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IN THE SUPREME COURT OF WASHINGTON

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Court of Appeals No. 61804-1-I

STATE OF WASHINGTON,

Plaintiff-Appellee,

v.

SIONE P. LUI,

Defendant-Appellant.

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BRIEF AMICUS CURIAE
OF THE
WASHINGTON ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS (WACDL)

Amanda E. Lee
WSBA NO. 19970
On Behalf of the *Amicus* Committee,
Washington Association of Criminal Defense Lawyers
810 Third Avenue, Suite 500.
Seattle, WA 98104
(206) 805-0990

Sheryl Gordon McCloud
WSBA No. 16709
Co-Chair, *Amicus* Committee
Washington Association of Criminal Defense Lawyers
710 Cherry St.
Seattle, WA 98104
(206) 224-8777
Attorney for WACDL

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I. Introduction

The issue in this case is whether the Confrontation Clause is violated when a State expert witness testifies at trial based on work performed by a non-testifying expert. The State relies heavily on cases decided after *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009) finding no confrontation clause violation where the expert witness offered his or her own opinion based on forensic testing performed by another analyst. State's Supplemental Brief, at 7-10. Overlooked by the State in its argument is the particular problem of allowing a surrogate witness to testify regarding the specific processes and procedures employed by the non-testifying analyst.

A number of fairly recent incidents demonstrate that the work of individual analysts and even entire forensic laboratories may be compromised by professional misconduct, systemic inaccuracies, and lax oversight, calling into doubt the accuracy and reliability of their work product. If for no other reason than this, confrontation of individual experts directly involved in forensic analysis of evidence must be ensured to permit the defendant to test the reliability and accuracy of their work in "the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). Confrontation of the analyst who performed the testing that is the basis for expert interpretation

is “one means of assuring accurate forensic analysis.” *Melendez-Diaz*, 129 S. Ct. at 2536.

II. Recent Cases of Improprieties in Washington State Laboratories Demonstrate Why Confrontation of Experts Who Performed Forensic Analysis Matters

Following is an incomplete, but representative, sampling of episodes involving fraud, incompetence, or other serious deficiencies in forensic analysis.

A. Washington State Toxicology Lab: Fraudulent Certifications of Simulator Solution Testing

The Washington State Toxicology lab (“WSTL”) prepares simulator solutions of ethanol and water, used by state and local law enforcement agencies in Datamaster breath analyzer machines. *See*, Forensic Investigations Council, Report on the Washington State Toxicology Laboratory and the Washington State Crime Laboratory 4-6, April 17, 2008, *available at* <http://www.corpus-elicti.com/ficinvestigative-report04-17-08.pdf> [hereinafter *FIC Report*]; Order Granting Defendants’ Motion to Suppress, *State v. Ahmach, Sanafim, et al.*, No. C00627921, at 1-2 (King Cty. Dist. Ct., East Div. Jan. 30, 2009). These solutions are prepared according to protocols established by the State Toxicologist and require that at least three analysts test the solutions and certify that they have performed the test and that the published test results are correct. *Id.*

at 5-6. As of 2007, however, the practice was to have sixteen analysts test and certify the simulator solution, so that any one of the analysts would be able to testify if needed. *Id.*

In 2007, Ann Marie Gordon was a manager of the WSTL and was among the employees who routinely certified that she had prepared and tested simulator solutions. *Ahmach*, Order at 3. Beginning as early as 2003, however, Gordon had ceased personally preparing and testing solution; rather, she delegated this to another analyst. Gordon then falsely signed certifications under penalty of perjury indicating that she had prepared and tested the solutions herself and that they conformed to the State Toxicologist's standards. *Ahmach*, Order at 20.

Gordon's falsification of certifications came to light in 2007, after the Washington State Patrol received two anonymous tips. The three-judge panel hearing the *Ahmach* matters noted they did not know whether Gordon's false certificates were used in court, "but considering the number of DUI trials, it is more than likely that some were." *Id.* at 21. As noted by the Forensic Investigations Council, Gordon's misconduct "prevented the utilization of breath test results in courts all over the State of Washington, and has raised a cloud of doubt over the Toxicology Laboratory." *FIC Report*, at 11. The effects of Gordon's intentional misconduct were amplified by other serious deficiencies exposed during

the investigation and litigation that followed the tips to the WSP. Among other issues, the court in *Ahmach* found: (1) analysts regularly signed off on declarations that were prepared by support staff and not verified for accuracy and that were, in some cases, erroneous, *Ahmach*, Order at 5; (2) software used for certain simulator solution calculations was never verified for accuracy and produced erroneous calculations over a two-year period, *id.* at 5; (3) declarations for certification were drawn up by support staff but not checked against the chromatographs or worksheets for accuracy, leading to at least 150 non-software errors, *id.* at 6; (4) toxicologists were trained to discard data from simulator solution testing “if any single data entry lay outside the range for the mean value of the solution as dictated by the protocol,” *id.* at 8, a practice that defeated the entire purpose of the tests; and (5) machine bias, which affects a Datamaster machine’s accuracy, was not made readily available to the public and few in the legal community were aware of the bias, *id.* at 11.

The plurality of justices in *Melendez-Diaz* recognized that forensic analysts may “sometimes face pressure to sacrifice appropriate methodology for the sake of expediency,” *Melendez-Diaz*, 129 S. Ct. at 2536, and indeed, Gordon told the Washington State Patrol during a 2004 investigation of simulator solution policies and procedures that “she did not have time to follow WSP policies and would not do so,” *Ahmach*,

Order at 7.

It is immaterial to this Court's decision whether Gordon would or would not have lied under oath had she been asked about the certifications at a trial. Confrontation is a procedural right, not a substantive guarantee. *Crawford*, 541 U.S. at 61-62. And as the Supreme Court noted in *Melendez-Diaz*, at 2537:

Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. See *Coy v. Iowa*, 487 U.S. 1012, 1019, 108 S. Ct. 2798, 101 L.Ed.2d 857 (1988). And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.

The need for confrontation is apparent when the effect of a surrogate is considered. A surrogate expert reviewing the non-testifying analyst's report would not know that the work was actually done by support staff. The surrogate might endorse the analyst's qualifications on cross-examination, not realizing that the work was actually done by someone less qualified. Similarly, a surrogate may be unaware that the reported results were not checked for accuracy against the chromatograph readings. The surrogate would be particularly unlikely to know that the non-testifying analyst had discarded any data indicating that the solution was *not* within the required concentration range. Put another way, a surrogate who has reviewed the paperwork generated by an analyst in the

toxicology lab might testify in good faith testify, but incorrectly, that a qualified analyst had followed the protocol and procedures, whereas cross-examination of the analysts themselves could reveal the shoddy practices that were in fact employed.

B. Washington State Patrol Crime Laboratory, Marysville: Diversion and Use of Heroin from Investigative Files

Michael Hoover was a chemist in the Washington State Patrol Crime Laboratory (WSPCL) in Marysville. In the late 1990s, his co-workers began noticing that Hoover assigned himself a “disproportionately large number of heroin cases,” reassigned others’ heroin cases to himself, and engaged in other behavior that triggered suspicion Hoover was using drugs. *State v. Roche*, 114 Wn. App. 424, 428-29, 59 P.3d 682 (2002). More than two years after Hoover’s conduct first drew attention, in September 2000, he was confronted by a coworker, at which point he falsely claimed that he was assisting a trooper who had requested purified heroin for dog training purposes. *Id.* at 430. In December, 2000 following an investigation by the WSP, Hoover was interviewed and ultimately admitted he was stealing heroin from investigative files and using it at the office to self-medicate for back pain. *Id.* at 430-31. The Court of Appeals found that “Hoover’s credibility has

been totally devastated by his malfeasance.” *Id.* at 437.

Both of the defendants in *Roche* were tried and convicted, in unrelated cases, of possession of methamphetamine prior to the discovery of Hoover’s misconduct. Although there was no indication in Roche’s case that Hoover corrupted or contaminated the test, the court concluded that the events were “serious enough that a rational trier of fact could reasonably doubt Hoover’s credibility regarding his testing of any alleged controlled substances, not just heroin, and regarding his preservation of the chain of custody during the relevant time period.” *Id.* at 690-91. The right of confrontation appears nowhere in the *Roche* decision; but the court noted that shortly after Hoover’s misconduct was discovered, the Snohomish County Assistant Chief Criminal Deputy, Michael Downes, issued an internal memorandum to the Snohomish trial deputies directing them to not call Hoover as a witness. Hoover’s diversion and use of heroin ultimately “led to the dismissal of hundreds of pending drug cases in Snohomish, Island, Skagit, Whatcom, Jefferson and Clallam counties. Ruth Teichroeb, *Oversight of Crime-Lab Staff has Often Been Lax*, Seattle Post-Intelligencer, July 23, 2004, available at http://www.seattlepi.com/local/183203_crimelab23.html [hereinafter *PI Oversight Article*].

Although the WSPCL eventually discovered Hoover’s misconduct, there is no assurance that laboratories will successfully police themselves.

Even here, it appears that Hoover's misconduct continued for a substantial period of time before it was pursued. *Roche*, 114 Wn. App. at 430 (noting that more than two years passed from when Hoover's coworker first noticed suspicious behavior to when Hoover was formally investigated). As the opinion in *Roche* notes, Hoover also appeared to be engaged in the practice of "dry-labbing," the practice of "testing a single purified sample and applying the results across a number of cases." *Id.* at 429. A surrogate expert who reviewed Hoover's data could in good faith, but incorrectly, testify that she had verified Hoover's conclusion that the chromatograph readings proved that the substance was a controlled substance. Only Hoover himself would know that he had copied the chromatograph from another sample. Here, Hoover admitted some of his misconduct when confronted by video evidence captured by the WSP. In another case, the defendant's best hope of uncovering such misconduct would be through his own cross-examination of the analyst.

C. WSPCL: Destruction of Exculpatory Test Results and Attempted Cover-Up

John Brown, a forensic scientist at the WSCPL conducted a DNA test on a rape kit in 1997. He compared the DNA with the crime lab's database, and did not find a match. *State v. Barfield*, No. 48147-9-I, 2003 Wash. App. LEXIS 2060, at *2 (Div. I Sept. 15, 2003). His supervisor,

Donald MacLaren, reviewed the test results and found that Brown had made an error. Upon retesting, the DNA sample matched the DNA profile of Craig Barfield, who charged with rape. *Id.* at *1-2. After Brown retested the DNA and got the match to Barfield, he “discarded” his original results and draft report, leaving no documents related to it in the file. *Id.* at *2.

Prior to trial, Brown was interviewed by Barfield’s defense counsel. At first, he lied about having run any tests that excluded Barfield as a suspect and about having destroyed evidence of the initial test. Later in the same interview, however, Brown admitted having preformed the original test, prepared a draft report finding no match, and discarding the results after he retested the sample. *Id.* at *2.

Brown was an experienced DNA analyst, having been one of the founders of the WSPCL’s DNA section. He had tested evidence in 300 cases and testified in 40 DNA cases. *PI Oversight Article*. Yet he told the PI during an interview that the “harm” of the initial test result was that it might assist the defense: “I saw it as much more harm that the defense would get hold of the data saying there's no match in the database, and they'd prance around and say it proves the innocence of their client.” *PI Oversight Article*.

At trial, Brown testified that he had lied to defense counsel, saying

he was embarrassed about the mistake. Barfield was convicted of the rape and sentenced to life without parole as a persistent offender. *Barfield*, 2003 Wash. App. LEXIS 2060, at *2. As the experience in Brown shows, confrontation – even in an interview – may pressure a deceitful analyst into revealing mistakes or misconduct.

D. WSPCL. Unsound Science and Incompetence in Hair Analysis

Arnold Melnikoff joined the WSPCL in 1989, after having served as the manager of the Montana Criminalistics Laboratory for nearly twenty years. *Melnikoff v. Washington State Patrol*, 2008 Wash. App. LEXIS 2 (Div. II Jan 3, 2008). During his employment in Montana, Melnikoff testified in hundreds of cases involving microscopic hair analysis. Two of these were cases involving sexual assault in which the defendants were later exonerated by DNA evidence. *See, Melnikoff*, 2008 Wash. App. LEXIS at * 1. *See also State v. Bromgard*, 261 Mont. 291, 294, 862 P.2d 1140 (1993) (affirming conviction for sexual intercourse without consent); *State v. Kordonowy*, 251 Mont. 44, 47-48, 823 P.2d 854 (1991) (affirming conviction for burglary and sexual intercourse without consent). At the time Melnikoff testified in the *Kordonowy* case, he was already working for the WSPCL.

Bromgard was exonerated in 2002 through the efforts of the

Innocence Project at Cardozo Law School. *Melnikoff*, 2008 Wash. App. LEXIS at *2. The co-director of the Project then complained to the WSP, which launched an investigation into Melnikoff's methods. The WSP determined that Melnikoff engaged in misconduct in connection with his testimony, case analysis, and statistical comparisons in the *Bromgard* matter, and that he provided "inaccurate, incorrect, misleading, and confused statements in the *Kordonowy* trial." *Id.* at *3. Among other things, Melnikoff misapplied probabilities and statistics in microscopic hair analysis, falsely telling juries in his testimony that there was a 1 in 10,000 chance that a hair from the crime scene came from someone other than the defendant. As the Court of Appeals concluded, Melnikoff lacked understanding of the science and statistics in the field of hair analysis and probability calculations. *Id.* at *6. This rendered him ineffective as a witness in future cases, and called into question his judgment, objectivity, and trustworthiness. *Id.* at 10-11.

A careful cross-examination of a "pseudo-scientist" such as Melnikoff may reveal the flaws in his analysis. For example, the defendant could explore his training in and understanding of probability and statistics. The defendant could also explore more thoroughly the precise similarities found between the suspect and known hair samples.

III. Improprieties and Misconduct in Other Jurisdictions Also Supports the Need for Confrontation of Expert Witnesses Who Perform the Forensic Analysis

No jurisdiction is immune from the risk of individual misconduct or systemic flaws that undermine the reliability of forensic analysis. This section discusses just two of the many episodes of forensic misconduct that have occurred nationally and garnered widespread attention.

A. North Carolina: Misconduct by Prosecutor and Private DNA Testing Firm

Michael Nifong was appointed to serve as District Attorney in Durham County, North Carolina in 2005, and faced election in 2006. In March, 2006 an exotic dancer reported that she had been raped by three men during a party attended by members of the Duke Lacrosse team. *See Amended Findings of Fact, Conclusions of Law and Order of Discipline, North Carolina State Bar v. Nifong*, 06 DHC 35 at ¶¶ 3-5 (N.C. State Bar Disciplinary Hrg. Comm'n July 24, 2007) [hereinafter *Nifong Disbarment Order*]. In April, the rape kit was turned over to a private company, DNA Security ("DSI"), for sensitive DNA testing that was beyond the capability of the State Bureau of Investigation. *Nifong Disbarment Order* at ¶ 44. Over the course of the next few weeks, Dr. Brian Meehan, the lab director for DSI met with Nifong and explained that the DNA testing had isolated DNA of up to four different men on several items from the rape kit, and

none of the DNA matched any members of the lacrosse team. *Id.* at ¶¶ 47, 55-56. Although this information was exculpatory, *id.* at ¶ 57, Nifong directed Meehan to prepare a report that included just the results two fingernail specimens, which could have come from two of the players. All of exonerating findings would be omitted. *Id.* at ¶¶59-60, 63. Nifong produced Meehan's limited report to defense counsel, but disclosed nothing related to the exculpatory results. *Id.* at ¶¶ 65-68. Indeed, Nifong expressly denied the existence of any exculpatory material and told the court in a hearing that he had turned over "everything I have." *Id.* at ¶ 70, 74.

In August 2007, after weeks of maneuvering, the defendants filed a motion to compel. At a hearing in September, Nifong stated that the written report he had already turned over encompassed all of DSI's tests and everything he had discussed with DSI. *Id.* at ¶¶ 84-86. Only after the court ordered it did Nifong produce about 1850 pages of documents from DSI, analysis of which made it clear there were other DNA results. *Id.* at ¶¶ 92-94. At a December hearing on another motion to compel, Meehan testified about the DNA testing and his interactions with Nifong. *Id.* at ¶ 97. On cross-examination, Meehan disclosed that there were three meetings at which he shared the exculpatory test results with Nifong, that he and Nifong agreed to limit disclosure of the exculpatory evidence, and

that he would have prepared a report that contained all of the DNA test results if Nifong had asked him to. *Id.* at 97.

Nifong removed himself from the case shortly thereafter, and the Attorney General of North Carolina took over. Within weeks, all of the charges against the Duke lacrosse players were dropped. The prosecution of the Duke players generated intense media coverage and has been recognized for revealing the dangers of overzealousness in prosecution. Yet it also reveals the importance of confrontation: Nifong was willing to lie, but the expert who performed the forensic analysis was not. Had Nifong called a surrogate for Meehan, his deception might have succeeded: a surrogate would have known nothing about the other testing that was not reduced to writing. The truth came out because the defense questioned Meehan himself.

B. FBI Explosives Unit: Unsound Science Revealed by Agency Whistleblower

Frederic Whitehurst was a leading explosives scientist employed by the FBI Laboratory in the 1990s when he submitted concerns of fraud and abuse to the FBI's Office of Professional Responsibility, the DOJ's Office of Inspector General, and the FBI's Office of General Counsel. The OIG conducted a lengthy investigation that substantiated many of Whitehurst's allegations, and rejected many others. *See generally,*

USDOJ/OIG Special Report: The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-related and Other Cases, Executive Summary (DOJ April 1997) available at <http://www.justice.gov/oig/special/9704a/index.htm> [hereinafter *OIG Executive Summary*]. The OIG found serious shortcomings in connection with several explosives investigations, including both the 1993 World Trade Center bombing and the Oklahoma City Bombing, among others. For instance, the OIG concluded that an explosives analyst gave inaccurate and incomplete testimony in the trial of Mohammed Salameh “and testified to invalid opinions that appeared tailored to the most incriminating result.” OIG Executive Summary Section III.C. The analyst came up with an estimate of the amount of explosive used in the 1993 WTC bombing, and then used unscientific and speculative methods to determine that the defendants had the capacity to make just the amount of explosive needed. During the OIG investigation, the analyst conceded that “he had no basis from the crime scene for determining the type of explosive used,” and that the main charge “could have been anything.” *Id.*

The same analyst produced a report used in the Oklahoma City case identifying the type of explosive used that was “inappropriate based on the scientific evidence available to him.” OIG Executive Summary Section III.G. Similar to his approach in the World Trade Center case, the

analyst estimated the weight of the main charge based not on any scene evidence, but on what one of the defendants had allegedly purchased for the bomb.

Whitehurst's reporting led to the reassignment and demotion of many FBI agents and analysts, and to recommendations for sweeping systemic reforms in the FBI's crime labs. The OIG specifically recommended that "instead of one report emanating from the Laboratory with analytical results reflected in the body of that report without attribution to individual examiners, each examiner who performs work should prepare and sign a separate report." OIG Executive Summary Section Seven; *see also* OIG Report, Part Seven, Section V.3 ("[Reports] should fully disclose the involvement of the issuing examiner in the case and all pertinent information and findings.") The OIG explained that "having examiners prepare separate reports will more clearly identify responsibility and the work underlying particular conclusions, which in turn will help identify the examiners who should be witnesses in court proceedings." OIG Report, Part Six, Section IV, *available at* <http://www.justice.gov/oig/special/9704a/24part6a.htm>. Although this recommended reform may not be founded on concerns for defendants' rights of confrontation, it clearly demonstrates OIG's recognition of the risks of putting on forensic analysis through witnesses who did not do the

work.

IV. Conclusion

Regrettably, the episodes discussed above demonstrate that the risks of incompetent or fraudulent forensic analysis are real. Confrontation is an important tool in ferreting out these instances. Just as the Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, it also prohibits the use of surrogate expert witnesses.

DATED this 15th day of August, 2010.

Respectfully submitted,

Amanda E. Lee
WSBA No. 19970
Attorney for WACDL

Sheryl Gordon McCloud
WSBA No. 16709
Attorney for WACDL

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I certify that on the 16th day of August, 2010, a true and correct copy of the foregoing BRIEF *AMICUS CURIAE* OF THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (WACDL) was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

David Zuckerman
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
Attorneys for Defendant-Appellant

Deborah Dwyer,
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney
West 554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Attorney for Plaintiff-Appellee

Amanda E. Lee

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