the Cardinal Rule is, if you find a fire victim in this state, the victim wasn't breathing at the ignition, the victim's dead.'" VRP 5002-5003**

**"So she was dead before the fire." VRP 5148**

**"What is the undisputed forensic pathology? In essence that Ms Hacheney was either dead or not breathing before the fire because there's no carbon monoxide in her blood, there's no soot in her lungs." VRP 5172**

These statements are false and contrary to the testimony of the State's expert witness. There is no "Cardinal Rule." The conclusions the State is making are certainly not "undisputed pathology." Dr. Selove stated that a room full of pathologists would have come up with several opinions as to the cause of death in this case. VRP 1459

**b) The prosecutor misstated the testimony about propane in the lungs.**

In closing the State asserted:

**“there was testimony that there was no propane in the lungs.”** VRP

5151

This is a misstatement of the facts. Dr. Logan, the State toxicologist was very clear that only 1 to 5 grams of the lung or approximately 1%, was tested. The testimony of Dr. Logan was very specific and qualified and he definitely did not say that there was no propane in the lungs.

**Q- “So to summarize, your testimony yesterday, was that the sample...that Ms. Weiss tested, did not have propane in it?”**

**A- “To the extent that her test was sensitive, yes.”**

**Q- “All right. And you’re not able to say that the lung from Ms. Hacheney didn’t have propane in it, are you? The actual lung, 500 grams of lung?”**

**A- “That the remainder of the lung that wasn’t sampled and sent to us, no, I can’t say what that had in it.”**

**Q- “So all you can say is that somewhere between 1 to 5 grams did not have propane detected to the level of your ability to detect it with your equipment?”**

**A- “Correct.”** VRP 1636

To summarize this testimony to mean that the lung had no propane in it is a misstatement of the testimony. This is precisely what the defense argued in an earlier hearing that the State would do and why the testimony should not be allowed. (Pre-trial Motions Volume IV October 1 page 567-575) The State responded that Dr. Logan would not be asked to testify **“about whether she inhaled propane.”** Pre-trial Motions Volume IV October 1 Page 578. Adding that this would be inappropriate. Page 579. The defense had in fact asked Dr. Logan in the Frye Hearing :

**Q- “So at the end of this testing we don’t know if Dawn Hacheney breathed propane in some small quantity or not?”**

**A- “I can’t rule that out based on our test results.”** <sup>54</sup>

The defense finally argued:

**“If the State is precluded from arguing that, if they’re willing to stipulate right now, ‘We won’t argue anything about whether she inhaled or not inhaled propane.....then all this is moot, but I don’t think they will, because that is their purpose for this evidence, whether or not she inhaled propane,”** <sup>55</sup>

<sup>54</sup> Pre-trial Motions Volume IV, October 1, 2002. Page 532

<sup>55</sup> Pre-trial Motions Volume IV, October 1, 2002. Page 584

This is precisely what the prosecutor stated in closing argument:

**“She was not subjected to minutes or hours of propane, breathing in propane.”** VRP 5152

If it was inappropriate for the head of toxicology for the State of Washington to answer this question it is certainly inappropriate for the State to interject this unsubstantiated and misleading statement during closing argument. This particular misstatement was extremely prejudicial to the defendant because the inference goes right to the heart of the defense case and that is that a propane leak was a possible cause of the fire.

- c) The prosecutor made misleading statements unsupported by evidence or testimony regarding the effects of smelling or hearing a propane leak.

During closing argument the State claimed:

**“Propane is a smelly gas. That would not have happened if Dawn Hacheney were alive and there was a leak, she would have awoken to a very smelly, noisy leak, and it didn’t happen.”** VRP 5150

This assertion that the smell of propane or the noise from a leaking canister would wake somebody up from sleep is completely unsupported by scientific evidence. In fact, the only time any expert was asked this question was by the defense of Dr. Logan, when he was asked if a sleeping person would smell the propane. VRP 1649. The State objected to the question stating that it was speculation and the court sustained the objection. VRP 1649. Dr. Logan was not permitted to answer the question but the State was allowed to insert its own scientific conclusion in closing argument.

- d) The State misrepresented evidence regarding prominent redness of the larynx.

During closing the prosecutor stated:

**“An important piece of evidence from Dr. Lacsina in his report, is that he notes there’s a prominent redness of the mucosa at the larynx and trachea level below the larynx. That was not spasm. That larynx was not in a spasm at that time because it would have protected that trachea.”** VRP 5175

This is totally false and is not a conclusion that Dr. Lacsina drew. Dr. Lacsina testified:

Q- **“Was there any indication of damage to the mucosa of the larynx or trachea?”**

A- **“The only indication is that the inside lining of the larynx was red, it was congested.”**

Q- **“What about the trachea?”**

A- **“Same thing with the trachea.”** VRP 872

The prosecutor never went on to ask if he could draw any conclusions from this evidence but simply waited until closing to draw her own conclusion from the report which was contradicted by the testimony. Dr. Lacsina testified later said that this redness could actually be an indicator of a flash fire:

**"If there is extensive burns as a result of a flash fire you may see swelling of the larynx, swelling and redness." VRP 937**

Obviously if Dr. Lacsina was able to draw the conclusion that the larynx could not have been in spasm he would not have said all the evidence in the autopsy supports a flash fire:

**Q- "So, the evidence that you have in the autopsy supports the idea that there was a flash fire. Everything corresponds to a flash fire, your initial idea?"**

**A- "Yes" VRP 961**

**Q- "So if a flash fire is a reasonable possibility, you would stand by your original findings?"**

**A- "Probably, yes." VRP 964**

For the prosecutor to state that the larynx could not have been in spasm and therefore the jury can rule out laryngospasm as a possibility is a blatant misrepresentation of the testimony of the expert witnesses and the evidence in this case. Not one of the expert witnesses drew the conclusion that you could rule out laryngospasm as a cause of death from the medical evidence. The State is drawing medical conclusions that their own pathologists were unable to draw. Dr. Selove testified:

**Q- "And as far as the medical evidence goes...the physical and medical view of her body would be the same for a suffocation from a flash fire or a suffocation of the bag over the head. Is that right?"**

**A- "Yes. Once she was burned to that extent, the physical findings would be the same." VRP 1490-91**

The prosecution should not have been allowed to express personal opinions or draw it's own conclusion to issues that the medical experts were not able to draw conclusions to.

"Nor may he or she express personal opinions about matters requiring expert knowledge."<sup>56</sup>

"Misrepresenting facts in evidence can amount to a substantial error because doing so may profoundly impress a jury and may have a significant impact on the jury's deliberations...This is particularly true in the case of prosecutorial misrepresentation because a jury generally has confidence that the

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<sup>56</sup> The Georgetown Law Journal Annual Review of Criminal Procedure. 2003, PG 558.

prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty, whose interest in a criminal prosecution is not that it shall win but that justice will be done.”<sup>57</sup>

“Counsel may not, however, mislead the jury by misstating the evidence; this is particularly true of a prosecutor- a quasi-judicial officer, who has a duty to see that the defendant receives a fair trial.”<sup>58</sup>

“Given the danger that the jury will perceive argument as an attempt to inject prosecutors personal knowledge into the case, prosecutors arguments not only must be based on facts in evidence, but should be phrased in such a manner that it is clear to the jury that the prosecutor is summarizing evidence rather than inserting personal knowledge and opinion into the case.”<sup>59</sup>

For the State to continually misstate and misrepresent the scientific and medical facts of this case was a violation of the defendant's due process as guaranteed by the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution, and is clearly prejudicial. Furthermore, these comments were the last ones the jury heard before deliberations. The defense had no opportunity to respond to or rebut these statements. The jury had just gone through nearly 10 weeks of intensive testimony about very difficult medical and scientific information. Some of the misquoted and misrepresented testimony took place a month and a half prior to this closing argument. The jury has an expectation that the prosecutor is telling the truth. “A jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty.”<sup>60</sup>

**2) The State used the closing arguments to interject testimony that had been previously ruled inadmissible.**

“At no time should the prosecutor make statements he either cannot prove or proof of which is not admissible.”<sup>61</sup>

During trial the State sought to introduce testimony of an alleged phone conversation that took place between Scott Nickels and the defendant. The defense argued that the phone call was not substantiated and inadmissible. The Court agreed and ruled that the testimony about this particular phone call was not allowed. VRP 2538

<sup>57</sup> Gall v Parker 231 F. 3d 265 (6<sup>th</sup> Cir. 2000) @ pg 313

<sup>58</sup> State v. Guizzotti 60 Wn. App, 289 @ pg 296, 803 P.2d 808 (1991)

<sup>59</sup> US v. Hermanek 289 F. 3d 1076 (9<sup>th</sup> cir. 2002) @ page 1081

<sup>60</sup> Washington v. Hofbauer 228 F.3d 689, @ page 700

<sup>61</sup> Washington Practice Criminal Procedure Volume 13 §4403 page 252

During the last phase of closing argument the prosecutor relayed this same phone conversation to the jury:

**“Scott Nickel’s testimony also corroborates Sandy Glass’s testimony. He told you in fact, Sandy had told him about the call from Mr. Hacheney. She gave him a cell phone number, which as you recall. She said she wrote it down because he gave it to her, and he called that cell phone and said, ‘You better not call Sandy Glass and you better go to the authorities. I know what you did.’” VRP 5169-5170**

Defense counsel did not object to this interjection. Apparently they did not notice it. If prosecutorial misconduct is flagrant, it is still reviewable.<sup>62</sup> These comments are highly prejudicial because it is a direct accusation from Scott Nickels, **“I know what you did.”** It also infers that he somehow felt the need to protect Sandy Glass from the defendant, **“you better not call Sandy Glass.”** In *State v Alexander* the Court of Appeals said:

“The prosecutors repeated attempts in closing, to instill inadmissible evidence into the jurors minds was flagrant and ill intentioned and therefore constituted misconduct.”<sup>63</sup>

Although it is possible that the prosecutor inadvertently inserted this inadmissible testimony, it does not change the prejudice to this defendant. The defendants right to due process was violated as well as the right of confrontation guaranteed under the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution. This was inadmissible hearsay, the defense had no opportunity to cross examine Scott Nickels on this testimony and furthermore, there is no way of knowing if he would have even testified to the statements that the prosecutor testified to for him. The fact that neither defense counsel nor the Trial Court took notice of this statement is symptomatic of the problem that the jury faced. In a myriad of information presented over ten weeks in an exhaustive manner, which pieces of information are accurate and true? The assumption is that the State is presenting factual information that was properly admitted. Unfortunately, this is a false assumption because the prosecution decided to go beyond the four corners of the record.

“By going beyond the record, the prosecutor becomes an unsworn witness, engages in extraneous and irrelevant argument, diverts the jury from it’s proper function and seriously threatens the defendant’s right to a fair trial.”<sup>64</sup>

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<sup>62</sup> *State v. Belgarde* 110 Wn. 2d. 504, 755 P.2d 174 (1986)

<sup>63</sup> *State v. Alexander* supra @page 156

<sup>64</sup> *Prosecutorial Misconduct*, Bennett L. Greshman, Thomson West, 2003. Page 11-55

- a) The State misquoted and misrepresented key testimony regarding the time of day when the defendant met with two friends to go hunting the morning of the fire.

The timeline of events on the morning in question was a critical factor for both the prosecution and the defense. It was the defense's assertion that the three individuals met at the Hood Canal Bridge to go duck hunting somewhere between 6:00 and 6:15 am and therefore that I would have left our house at about 5:30 am. This is consistent with statements given to the Safeco Insurance officials in 1997. This timeline would have meant that the fire would have had to burn for nearly two hours and only consume one room of the house. The entire focus of the defense case was to show that a flash fire was a possibility and that this fire could not have lasted for more than 30 to 40 minutes. To misstate key testimony regarding the timeline at a point in the trial when the defense had no opportunity to respond was fatally prejudicial to the defense.

A key issue was the difference between "daylight" and "sunrise". It was agreed by both parties through a stipulation that "sunrise" was at 7:58 am on December 26, 1997 and legal shooting time was at 7:28 a.m. VRP 465 Officer Davis, of the Bremerton police force testified as to the distances and driving times from the house to the Hood Canal Bridge and from the bridge to Indian Island. He testified that the total distance was 39.6 miles and the travel time was 51 minutes. VRP 2584-2585 Officer Davis did not get out of his car at the Bridge, he did not drive to the hunting location on Indian Island, he did not unload gear and walk to the hunting sight. VRP 2590-2591. Phil Martini testified that upon arriving at the hunting area we got out and he changed the choke on his shotgun and then we walked down to the hunting blinds. VRP 536

During the initial closing arguments the first prosecutor asserted that:

**"From Lindsey Smith we can conclude that they're in the blinds and ready to hunt at approximately 7:50 am." VRP 5028**

He then went on to describe a timeline that is completely conflicting with the evidence and puts the defendant leaving his house at 6:45 am.

During the second portion of closing argument the other prosecutor made numerous assertions that were clearly erroneous and completely misquoted the testimony:

**"The testimony is undisputed, Lindsey Smith and Phil Martini and the defense investigator, Mr. Tomaso all said the same thing. That these people were to meet at the Hood Canal Bride at 7:00 am." VRP 5152**

The defense objected at this point and the trial court overruled the objection and told the jury to:

**“disregard any comments that are not supported by your memory.”**

VRP 5152

The prosecution then went on to say:

**“Lindsey submitted and Phil said that it was 45 minutes to an hour before sunrise.”** VRP 5153

This is clearly not true. This is not even a reasonable speculation from the testimony.

**Phil Martini**

Phil Martini was asked what time they were to meet at the Hood Canal Bridge:

**“It would have been 45 minutes to an hour before daylight.”** VRP 513

The prosecutor then interjected the word “sunrise.”

**Q- “Why was it your plan to leave 45 minute to an hour before sunrise?”**

**A- “Need to be in position before first light?”**

**Q- “And did you get to the hunting spot before first light?”**

**A- “Yeah barely.”**

**Q- “So it was still dark when you arrived at the hunting site?”**

**A- “It was still dark, but you could see the beginnings of dawn.”**

VRP 513

Clearly his testimony is that when they arrived at the hunting site, which is 23 miles and at least 35-45 minutes away from the Hood Canal Bridge, it was still dark and just starting to get light. He clarified this point further on cross- examination:

**Q- “You testified that you got to the Hood Canal Bridge about an hour or so before hunting?”**

**A- “Before daylight.”** VRP 533

Then on re-direct the very same prosecutor who is making these misstatements in closing, asked him about the lighting conditions and he clarified what he meant by daylight:

**Q- “What was your understanding as to when you were to be in place with hunting?”**

**A- “It is my understanding it had to be in place before- long before daylight. When I say daylight, I mean just the beginnings of the cracks of dawn coming over the edge of the horizon. I don’t mean full sunrise.”**

**Q- “You already testified that when you got there it was dark; how long till it became light or dawn?”**

**A- “Just a few minutes.”**

**Q- "You indicated that you saw two birds but you didn't take a shot; when was that?"**

**A- "Probably been there approximately 20 or 30 minutes, and there were two birds out there that I didn't think I could hit."**

**Q- "Was it fully daylight when you saw those two birds?"**

**A- "No, it was not fully daylight at that time." VRP 541-542**

During the opening days of the trial, numerous witnesses testified as to the lighting conditions on that morning. Mr. Richards was the first person on the scene of the fire; he reported the fire at 7:13 am. He testified as to the lighting conditions at 7:10 am when he showed up at the house:

**"The visibility was good and it was reasonably light." VRP 165**

Amy Pitts the next-door neighbor said:

**"It was dark and the sun was just coming up." VRP 207**

Jim Hardy the fireman who arrived at the scene at 7:15 am said:

**"The sun was just breaking" VRP 2**

Dana Normandy, another firefighter said:

**"It was dawn or pre-dawn, in between light and dark." VRP 984**

Officer Patrick Johnson arrived at 7:15 am said:

**"It was dawn or the sun was just coming up." VRP 1022**

It was clear from all this testimony that the lighting conditions are the exact same condition as what Phil Martini is describing at the hunting blinds. It would be physically impossible to be at the Hood Canal Bridge at 7:00 am, drive 23 miles to Indian Island, drive to the parking area, get out and load up dogs, guns and gear, and walk out to the actual blinds and still have it be dark for a few minutes. Phil Martini did not testify that he was at the Hood Canal Bridge at 7:00 am. This piece of misstated information is critical to the States timeline. Given the fact that Phil Martini gave his testimony on Nov 6, the closing arguments were given December 23<sup>rd</sup>, 48 days later and the only direction given to the jury by the court was to rely on their memory, this kind of misrepresentation was extremely prejudicial.

### **Lindsey Smith**

Lindsey Smith's testimony about the time of events that morning was very equivocal and confusing. The prosecutor obviously led her to her answers, but a key fact is that Lindsey Smith never actually stated sunrise:

**Q- "Would you have a routine with respect to what time you would aim to get into your hunting spot?"**

**A- "Yeah, we would aim to be there a couple of minutes before daylight, when it was visible to shoot.' VRP 581 (emphasis added)**

Then the prosecutor again interjected the word "sunrise."

**Q- "So the usual routine was for you to get into your hunting blinds or hunting spot within a few minutes before sunrise?" VRP 582**

She then goes on to get her to state that if sunrise was at 7:58 am then we would have been at the Hood Canal Bridge at 7:00 to 7:15 am, but it is clear from the testimony that Lindsey Smith has sunrise and daylight confused because she is asked:

**Q- "Have you ever shot before sunrise?"**

**A- "It's not really possible because you hunt in the morning and it's dark." VRP 582-583**

And

**"I said shooting time but I'm confused about the legal ...the difference between the definitions." VRP 698**

Then on re-direct the prosecutor attempted to clarify the time and lighting conditions:

**Q- "What was the lighting conditions when you got into your position in the area of Indian Island?"**

**A- "It was starting to get light and we could see where we were going fine, we didn't need flashlights or anything."**

**Q- "What was the lighting conditions at the Hood Canal Bridge?"**

**A- "It was dark." VRP 798**

So clearly the testimony of Lindsey Smith is equivocal at the least but when asked the lighting conditions when we all were in the blinds and ready to hunt she described the same conditions that Phil Martini and numerous others did, that it was just starting to get light. The reasonable inference from this testimony would have to be that we were in the blinds somewhere between 7:10 and 7:15 am, which makes it impossible to be at the Hood Canal Bridge. It may have been proper argument for the State to say that Lindsey testified to being at the Bridge at 7:00 am but to say that : **"The testimony is undisputed, Lindsey Smith and Phil Martini and the defense investigator, Mr. Tomaso all said the same thing. That these people were to meet at the Hood Canal Bride at 7:00 am."**, is a blatantly false statement, misrepresentation of the testimony and very misleading to the jury.

**Doug Tomaso**

The defense investigator was put on stand to testify as to the differences between Lindsey Smith's testimony and previous interviews with her:

**Q- "In that interview process was Lindsey Smith questioned about what time they were to be in place and ready to hunt?"**

**A- "Yes she was..according to my notes- I don't have a specific time but I had the fact that she was in place 5 to 10 minutes before shooting light?" VRP 4805**

Then the prosecutor on cross –exam asked him:

**Q- "And then she indicates 'in place before shooting light' is that right?"**

**A- "Yes"**

**Q- "This is 5 to 10 minutes before shooting light, is that right?"**

**A- "Correct" VRP 4408-4409.**

As has been previously stated, both sides stipulated to the fact that legal shooting time was 7:28 a.m. Obviously, Mr. Tomaso's testimony is that Lindsey Smith's testimony was that we were in the duck blinds by 5 to 10 minutes prior to that time. He did not testify that any of the witnesses stated being at the Hood Canal Bridge at 7:00 a.m.

During the final portion of closing arguments the State quoted Tomaso as saying:

**"In fact Mr. Tomaso, the defense's own investigator, indicated, 'Yep, Lindsey Smith, told us they were to meet at the Hood Canal Bridge 45 minutes to one hour before sunrise.' ...Now Mr. Talney can make what he wants of the differences between shooting light and the legal shooting time, which is half an hour, but the bottom line is it's not going to change the testimony of Ms. Smith or Mr. Martini, who both indicate that they were there 45 minutes to one hour before sunrise." VRP 5153**

This is completely erroneous. The State sought to confuse the timeline and did not present a reasonable inference from the evidence. The State took one statement from Lindsey Smith and based there entire timeline on it. Furthermore, they misquoted Phil Martini and Doug Tomaso and misrepresented the testimony of Lindsey Smith. The prejudice is clear. If the defendant were at the Hood Canal Bridge at 7:00 am, he would have had time to light the fire. If he were in a duck blind on Indian Island, approximately an hour and a half away from home, as the wealth of evidence shows then the jury would have to believe that this fire lasted nearly two hours and only consumed one room of the house. This is contrary to the testimony of the States most credible witness and the only person who conducted an actual

investigation of this fire scene, Scott Roberts. It is also totally contrary to all the evidence and fire testing presented by the defense through Western Fire Center. It would be an appropriate situation for the jury to have to decide whether they found Phil Martini's account or Lindsey Smith account of the times more credible, but for them to have to decide which attorney to believe as to what was actually said is improper.

"Argument by counsel must be restricted to the facts in evidence and the applicable law lest the jury be confused and misled."<sup>65</sup>

"It is error for counsel to make statements in closing argument unsupported by evidence, to misstate admitted evidence or to misquote a witness testimony."<sup>66</sup>

For the State to misrepresent key testimony during the final phase of closing argument, without any correction from the court and without any opportunity for the defense to rebut the erroneous statements clearly violated the defendants due process rights as guaranteed by the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution.

**b) The State presented a false statement regarding the existence of an autopsy report.**

During the trial the issue of whether or not Sandy Glass would have had access to a copy of the autopsy report became important because it was the State's assertion that she would not have been able to know the facts of the case. During Closing the prosecutor stated:

**"No one had a copy of the autopsy report or saw one. Anybody who testified said they never had seen one, never saw the defendant with one, never even had one referred to." VRP 5176**

The defense objected and the Court responded:

**"The jury will disregard any comment that isn't supported by your memory of the evidence." VRP 5176**

The State went on to say that:

**"Mr. Nickel indicated that Sandy Glass had seen a court document after she had already gone to the police." VRP 5176**

The defense again objected and the court gave the instruction:

**"The jury will disregard any comment that isn't supported by the evidence." VRP 5176**

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<sup>65</sup> State v Perez-Cervantes 141 Wn 2d 468 @ page 474, 6. P.3d 1160 (2000).

<sup>66</sup> U.S v Watson 171 F.3d 695 @ page 609

The purpose of this statement is to infer that since Sandy Glass did not have access to an autopsy report, therefore she would not have know that her statement would fit the evidence.

The statement is simply not true. Scott Nickels testified regarding this issue:

**Q- “Now you were made aware by Ms. Glass that she had a copy of the autopsy report, or had been read the autopsy, is that right?”**

**A- “In the early discussions, Ms. Glass did say, I believe, she had seen the autopsy report.”**

**Q- “And these discussions. When you say early discussions, what do you mean?”**

**A- “Before she had gone to the authorities.” VRP 2548**

Donald Tienhaara, Dawn’s father, testified about the existence of an autopsy report:

**Q- “Did you ever see Mr. Hacheney in possession of any autopsy report?”**

**A- “It seems like we had some copies or something. But I don’t know what happened to them. I wanted to put it away in my mind so I didn’t... I think we did have some copies or something, I don’t know what even happened to them.” VRP 1685**

Jane Jeremy stated that she believed that the defendant had requested a copy of the autopsy. VRP 1742.

This statement by the State intended to bolster the credibility of the most important witness in the case, Sandy Glass, was clearly false and highly prejudicial.

**c) The State sought to inflame the passions of the jury by stating that the defendant was having oral sex with Nicole Matheson 1 month after his wife died.**

During closing argument the prosecutor stated:

**“There’s testimony in evidence that , as early a January of 1998, he and Ms. Matheson were engaged in oral sex.” VRP 5018**

Ms. Matheson did not testify to this very graphic and inflammatory statement. She was asked about the physical relationship and she stated that, **"We became intimate with each other."** VRP 3734. She was then asked if that meant sexual intercourse and she responded. **"No that happened later."** VRP 3734. No question was ever asked or answered about oral sex. The only purpose of the State to make this misstatement in closing argument was to prejudice the defendant in the minds of the jury. The Court of Appeals, Division 1 recently ruled in State v. Rivers that :

"A prosecutor has a duty to the public to act impartially and in the interest of justice. In the context of this responsibility, the prosecutor may not make heated partisan comments which appeals to the passions of the jury in order to procure a conviction at all hazards."<sup>67</sup>

This particular statement as well as numerous others was clearly intended to inflame the jury and furthermore was a misstatement of the testimony.

**3) The State made numerous other inflammatory and erroneous statements during opening argument which were never testified to.**

The State has an obligation to only make statements during opening arguments that "counsel has a good faith belief such testimony will be produced at trial."<sup>68</sup>

The following statements were made during opening statements:

**"Mr. Hacheney called Sandy Glass very upset, crying, very upset. His faith was overturned, upside down. 'How can I believe in what God said when it doesn't come true?' He expressed a desire to act towards their goal." VRP 26**

This is complete fantasy. The State never produced any record of this call and Sandy Glass said she had no recollection of what was said:

**Q- "And what did he say when he called you?"**

**A- "I don't remember specifically what he said."**

**Q- "And specifically what was said about that date?"**

**A- "I don't specifically remember what was said." VRP 2212**

Next the State made statements about my arrival at the Hood Canal Bridge;

**"Both of the friends that were waiting to meet him indicated that he was late, and that he was huffing and puffing and seemed anxious and agitated about something." VRP 40**

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<sup>67</sup> State v. Rivers 96 Wn. App 672 @ page 675, 981 P.2d 16 (1999).

<sup>68</sup> State v Campbell 103 Wn 2d. 1 @ page 16, 692 P.2d 929 (1984)

This is also completely false. Phil Martini and Lindsey Smith both testified about the meeting at the bridge and it is totally contrary to this "testimony" by the State. Phil Martini said:

**Q- "What was his demeanor when he drove up?"**

**A- "He basically just pointed and we followed him." VRP 514-515**

Lindsey Smith's testimony was even more contradictory:

**Q- "When you met Mr. Hacheney at the bridge, what was his demeanor?"**

**A- "He was a little bit more quiet than usual, kind of more- kind of introspective, maybe subdued." VRP 583**

This is obviously not huffing and puffing and agitated but the effect of these statements is to plant a prejudicial seed in the minds of the jury.

The State went on to suggest that there was a "conflict" between the defendant and his wife about wanting to have children. **"You'll hear testimony that there was a conflict between Dawn Hacheney and Mr. Hacheney about babies"** VRP 43 This is completely false and no testimony was ever put forth about any "conflict". There was testimony that we openly talked about children with the Delashmutts. (Perpetuation Deposition of Julia Delashmutt page 18.) Dawn's mother testified that we were planning on having children after a planned trip to Africa in the spring of 1998. VRP 1780 There was medical records admitted from Dawn's medical provider that she had gone in for pre-conception counseling. VRP 1658 Not one single person ever testified that they had ever seen Dawn and I in any argument much less a "conflict." The defense argues this very point at the time of the State admitting the medical documents. VRP 1660. The prosecutor admitted that fact, **"While the State doesn't have somebody who can testify that they saw an actual fight occur ..that still does not eliminate the possibility that this was a conflict in their marriage."** VRP 1663. This is an improper standard. The State implanted prejudicial and untrue information into the minds of the jury. They were never able to substantiate it with anything other than speculation. The defense argued this point repeatedly throughout the trial on this and numerous other allegations that were supported only by insinuation.

The State then stated: **"Lindsey Smith was an 18 year old youth in 1997....She was a part of Mr. Hacheney's youth group."** VRP 43

This is completely false. Lindsey Smith testified that she was 20 in 1997 and 21 in 1998 when she had a relationship with the defendant. VRP 543

To state that the defendant was having a romantic relationship with an 18-year-old youth in his youth group was extremely inflammatory and intended to prejudice the jury against him early on in the proceedings.

The State then insinuated that there was a romantic relationship between Nicole Matheson and the defendant prior to the death. VRP 45. This is completely false and unsupported by the evidence. It is merely speculation and insinuation.

The State then said, **"Mr. Hacheney made physical advances towards Annette Anderson at Dawn Hacheney's funeral."** VRP 46 (This is addressed in issue # 13 of Appellate brief and is erroneously attributed to Ms. Latsbaugh.)

The Statement made by the prosecutor is completely false. Annette Anderson testified that she gave me a hug at Bob Smith's house on the day that Dawn died. There had already been testimony from Bob Smith about how distraught and emotional I was, and that I had collapsed into his arms at the house:

**Q- "Did he say anything when he came into your home?"**

**A- "Basically he came over to me, collapsed in my arms, and began to cry." VRP 2090**

Annette Anderson testified:

**Q- "Tell me what happened when you walked into the door of the Smith residence."**

**A- "He gave me a big hug, and it was a different sort of hug, although, you know, it was a specific moment."**

**Q- "What do you mean by it was a 'different' type of hug?"**

**A- "Well like sort of a no-holds barred, "I'm giving you a full body hug thing." VRP 2888**

This is the only testimony from Annette Anderson about any hug. The hug Annette Anderson speaks of is not at the funeral, it is at the Smith residence, hours after a man has found out his wife was killed in a house fire. No question was ever asked of her if she felt like this was an advance or sexual in any way. It should also be noted that this is supposedly the "romantic advances" at Dawn's funeral, that the State presented to the court in its initial 404(b) offer of proof.<sup>69</sup> CP 48. The trial court ruled; **"Engaging in an intimate embrace with Mrs. Anderson at his wife's funeral is overwhelming inconsistent with an innocent grieving spouse."**<sup>70</sup> This is a perfect example of how prejudicial these kind of statements

<sup>69</sup> State's Preliminary List of ER 404(b) Dated January 9<sup>th</sup> 2002. Page 7.

<sup>70</sup> See Memorandum Opinion February 22, 2002. Page 9.

are. The seeds of prejudice were planted early and watered often. At the end of the process the jury had been exposed to 40 days of trial and volumes of exhaustive information, much of it irrelevant. For the State to make these kind of insinuations and innuendos that are completely unsupported by the evidence is highly prejudicial and violated due process.

**4) The State committed prosecutorial misconduct by “sandbagging” during closing arguments.**

“Sandbagging occurs when a prosecutor argues new theories or makes new arguments not made previously.”<sup>71</sup> During closing arguments the State was given the opportunity to open oral arguments defense was then given an opportunity to argue their side and the State was given an opportunity for final rebuttal. During the final portion of closing arguments the prosecutor presented argument that was not the subject of anything the defense presented. The defense objected numerous times. The most blatant use of sandbagging was when that State said:

**“Actually, this can be a fairly straightforward case, when you consider a piece of evidence that Mr. Talney intentionally did not talk about.”**  
VRP 5163.

The defense objected and the Trial Court stated:

**“I’m going to wait until I hear what it is.”** VRP 5163

The defense renewed it’s objection and it was overruled. VRP 5166. This allowed the State to put numerous facts before the jury about the testimony of Sandy Glass without the defense having any opportunity to respond. This is a due process violation and deprived the defendant of a fair trial. CrR 6.15(d) says in part “The prosecution may then address the jury after which the defense may address the jury followed by the prosecutions rebuttal.” Any argument by the State that was not direct rebuttal of the defense was in violation of this rule. Obviously, when the State asked the jury to **“consider a piece of evidence that Mr. Talney intentionally did not talk about.”** VRP 5163, it was not rebuttal. The State chose to present their closing arguments in two parts and just split up which issues would be better presented by each individual. This is not a proper procedure under CrR 6.15 and furthermore, just like much of the issues brought forward in this section, it was the last pieces of information heard by the jury. Any prejudice to the defendant would have been compounded by the fact that there was no opportunity to respond.

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<sup>71</sup> Prosecutorial Misconduct, Bennett L. Greshman, Thomson West, 2003. Page 11-39

"The governments opportunity to have the last word must give way when the opportunity is abused."<sup>72</sup>

"Rebuttal provides the government with the opportunity to respond to the defendant's arguments. It does not allow the government to bring in new matters."<sup>73</sup>

It was during this "rebuttal" argument on pages 5163-5171 that the State outlined the alleged confession of the defendant as reported by Sandy Glass. The State also used this opportunity to vouch numerous times for the credibility of Sandy Glass and to introduce inadmissible testimony of Scott Nickels to bolster her credibility. The prejudice is clear.

**5) The State improperly vouched for the credibility of it's key witness, Sandy Glass.**

During closing arguments the State sought to bolster the credibility of Sandy Glass by bringing in the inadmissible testimony of Scott Nickels, (outlined above), and by making numerous statements that amount to personal vouching:

**"Scott Nickel's testimony also corroborates Sandy Glass's testimony."**

VRP 5169

**"Sandy Glass is credible."** VRP 5170

**"Ms. Glass has had to parade her entire life in front of you. No detail, no personal detail has gone unspoken....she's credible.." VRP 5171**

These are personal assertions of the prosecutor. The Nickels testimony is inadmissible and the statements about Sandy Glass are not true. During the early portions of the trial the State was able to get major "personal details" of Sandy Glass's life excluded from being presented to the jury, namely that she was involved in an extra marital affair with Scott Nickels at the time of coming forward with these allegations and most importantly that she had felt God tell her to kill her husband and that she had planned it out. For the State to say that "**no personal detail has gone unspoken,**" is vouching because the jury must assume that the State has spent a great deal of time with this witness and does know the personal details of her life. In Alexander the Court said:

"The prosecutors improper remarks were an attempt to bring in inadmissible testimony to bolster M's trial testimony and credibility."<sup>74</sup>

In U.S. v. Edwards, the 9<sup>th</sup> Circuit Court of Appeals stated:

<sup>72</sup> U.S. v. Giovanelli 945 F. 2d 479 @ page 496 (2<sup>nd</sup> Cir. 1991)

<sup>73</sup> U.S. v. Byrd 834 F.2d 147 @page 147 (8<sup>th</sup> Cir. 1987)

<sup>74</sup> State v Alexander Supra@ page 155.

"It is well settled that a prosecutor in a criminal case has a special obligation to avoid improper suggestions, insinuations, and especially assertions of personal knowledge. A prosecutor may not impart to the jury his belief that a government witness is credible...When the credibility of witnesses is crucial, improper vouching is particularly likely to jeopardize the fundamental fairness of the trial."<sup>75</sup>

### **Conclusion of prosecutorial misconduct.**

The cumulative effect of these numerous incidents of prosecutorial misconduct deprived the defendant of a fair trial. This is a violation of due process as guaranteed by the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution.

"Prosecutorial misconduct which denies a defendant a fair trial violates the defendant's Constitutional due process rights."<sup>76</sup>

"It is well settled that presentation of false evidence violates due process."<sup>77</sup>

The prosecutor summed up their strategy on this case precisely when he said: **"It's not about proving all of the facts, but this case is proven by strong motives."** VRP 5054

The Washington Supreme Court however has said:

"A person being tried on a criminal charge can be convicted only by evidence not by innuendo."<sup>78</sup>

This is exactly what was done. The State sought to distract the jury from the facts of the case and overwhelm them with superfluous information that had little relevance but had the appearance of legitimate evidence given the jury instructions. In addition, the State sought to mislead and confuse the jury by misstating the evidence, misquoting the key witnesses, interjecting inadmissible testimony into the record, and vouching for the State's key witness.

"For the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt."<sup>79</sup>

The prejudice to the defendant is clear. This case is based entirely on circumstantial evidence and the credibility of one witness. The prosecutor admitted, **"Here's where we get to the strongest mode of evidence, circumstantial evidence of consciousness of guilt."** VRP

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<sup>75</sup> U.S. v. Edwards 154 F.3d 915 (9<sup>th</sup> Cir. 1998) @ page 921. (citations omitted)

<sup>76</sup> Washington Practice Criminal Procedure Volume 13 §4406 page 257

<sup>77</sup> Phillips v. Woodford 267 F.3d. 966 (9<sup>th</sup> Cir. 2001) @ page 984

<sup>78</sup> State v. Yoakum 37 Wn. 2d. 137. @ page 144, 222 P.2d 181 (1950).

<sup>79</sup> Herring v. New York 422 U.S. 853, 862, 95 S. Ct. 2550. 45 L.Ed. 2d 593 (1975)

5017. It is clear that the scales were not balanced but were heavily weighted with innuendo, speculation and false information.

### **Additional Ground # 13**

#### **The State did not establish the Corpus Delicti of Homicide or Arson.**

The State never established independent evidence of the crimes of arson or homicide.

The entire case was premised on the reliability of statements by Sandy Glass of an alleged confession. In *State v Aten*,<sup>80</sup> The Court of Appeals and the Washington State Supreme Court clarified the corpus delicti rule:

“A confession is inadmissible unless there is independent evidence that prima facie establishes **each element of** the corpus delicti of the charged crime. The corpus delicti of a crime is composed of two elements: (1) an injury or loss caused by (2) a criminal act.”<sup>81</sup>

The Court overturned a 2<sup>nd</sup> degree manslaughter conviction and the State Supreme Court upheld the decision. This case has similarities because the circumstances of Aten’s confession bore striking similarities to Sandy Glass’ testimony. Aten was having “hallucinations” that Dr. Norman Peterson testified about;

“Nurses reported Respondent was having hallucinations. He spoke to Respondent about it. She said she felt inner inspiration from God through prayer. She denied hearing the voice of God from somewhere outside herself. He concluded Respondent’s ‘hallucinations’ were more like a phenomenon or an intense religious experience.”<sup>82</sup>

This is very similar to many of the statements from Sandy Glass’s testimony:

**Q- “Now, how exactly do you get a prophecy.....?”**

**A- “Third person speaking in your head kind of, that would be a way to describe it.”**

**Q- “These other ...times that you may have had this prophecy. How did it come to you?”**

**A- “Just a quiet voice in my head.”**

**Q- “Does this voice have a different voice than your own?”**

**A- “Yes”**

**Q- “Is it a male voice or a female voice?”**

**A- “I don’t know.”**

**Q- “Is it always the same voice?”**

**A- “I don’t know. I haven’t thought about that.”**

**Q- “Well take your time.”**

**A- “I believe so.”**

<sup>80</sup> *State v Aten* 79 Wn. App. 79, 900 P.2d 579 (1995). 130 Wn. 2d 640, 927 P.2d 210 (1996).

<sup>81</sup> *State v Aten* 79 Wn. App. 79, 900 P.2d 579 (1995)

<sup>82</sup> *St v Aten* 130 Wn 2d.640 @ 654

**Q- "Is it your own voice?"**

**A- "Not that I am aware of." VRP 2389**

In *Aten* the Supreme Court cited *State v Meyer*,

"This distrust stems from the possibility that the confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or **falsely given by a mentally disturbed individual.**"<sup>83</sup>

The Court also noted:

"Based upon the autopsy findings alone, Dr. Schiefelbein could not reasonably and logically infer Sandra died as a result of a criminal act."<sup>84</sup>

This is precisely the language used by Dr. Selove, the State's own witness:

**"And that's why on the basis of the autopsy and the toxicology alone, I would say that the cause of death and manner are undetermined. Without the investigative information and fire investigative information, I would have no basis to go one step farther and say asphyxia by plastic bag, homicide." VRP 1493**

The Supreme Court also noted:

"Earlier cases from this Court support the reasoning of the Court of Appeals that the corpus delicti is not established when independent evidence supports reasonable and logical inferences of both criminal and non-criminal cause."<sup>85</sup>

In *State v Lung*<sup>86</sup> the Supreme Court said,

"The final test is whether the facts found and the reasonable inferences from them have proved the nonexistence of any reasonable hypothesis of innocence."<sup>87</sup>

And,

"The circumstantial evidence must be consistent with guilt and inconsistent with an hypothesis of innocence."<sup>88</sup>

In the case at hand the State sought to prove its case by eliminating the possibility of a flash fire as the cause of death. This position is not supported by the scientific and medical evidence. Dr. Lacsina performed the autopsy and testified:

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<sup>83</sup> *St v Aten* 130 Wn 2d.640 @ 657, citing *State v Meyer*, 37 Wn. 2d 759, 742 P.2d 180

<sup>84</sup> *Id* @ page 659

<sup>85</sup> *Id* @ page 660

<sup>86</sup> *State v Lung* 70 Wn. 2d 365, 423 P.2d 72 (1967).

<sup>87</sup> *Id* @ page 371

<sup>88</sup> *Id* @ page 372

**Q- "So, the evidence that you have in the autopsy supports the idea that there was a flash fire. Everything corresponds to a flash fire, your initial idea?"**

**A- "Yes" VRP 961**

Mr. White from Western fire Center testified to the possibility of a flash fire. VRP 4595-4596. No witness from the State could conclusively rule out a flash fire. Andrew Cox from the ATF was asked if propane could have leaked and a fire could have occurred and he stated: **"In a general sense, that's absolutely true."** VRP 4913

The Court of Appeals stated in Aten:

"Evidence may lead to a reasonable inference of criminality, or it may lead to a reasonable inference of innocence. But evidence that simply fails to rule out criminality or innocence does not reasonably or logically support an inference of either. It would be speculative to conclude from the autopsy report that Aten was criminally negligent."<sup>89</sup>

The Supreme Court stated:

"In a homicide case where the life or liberty of a citizen is at stake, and where the guilt of the accused must be established beyond a reasonable doubt, the casual connection between the death of the decedent and the unlawful acts of the respondent (accused) cannot be supported on mere conjecture and speculation."<sup>90</sup>

The State's case, outside of the statements of Sandy Glass and the 404(b) evidence was primarily based on the lack of evidence. The theory was that if there is not enough evidence to support the defense theory of accidental death then the jury must believe the States alternative theory of murder, but a lack of evidence does not **prove** the corpus delicti of the crime. Furthermore there are strong statements that indicate the only reason the pathologist changed his determination to homicide is because of the statements of Sandy Glass. Dr. Lacsina stated that there has been no new medical evidence:

**Q- 'And you originally made your findings in the autopsy, your findings of an accident, with a reasonable degree of medical certainty.'**

**A- "With what was available information at that time, yes."**

**Q- "And there has been no medical changes since that date?"**

**A- "No" VRP 961-962.**

Both pathologists testified that they were presented with extensive information about the defendant's personal life as well as the statements from Sandy Glass.

<sup>89</sup> State v Aten 79 Wn. App. 79 @ page 91

<sup>90</sup> St v Aten 130 Wn 2d.640 @661. Citing St v Little 57 Wn 2d 516,

If the corpus delicti existed independently from the story of Sandy Glass this fire would not have been ruled accidental and the death would have either been ruled homicide or undetermined. In January 1998 Dr. Lacsina conducted an autopsy and determined the cause of death to be laryngospasm, possibly caused by a flash fire. The death was ruled accidental. VRP 961 Dr. Lacsina testified that all of the medical evidence was consistent with a laryngospasm and if a flash fire were a possibility he would stand by his initial findings as to cause of death. VRP 964. Dr. Selove also testified that all the medical evidence was consistent with a flash fire death. VRP 1490-1491. Dr. Selove also testified that without the testimony of Sandy Glass he would have no medical reason to rule homicide as a cause of death. VRP 1493-1494 He also testified that the basis for his opinion of suffocation by plastic bag **"relies completely and solely on the statements of Sandy Glass."** VRP 1467 The State did not establish independent proof that a crime was committed and therefore the alleged confession reported by Sandy Glass should not have been admitted. Although no objection was made at trial, the State Supreme Court has addressed corpus delicti arguments raised for the first time on appeal.<sup>91</sup>

#### **Additional Ground #14**

The trial court abused it's discretion by not limiting the prejudicial effect of 404(b) evidence with an appropriate limiting instruction and not calling a mistrial once the evidence was shown to be falsely presented.

Prior to trial there were numerous motions to prevent the State from presenting graphic details of the defendants post death relationships. The basic premise that the State contended is that the defendant was "grooming" several women for sexual relationships after his wife died. This led the trial court to allow the evidence in and to make the following statements in it's memorandum opinion. :

**"It is obvious that the trier of fact may be moved to some level of disgust at Mr. Hacheney's quickening relationship with Ms. Smith"<sup>92</sup>  
"Mr. Hacheney was yearning for sexual freedom."<sup>93</sup>**

**"In Ms. Anderson's case, it is particularly probative due to the behavior exhibited by Mr. Hacheney at the funeral of his wife. Engaging in an intimate embrace with Ms. Anderson at his wife's funeral is overwhelming inconsistent with an innocent grieving spouse. The**

<sup>91</sup> State v. Vangerpen 125 Wn. 2d 782, 888 P.2d 1177 (1995). State v. Riley, 121 Wn. 2d 22, 846 P.2d 1365 (1993)

<sup>92</sup> Memorandum Opinion February 22, 2002. page 8

<sup>93</sup> Id @ page 8

**relationship with Ms. Anderson was fostered prior to December of 1997 and then blossomed after the death of Mrs. Hacheny. There could be no more clear evidence of motive of yearning to be sexually free than consummating long held, but unfulfilled desires.”<sup>94</sup>**

The trial Court noted that the defense contested the State’s version of much of this information. The Trial Court based its opinions and rulings on the truth of the State’s offers of proof. In *State v. Kilgore*<sup>95</sup> this Court of Appeals ruled that it was appropriate for a trial Court to admit evidence based upon the State’s offer of proof but noted:

“If the trial testimony deviated from this offer, the trial court could strike it and instruct the jury to disregard it.”<sup>96</sup>

The Court also added the following footnote:

“Depending upon the nature of the ER 404(b) evidence a mistrial, rather than merely striking the testimony, may be the appropriate remedy.”<sup>97</sup>

The Supreme Court affirmed the decision of the Court of Appeals.<sup>98</sup> In a concurring opinion Justice Chamber wrote:

“Evidence of other bad acts is generally inadmissible. ER 404(b). Exclusion is grounded on the principle that the accused must be tried for the crimes charged, not for uncharged crimes.....A fair trial is denied when the jury is permitted to conclude the accused deserves punishment because of other bad acts.”<sup>99</sup>

This is precisely the situation in the case at hand. The evidence at trial greatly differed from the pre-trial assertions. As has been outlined previously in the Brief of Appellant as well as in previous grounds of this brief, the testimony of Annette Anderson, Nicole Matheson and Lindsey Smith was that no romantic relationship existed prior to Dawn’s death. Perhaps most telling is the allegation of the “intimate embrace” of Annette Anderson at the funeral which was then called a “physical advance” in opening arguments. As is outlined in Additional Ground 12, this allegation is completely false and highly prejudicial.

Furthermore, the Court gave the jury no appropriate instruction on how to deal with this evidence. The record contains no reference to any pre-trial instructions that the court gave the jury to prepare them for the admittance of 404(b) evidence. At the end of trial the

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<sup>94</sup> Id @ page 9

<sup>95</sup> *State v. Kilgore* 107 Wn. App. 160

<sup>96</sup> Id @ page 189

<sup>97</sup> Id @ page 189 footnote 30

<sup>98</sup> *State v. Kilgore* 147 Wn. 2d. 288, 53 P.3d 974

<sup>99</sup> Id @ 296

defense sought to admit a jury instruction from WPIC 5.30. VRP 4971. The State sought to amend the instruction and include "consciousness of guilt." The Court amended the instruction. This allowed the State to argue that an inappropriate grieving process amounts to guilt. This is an incredibly broad application of 404(b) evidence and is inconsistent with this Courts rulings in numerous cases:

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined."<sup>100</sup>

"Doubtful cases should be resolved in favor of the defendant."<sup>101</sup>

In order to accurately evaluate the prejudicial impact of this evidence the Court must take into consideration the facts that literally volumes of information regarding the defendant's sex life after his wife's death was presented to the jury. Not only were the witnesses asked if they had engaged in sexual activity, they were asked precisely what type of sex. Sexually explicit e-mails were copied and given to each juror. This "where, when and how" could serve no probative value to prove any material element of the crime charged. In State v. Coe the Washington Supreme Court held:

"The evidence of Coe's sexually oriented writings was inflammatory on it's face and carried with it a high probability of prejudice to his right to a fair trial."<sup>102</sup>

The jury was told about numerous incidents of impropriety, given sexually explicit e-mails and then directed to use this evidence to determine, **"What behavior demonstrated by Mr. Hachenev is inconsistent with that of a grieving man, inconsistent with innocence?"**  
VRP 5107

"It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."<sup>103</sup>

"In assessing the prejudicial effect the court will normally consider the necessity for the evidence, the availability of other less inflammatory evidence to make the same point, and the probable effectiveness of a limiting instruction under Rule 105."<sup>104</sup>

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<sup>100</sup> State v. Wade 98 Wn. App. 328, 989 P.2d 576

<sup>101</sup> Id @ page 334

<sup>102</sup> State v. Coe 101 Wn 2d 772, 780, 684 P.2d 668

<sup>103</sup> Id @ page 334 (quoting Justice Cardozo, Shepard v. United states, 290 U.S. 96 104)

<sup>104</sup> Washington Practice Courtroom Handbook on Evidence 2004, Karl B. Tegland @ page 229

"When considering misconduct which does not rise to a level of criminal activity, but which may nonetheless disparage the defendant, extreme caution must be used to avoid prejudice."<sup>105</sup>

It is clear that no such caution was employed in the present case. The evidence was not necessary to prove an element of the crime charged, although it may have certainly been necessary to secure a conviction. The Court of Appeals will not disturb a trial court's evidentiary rulings absent an abuse of discretion.<sup>106</sup> An abuse of discretion occurs when the trial court bases its decision on untenable grounds.<sup>107</sup> That is clearly the case here. The trial court based its decisions on the presumption that the evidence would substantiate the State's claim of some sort of plan or scheme to pursue these relationships. In the end all they could do is point to unauthenticated phone records and argue that it showed some level of intimacy. As has been previously cited:

"It is well established that the existence of a fact cannot rest in guess, speculation, or conjecture....This rule is even more essential in criminal cases where the evidence is entirely circumstantial."<sup>108</sup>

The State's theory of motive is inconsistent with the evidence. It is completely contrary to the statements of the key witness Sandy Glass who testified that she believed the defendant killed his wife so he could marry her, and the theory of some sort of pre-death 'grooming' for sex is purely insinuation. The Trial Court's decision to allow volumes of 404 (b) evidence in without an appropriate limiting instruction and failure to call a mistrial once the evidence was unable to substantiate the State's offers of proof was based on untenable grounds and warrants reversal of this conviction.

### **Additional Ground #15**

The trial court abused its discretion by allowing State witness Scott Roberts to give opinion testimony outside of his area of expertise.

During trial, the State asked Scott Roberts, a fire investigator hired by Safeco Insurance, to give his opinion about whether or not he disagreed with the results of the original autopsy report from Dr. Lacsina. VRP 3584. The defense strenuously objected and voir dired Mr. Roberts on his qualifications to give an opinion about toxicology and pathology. He testified that he was not a toxicologist, he had no training in toxicology and he had never interviewed Dr. Logan or heard his testimony in this case. VRP 3584-3587. The objection was overruled.

<sup>105</sup> State v. Meyers 49 Wn App. 243, 247, 742 P.2d 180

<sup>106</sup> <sup>106</sup> State v. Wade 98 Wn. App. 328, 333, 989 P.2d 576

<sup>107</sup> Id @ 333

<sup>108</sup> State v Golladay supra @page 129-130

VRP 3587. Mr. Roberts was allowed to testify that his opinion was that the deceased did not ingest propane and there would have been some propane present. VRP 3588. This is the precise opinion that Dr. Barry Logan was unable to give from the limited testing that was done. Furthermore, it is an opinion that the State had previously said would be inappropriate to ask of Dr. Logan.<sup>109</sup> Mr. Roberts was clearly giving opinion evidence outside his area of expertise. This Court of Appeals has held that:

"The expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness' area of expertise."<sup>110</sup>

This is consistent with rulings of the Washington Supreme Court,<sup>111</sup> and the 9<sup>th</sup> Circuit Court of Appeals.<sup>112</sup> The State did not lay any foundation as to Mr. Robert's qualifications to state an opinion that the head of toxicology for the Washington State Crime Lab would not state. The trial court's decision to allow the opinion was based on untenable grounds and is an abuse of discretion. The opinion was highly prejudicial because it went to the heart of the defense theory and it was an opinion the State was unable to get from the individuals that would have been qualified to give such an opinion.

### **Conclusion**

As previously stated this appellant would ask this Court to consider the cumulative effect of all the errors that deprived this appellant of due process as guaranteed under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution. A case decided by the 9<sup>th</sup> Circuit Court of Appeals that is particularly on point is U.S. v. Frederick 78 F. 3d. 1370. (1996).

The cumulative effect of all the errors in the present case deprived this appellant of a fair trial. This appellant would respectfully would ask this court to reverse the conviction against him.

Dated this 9<sup>th</sup> day of March, 2004.

Respectfully submitted,



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Nicholas D. Hacheney

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<sup>109</sup> Pre-trial Motions Volume IV October 1 Page 579. (See page 25 of this brief)

<sup>110</sup> State v. Farr-Lenzini 93 Wn. App. 453, 461, 970 P.2d 313 (1999)

<sup>111</sup> State v. Roberts 142 Wn. 2d 471, 521, 14 P.3d 717 (2000)

<sup>112</sup> U.S. v. Hankey 203 F.3d 1160 (2000)