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Case # 267890

**Statement of Additional Grounds
for Review**

State of Washington

v.

Frederick D. Russell

ORIGINAL

FILED

SEP 16 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: *JP*



NO. 26789-0-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

FREDERICK DAVID RUSSELL,

Defendant/Appellant.

STATEMENT OF ADDITIONAL GROUNDS

Frederick David Russell
Appellant DOC #314145
Coyote Ridge Correction Center
P.O. Box 769 Connell, WA 99326

1 **A. Pre-Trial**

2 **1.** Mr. Russell's *Miranda* rights, afforded by the Fifth Amendment, were violated and
3 statements made by him wrongfully admitted into evidence at trial. (RP 2742, ll. 13-17)

4 Washington State Patrol (herein, WSP) Trooper Murphy questioned Mr. Russell at
5 Gritman Memorial Hospital prior to a *Miranda* warning being given. Statements made in
6 response by Mr. Russell were admitted into evidence at trial. (RP 1397 to 1400) Those statements
7 were solicited from Mr. Russell during a custodial interrogation and circumvented the reading of
8 *Miranda*.

9 Trooper Murphy had every intention to arrest Mr. Russell for vehicular homicide, once
10 his identity had been established and prior to the questioning at issue. (RP 1405, ll. 1-13; 1406,
11 ll. 1-5, 15-18; 1422, ll. 18-25 to 1423, ll. 1-6) Trooper Murphy observed gouge and skid marks at
12 the scene that indicated, to him, impact had occurred while an Eastbound vehicle crossed over
13 the center fog line in a no-passing zone. (RP 1395, ll. 22-24 to 1396, ll. 1-6; RP 1403, ll. 21-23 to
14 1404, ll. 1-25)

15 Prior to interrogating Mr. Russell, Trooper Murphy had already spoken with Tony Catt
16 and David Uveruaga of the Moscow Fire Department, who indicated that Mr. Russell was the
17 driver of the Eastbound vehicle and had the odor of intoxicants on his breath. (RP 1421, ll. 6-25
18 to 1422, ll. 1-3) Trooper Murphy then talked with Vihn Tran, the driver of the fourth vehicle, and
19 Mr. McFarland, Mr. Russell's passenger whom also indicated that Mr. Russell was the driver.
20 (RP 1422, ll. 4-13)

21 Finally, Trooper Murphy chose to make contact with Mr. Russell and immediately noted
22 the odor of alcohol coming from his person. (RP 1425, ll. 17-24) At this point in time Trooper
23 Murphy continued to perform his interrogation of Mr. Russell with the full knowledge and
24 intention of placing Mr. Russell under arrest for vehicular homicide. (RP 1426, ll. 22-25 to 1427,
25 1.1) Trooper Murphy's excuse for interrogating Mr. Russell, *Miranda* withheld, is the very

1 reason that *Miranda* warnings exist in this country. The Trooper testified: “Because I was still in
2 investigation – I hadn’t heard his side of the story....after I had all of the information that I
3 could I placed him under arrest for vehicular homicide.” (RP 1427, ll. 4-5, 15-17)

4 Mr. Russell made statements that Trooper Murphy believed to be inaccurate, yet the
5 Trooper continued to interrogate him further. (RP 1412, ll. 12-25 to 1413, ll. 1-18)

6 Trooper Murphy’s surreptitious interrogation of Mr. Russell occurred while in custody.
7 This custodial interrogation violated Mr. Russell’s *Miranda* rights as envisaged by the Fifth
8 Amendment. Mr. Russell invoked his right not to answer any further questions immediately upon
9 those rights being explained to him. (RP 1403, ll. 8-10, 1413, ll. 19-24 to 1414, ll. 1-7)

10 During a 3.5 hearing at trial, defense counsel objected to the admissibility of these
11 harmful statements, citing *State v. Lewis*, 32 Wn. App. 13 (1982). (RP 1434 to 1439) Without the
12 *Miranda* rule “law enforcement in every particular case can conduct an investigation as long as
13 they want, very well knowing that they have sufficient probable cause to arrest an individual but
14 never formally placing that person under arrest for the sole purpose of gathering as much
15 information as they can without advising someone of their rights.” (RP 1436, ll. 15-21)

16 The error, of admitting Mr. Russell’s statements, was obviously harmful and the impact
17 self-evident. The content of those statements which Mr. Russell is alleged to have made conflict
18 with those of two other witnesses and evidence observed at the scene by Trooper Murphy. (RP
19 1412, ll. 1-25 to 1413, ll. 1-18)

20 The jury was lead to believe that Mr. Russell’s election not to testify at trial was an
21 endorsement of the unlawfully obtained statements, which proved to be highly prejudicial. Mr.
22 Russell, prior to his inevitable arrest, should have been afforded the same right - not to make
23 potentially incriminating statements - as he would otherwise be given at trial.

24 “[T]here can be no doubt that the Fifth Amendment privilege is available outside of
25 criminal court proceedings and serves to protect persons in all settings in which their freedom

1 of action is curtailed in any significant way from being compelled to incriminate themselves.”
2 *Miranda v. Arizona*, 384 U.S. 436, 467, 16 L. Ed.2d 694, 86 S.Ct. 1602 (1966).

3 “The protections of the Fifth Amendment are directed squarely toward those who are the
4 focus of the government’s **investigative and prosecutorial** powers. ... A communication does
5 not enjoy the Fifth Amendment privilege unless it is testimonial. ... In all instances, we have
6 afforded the Fifth Amendment protection if the disclosure in question was being **admitted**
7 **because of its content** rather than some other aspect of the communication.” *Hiibel v. Sixth*
8 *Judicial Dist. Ct. of Nevada, et al.*, 542 U.S. 177, 193-94, 159 L. Ed.2d 292, 124 S.Ct. 2451
9 (2004). (Emphasis supplied.)

10 The compelled statements at issue in this case are clearly testimonial. It is significant that
11 the communication must be made in response to a question posed by a police officer. “The vast
12 majority of verbal statements thus will be testimonial and, to that extent at least, will fall within
13 the privilege.” *Doe v. United States*, 487 U.S. 201, 213-14, 101 L. Ed.2d 184, 108 S.Ct. 2341
14 (1988).

15 “The *Miranda* exclusionary rule...sweeps more broadly than the Fifth Amendment
16 itself.” *Oregon v. Elstad*, 470 U.S. 298, 306, 84 L. Ed.2d 222, 105 S.Ct.1285 (1985). In the
17 different context of the Sixth Amendment’s Confrontation Clause, “[w]hatever else the term
18 [‘testimonial’] covers, it applies at a minimum...to police interrogations.” *Crawford v.*
19 *Washington*, 541 U.S. 36, 68 158 L. Ed.2d 177, 124 S.Ct. 1354 (2004).

20 Trooper Murphy would not have allowed Mr. Russell to leave before or during his
21 interrogation, prior to a formal arrest. During a pre-trial hearing in 2001, only three (3) months
22 after the accident, Trooper Murphy testified to the following:

23 “[A]s I was doing my investigation, because I was investigating a possible felony, while I
24 was there investigating, Mr. Russell wasn’t free to leave until I did my investigation. ... He
25 wasn’t free to leave. ... [I]f he got up while I was doing my investigating and started out of the

1 hospital, I wouldn't have let him leave until I finished my investigation.” (PTRP¹ 87, ll. 18-21;
2 88, ll. 6-10)

3 An Idaho State Patrolman (herein, ISP), Baldwin, stood guard at the door of Mr.
4 Russell's hospital room. (RP 1407, ll. 1-24) Trooper Murphy testified at trial and the court made
5 a finding to the fact that Mr. Russell was not free to leave prior to the *Miranda* warning. (RP
6 1410, ll. 9-13)

7 Trooper Murphy also testified that Mr. Russell indicated a concern with the interrogation
8 “because [the Trooper] kept on asking the same questions over and over”. (RP 1397, ll. 24 to
9 1398, ll. 24; 1399, ll. 22 to 1400, ll. 12) (quoting RP 1400, ll. 8-9)

10 Mr. Russell's detainment and initial questioning by Trooper Murphy was the epitome of a
11 custodial interrogation. Custodial interrogation is clearly defined by the following relevant
12 clearly established law, as it pertains to the date of Mr. Russell's conviction.

13 “For purposes of 28 USC 2254(d)(1), clearly established law as determined by this Court
14 ‘refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the
15 relevant state-court decision’. *Williams v. Taylor*, 529 U.S. 362, 412, 146 L. Ed.2d 389, 120
16 S.Ct. 1495 (2000). We look for ‘the governing legal principles or principles set forth by the
17 Supreme Court at the time the state court renders its decision’. *Lockyer v. Andrade*, 538 U.S. 63,
18 71-72 155 L. Ed.2d 144, 123 S.Ct. 1166 (2003).” quoting *Yarborough v. Alvarado*, 541 U.S. 652,
19 660 158 L. Ed.2d 938 (2004).

20 “*Miranda* itself held that pre-interrogation warnings are required in the context of
21 custodial interrogations.” *Id.*, at 661, (citing *Miranda*, 384 U.S., at 458). Washington State courts
22 have held that “the Fifth Amendment right against compelled self-incrimination requires police
23 to inform a suspect of his or her *Miranda* rights before a custodial interrogation”. *State v.*
24 *Grogan*, 147 Wn. App. 511, 516-17, 195 P.3d. 1017 (2008), (quoting *State v. Cunningham*, 116
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¹ Pre Trial Report of Proceedings, Allred-e.
Statement of Additional Grounds
1. Statements made absent *Miranda*
Admissibility>>>Violation of Rights

1 Wn. App. 219, 227, 65 P.3d. 325 (2003)) (citing *State v. Baruso*, 72 Wn. App. 603, 609, 865
2 P.2d 512 (1993)).

3 “The *Miranda* Court explained that ‘custodial interrogation’ meant ‘**questioning**
4 **initiated by law enforcement officers after a person has been** taken into custody or otherwise
5 **deprived of his freedom of action in any significant way’.**” *Yarborough*, 541 U.S., at 661;
6 (quoting *Miranda*, 384 U.S., at 444). (Emphasis supplied.)

7 The Court first applied the custody test in *Oregon v. Mathiason*, 429 U.S. 492, 50 L.
8 Ed.2d 714, 97 S.Ct. 711 (1977) (per curiam). “In *Mathiason*, a police officer contacted the
9 suspect after a burglary victim identified him. At the outset of the questioning, the officer stated
10 his belief that the suspect was involved in the burglary but that he was not under arrest. He was
11 then allowed to leave. The Court held that the questioning was **not custodial because** there was
12 ‘no indication that the questioning took place in a context where [the suspect’s] freedom to
13 depart was restricted in any way’.” *Ibid.*, (citing *Mathiason*, at 495).

14 Mr. Russell’s case is quite similar to *Mathiason*, except for two undeniable distinctions.
15 Trooper Murphy did not warn Mr. Russell of his beliefs or intentions, nor was Mr. Russell at any
16 time free to leave. The converse of *Mathiason* applies to Mr. Russell’s custodial interrogation
17 and arrest.

18 “[I]nterrogation’ is defined as ‘any words or actions on the part of the police...that the
19 police should know are reasonably likely to elicit an incriminating response from the suspect’.”
20 *State v. Kendall*, 2000 Wash.App. LEXIS 895 (2000), (quoting *State v. Richmond*, 65 Wn. App.
21 541, 544, 828 P.2d 1180 (1992); *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.
22 Ed.2d 297 (1980)).

23 As previously stated, the primary objective of Trooper Murphy’s first contact with Mr.
24 Russell was to confirm the identity of the driver of the Eastbound vehicle involved in contact
25 over the center line. Once it was established that he had made contact with that driver, Trooper

1 Murphy was negligent to ignore Mr. Russell's expectations.

2 This analytical framework was ratified in *Stansbury v. California*, 511 U.S. 318, 128 L.
3 Ed.2d 293, 114 S.Ct. 1526 (1994). *Stansbury* provided that "the initial determination of custody
4 depends on the objective circumstances of the interrogation, not on the subjective views
5 harbored." *Id.*, at 323.

6 Once that element of Trooper Murphy's investigative curiosity was satisfied, a new
7 realm of concern should have been explored. Trooper Murphy's irreverence for Mr. Russell's
8 rights and perceptions of the situation must not be excused.

9 *Yarborough* explained "more recent cases instruct that custody must be determined based
10 on how a reasonable person in the suspect's situation would perceive his circumstances. In
11 *Berkemer v. McCarty*, 468 U.S. 420, 82 L. Ed.2d 317, 104 S.Ct. 3138 (1984), the Court held that
12 '[a] policeman's unarticulated plan has no bearing on the question whether a suspect was "in
13 custody" at a particular time'. *Id.*, at 442. '[T]he only relevant inquiry is how a reasonable man
14 in the suspect's position would have understood his situation'. *Ibid.*" *Supra*, at 663.

15 Courts must examine "all of the circumstances surrounding the interrogation" and
16 determine "how a reasonable person in the position of the individual being questioned would
17 gauge the breadth of his or her freedom of action". *Stansbury*, at 322, 325.

18 In *Thompson v. Keohane*, 516 U.S. 99, 133 L. Ed.2d 383, 116 S.Ct. 457 (1995), the Court
19 described the *Miranda* custody test in detail: Washington State court decisions parallel those of
20 the United States Supreme Court by necessity.

21 *Thompson* found that "two discrete inquiries are essential to the determination" of a
22 custodial interrogation. *Id.*, at 112. "Custody is a mixed question of fact and law." *Grogan*, 147
23 Wn. App. At 517, (quoting *State v. Solomon*, 114 Wn. App. 781, 787, 60 P.3d. 1215 (2002)
24 (citing *Thompson*, 516 U.S. at 112-13)).

25 "The factual inquiry determines 'the circumstances surrounding the interrogation'." *Ibid.*

1 (quoting *Solomon*, 114 Wn. App., at 787; *Thompson*, 516 U.S., at 112).

2 “The legal inquiry determines, given the factual circumstances, whether [a] ‘reasonable
3 person [would] have felt he or she was not at liberty to terminate the interrogation and leave’.”
4 *Ibid.* (quoting *Solomon*, 114 Wn. App., at 787-88) (alteration in original) (quoting *Thompson*,
5 516 U.S., at 112); also see, *Yarborough*, 541 U.S., at 663.

6 The crux of the reviewing decision occurs once the circumstantial test has been applied
7 and it is determined that the defendant had, in fact, perceived to endure the three elements
8 essential for applying *Miranda* protection.

9 “Whether an officer should have given *Miranda* warnings to a defendant depends on
10 whether the examination or questioning constituted (1) a custodial (2) interrogation (3) by a state
11 agent.” *Grogan*, 147 Wn. App., at 516-17, (quoting *Solomon*, 114 Wn. App., at 787) (citing *State*
12 *v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992)); also see, *State v. Heritage*,
13 152 Wn.2d 210, 214 (2004).

14 “[T]he reviewing court applies an objective test to determine the ultimate inquiry:
15 whether there was a formal arrest or restraint [on freedom of movement] of the defendant to a
16 degree [associated] with a formal arrest.” *Id.*, at 517, (quoting *State v. Rehn*, 117 Wn. App. 142,
17 153, 69 P.3d 379 (2003)) (alteration in original) (citing *Thompson*, 516 U.S., at 113; *Solomon*,
18 114 Wn. App., at 788).

19 As previously stated, all subjective determinations must be based on the perceptions of a
20 reasonable person in that situation **and** all other inquiries are irrelevant. See, *Yarborough*, 541
21 U.S., at 663.

22 If argument were made that either Trooper Murphy’s knowledge of the suspect or the
23 length of time passed from the collision to the interrogation were at issue for consideration, it
24 would be lost.

25 “In *California v. Beheler*, 463 U.S. 1121, 1125, 77 L. Ed.2d 1275, 103 S.Ct. 3517 (1983)

1 (per curiam), the Court noted that how much the police knew about the suspect and how much
2 time had elapsed after the crime occurred were irrelevant to the custody inquiry.” *Supra*, at 663.

3 “A defendant is in custody for purposes of *Miranda* when his or her freedom of action is
4 curtailed to a ‘degree associated with formal arrest’.” *Grogan*, 147 Wn. App., at 517, (quoting
5 *Beheler*, 463 U.S., at 1125; *Solomon*, 114 Wn. App., at 787).

6 Mr. Russell maintains, as assigned in the appellant’s brief, that the trial court’s
7 Conclusion of Law 2 as it relates to probable cause to arrest is legally erroneous and/or not
8 supported by the Findings of Fact. (CP 1001)

9 The argument here, in part, is that if the reviewing court determines probable cause to
10 arrest Mr. Russell existed, then it existed prior to the interrogation of Mr. Russell. Nothing could
11 have been gained by questioning the suspect in this case prior to *Miranda*; other than unlawfully
12 obtained self-incriminating, testimonial statements for fueling prosecutorial efforts. Our Courts
13 have historically and clearly expressed their disapproval of this investigatory practice.

14 In *State v. Lewis*, 32 Wn. App. 13 (1982), the court held that an officer should not
15 circumvent the readings of *Miranda* warnings once they have formulated a probable cause to
16 arrest just because they want to further their investigation.

17 Not only is it incumbent that Trooper Murphy read Mr. Russell his *Miranda* rights prior
18 to questioning him, but in the context of existing probable cause, the custodial element is
19 triggered as it concerns interrogation.

20 Interrogation becomes “custodial” for *Miranda* purposes when the questioning officer
21 already has probable cause to justify an arrest for the offense which is the subject of inquiry,
22 regardless of whether the suspect is actually placed under physical arrest or not. *State v. Creach*,
23 77 Wn.2d 194, 461 P.2d 329 (1969); *State v. Hilliard*, 89 Wn.2d 430, 573 P.2d 22 (1977); also
24 see *State v. Franze*.

25 This argument concludes with the fact that the trial court erroneously found Mr. Russell

1 was not in custody for purposes of the *Miranda* requirement, at the time in which he allegedly
2 made statements to Trooper Murphy. (RP 2742, ll. 20-24)

3 When one considers that Trooper Murphy's objective of identifying the driver of the
4 eastbound vehicle was accomplished and Mr. Russell's perception was that he was being
5 detained, the only element remaining in dispute is the condition surrounding the interrogation.
6 Given that the exact conditions of restraint existed for Mr. Russell, both, before and after his
7 formal arrest, the following conclusion is inherent.

8 When *modus ponens* is applied to the contextual converse of Mr. Russell's interrogation,
9 arrest and blood draw, only one logical inference may be made.

10 Mr. Russell was confined to his hospital bed and ISP Baldwin stood by the room's door,
11 at the same time, Trooper Murphy formally arrested Mr. Russell and seized his blood.

12 Trooper Murphy formally arrested Mr. Russell and seized his blood, at the same time, a
13 custodial nature existed for interrogation.

14 Therefore, as Mr. Russell was confined to his hospital bed and ISP Baldwin stood by the
15 room's door, a custodial nature existed for interrogation.

16 Thus, Mr. Russell's interrogation was of a custodial nature and offended his *Miranda*
17 rights as guaranteed by the Fifth Amendment.

18 Mr. Russell contends that if a restraint on his freedom of movement to the degree
19 associated with a formal arrest did not exist during Trooper Murphy's interrogation, then those
20 conditions could not have existed during the application of the implied consent statute. In that
21 instance, a formal arrest could not have been conducted and any resulting blood evidence would
22 be forfeited, as only a lawful arrest may trigger implied consent law.

23 The trial court took no measures to ensure the protection of Mr. Russell's rights. To the
24 contrary, it allowed the jury to consider Mr. Russell's ill begotten self-incriminatory statements,
25 naively made to a state agent whom had every intention of arresting him.

1 In the absence of *Miranda* warnings, a suspect's statements during custodial interrogation
2 are presumed involuntary and may be inadmissible at trial. *State v. Sargent*, 111 Wn.2d 641,
3 647-48 (1998).

4 Mr. Russell therefore requests that his conviction be reversed and all statements made to
5 Trooper Murphy be suppressed if a retrial is sought by the state.

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Statement of Additional Grounds
1. Statements made absent Miranda
Admissibility>>>Violation of Rights

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1 2. In regard to the issue concerning the Interstate Mutual Aid Agreement's (herein,
2 IMAA) validity and authority in the case of Mr. Russell's arrest, the following argument is made
3 in consideration of and adherence to that included in the appellant's brief. (Pre-trial Exhibit 1)

4 The IMAA, which the trial court relied upon to support and validate the arrest of Mr.
5 Russell in the State of Idaho by a Washington State Patrolman, does not possess the legal
6 authority to validate a warrantless arrest. Moreover, the trial court's finding that the IMAA
7 supports or legitimizes applicable statutory authority is a misrepresentation of law and in conflict
8 with legislative intent.

9 Washington law cannot make valid the IMAA in Mr. Russell's case or any other arrest
10 made in the state of Idaho. Absent Chapter 10.93 RCW and former 39.34 RCW, Idaho entered
11 into the IMAA under Title 67 and Title 19 of the Idaho Code.

12 The intent of the Idaho legislature was never to allow compact agreements, such as the
13 IMAA, to trump or replace ratified Idaho Code. Idaho's version of Chapter 39.34 RCW, Title 67
14 of the Idaho Code, addresses this issue in full at §§2328. In states, in part,

15 "Joint Exercise of Powers: (a)...[T]he state or any public agency thereof when acting
16 jointly with another public agency of this state may exercise and enjoy the power, privilege and
17 authority conferred by this act; but **nothing in this act shall be construed to extend the**
18 **jurisdiction, power, privilege or authority of the state...agency thereof, beyond the power,**
19 **privilege or authority said state or public agency might have if acting alone."** (Appendix
20 "A")

21 Essentially, even when performing a duty *with* the Idaho State Patrol, the Washington
22 State Patrol would be bound to procedural and judicial obligations, the very same as if they were
23 performing said duty in the State of Idaho, yet without mutual aid.

24 The presence of ISP Baldwin did not, in any fashion, relieve Trooper Murphy of his
25 obligation to take Mr. Russell before a magistrate of Latah County to determine the validity of

1 his warrantless arrest, as set forth by Title 19, Chapter 702 of the Idaho Code. (Appendix "B")

2 Chapter 67 goes further to limit the privileges of agencies entered into agreements
3 constructed there from. Nothing provided in §67-2328 may be construed to allow any agreement,
4 constructed thereby, to supersede previously established and current law. It states, in part:

5 "(d) In the event that the agreement does not establish a separate legal entity to conduct
6 the joint or cooperative undertaking...**(3) no agreement made pursuant to this act shall**
7 **relieve any public agency of any obligation or responsibility imposed upon it by law** except
8 that to the extent of actual and timely performance thereof by a joint board or other legal or
9 administrative entity created by an agreement made hereunder, said performances may be
10 offered in satisfaction of the obligation or responsibility." (Appendix "A")

11 Also, Title 67-2333 provides that "nothing in this act shall be interpreted to grant any
12 state or public agency thereof the power to increase or diminish" the governmental powers of
13 agencies. (Appendix "C")

14 No separate legal entity was ever created as specified by §67-2328(c)(2). It is
15 inconceivable that any two state legislative branches would deem the construction of a separate
16 judicial arm as such, necessary in this case, legally permissible. (Appendix "A")

17 The applicable law in Mr. Russell's case is that of Idaho.

18 Title 67-2337, Idaho Code, addresses extraterritorial authority of peace officers only
19 within the State of Idaho; much like 10.93 RCW is limited to mutual aid only within the State of
20 Washington. Interestingly, §67-2337 obligates Idaho officers in fresh pursuit throughout the
21 State to the same procedures outlined in §19-702. (Appendix "B" and "D")

22 Therefore, the only relevant authority remaining is Chapter 7, Title 19 of the Idaho Code.
23 (Appendix "B" and "E")

24 Finally, the IMAA is invalid according to §67-2328(b), for the same reason cited in the
25 appellant's brief as required by former RCW 39.34.040. (Appendix "A")

1 Title 67-2328(b) states, in part:

2 "Appropriate action by ordinance, resolution or otherwise pursuant to the law of the
3 governing bodies of these participating public agencies shall be necessary before any such
4 agreement may enter into force." (Appendix "A")

5 No evidence was presented by the State to suggest that the IMAA was recorded with the
6 appropriate governing bodies, nor was it filed with the Secretary of the State of Idaho prior to
7 Mr. Russell's arrest. Both of the aforementioned procedures are required to validate the IMAA.

8 The IMAA is invalid. This agreement must not be construed to validate Mr. Russell's
9 arrest, nor support it in any way. The IMAA must not be interpreted so as to replace or surpass
10 established and current law; i.e., Title 19, Chapter 7-02, of the Idaho Code. (Appendix "B")

11 Mr. Russell's arrest was invalid. Furthermore, on the 4th of June, 2001, Idaho did not
12 have any statutes enacted which either empowered officers to seize blood evidence for purpose
13 of limited arrest, or those resembling Washington State's implied consent law.

14 Failure to take Mr. Russell immediately before a magistrate, as required by Idaho Code
15 §19-702, violated his due process rights guaranteed by the Fifth Amendment.

16 The IMAA cannot support Mr. Russell's arrest. Mr. Russell asks that his convictions be
17 overturned and the charges against him dismissed.

1 3. Mr. Russell's blood was obtained in the State of Idaho, for the purpose of forensic
2 testing and prosecution, without the legal authority required to lawfully enforce its seizure.

3 Washington's Implied Consent law cannot reach outside the territorial boundaries of the
4 State of Washington.

5 The blood samples obtained by Trooper Murphy pursuant to 46.20.308 RCW were
6 allegedly tested by the Washington State Patrol's Toxicology Laboratory (herein, WSTL). The
7 result of that test was admitted at trial as forensic evidence.

8 Defense Attorney Diana Lundin objected to the State using the forensic blood evidence at
9 trial, in a motion to suppress. 46.20.308 RCW, containing the Implied Consent law, cannot
10 operate in the State of Idaho. (RP 1557)

11 The trial court was wrong to find "that the Washington Implied Consent law – would
12 apply in this case even though the arrest took place in the State of Idaho and that – if there's a
13 lawful arrest and if the arrest is for vehicular homicide or vehicular assault, as was the case here,
14 that the officer has the authority to compel the giving of the blood sample". (RP 1562)

15 The trial court's denial of Mr. Russell's motion to suppress the forensic blood test
16 result was harmful error. The forensic test result was the foundation and mainstay of the state's
17 case, ultimately and prejudicially swaying the jury.

18 The first fact that must be considered is "the proposition that the State cannot acquire
19 jurisdiction either by estoppel or by stipulation." *State v. Pink*, 144 Wn. App. 945, 950 (2008),
20 (citing *State v. Boyd*, 109 Wn. App. 244, 249, 34 P.3d 912 (2001), *review denied*, 146 Wn.2d
21 1012 (2002)).

22 "When the situs of the crime is undisputed, we decide the issue of territorial
23 jurisdiction as a question of law." *Ibid.*, (citing *State v. Squally*, 132 Wn.2d 333, 340, 937 P.2d
24 1069 (1997)). Dispute over territorial jurisdiction "is a question of law that we review de novo."
25 *Squally*, 132 Wn.2d, at 340-41 (citing *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992));

Statement of Additional Grounds
3. WA Implied Consent Law not
Applicable to Idaho Arrest.
Arrest Invalid>>Blood Draw Unlawful

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1 *Joy v. Kaiser Aluminum & Chem. Corp.*, 62 Wn. App. 909, 911, 816 P.2d 90 (1991)).

2 Finally, Washington case law, based on a plain language reading of Washington statute,
3 has held that “the lawfulness of an arrest made by a Washington law enforcement officer in a
4 foreign state is determined under the law of the foreign state”. *In re license suspension of Richie*,
5 127 Wn. App. 935, 940, 113 P.3d 1045, 1048 (2005).

6 “[A] lawful arrest of an offending motorist is an essential step before the implied consent
7 statute applies.” (*State v. Rivard*, 131 Wn.2d 63, 929 P.2d 413, 417 (1997)).

8 Trooper Murphy’s act of crossing the Idaho State line, arresting Mr. Russell and then
9 drawing his blood violated several Constitutional principles.

10 Article IV, Section 2, Clause 1, of the United States Constitution, entitled “Privileges and
11 immunities of citizens” provides the following:

12 “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens
13 in the several States.”

14 While in the care of an Idaho hospital, Mr. Russell was not afforded the same rights and
15 protections as a citizen of the State of Idaho should have been under those circumstances.

16 Trooper Murphy’s actions led to the violation Mr. Russell’s Eleventh Amendment rights.

17 It states: “The judicial power of the United States shall not be construed to extend to any
18 suit in law or equity, commenced or prosecuted against one of the United States by citizens of
19 another state or subject of any foreign state.”

20 Trooper Murphy’s actions also deprived Mr. Russell of his Fifth Amendment right to
21 enjoy due process of law. The laws of Idaho required Russell to be taken in front of a Latah
22 County magistrate to determine the validity of the arrest; Title 19, Chapter 7-02 of the Idaho
23 Code. On the 4th of June, 2004, Idaho did not have any law similar to that of Washington’s
24 Implied Consent statute and said statute does not apply in this case.

25 The act of seizing samples of Mr. Russell’s blood without due process of law also

Statement of Additional Grounds
3. WA Implied Consent Law not
Applicable to Idaho Arrest.
Arrest Invalid>>Blood Draw Unlawful

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1 violated the Fourteenth Amendment of the United States Constitution. It guarantees that the
2 rights of the citizens of this country not be abridged by the states, but rather be applied equally
3 and fairly.

4 Trooper Murphy enforced a law that could not apply to Mr. Russell at that time and in
5 that State. Neither Washington or Idaho case law nor statute support the finding that the Implied
6 Consent Law of 46.20.308 RCW permit the seizure of samples of Mr. Russell's blood, as it stood
7 at Gritman Memorial Hospital in Moscow, Idaho on the 4th of June, 2001.

8 Accordingly, Mr. Russell requests that his convictions be overturned and those blood
9 samples be suppressed if a retrial were sought by the State.

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1 4. Mr. Russell's rights to a fair trial and due process of law were abolished when the State
2 was allowed to present, as evidence, forensic blood test results which the defendant was unable
3 to retest or rebut. Mr. Russell was never provided access to the blood sample evidence and his
4 ability to do so now or in the future has been erased by the State's destruction of that evidence.

5 The government's mismanagement has irrevocably prejudiced Mr. Russell's rights to a
6 fair trial and due process of law.

7 Defense counsel had requested that Mr. Russell's blood samples be made available for re-
8 testing. The forensic whole blood test result was highly suspect when compared to that of the
9 medical blood serum draw taken an hour prior.

10 Defense counsel was lead to believe that the forensic blood evidence had been preserved,
11 until personally visiting the State Toxicologist's office in May of 2007. (Appendix "G", **CP 857**)

12 The facts of this case tell us that the destruction of Mr. Russell's blood samples went
13 undocumented and completely outside of normal Washington State Patrol (herein, WSP)
14 practice. (RP 4374, ll. 10-16) The destruction of his blood samples was unlawful and intentional,
15 occurring as the result of persistent mismanagement of the WSP's Toxicology Laboratory
16 (herein, WSTL) and a conscious disregard for forensic blood evidence by Anne Marie Gordon
17 (herein, AMG), the WSTL's manager.

18 The Whitman County Prosecuting Attorney's office sent a request to the WSTL for the
19 indefinite retention of Mr. Russell's blood samples, on the 17th of February, 2004. (RP 696, ll. 8-
20 11; 4372, ll. 10-14; App **G**, **CP 857**) Although the WSTL's policy at the time was to save samples
21 for ninety days, AMG agreed to save them in one year increments provided that an additional
22 request was made prior to the date of the previous request's expiration. (RP 651, ll. 6-15; 4370,
23 ll. 17-20; 4371, l. 17 to 4372, l. 22)

24 Edward Formoso is a forensic toxicologist at the WSTL. (RP 4426, ll. 16-18)

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Statement of Additional Grounds
4. Blood Evidence Destroyed by State
Defendant Unable to Retest or Rebut.
Rights to a Fair Trial and Due Process
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1 Mr. Formoso marked Mr. Russell's blood samples to be saved, per procedure, by affixing red
2 labels to the vials and a subsequently created file. (RP 647, ll. 19-24; 723, ll. 20-24; 4446, ll. 13-
3 17; 4448, ll. 5-7) "They just said keep it indefinitely and don't destroy it." (RP 4449, ll. 1-25)

4 The Prosecuting Attorney's office was informed that Mr. Russell's samples had been
5 saved on the 18th of February 2004 by way of a letter signed by AMG. (RP 649, ll. 2-6; 697, ll.
6 17-25; 698, ll. 1-4; 4372, ll. 19-22, Trial Exhibit 92)

7 A second request was made to the WSTL on the 6th of January, 2005, from the
8 Prosecuting Attorney's office, to preserve Mr. Russell's blood samples for an upcoming trial.
9 (RP 651, l. 23 to 652, l. 6; 719, ll. 10-13) AMG confirmed that Mr. Russell's samples would
10 again be saved by calling Carol LaVerne that very morning. (RP 719, ll. 14-17; 720, ll. 6-7, 16 to
11 721, l. 1)

12 Mr. Russell's blood samples were again requested and re-confirmed to be saved on the
13 16th of February, 2005. (RP 4373, ll. 9-17)

14 Whitman County Prosecutor, Carol LaVerne, requested that Mr. Russell's blood samples
15 be re-tested. (RP 649, ll. 17-22) Mr. Russell's blood samples needed to be retested for use at the
16 pending trial. (RP 4386, ll. 14-24)

17 The original lab analyst in Mr. Russell's case, Eugene Schwilke, was no longer
18 employed by the WSTL as early as 2004. (RP 652, ll. 22-25; 724, ll. 19-20) AMG's signature
19 also appears on the document indicating the forensic test results of Mr. Russell's samples. (RP
20 4167, 9-12)

21 On February 16th, 2005, AMG attempted to locate Mr. Russell's samples for re-testing
22 and further preservation, but she could not find them. (RP 652, 7-15) She concluded that those
23 samples had been destroyed on the 11th of July, 2004, long before the initial request would
24 expire. She notified the Prosecuting Attorney's office by letter. (Appendix "G", CP 857, Exhibit 8)

25 The State itself reiterated the potentially useful value of Mr. Russell's blood evidence, as

1 illustrated by the February 16th letter from Prosecuting Attorney, Denis Tracy, to AMG. "The
2 destruction of his blood sample by the State will have an impact on that trial, and not for the
3 better." (Appendix "G", CP 857, Exhibit "15")

4 Against required RCW statute, and WSP policy and procedure, AMG destroyed Mr.
5 Russell's samples on her own, without an impartial witness who has no supervisory duties. (RP
6 683, l. 17 to 684, l. 5; 4332, ll. 14-18; 4347, ll. 22-25; 4348, ll. 1-4, 9-23; 4375, l. 12 to 4376, l.1)
7 The quality assurance lead was not involved in the destruction of his blood samples as required
8 by WSP policy. (RP 685, ll. 7-10)

9 Sergeant Patricia Ann Lankford (herein, Sgt. Lankford), employed by the WSP since
10 March of 1985, was the internal auditor for the bureau of risk management – overseeing the
11 WSP in its entirety. (PTRP 1030, l. 7; 1034, ll. 4-17) (RP 4323, l. 18; 4325, l. 21 to 4326, l. 4)
12 From 2004 and through the present date she is in charge of conducting evidence audits for the
13 Crime Labs, including the WSTL. (RP 4323, l. 18; 4325, l. 21 to 4326, l. 4)

14 Sgt. Lankford testified that the proper procedure for discarding of blood sample evidence
15 requires total accountability and at least two individuals "to confirm they are both seeing the
16 same [save] number." (RP 1078, ll. 18-23) "In 2004, for a disposal to occur...in any other
17 location a property and evidence custodian and at least one witness and a supervisor would be
18 present for the destruction of evidence." (RP 1080, ll. 1-7)

19 AMG's co-workers at the WSTL were disapprovingly surprised that she had single-
20 handedly conducted the destruction of saved samples. (RP 973, l. 15 to 974, l. 6)

21 No one except for AMG was responsible for the disarray surrounding the saved sample
22 freezer, nor the deficiency of the records for the samples lost within it. "The only person that had
23 the inventory for the save sample freezer was [AMG]" and only a partial inventory list of that
24 freezer existed in 2004. (RP 1074, ll. 10-25; 4366, ll. 1-5)

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1 In 2004, there were 700 undocumented vials in the save sample freezer. (RP 4366, ll. 7-
2 14; 4368, ll. 1-3) AMG would not allow Sgt. Lankford to access her inventory list prior to an
3 upcoming audit. (RP 4365, ll. 10-15)

4 “[T]he Washington State Toxicology Laboratory lacked accountability in their –
5 management, handling, preservation of [Mr. Russell’s] blood samples.” (RP 1090, l. 24 to 1091,
6 l. 3)

7 “[T]he [WSTL] is not properly handling, preserving and discarding blood sample
8 evidence.” (RP 1096, ll. 19-23)

9 A reasonable expectation at the WSTL in 2004, although at odds with policy, would have
10 been to come across save samples in the general population of blood samples. (RP 726, ll. 16-20;
11 1078, ll. 8-14; 4364, ll. 1-8)

12 The problems at the WSTL arose from AMG’s conscious disregard for WSP procedure
13 and policy, fueled by a lack of respect for evidence. “She did not view the blood as evidence.”
14 (RP 1039, ll. 11-17; 1041, ll. 9-16; 4340, l. 20 to 4341, l. 8) Her co-workers did not share in that
15 opinion. (RP 4454, ll. 7-24)

16 Sgt. Lankford illustrated her disapproval of AMG’s conscious disregard for blood
17 samples as evidence during the following testimony.

18 “I spoke with [AMG] directly...and asked why it was that this documentation was not
19 being put in the files and she indicated to me that it wasn’t necessary, this was just blood or just
20 urine. And I responded no ma’am, this is evidence and you need to document everything you’re
21 doing with this.” (RP 4344, ll. 18-23)

22 “I observed Ms. Gordon pick a [cap] that had come off a [tube], off the floor and stick it
23 onto a tube. Well, then I asked her if she could be certain that the cap was from that tube and she
24 said no, but it doesn’t matter. I disagreed with her.” (RP 4338, ll. 3-9)

25 This malpractice “increases the risk of cross-contamination”. (RP 4338, ll. 20-22)

1 Not surprisingly, AMG claimed she never witnessed any employee of the WSTL recap a
2 blood sample vial with a random cap. (RP 673, ll. 14-23)

3 AMG's treatment of evidence and willful disregard for policies and procedures put the
4 successful prosecution of criminal cases in jeopardy. (RP 1096, ll. 17-18) AMG acted
5 maliciously and purposefully.

6 AMG was employed by the WSTL as lab manager in 1998. (RP 669, ll. 13-14) The
7 WSTL came under the umbrella of the WSP in 1999. (RP 4382, ll. 21-22; 4445, ll. 14-16)

8 "The [WSTL] is under the Forensic Lab Services Bureau side of the patrol. And in that
9 arena there is a quality standards and operating procedure manual that deals with how to handle
10 evidence." (RP 1044, ll. 3-6, 10-12)

11 The Chief of the WSP expected the WSTL to follow all WSP policies and procedures,
12 but as of 2004 AMG was still not fulfilling her duties. (RP 4349, ll. 1-4; 4401, ll. 10-15, 21-24)
13 AMG was intentionally unreceptive to the chain of command's view to the uniform handling of
14 evidence. (RP 1042, ll. 13-25)

15 AMG was in charge of implementing and assuring adherence to policies and standard
16 operating procedures (herein, SOP's) within the WSTL. (RP 662, ll. 10-17; 667, ll. 1-9; 4336, l.
17 21 to 4337, l. 1)

18 By her admission, policies and SOP's should have been followed by all WSTL
19 employees when handling and destroying blood samples, such as Mr. Russell's. (RP 686, l. 21 to
20 687, l. 13) AMG knew that these policies and procedures existed within the WSP. (RP 670, ll. 5-
21 11)

22 In fact, AMG claimed to have written most of the SOP's within the WSTL. (RP 667, ll.
23 1-10) Although she could not recall policies from 2001 or any other year, she agreed that SOP's
24 were critical for the overall handling of blood samples; including the processes of receiving,
25 testing, preserving and destroying. (RP 668, l. 11 to 669, l.2; 778, ll. 9-13; 779, ll. 7-22)

1 Interestingly, she made these admissions only after it was exposed that her conscious
2 disregard for forensic evidence and severe mismanagement of the WSTL led to her destruction
3 of MR. Russell's blood samples.

4 Sgt. Lankford, representing the views of the WSP's commanding officers, believed that
5 AMG's lack of concern for following required WSP policies and procedures jeopardized the
6 successful prosecution of cases involving evidence. (RP 1038, ll. 17-22; 1043, ll. 4-7; 1096, ll. 8-
7 18)

8 AMG's misconduct was an ongoing malfeasance, which violated a public trust essential
9 to the inner-workings of fundamental fairness.

10 The WSTL had a history of poor performance under the management of AMG. This
11 aroused concern in successive internal evidence auditors of the WSP.

12 AMG described the deficiencies of the WSTL's facilities and procedures. "[T]he samples
13 were all caked in ice. The freezers were absolutely filled with ice. Um...our first [WSP] audit –
14 the auditor came in and looked at the freezer and just threw up his hands and said he didn't know
15 how to do an audit of our evidence because they were in – they were encased in ice. (RP 684, ll.
16 18-24)

17 Sgt. Lankford described the desperate conditions found at the WSTL during AMG's
18 management. The concerns related to the lack of SOP's followed and the disturbingly negligent,
19 apathetic attitude AMG displayed regarding the overall handling of forensic evidence.

20 Sgt. Lankford's predecessor, now Lieutenant, Karen Dewitt, informed her of several
21 ongoing issues observed during previous audits. "[Sgt. Dewitt] had been distressed by the
22 conditions in the lab that she had seen." (RP 1035, ll. 18-22; 1036, ll. 9-12)

23 "There were a large number of cracked tubes in the freezers...there were a large number
24 of tubes where the tops had come off the tubes and were lying on the freezer floors. ...[S]he had
25 concerns about the policy and procedure manual or the lack of a procedure manual providing

1 direction to the staff there.” (RP 1036, ll. 12-15, 19-21)

2 All of these concerns were repeatedly and formally conveyed to AMG, yet she
3 continually and blatantly ignored them. (RP 4340, ll. 20-25; 4341, l. 19 to 4342, l. 2; Appendix
4 “G”, Exhibit “13”) She remained “resistant to change”. (RP 1042, ll. 13-25)

5 The risk management division conducts an annual audit and a spot inspection once a year
6 at each of the locations under the WSP. (RP 1052, ll. 19-20; 1053, ll. 23-24)

7 In addition, the WSTL is required to perform its own quarterly audits. These are the
8 responsibility of the WSTL’s manager. As mandated by the WSP manual, these required audits
9 applied to the WSTL under AMG’s management in 2003 through 2005. (RP 1047, l. 24 to 1049,
10 l. 10)

11 AMG did not comply with either the WSP policy or its manual. She did not perform
12 these audits prior to, or up until the discovery of the destruction of Mr. Russell’s blood samples.
13 (RP 1049, ll. 3-17; 4358, l. 22 to 4359, l. 2; 4360, ll. 16-22)

14 The conscious disregard for conducting quarterly audits leads to problems in the overall
15 handling of blood sample evidence. (RP 1050, ll. 6-13)

16 Audits are critical in order to establish accountability and accuracy. They allow the WSP
17 to determine if the WSTL addressed prior concerns by implementing the necessary policies and
18 procedures. (RP 1054, l. 15 to 1055, l. 10)

19 AMG’s refusal to properly and expeditiously address grave concerns previously
20 expressed by Sgt. Lankford’s predecessor, warranted Chief Porter (WSP) to order an additional,
21 “full-blown” risk management audit. This audit was exceptional and unusual as it relates to the
22 WSTL. (RP 1046, l. 19 to 1047, l. 9; 1056, ll. 11-21; 4345, ll. 10-19)

23 Several attempts were made by Sgt. Lankford to make AMG comply with WSP policies
24 and procedures for the preservation and destruction of forensic blood evidence. AMG resisted
25 these compliance requirements and stated that she would not do so. (RP 1042, ll. 21-25; 1050, ll.

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1 11-24; 1076, ll. 5-16)

2 Although greater attention needed to be paid to policy and procedure at the WSTL, AMG
3 instead relaxed the manner in which critical blood evidence was handled. (RP 730, ll. 3-11)

4 The pending risk management audit was originally scheduled for August of 2004, but
5 then delayed until November per AMG's request. She requested the delay because she was
6 nervous and frustrated. "She then requested a second delay and I denied the second request," Sgt.
7 Lankford explained. (RP 1089, ll. 12-19)

8 As the result of mismanaging the WSTL and mistreating her staff, AMG made the
9 conscious decision to conduct a mass destruction of blood samples, herself as the sole
10 perpetrator.

11 AMG was frustrated and scared.

12 Prior to the undocumented mass destruction, on the 27th of April, 2004, AMG was
13 reprimanded for disciplinary problems by Dr. Barry Logan. (RP 700, ll. 20-25) The Office of the
14 State Toxicologist was headed by Dr. Logan. (RP 1044, ll. 3-4; 4329, ll. 13-15; 4331, ll. 13-15)

15 AMG was again reprimanded for the way in which she treated Dr. Dora Schranz, the
16 Quality Assurance Lead Technician. (RP 713, ll. 7-16) Dr. Schranz had, prior to that, complained
17 about AMG's poor performance as manager of the WSTL. (RP 717, ll. 5-9)

18 It was at that time when AMG had requested to have the upcoming risk management
19 audit postponed. (RP 676, ll. 10-18)

20 AMG made the conscious decision to act alone; negligently, willfully and unlawfully.
21 She offered the excuses that the freezers were overcrowded and the WSTL was understaffed.
22 (RP 679, ll. 15-22; 680, ll. 19-23; 681, ll. 5-9; 683, ll. 6-16)

23 The appropriate course of action that AMG, as the manager of the WSTL, should have
24 taken would have been to submit a written notice of her opinion of the situation to her superiors.
25 (RP 1051, ll. 13-18) AMG did not take any action to inform the chain of command of her alleged

1 challenges. (RP 1052, ll. 1-11)

2 It is **“extremely important” to physically manipulate every blood sample before**
3 **discarding it.** (RP 1083, ll. 19-22) The save sample stickers are affixed in such a way that
4 “unless you actually lifted the tube out or the tube was right against the exterior of the rack you
5 would not see the save sample sticker.” (RP 1083, ll. 3-11)

6 AMG admitted that it would be “challenging” to see a save sample sticker on any vial of
7 blood and that the evidence tape on each vial was the same color. (RP 768, ll. 15-23)

8 Nonetheless, AMG made the conscious decision to dump a rack at a time and just “threw
9 them out”. Each rack contains 72 (seventy-two) vials of blood. (RP 692, ll. 9-20) She testified to
10 these facts and stated, “I did not verify the tube myself.” (RP 769, ll. 7-10)

11 AMG did not pull the files pertaining to the samples she destroyed, nor did she document
12 them in any way. (RP 768, l. 24 to 769, l. 4) AMG did not consult an electric log in any fashion,
13 claimed not to know when such a log would have been initially implemented and yet admits one
14 should have been used to document these samples. (RP 698, ll. 9-17; 699, ll. 1-7)

15 Again, her excuses followed.

16 “It might have been more prudent. It would have taken a much longer period of time and
17 I didn’t have that much time to get these samples done because we had the audit coming.” (RP
18 776, ll. 9-12)

19 The WSP, and certainly Sgt. Lankford, construe the conduct of AMG to be not only
20 improper but unacceptable as well. Sgt. Lankford explained how the destruction should have
21 occurred.

22 “I would pull out each one of the racks of tubes and pull out each individual tube to
23 ensure that it did not have a save sample sticker on it before I destroyed a tube.” (RP 1081, ll. 11-
24 15)

25 Save samples are to be preserved and not destroyed regardless of where they are stored

1 within the WSTL. There is no difference between the functions for storing blood sample
2 evidence and the functions for destroying blood sample evidence. (RP 1110, ll. 3-9, 15-19)

3 Furthermore, there is no way of actually knowing what happens to an undocumented
4 sample. (RP 4369, ll. 1-8) “[Sgt. Lankford] was – disappointed in the lack of documentation in
5 each of the files for each of the pieces of evidence.” (RP 4342, ll. 1-2)

6 When Sgt. Lankford was asked if it was her professional opinion that a forensic scientist,
7 such as AMG, should be excused for not properly handling evidence, she candidly replied, “No,
8 sir, I do not and that’s why I’m sitting here.” (RP 4402, ll. 8-12)

9 The following exchanges dismissed AMG’s many excuses.

10 Q. “Would you find it justifiable – a reason or rationale not to do what you say, which is
11 to take every single physical vial and inspect it because of overwork issues?”

12 A. “No, sir.”

13 Q. “Because they’re overstaffed?”

14 A. “No, sir.”

15 Q. “Because the[re] are too many samples?”

16 A. “No, sir.” (RP 1081, ll. 16-24)

17 Q. “The fact that the [WSTL] is a work in progress, should that be a practical
18 consideration in excusing the destruction of evidence?”

19 A. “No.”

20 Q. “And the fact that they had many samples, many more than they should have
21 maintained in storage, should that be a practical consideration excusing the destruction of
22 evidence?”

23 A. “No.” (RP 1112, l. 23 to 1113, l. 8)

24 The mismanagement of the WSTL and the improper destruction of Mr. Russell’s blood
25 samples by AMG was disturbing for the WSP’s chain of command.

1 On February 21st and March 17th of 2005, Sgt. Lankford received e-mails from Dr.
2 Logan, indicating he wanted a review conducted regarding the destruction of evidence from Mr.
3 Russell's case. (RP 1084, ll. 4-15; 1106, ll. 4-8; Appendix "G", Exhibit "7", CP 857)

4 After the destruction of Mr. Russell's blood samples was finally discovered by defense
5 counsel Sgt. Lankford's immediate superior, Dr. Don Sorenson, ordered a 100% audit of the save
6 sample freezer to be done by August of 2007. (RP 1077, ll. 10-19; Appendix "G", Exhibit "14",
7 CP 857)

8 Sgt. Lankford testified that, "the risk management division was asked to look into the loss
9 of evidence in this case and in discussion with Dr. Sorenson...wanted to look at chain of
10 custody." (RP 1085, ll. 18-25)

11 Although there were numerous missing samples later appearing on an unsecured Excel
12 spreadsheet, "[AMG] provided no evidence attesting to where [Mr. Russell's] sample was
13 placed." (RP 1089, ll. 2-3; 1113, ll. 14-22; Defense Exhibit 233, Appendix "G", Exhibits "9" and
14 "11", CP 857)

15 Sgt. Lankford's conclusion with respect to the proper chain of custody in regard to this
16 particular case was clear.

17 "[The chain of custody] was non-existent. ... [A]fter the evidence came into our hands
18 the chain of custody for all intents and purposes stopped." (RP 4332, ll. 6-23; 4380, ll. 8-14)

19 Sgt. Lankford exclaimed that she had no way of knowing who, when, what, how or why"
20 Mr. Russell's blood samples were destroyed. (RP 1090, ll. 12-15)

21 It was Sgt. Lankford's conclusion that AMG had very little regard for the proper handling
22 of blood evidence. (RP 4381, ll. 1-5) AMG did not treat blood samples with the caution required
23 for evidence. She did not adhere to statute and procedures mandated for the handling of blood
24 evidence. (RP 4346, ll. 11-20; 4347, l. 20 to 4349, l. 4; 4350, l. 18 to 4351, l. 7)

25 AMG's misconduct included falsifying simulator solutions which led to a criminal
investigation for committing perjury. (RP 4406, ll. 13-22; Appendix "G", Exhibit "6", CP 857)

1 AMG also committed the unlawful and intentional undocumented destruction of blood
2 samples marked to be saved; the disobedience of deliberately ignoring and violating WSP
3 policies and procedures; along with potentially contaminating useful evidence. (RP 4332, ll. 19-
4 23; 4334, ll. 14-25; 4338, ll. 3-22; 4375, l. 9 to 4376, l. 1)

5 In July of 2007, as a consequence of her criminal investigation, AMG was placed on
6 administrative reassignment and almost immediately resigned from her position as manager of
7 the WSTL. (RP 538, ll. 16-22; 4406, ll. 13-22; Appendix "G", Exhibit "6", CP 857)

8 **The blood samples AMG improperly and willfully destroyed contained a potentially**
9 **exculpatory value.** The test result that the WSTL is alleged to have produced conflicts with the
10 result of the medical blood serum draw obtained from the hospital.

11 Mr. Russell's samples had been pursued for retesting. **The absence of this evidence does**
12 **undermine confidence in the verdict of this case.**

13 The medical blood draw is a serum blood test performed at the hospital and is different
14 from a whole blood test conducted at the WSTL. (RP 4161, ll. 9-12; 4192, ll. 1-25)

15 A medical serum blood draw was taken at 12:30 am. The test result of the serum blood
16 draw from the hospital lab was .128. (RP 2976, ll. 7-16; 2981, ll. 15-22; 3174, ll. 9-10, 20-21;
17 3180, ll. 20-23; 4161, ll. 4-12, 23-25)

18 A forensic whole blood draw was taken at 1:34 am. The test result of the whole blood
19 draw from the WSTL was .12. (RP 3076, ll. 15-18; 4114, l. 9; 4128, ll. 7-9)

20 It is agreed in the scientific community that serum blood testing results in higher alcohol
21 concentrations than whole blood testing. A conversion formula is used to estimate what the
22 whole blood concentration was if the serum concentration was known. (RP 4193, ll. 9-18; 4194,
23 ll. 13-19)

24 Mr. Russell's serum blood draw result converts to a .10 whole blood reading, well below
25 the WSTL's whole blood result drawn over an hour later. (RP 4199, ll. 5-21; 4248, ll. 18-20)

1 Ed Formoso testified that the average person reaches their “peak level...maximu[m]
2 alcohol concentration on average within about thirty (30) minutes...after they stop drinking
3 alcohol.” (RP 4433, ll. 7-14)

4 Eugene Schwilke concurred stating, “Most people after their last drink are completely
5 post-absorptive within one (1) hour. I’ve seen as low as thirty (30) minutes and up to two (2)
6 hours, but forty-five (45) minutes later if they’re not completely post-absorptive, they are near
7 the post-absorptive phase.” (RP 4120, ll. 13-18; 4228, ll. 6-8)

8 Mr. Russell’s last drink of alcohol was at approximately 10:00 on the evening of June 4th,
9 2001. (RP3290, ll. 21-23; 3315, ll. 7-9) He had not consumed any food in the several hours prior
10 to driving and the collision occurred at approximately 10:45 pm. (RP 3712, ll. 3-7)

11 The average person reaches post-absorption much quicker when they have not consumed
12 food prior to or during their consumption of alcohol. (RP 4224, ll. 16-22)

13 If someone was fully post-absorptive their “alcohol concentration would be higher – at
14 the time of driving than when the specimen was collected.” (RP 4121, ll. 6-11)

15 When both the serum and whole blood draws are compared, they do not agree in the
16 context of the testimony professed by either forensic expert witness.

17 An accurate way of determining a person’s blood alcohol concentration would be to take
18 two different samples from an individual at two different times. (RP 4187, ll. 14-17)

19 By 12:30 am, two and one half hours after last consuming alcohol, Mr. Russell’s blood
20 alcohol concentration would have already peaked and then began to plateau.

21 By 1:34 am, three and one half hours after last consuming alcohol, Mr. Russell’s blood
22 alcohol concentration would have been descending rather rapidly.

23 All of the evidence suggests that an inaccuracy was inherent in one of the blood samples.
24 The only way to extinguish any doubt and determine which result may be relied upon would
25 have been to retest Mr. Russell’s whole blood samples. Those samples, lost forever at the hands
of AMG, undeniably possessed potentially exculpatory value.

Statement of Additional Grounds
4. Blood Evidence Destroyed by State
Defendant Unable to Retest or Rebut.
Rights to a Fair Trial and Due Process
>>>Abolished

Frederick David Russell, DOC 314145
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1 Although Schwilke testified that it was unlikely the whole blood test result would have
2 indicated a .08 or lower at the time Mr. Russell was driving, he could not give a definitive
3 answer. Thus, reasonable doubt did exist. (RP 4247, l. 22 to 4248, l. 3)

4 Even the State appeared to suggest that Mr. Russell may have consumed alcohol after the
5 collision. (RP 4307, ll. 22-24) A Freudian slip perhaps, but it was recorded nevertheless.

6 The critical fact to recognize is that the result of the whole blood test reported by the
7 WSTL is not indicative of an accurate result, in consideration of the medical serum blood test
8 result also endorsed by the State.

9 This highly suspicious result provided by an undeniably mismanaged State laboratory
10 was prejudicial and offended Mr. Russell's rights. It should not be allowed to support a
11 conviction under either the *per se* or *affected by* intoxication prongs of the vehicular homicide
12 and vehicular assault statutes.

13 When evidence is unduly prejudicial, "the minute peg of relevancy is said to be obscured
14 by the dirty linen hanging upon it." *State v. Turner*, 29 Wn.App. 282, 289, 627 P.2d 1324 (1981).
15 ER 403 governs the exclusion of relevant evidence when it is unfairly prejudicial, confusing or
16 misleading to the jury.

17 The conflicting results of the WSTL's whole blood test only confused Mr. Russell's jury.

18 The results of the whole blood test were contradictory to the serum blood evidence made
19 available by the State and forensic expert testimony only served to cloud the matter; shedding
20 only a minimal light on its inaccuracy. Expert opinion is helpful to the trier of fact only when it
21 concerns matters beyond the common knowledge of the average lay person **and does not**
22 **mislead the jury.** *State v. Farr-Lenzini*, 93 Wn.App. 453, 461, 970 P.2d 313 (1999).

23 Given the admission of two conflicting blood test results, Schwilke's testimony did
24 mislead the jury. The use of the whole blood test result was prejudicial and confused the jury
25 beyond repair.

1 Errors are prejudicial, when within “reasonable probabilities, the outcome of the trial
2 would have been materially affected had the error not occurred.” *State v. Bourgeois*, 133 Wn.2d
3 389, 403, 945 P.2d 1120 (1997)

4 The blood test evidence was relevant to the prosecution’s case in chief, as their
5 allegations of Mr. Russell’s intoxication relied solely upon it.

6 Moreover, Mr. Russell has now and forever been denied his right to rebut the State’s
7 whole blood test result by having them either retested or independently analyzed. Given the
8 obviously impossible result that test provided a DNA confirmation would be in order, if the State
9 had not unethically and intentionally abolished that opportunity.

10 The State cannot use evidence which the defendant is unable to rebut. *State v. Rosenquist*,
11 145 Wn.App. 1019 (2008).

12 Mr. Russell’s defense counsel properly preserved this issue for review.

13 “Under both Federal and Washington State law, Mr. Russell has a Constitutional due
14 process right to access tangible evidence that the State seeks to admit against him. Here,
15 obviously we’re talking about blood. Where the State, as the caretaker of that evidence, failed to
16 preserve it, Mr. Russell’s right to confrontation and a fair trial are eviscerated. The proper
17 remedy for which is dismissal of the action, or in the alternative, suppression of the evidence.”
18 (RP 1125, ll. 1-10)

19 “The Laboratory was operated with a conscious disregard for proper evidence handling.
20 With no system, no policy to track a sample; account for a sample, account for destruction of a
21 sample; ensure proper preservation of that sample. And we can’t even trust the word of the
22 person claiming responsibility because she’s admitted to lying under oath.” (RP 1130, ll. 5-12)

23 The State is clearly at fault. “This sample was marked for saving which indicates that
24 anybody dealing with that sample is on notice that it should be treated with particular care,
25 **particular care.**” (RP 1130, ll. 17-21)

1 **Defense counsel motioned for the trial court to dismiss under CrR 8.3.** (RP 1144, ll.
2 11-18)

3 A court may require dismissal under CrRLJ 8.3 when the defendant shows: (1)
4 governmental misconduct; and (2) prejudice affecting the defendant's rights to a fair trial. *State*
5 *v. Michielli*, 132 Wn.2d 229 (1997).

6 Black's Law Dictionary defines misconduct as "A dereliction of duty; unlawful or
7 improper behavior." 8th Ed., Thomson-West, 1019 (2004). Strict standards must apply when
8 assessing the behavior of governmental agencies and their custodians.

9 Case management falls within the standard of government misconduct. *State v.*
10 *Blackwell*, 120 Wn.2d 822, 831 (1993); *State v. Sulgrove*, 19 Wn.App. 860, 863 (1978).

11 Washington courts have held that the misconduct need not be intentional or dishonest, but
12 that mere mismanagement is indeed sufficient. *State v. Sherman*, 59 Wn.App. 763, 801 P.2d 274
13 (1990).

14 The underlying purpose of CrRLJ 8.3(b) is fairness to the defendant. *State v. Stephans*, 47
15 Wn.App. 600, 603 (1987) CrRLJ 8.3 exists to provide a trial court with the authority to dismiss
16 any criminal prosecution in the furtherance of justice and to ensure that an accused person is
17 treated fairly. *State v. Wilke*, 28 Wn.App. 590, 624 P.2d 1176 (1981).

18 **Dismissal of charges is appropriate** when the potentially "credible" and "admissible"
19 **evidence is tainted by governmental misconduct.** *State v. Marks*, 114 Wn.2d 724, 730, 790
20 P.2d 138 (1990). The State is not excused from its obligations where the evidence or testimony
21 emanates from a third party, especially where that party is a State actor. *Sherman*, 59 Wn.App. at
22 763.

23 **The WSTL is an investigative arm of the prosecution** and accordingly subject to the
24 same duties and responsibilities applicable to the police. *State v. Lord*, 117 Wn.2d 829, 822 P.2d
25 177 (1991). See *In re Brown*, 17 Cal. 4th 873, 952 P.2d 715, 718-19, 72 Cal. Rptr. 2d 698 (1998)

1 (recognizing crime labs as part of the investigative team subject to Brady obligations):

2 Actions of the employees of the WSTL are considered actions of the State. *State v. Wake*,
3 56 Wn.App. 472, 475, 783 P.2d 1131 (1989); (cited in *State v. Woods*, 143 Wn.2d 561, 23 P.3d
4 1046, 1060 (2001)).

5 Finally, the duty to disclose and preserve evidence potentially favorable to the defense
6 applies to the prosecution as well as to “others acting on the government’s behalf.” *Kyles v.*
7 *Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

8 As an agent of the State and manager of the WSTL, AMG rendered the chain of custody
9 for the Mr. Russell’s blood samples non-existent, and violated Mr. Russell’s due process rights.

10 The reviewing court determines whether the trial court’s ruling on the admission of a
11 blood alcohol test result was an abuse of discretion. *State v. Hultenschmidt*, 125 Wn.App. 259,
12 264, 102 P.3d 192 (2004); *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 44 93 P.3d 141 (2004).
13 A court abuses its discretion when such discretion is exercised on untenable grounds or for
14 untenable reasons. *Hultenschmidt*, 125 Wn.App. at 264. *State v. Hui Kim*, 134 Wn. App. 27, 28,
15 139 P.3d 354 (2006).

16 Use of contested evidence implicates Mr. Russell’s constitutional rights. *State v.*
17 *Borsheim*, 140 Wn.App. 357 (2007).

18 The Fourteenth Amendment and the Washington Constitution both require “that criminal
19 prosecutions conform with prevailing notions of fundamental fairness and that criminal
20 defendants be given a meaningful opportunity to present a complete defense.” *State v. Jackson*,
21 2008 Wash.App. LEXIS 1758; *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517
22 (1994).

23 “The State due process clause affords the same protection regarding a criminal
24 defendant’s right to discover potentially exculpatory evidence as does its federal counterpart.”
25 *State v. Tremberth*, 2008 Wash.App. LEXIS 944.

1 The prosecution has a duty to disclose material exculpatory evidence **and a related duty**
2 **to preserve such evidence for use by the defense.** *Wittenbarger*, 124 Wn.2d at 475; *California*
3 *v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

4 In order to be considered ‘material exculpatory evidence’, the evidence must both possess
5 an exculpatory value that was apparent before it was destroyed and be of such a nature that the
6 defendant would be unable to obtain comparable evidence by other reasonably available means.
7 *Wittenbarger*, 124 Wn.2d at 475 (citing *Trombetta*, 467 U.S. at 489).

8 The conflicting test results were known to the prosecution several years prior to their
9 destruction. Quite obviously, destroyed blood evidence is irreplaceable as it relates to the time
10 and place particular to the alleged crime.

11 The standard of review for trial court determinations that evidence is or is not material
12 and exculpatory is de novo. *State v. Burden*, 104 Wn.App. 507, 512, 17 P.3d 1211 (2001).

13 Furthermore, the WSTL was obligated to preserve Mr. Russell’s blood samples per
14 statute. §8.50.107 RCW states in part:

15 “There shall be established **in conjunction with** the chief of the **Washington State**
16 **Patrol...a state toxicological laboratory...whose duty it will be to perform all necessary**
17 **toxicologic procedures requested by...prosecuting attorneys.”**

18 An important consideration is whether the acting party, in this case AMG, violated a duty
19 to preserve the evidence. *Simich v. Culjack*, 27 Wn.2d 403, 408, 178 P.3d 336 (1947).

20 Not only did AMG know of the prosecutor’s request to preserve Mr. Russell’s blood
21 samples, but she willfully breached that duty by destroying that evidence even after she agreed to
22 preserve it.

23 If the State fails to preserve evidence that meets this standard, it must dismiss the
24 criminal charges against the defendant. The State’s good or bad faith is irrelevant to this analysis.
25 *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1981); *State v.*
Copeland, 130 Wn.2d 244, 279-80 922 P.2d 1304 (1996).

1 A due process violation can also exist if the defense shows that the prosecution acted in
2 bad faith by destroying potentially useful evidence. *Youngblood*, 488 U.S. at 58.

3 The predicate to engaging in a bad faith analysis is not the lack of an apparent
4 exculpatory value, but rather the existence of a potentially exculpatory value.

5 The issue of whether the State acted in bad faith is a mixed question of law and fact.
6 *Tapper v. State Employment Sec. Dept.*, 122 Wn.2d 397, 858 P.2d 494 (1993).

7 Relevant considerations in evaluating the circumstances of the destruction include, but
8 are not limited to: (1) whether the State offered the evidence in its case in chief, (2) whether
9 there has been a specific request for preservation of the evidence, (3) what knowledge the State
10 had of the evidentiary value of the type at issue, (4) whether the State misrepresented that status
11 of the evidence as preserved when in fact it was not, and (5) whether the State followed
12 established procedures in the destruction. (Notably, the length of time during which an
13 investigation or criminal matter remains pending is **not** a factor to be weighed, nor is the conduct
14 or the actions of the defendant.) See *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L.
15 Ed. 2d 281 (1988); *United States v. Elliot*, 83 F.Supp.2d 637 (1999), *U.S. v. Cooper*, 983 F.2d
16 928 (1993); *State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060 (1992); *State v. Boyd*, 29 Wash.App.
17 584, 629 P.2d 930 (1981).

18 Finally, liability may be imposed on the State for the negligent conduct of a public
19 official once the duty breached is owed to a particular individual rather than to the public as a
20 whole. The public duty doctrine was obviously violated by AMG and the requirement of
21 §8.50.107 RCW was offended beyond reconciliation. *Stansfield v. Douglas County*, 107
22 Wn.App. 1 (2001).

23 As noted earlier, the State recognized the potentially useful value of the blood evidence
24 destroyed by the WSTL. (Appendix "G", Exhibit "15", CP 857)

25 "Where relevant evidence which would properly be a part of a case is within the control

1 of a party whose interests it would naturally be to produce it and he fails to do so, without
2 satisfactory explanation, **the only inference which the finder of fact may draw is that such**
3 **evidence would be unfavorable. In so holding we have noted ‘[t]his rule is uniformly**
4 **applied by the courts and is an integral part of our jurisprudence’** (internal citations
5 omitted).” *Henderson v. Tyrrell*, 80 Wash.App. 592, 910 P.2d 522 (1996). (Emphasis supplied.)

6 The Washington State Supreme Court conducted a *Brady* rule analysis which applies
7 here. The Court recognized the three distinct suppression situations set forth in *United States v.*
8 *Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976); *State v. Laureano*, 101 Wn.2d 745
9 (1984) (reiterated in *State v. Ortiz*, 119 Wn.2d 294 (1992)).

10 “First, if prosecutor misconduct is involved, a conviction ‘must be set aside if there is any
11 reasonable likelihood’ that the undisclosed evidence could have affected the jury’s decision.”

12 “Next, where the defense has made a specific pretrial request for evidence, the court
13 asked if ‘the suppressed evidence might have affected the outcome.’” *Agurs*, 427 U.S. at 103.

14 “Finally, where only a general discovery request, or no request at all, had been made the
15 State has a duty to disclose evidence if the ‘evidence creates a reasonable doubt that did not
16 otherwise exist.’” *Agurs*, 427 U.S. at 112.

17 Mr. Russell’s defense team did make a specific request to have the forensic blood test
18 results sent to be retested in 2006, only to find out in 2007, that they had been destroyed in 2004.
19 (RP 2760, ll. 20-25) He was never afforded a meaningful opportunity to present a complete
20 defense as guaranteed by the Sixth Amendment.

21 It would be incongruous to allow a party to put a matter in issue and then deny access of
22 an opposing party to relevant information concerning it. That is what has happened here.

23 Our modern concept of criminal trials favors full disclosure of facts, within
24 Constitutional limitations, on both sides of the table. *State v. Hutchinson*, 111 Wn.2d 872
25 (1989).

1 A fair trial cannot be had when the prosecution relies on evidence that is tainted by
2 government misconduct. *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340 (1935)

3 “[Governmental] misconduct may deprive the defendant of a fair trial. And only a fair
4 trial is a constitutional trial.” *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142, 146-47
5 (1978); *State v. Case*, 49 Wash.2d 66, 298 P.2d 500 (1956); *State v. Huson*, 73 Wash.2d 660, 440
6 P.2d 192 (1968); *State v. Kroll*, 87 Wash.2d 829, 558 P.2d 173 (1976).

7 **“It has been thoughtfully observed that [i]f prosecutors are permitted to convict**
8 **guilty defendants by improper, unfair means, then we are but a moment away from the**
9 **time when prosecutors will convict innocent defendants by unfair means.”** *Charlton*, 90
10 Wn.2d at 664; quoting *State v. Torres*, 16 Wash.App. 254, 263, 554 P.2d 1069, 1075 (1976).
11 (Emphasis supplied.)

12 In Mr. Russell’s case, the State was permitted to present evidence, which was once in
13 AMG’s care, but is no longer available for challenge. The blood evidence that was destroyed has
14 been shown to possess potentially favorable results, if it were to be retested or independently
15 analyzed. This showing was made simply by the State’s use of other blood evidence, although
16 distinctly different in its nature.

17 Furthermore, the State would not produce the only witness in a position to answer
18 questions about that missing evidence, the perpetrator herself, AMG.

19 The reversal of a conviction is required upon a showing that favorable evidence could
20 reasonably be taken to put the whole case in such a different light as to undermine confidence the
21 verdict. *Youngblood v. West Virginia*, 488 U.S. 51 (2006).

22 The denial of due process during a defendant’s trial cannot be cured by a new trial at
23 which the destroyed evidence would be equally unavailable. *State v. Boyd*, 29 Wn.App. 584
24 (1981). It was no accident that Mr. Russell’s questionable blood evidence was destroyed. It is a
25 severe injustice, said evidence was nonetheless used to prosecute him, absent the ability to rebut.

1 5. A *Batson* challenge error was committed when all minorities on the jury were struck
2 by the State.

3 Mr. Russell's Hispanic defense lawyers motioned the trial court for a *Batson* challenge:
4 (RP 2700)

5 Juror number 39 was an African American lady named Ms. Ruby West, who said she
6 would be a fair and impartial juror there was no justification for striking Ms. West other than
7 race. With the trial in a nearly all white small community, the three minorities were struck by the
8 prosecution because the defense lawyers were also "of color". There was a pattern established
9 excluding minorities to meet the *Batson* threshold. (RP 2708)

10 Finally, The State alleged that the defense struck a minority prospective juror, Ms.
11 Perniconi. She was an Italian. (RP 2716)

12 An Italian is not regarded as a minority in the United States of America; not any more
13 than an Irishman is. 44 million people in the U.S. claim to be of Irish heritage.

1 6. The trial court erred in not excluding evidence that was more prejudicial than
2 probative. The evidence at issue could not prove any necessary element of this crime required
3 under Evidence Rule 401 for relevance.

4 Judge Frasier denied the defense motion to exclude testimony of detectives Snowden and
5 Fenn that was clearly unfairly prejudicial. (R.P. 3827, ll. 3-8).

6 The weight a jury gives a veteran police officer is extremely compounded when
7 personalized comparisons are made, as was the case here. “the white Cadillac incurred more
8 contact damage and intrusion than almost any of the hundreds of collisions involved vehicles that
9 he has encountered in almost twelve years of employment with the Washington State Patrol.”
10 (RP 3824, ll. 5-9)

11 This testimony does not serve to prove or disprove anything. It does clearly horrify the
12 accident to play on the emotions of the jury, and should not have been allowed at trial for lack of
13 relevance.

14 The same can be said of the following statement the defense also tried to preclude.

15 “It looked like the jaws of life had to be used.” (RP 3825, l.1) They were not used, and
16 eluding to their use also heightened the prejudice caused.

17 On the contrary, not having to use the “jaws of life” is paramount to factors that are
18 elements of the crime alleged, such as speed and the type of driving and impact.

19 After extensively touting the training and specialty schooling involved Detective Ron
20 Snowden gravely prejudiced Mr. Russell by testifying his opinion in answer to the State’s
21 question “And how did the damage to this vehicle compare to the other hundreds that you have
22 been to?” (RP 3894 to 3897; 3925, ll. 9-10)

23 He replied, “I don’t know if I have ever seen damage that extensive to a vehicle – in any
24 of my other wrecks, other than – you know, having a semi or a train involved.” (RP 3925, ll. 11-
25 13)

1 9. Jury instructions were inadequate as they shifted the burden of proof required by the
2 state to prove elements of the crime.

3 The jury instructions for Vehicular Homicide: instruction number 10 (R.P. 5052),
4 instruction number 11 (R.P. 5053), instruction number 12 (R.P. 5055), and the jury instructions
5 for Vehicular Assault: instruction number 16 (R.P. 5058), instruction number 17 (R.P. 5059),
6 instruction number 18 (R.P. 5060) relieved the state of proving beyond a reasonable doubt that
7 Mr. Russell's "ability to drive a motor vehicle was lessened in any appreciable degree as a result
8 of intoxicating liquor."

9 The trial court gave a limiting instruction, jury instruction number 22 (R.P. 5064) which
10 commanded the jury "you are not permitted to consider this evidence in determining whether the
11 defendant had, within two hours after driving, an alcohol concentration of 0.08 or higher as
12 shown by analysis of his blood." This narrowed the field for the elements to convict, requiring
13 the aforementioned element to be found. The state of Washington requires 0.08 to be met as a
14 standard for being under the influence.

15 By giving jury instruction number 25 (R.P. 5065), "The mere consumption of an
16 intoxicating liquor must be shown to establish that a person is under the influence", the trial
17 court wrongly instructed the jury and confused them. Jury instruction number 25 misstates the
18 law.

19 The trial court allowed the state to get away with using a blood test result to establish
20 guilt that it ordered the jury to disregard. The state relied on jury instruction number 9 (R.P.
21 5053) to infer guilt and the elements of Vehicular Homicide as being met by mere consumption
22 of intoxicating liquor.

23 "Under the influence" should have been defined by the use of WPIC 90.06, and not the
24 wrong and ambiguous jury instruction number 25 (R.P. 5065) that relieved the state of its
25 required burden to prove elements and confused the jury. Russell was denied a fair trial.

1
2 WPIC 90.06 was drafted for use only with Vehicular Homicide and Vehicular Assault
3 cases. It should have been given instead of the confusing and ambiguous jury instruction number
4 25. Jury instruction number 25 violates Russell's due process rights in regards to meeting the
5 elements required of all six of his charges.

6 The jury instructions included language that the jury "need not be unanimous as to which
7 alternatives 3.)a.), 3.)b.) or 3.)c.) has been proved beyond a reasonable doubt as long as each
8 juror finds that at least one alternative has been proved beyond a reasonable doubt" (R.P. 5053).
9 Due to this language the entire process has to be voided because of the faulty instruction relieved
10 the state of its burden. The two prongs in the Vehicular Assault instruction would hold "no
11 conviction" was met. The unanimity of the Vehicular Homicide convictions does come into
12 question, as now with the wrong finding of a part 3.)a.) (R.P. 5053) it would not be a complete
13 verdict. The instructions cannot be considered in their entirety with incorrect and contradictory
14 language, canceling each other out.

15 The due process clause of the Fourteenth Amendment of the United States Constitution
16 protects a defendant in a [state] criminal case against conviction except upon proof beyond a
17 reasonable doubt of every element necessary to constitute the crime with which he is charged.
18 *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). Russell's jury instructions did not meet the
19 burden required because the jury did not find the element required "ability to operate a motor
20 vehicle was lessened by an appreciable degree".

21 Not requiring the jury to make the aforementioned finding shifted the burden the state has
22 to make beyond a reasonable doubt. The faulty instructions failed to meet the constitutional
23 requirement that the jury "be instructed as to each element of the offense charged". *State v.*
24 *Releford*, 2009 Wn. App. Lexis 261 (Feb. 2, 2009).

25 Washington courts have required that the elements of Vehicular Homicide be found and

1 that “driving under the influence” means “any influence which lessens in any appreciable
2 degree the ability of the accused to handle his automobile”. *State v. Hurd*, 5 Wn. 2d 308, 315
3 (1940); *State v. Hansen*, 15 Wn. App. 95 (1976).

4 The confusing, conflicting and contradictory jury instructions in Russell’s trial regarding
5 the aforementioned element made Russell’s right to a fair trial fail. Where jury instructions are
6 inconsistent, the reviewing court must determine whether the jury was misled as to its function
7 and responsibilities under the law. *State v. Benson*, 2009 Wn. App. Lexis 494.

8 Jury instruction number 25, did not include that any impairment lessened Russell’s ability
9 to drive by an appreciable degree which is required. What jury instruction 25, did do, was
10 misstate the law: “mere consumption of an intoxicating liquor must be shown to establish that a
11 person is under the influence” (R.P. 5065). The court combined jury instructions and
12 unconstitutionally misled the jury. Other significantly different definitions were needed. *State v.*
13 *Marquez*, 127 P. 3d 786 (Div. II, 2006).

14 The act of driving itself being lessened by any appreciable degree is required with the
15 death to find Vehicular Homicide, not the causal connection between the driver’s drug and
16 alcohol impairment and the victim’s death. *State v. Hensler*, 2009 Wn. App. Lexis 349 (Feb. 12,
17 2009).

18 Jury instructions read as a whole must make the relevant legal standards manifestly
19 apparent to the average juror. *State v. Walden*, 131 Wn. 2d 469 (1997). Not informing Russell’s
20 jury of applicable law when read as a whole created error that was not harmless. *State v.*
21 *Marquez*, 131 Wn. App. 566 (2006).

22 The state must prove every element of the offense charged beyond a reasonable doubt. *In*
23 *re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970).

24 It cannot be said that a defendant had a fair trial if the jury must guess at the meaning of
25 the essential element of the crime with which the defendant is charged, or if the jury might

1 assume that an essential element need not be proven. *State v. Davis*, 27 Wn. App. 498 (1980).

2 With the trial court giving the jury a limiting instruction number 22, saying to disregard
3 0.08 within two hours as criminal behavior, proving, that Russell’s “driving worsened by any
4 appreciable degree”, became the only criminal nexus element. The state trial court’s instructions
5 prevented jurors from giving meaningful consideration to constitutionally relevant mitigating
6 evidence, denying Russell a fair trial. *Abdul-Kabir v. Quarterman*, 500 U.S. _____, No. 05-
7 11284 (U.S. 2007).

8 It is clearly established federal law, as determined by the Supreme Court, that a defendant
9 is deprived of due process if a jury instruction has the effect of relieving this State of the burden
10 of proof enunciated in *Winship. Sandstrom v. Montana*, 442 U.S. 510, 521 (1979).

1 The errors resulting from the rulings and actions of Mr. Russell's trial court are both non-
2 constitutional and Constitutional in nature.

3 The non-constitutional errors which occurred in Mr. Russell's case materially impacted
4 the outcome of Mr. Russell's trial. In particular, issues involving the lawfulness of his arrest, the
5 seizure of the serum blood draw results, the validity of the WSTL blood analysis, and various
6 evidentiary errors compounded, leaving the outcome highly questionable in the mind of a
7 reasonable person.

8 Finally, the Constitutional errors which occurred are numerous and devastating.

9 Statements allegedly made to the arresting officer by Mr. Russell prior to his arrest,
10 offended his *Miranda* rights as guaranteed by the Fifth Amendment once presented to the jury.

11 The illegal seizure of Mr. Russell's blood in Idaho by WSP Murphy violated Article IV,
12 as well as the Fifth, Eleventh and Fourteenth Amendments of the Constitution of the United
13 States of America.

14 Mr. Russell's rights to confrontation and a fair trial free from falsehood and deception as
15 afforded by the Sixth Amendment were obliterated. His whole blood samples possessed a
16 potentially exculpatory value and were illegally destroyed by the Washington State Toxicology
17 Lab, eliminating his protected opportunity to present a complete defense.

18 The jury instructions provided, as identified herein, both utterly ambiguous and
19 inherently flawed, denied Mr. Russell his rights to enjoyment of due process and a fair trial as
20 envisaged by the Sixth and Fourteenth Amendments of the Constitution of the United States.

21 Mr. Russell's convictions should be overturned and the charges against him dismissed. At
22 the very least, a new trial should be explored in the event this reviewing court does not feel that
23 the burden for dismissal has been met.

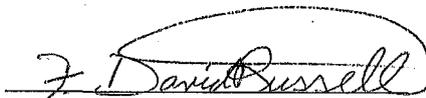
24 Mr. Russell must also be given credit for his pre-sentence incarceration time, served in
25 Ireland while awaiting extradition, as statute and treaty afford him that right.

Statement of Additional Grounds
Constitutional and Non-constitutional
Implications
Requested Remedy and Signature

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1 DATED this 23rd day of August, 2009.

2 Respectfully submitted,

3
4 

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Statement of Additional Grounds
Constitutional and Non-constitutional
Implications
Requested Remedy and Signature

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APPENDIX

“A”



TITLE 67
STATE GOVERNMENT AND STATE AFFAIRS
CHAPTER 23
MISCELLANEOUS PROVISIONS

67-2328. JOINT EXERCISE OF POWERS. (a) Any power, privilege or authority, authorized by the Idaho Constitution, statute or charter, held by the state of Idaho or a public agency of said state, may be exercised and enjoyed jointly with the state of Idaho or any other public agency of this state having the same powers, privilege or authority; but never beyond the limitation of such powers, privileges or authority; and the state or public agency of the state, may exercise such powers, privileges and authority jointly with the United States, any other state, or public agency of any of them, to the extent that the laws of the United States or sister state, grant similar powers, privileges or authority, to the United States and its public agencies, or to the sister state and its public agencies; and provided the laws of the United States or a sister state allow such exercise of joint power, privilege or authority. The state or any public agency thereof when acting jointly with another public agency of this state may exercise and enjoy the power, privilege and authority conferred by this act; but nothing in this act shall be construed to extend the jurisdiction, power, privilege or authority of the state or public agency thereof, beyond the power, privilege or authority said state or public agency might have if acting alone.

(b) Any state or public agency may enter into agreements with one another for joint or cooperative action which includes, but is not limited to, joint use, ownership and/or operation agreements pursuant to the provisions of this act. Appropriate action by ordinance, resolution, or otherwise pursuant to law of the governing bodies of these participating public agencies shall be necessary before any such agreement may enter into force.

(c) Any such agreement shall specify the following:

(1) Its duration.

(2) The precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created.

(3) Its purpose or purposes.

(4) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor.

(5) The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination.

(6) Any other necessary and proper matters.

(d) In the event that the agreement does not establish a separate legal entity to conduct the joint or cooperative undertaking, the agreement shall, in addition to items (1), (3), (4), (5), and (6) of subsection (c) of this section, contain the following:

(1) Provision for an administrator or a joint board responsible for administering the joint or cooperative undertaking. In the case of a joint board, public agencies party to the agreement shall be represented.

(2) The manner of acquiring, holding, and disposing of real and personal property used in the joint or cooperative undertaking.

(3) No agreement made pursuant to this act shall relieve any public agency of any obligation or responsibility imposed upon it by law except that to the extent of actual and timely performance thereof by a joint board or other legal or administrative entity created by an agreement made hereunder, said performances may be offered in satisfaction of the obligation or responsibility.

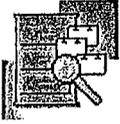
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[Search the Idaho Statutes](#)

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APPENDIX
“B”



Idaho Statutes

TITLE 19 CRIMINAL PROCEDURE

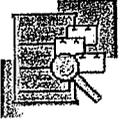
CHAPTER 7 FRESH PURSUIT LAW

19-702. PERSON ARRESTED TO BE TAKEN BEFORE MAGISTRATE -- EXTRADITION OR DISCHARGE. If an arrest is made in this state by an officer of another state in accordance with the provisions of section 1 of this act he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state or admit him to bail for such purpose. If the magistrate determines that the arrest was unlawful he shall discharge the person arrested.

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APPENDIX
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Idaho Statutes

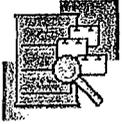
TITLE 67
STATE GOVERNMENT AND STATE AFFAIRS
CHAPTER 23
MISCELLANEOUS PROVISIONS

67-2333. POWERS OF AGENCIES NOT INCREASED OR DIMINISHED. Nothing in this act shall be interpreted to grant to any state or public agency thereof the power to increase or diminish the political or governmental power of the United States, the state of Idaho, a sister state, nor any public agency of any of them.

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APPENDIX
“D”



Idaho Statutes

TITLE 67
STATE GOVERNMENT AND STATE AFFAIRS
CHAPTER 23
MISCELLANEOUS PROVISIONS

67-2337. EXTRATERRITORIAL AUTHORITY OF PEACE OFFICERS. (1) As used in this section, "peace officer" shall mean a certified full-time paid employee of a police or law enforcement agency whose duties include and primarily consist of the prevention, investigation and detection of crime, and the enforcement of penal, traffic, or highway laws of this state or any political subdivision.

(2) All authority that applies to peace officers when performing their assigned functions and duties within the territorial limits of the respective city or political subdivisions, where they are employed, shall apply to them outside such territorial limits to the same degree and extent only when any one (1) of the following conditions exist:

(a) A request for law enforcement assistance is made by a law enforcement agency of said jurisdiction.

(b) The peace officer possesses probable cause to believe a crime is occurring involving a felony or an immediate threat of serious bodily injury or death to any person.

(c) When a peace officer is in fresh pursuit as defined in and pursuant to chapter 7, title 19, Idaho Code.

(3) Subsection (2) of this section shall not imply that peace officers may routinely perform their law enforcement duties outside their jurisdiction in the course and scope of their employment.

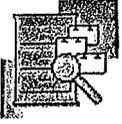
(4) Cities or political subdivisions may enter into mutual assistance compacts with other cities or political subdivisions of this state or of states immediately adjacent. In the case of a mutual assistance compact between cities or political subdivisions, the original, employing agency shall be responsible for any liability arising from the acts of its employees participating in such compact. Any mutual assistance compact between a city or political subdivision of this state with a city or political subdivision of any other state shall include a written statement of assumption of liability consistent with the requirements of this section.

(5) Circumstances surrounding any actual exercise of peace officer authority outside the territorial limits of the city, county, or political subdivision of their employment shall be reported, as soon as safety conditions allow, to the law enforcement agency having jurisdiction where the authority granted herein is exercised and the officer shall relinquish authority and control over any event to the authority having jurisdiction.

(6) The state of Idaho and its agencies or departments shall not be liable for the acts of police officers, other than its own employees, commissioned by the director of the Idaho state police, for acts done under a mutual assistance compact created under this section.

APPENDIX

“E”



Idaho Statutes

TITLE 19 CRIMINAL PROCEDURE

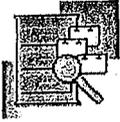
CHAPTER 7 FRESH PURSUIT LAW

19-701.OFFICER OF ANOTHER STATE ENTERING STATE IN FRESH PURSUIT OF SUSPECTED FELON. Any member of a duly organized state, county, or municipal peace unit of another state of the United States who enters this state in fresh pursuit and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

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APPENDIX
“F”



Idaho Statutes

TITLE 67
STATE GOVERNMENT AND STATE AFFAIRS
CHAPTER 23
MISCELLANEOUS PROVISIONS

67-2329.AGREEMENT FILED WITH SECRETARY OF STATE -- CONSTITUTIONALITY -- ENFORCEABLE IN COURTS -- RECIPROCITY. Prior to its becoming binding, any agreement made pursuant to this act between two (2) or more states or between two (2) or more public agencies of two (2) or more states shall be filed with the secretary of state, who shall require an opinion of the attorney general that such agreement does not violate the provisions of the Constitution of the United States, or the Idaho Constitution and statutes. Such opinion shall be rendered within thirty (30) days from the date of request by the secretary of state and submitted to the secretary and interested parties. Failure to render such opinion within such time shall be considered as approval by the attorney general. Upon receiving an opinion that the agreement is constitutional the secretary shall notify the agreeing parties and the agreement shall be in full force and effect from the date of such notice, provided, that such agreement shall not be enforced by the courts of this state unless the state of Idaho or public agency thereof is provided due process for enforcement in the courts of the United States or a sister state. In the event of action on any such agreement, any state or public agency joined in such action not a real party in interest, may seek damages incurred by it because of such joinder against any proper party to the action.

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APPENDIX
“G”

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IN THE WHITMAN COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON

Plaintiff,

vs.

FREDERICK DAVID RUSSELL,

Defendant.

NO. 01-1-00083-1

DEFENDANT'S SUPPLEMENTAL
BRIEF IN SUPPORT OF MOTION TO
DISMISS

INTRODUCTION

On June 22, 2007, Defendant, Frederick David Russell, by and through his counsel, Francisco A. Duarte, filed briefing in support of his pretrial motions filed concurrently therewith. Mr. Russell hereby submits the following memorandum containing additional argument and authority in support of his motion to dismiss, or in the alternative to suppress blood test evidence, as a result of the State's gross misconduct, which has irreparably prejudiced Mr. Russell's right to a fair trial.

STATEMENT OF FACTS

Mr. Russell hereby incorporates the factual assertions set forth in his opening brief, with the addition of the following:

DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT
OF MOTION TO DISMISS - 1

FILED
SEP 13 2007
SHIRLEY ORR, CLERK
WHITMAN COUNTY CLERK

FOX BOWMAN & DUARTE
Attorneys at Law
1621-114th Ave. S.E. Suite 210
Bellevue, Washington 98004
(425) 451-1995

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1 Mr. Russell has demanded, and been entitled, access to and preservation of the blood
2 samples taken since 2001. On June 7, 2001, Mr. Russell's previous counsel filed a Request for
3 Discovery, which requested inspection of (among other things):

4 "any documents and tangible objects: books papers, documents, photographs,
5 tangible objects, buildings or places, or copies or portions thereof, which are in
6 the possession, custody or control of the Prosecuting Attorney, and which are
7 material to the preparation of the defense, or intended for use by the prosecutor
8 as evidence at trial, or obtained from or belonging to the defendant."

9 Once again, on June 28, 2001, Mr. Moorer filed A Demand for Disclosure requesting,
10 among other things that the prosecution "attempt to cause such discoverable material of
11 information within the knowledge, possession or control of others to be made available to the
12 defendant." Finally, on June 13, 2001, this Court signed the Omnibus Application, which
13 granted Mr. Russell's request "to inspect physical or documentary evidence in the plaintiff's
14 possession." Mr. Russell was never provided access to the blood sample evidence and his
15 ability to do so now or in the future has been erased by the State's destruction of that evidence.

16 At the previous pretrial motion hearing held on July 23, 2007, Ms. Gordon, although
17 identified by the State as its proposed witness, did not appear or offer testimony regarding her
18 involvement in the destruction of the blood test evidence in this case. Instead, on July 26,
19 2007, the Washington State Patrol Toxicology Laboratory posted an announcement on its
20 webpage www.breathtest.wsp.wa.gov, stating:

21 **July 26, 2007** - The Washington State Patrol Toxicology
22 Laboratory prepares and tests simulator solutions used in
23 the DataMaster breath testing instruments. Each batch of
solution is prepared by a single analyst. Each batch of
solution is then examined and tested by multiple analysts
and each analyst signs a certificate for use in lieu of live
testimony pursuant to CrRLJ 6.13(c)(1).

1 **All certificates signed by Ann Marie Gordon have been**
2 **removed from this Web Based Discovery Materials Site**
3 **(WebDMS) as of July 21, 2007, because Ms. Gordon did**
4 **not personally examine and test the solutions. This**
5 **applies only to Ms. Gordon's certificates. All other**
6 **certificates remain on the website.**

7 The State Toxicology Laboratory released information establishing that Ms. Gordon
8 manufactured the results of her simulator solution "tests," which were used to approve and
9 certify the solutions for use in evidential breath testing. Id. An internal investigation has
10 commenced relating to the perjured documents; in addition, a criminal investigation of Ms.
11 Gordon's conduct is currently underway.

12 Ms. Gordon was the sole individual alleged by the State to have orchestrated the
13 destruction of Mr. Russell's blood samples, and was also the author of numerous documents,
14 procedures, and communications, both internal and inter-agency, upon which the State now
15 relies in responding to allegations of misconduct. She is the only person who can respond to
16 specific inquiries about the events surrounding her destruction of the blood vials, the timing
17 thereof, and her subsequent actions and communications; yet she is not available as a witness as
18 a result of her intentional, indeed possibly criminal, proliferation of perjured testimony.

19 The State's method of response to these allegations has been decidedly underwhelming.
20 First, the State has established a pattern of evasion of the defense's discovery requests, which
21 has escalated to such an extreme disregard for the rules of discovery and this Court's orders,
22 that after continued failures to timely and completely respond to demands for discovery the
23 Court felt it appropriate to impose monetary sanctions as a penalty for the State's improper
24 conduct.

1 Second, the State has yet to take any affirmative action to compel Ms. Gordon's
2 appearance for the pretrial motions or Mr. Russell's jury trial, yet continues to rely on
3 documents prepared by Ms. Gordon in a failed attempt to justify the destruction of the blood
4 samples in his case. In addition, many of the discovery materials that the State alleges it
5 delivered to the defense were not in fact provided in the manner described.¹ For example, the
6 defense was never informed of the destruction of the blood test evidence by the prosecuting
7 attorneys. To the contrary, Mr. Duarte was lead to believe that the evidence had been
8 preserved until he personally visited the State Toxicologist's office in May, 2007. At that time
9 Mr. Duarte specifically inquired as to the status of the blood vials as a result of information
10 provided to him by an attorney not associated with this case. (See Exhibit One: declarations
11 **under oath** from Bill A. Bowman and Francisco A. Duarte). Any allegations by the State of
12 personal or written communication of the destruction prior to that time are simply false.

13 Further, correspondence relating to the sample destruction prepared by Ms. Gordon in
14 March, 2005, was not included in the State's response to discovery, despite the State's
15 allegation to the contrary.² In fact, the first time defense counsel was made aware of that
16 document or had an opportunity to view it was at the motions hearing itself in July, 2007, and

17
18 ¹ Although the State finally provided its response to Mr. Russell's discovery requests, the following discussion
19 is necessary nonetheless given the blatantly false assertions contained in the State's Response Brief.

20 ² The State also alleges that a copy of Ms. Gordon's February 16, 2005, letter to the prosecuting attorney was
21 provided in its December, 2006 disclosure, however no such document was received by Mr. Russell or his
22 counsel. To the contrary, counsel's only knowledge of its existence stems from its attachment as an exhibit to
23 the State's Response to Pretrial Motions.

1 the copy provided was not on the official letterhead of the Washington State Patrol, nor was it
2 signed or dated by Ms. Gordon³. The only correspondence provided to the defense prior to
3 July, 2007, relating to the status of the blood test evidence ended with a copy of Ms. Gordon's
4 telephone message to the prosecutor's office in January, 2005, which *confirmed the*
5 *preservation* of the samples.

6 Additionally, the State's July, 2007, discovery response indicates that certain
7 documents are included, while in reality they were not so provided (*See e.g.* Dr. Logan's letter
8 of March 24, 2005, which states that the 2004 toxicology quarterly audit report is attached,
9 however no such document was included). Also not included were the results of the
10 Washington State Patrol's independent audit supposedly conducted in 2005 at Dr. Logan's
11 request.⁴

12 Dr. Logan's letter itself was not provided in the State's initial discovery response, even
13 though it was allegedly prepared in 2005. Not until July 19, 2007, just days prior to the pretrial
14 motions hearing, was this letter finally revealed to the defense, albeit without the above-
15 mentioned supporting documents.⁵ This ongoing pattern of mismanagement⁶ continues to
16 impede the defense's efforts to investigate this matter fully in preparation for trial.

17
18 ³ None of the discovery materials provided by the State includes an official signed version of this document.

19 ⁴ These documents were finally supplied on August 23, 2007.

20 ⁵ Notably, this discovery response was prepared by Ann Marie Gordon herself just days prior to her resignation
21 predicated upon the discovery of her falsification of testimony.

22 ⁶ This mismanagement may or may not be a deliberate attempt to evade or elude the State's obligations under
23 the discovery rules, however at a minimum this behavior constitutes grossly negligent conduct.

1 The discovery materials eventually obtained do, however, establish that there is no
2 justification for the destruction of the blood samples in Mr. Russell's case and that the
3 Washington State Toxicology Laboratory, and specifically Ms. Gordon, engaged in a pattern of
4 reckless disregard for the evidence entrusted into its care. To date, the State is unable to
5 establish with any degree of certainty the nature and condition under which Mr. Russell's blood
6 samples were destroyed, if indeed they were. Neither an internal investigation nor multiple
7 external audits have definitively revealed the circumstances surrounding the destruction. What
8 has been revealed, however is that the procedures for the handling of samples are in some
9 respects non-existent, while in other respects they are conflicting and inadequate to ensure
10 proper preservation of evidence, and in still other instances are simply disregarded by the
11 laboratory personnel.

12 ARGUMENT

13 **THE GOVERNMENT'S MISMANAGEMENT HAS** 14 **~~IRREVOCABLY PREJUDICED MR. RUSSELL'S RIGHT~~** 15 **TO A FAIR TRIAL.**

16 A. The Misconduct Of The State Toxicologist Ann Marie Gordon In 17 Providing False Testimony Requires Dismissal Of The Action.

18 The State at trial will seek to admit evidence (the results of the blood test) that is
19 premised on Ms. Gordon's perjurous misconduct. Where a state agent in a case against a
20 criminal defendant has falsely declared under penalty of perjury that they faithfully
21 administered their duties, as a predicate to securing admissible evidence at trial, then the
22 resulting misconduct eviscerates the defendant's rights to due process and a fair trial. *See,*
23 State v. Marks, 114 Wn.2d 724, 730, 790 P.2d 138 (1990). Further, the State cannot escape the
taint of this misconduct under the guise that it was initiated by someone outside the

1 prosecutor's office. The State is not excused from its obligations where the evidence or
2 testimony emanates from a third party, especially where that party is a state actor. See State vs.
3 Sherman, 59 Wash.App. 763, 801 P.2d 274 (1990). Dismissal of charges is appropriate when
4 the potentially "credible" and "admissible" evidence is tainted by the governmental
5 misconduct. Marks at 730.

6 Ms. Gordon's misconduct is relevant as regards any document or statement offered by
7 the State in relation to the destruction of blood sample evidence, which was in fact
8 orchestrated by Ms. Gordon. The only theory offered by the State by which to explain the
9 destruction is based solely on the otherwise unsubstantiated account of Ms. Gordon that the
10 samples were destroyed as part of a mass disposal, occurring outside the normal practice of
11 the toxicology laboratory. Evidence suggesting that Ms. Gordon has routinely provided false
12 testimony under the penalty of perjury for a lengthy period of time is not only relevant to the
13 issues in Mr. Russell's case, but establishes misconduct by the State that is so deeply rooted
14 and systemic that it taints the entire proceeding and prejudice's Mr. Russell's constitutional
15 right to a fair trial free from the interference of false testimony.

16 Even the Washington State Patrol Criminal Investigation Division acknowledges that
17 Ms. Gordon's misconduct is directly relevant to Mr. Russell's case. For example, on July 18,
18 2007, personnel in the Division were directed to contact Dr. Logan regarding Mr. Russell's
19 case based on "developments" in Ms. Gordon's case that these individuals had knowledge of.
20 (See Exhibit Two).

21 Further, the efforts undertaken by the Patrol to investigate allegations of misconduct
22 illustrate a general disregard for any diligent search for the truth. For example, the State was
23 first made aware of problems with the falsification of simulator solution records on March

1 15, 2007, via an anonymous phone message. (See Exhibit Three). The only action taken was
2 to task Ms. Gordon and Mr. Formoso to review the Department's policies amongst
3 themselves and to respond to the allegation. No outside personnel were requested to
4 investigate, nor did Dr. Logan intervene. Not surprisingly, Ms. Gordon and Mr. Formoso, the
5 two individuals later revealed as the culprits, found nothing improper in the solution
6 preparation procedure. (See Exhibit Four).

7 It was only after a second tip was received that a complete investigation was
8 undertaken, after which it was immediately determined that records were being falsified, thus
9 precipitating Ms. Gordon's departure from employment.⁷ Indeed, this second tip also
10 acknowledges the relevance to Mr. Russell's case by specifically naming his counsel of
11 record as an interested party. (See Exhibit Five). The State's failure to promptly and
12 thoroughly investigate allegations of misconduct, and thereby promoting its continuance,
13 casts a cloud of conspiracy over this case that cannot be minimized or massaged away.

14 It has long been recognized that a defendant has a valued right to have a fair trial.
15 Michielli, supra. A fair trial cannot be had when the prosecution relies on evidence that is
16 tainted by governmental misconduct. Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340
17 (1935). In Mooney, the United States Supreme Court originated the rule that a conviction
18 obtained through the use of perjured testimony violates due process. The Mooney court
19 reasoned that a conviction obtained through "deliberate deception of court and

20
21 ⁷ Notably, Ms. Gordon resigned only after receiving notification that as a result of the allegations and
22 investigation into her conduct she would be placed on administrative leave and subject to criminal
23 investigation. (See Exhibit Six).

1 jury...is...inconsistent with the rudimentary demands of justice.” 294 U.S. at 112. Similarly,
2 our own state courts have held that is fundamental that the prosecution should not obtain
3 evidence which it knew or suspected to be perjurious. State v. Carr, 13 Wn. App. 704, 706,
4 537 P.2d 844 (1975), *citing* Untied States v. Hart, 344 F. Supp. 522 (E.D.N.Y. 1971).

5 The problem presented here by Ms. Gordon’s misconduct can best be encapsulated by
6 the Washington Supreme Court, where it spoke about the duty of the government to secure
7 just and fair convictions, stating:

8 In presenting a criminal case to the jury, it is incumbent upon a
9 public prosecutor, as a quasi-judicial officer, to seek a verdict free
10 of prejudice and based upon reason. As we have stated on
11 numerous occasions, the prosecutor, in the interest of justice, must
12 act impartially, and his trial behavior must be worthy of the
13 position he holds. [Governmental] misconduct may deprive the
14 defendant of a fair trial. And only a fair trial is a constitutional
15 trial. State v. Case, 49 Wash.2d 66, 298 P.2d 500 (1956); State v.
16 Huson, 73 Wash.2d 660, 440 P.2d 192 (1968); State v. Kroll, 87
17 Wash.2d 829, 558 P.2d 173 (1976).

18 In spite of our frequent warnings that prejudicial prosecutorial
19 tactics will not be permitted, we find that some prosecutors
20 continue to use improper, sometimes prejudicial means in an effort
21 to obtain convictions. In most of these instances, competent
22 evidence fully sustains a conviction. Thus, we are hard pressed to
23 imagine what, if anything, such prosecutors hope to gain by the
introduction of unfair and improper tactics.

**It has been thoughtfully observed that (i)f prosecutors are
permitted to convict guilty defendants by improper, unfair
means, then we are but a moment away from the time when
prosecutors will convict innocent defendants by unfair means.**
State v. Torres, 16 Wash.App. 254, 263, 554 P.2d 1069, 1075
(1976).

A statement from State v. Montgomery, 56 Wash. 443, 447-48,
105 P. 1035 (1909), quoted in State v. Torres, *supra*, 16 Wash.App.
at 264-65, 554 P.2d at 1075, summarizes the thrust of our holding
today:

1 It is not our purpose to condemn the zeal manifested by the
2 prosecuting attorney in this case. We know that such officers meet
3 with many surprises and disappointments in the discharge of their
4 official duties. They have to deal with all that is selfish and
5 malicious, knavish and criminal, coarse and brutal in human life.
6 But the safeguards which the wisdom of ages has thrown around
7 persons accused of crime cannot be disregarded, and Such officers
8 are reminded that a fearless, impartial discharge of public duty,
9 accompanied by a spirit of fairness toward the accused, is the
10 highest commendation they can hope for. Their devotion to duty is
11 not measured, like the prowess of the savage, by the number of
12 their victims.

13 State v. Charlton, 90 Wn.2d 657, 664-665, 585 P.2d 142, 146-147 (1978) (emphasis added).

14 Therefore, when a prosecutor suspects perjury, the prosecution must at least
15 investigate. The duty to act "is not discharged by attempting to finesse the problem by
16 pressing ahead without a diligent and good faith attempt to resolve it. A prosecutor cannot
17 avoid this obligation by refusing to search the truth and remaining willfully ignorant of the
18 facts." Northern Mariana islands v. Bowie, 243 F.3rd 1109, 118 (9th Cir. 2001). This
19 principle is supported by Mooney, supra, and Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173
20 (1959) (the prosecution has the responsibility and duty to correct what he knows to be false
21 and elicit the truth).

22 Here, the State attempts to admit evidence, which was in Ms. Gordon's care, that is no
23 longer available for challenge, and cannot even produce the only witness in a position to
answer questions about that evidence, Ms. Gordon herself. Most importantly, the reason Ms.
Gordon is unavailable as a witness is the direct result of her acknowledged falsification of
official documents relied upon for the purposes of litigation that she improperly signed under
the penalty of perjury. This leaves Mr. Russell in the untenable position of not only being
unable to challenge the State's assertion as to the evidence *but also* without a means to

1 confront the witness in whose care that evidence resided at the time of the destruction.

2 Certainly the United States and Washington Constitutions exist to prevent such unjust results.

3 B. The Destruction Of The Blood Sample Evidence Constitutes Gross
4 Misconduct For Which The Appropriate Remedy Is Dismissal Of
5 The Action.

6 Mr. Russell's blood samples previously in the care and custody of the State are gone,
7 irrevocably destroyed by Ms. Gordon's irreversible act. Mr. Russell has never been given, and
8 indeed will never have, the opportunity to inspect, authenticate or challenge the physical
9 evidence that the State seeks to admit against him. The foundational underpinnings of
10 American jurisprudence in promoting an adversarial process whereby a defendant can
11 adequately respond to accusations and rebut the evidence against him are bereft where the
12 prosecution destroys that evidence without allowing the defendant access thereto. Thus, the
13 State's destruction of potentially exculpatory evidence without adequate explanation equates
14 with prejudice to an accused's right to a fair trial.

15 Both Federal and Washington courts have analyzed the implications of evidence
16 destruction upon an accused's right to a fair trial and have in many instances held that such
17 destruction presumes prejudice to that right where the State is responsible for the bad faith
18 destruction of potentially exculpatory evidence. State vs. Wittenbarger, 124 Wash.2d 467, 880
19 P.2d 517 (1994). As discussed below, the blood samples here were capable of independent
20 analysis and testing and therefore could have yielded exculpatory information which would
21 rebut the State's assertion that the samples reveal an alcohol content above the legal limit.
22 Thus, the samples contained potentially exculpatory value.

23 The issue of whether the State acted in bad faith is a mixed question of law and fact.

Tapper vs. State Employment Sec. Dept., 122 Wn.2d 397, 858 P.2d 494 (1993). Relevant

DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT
OF MOTION TO DISMISS - 11

FOX BOWMAN & DUARTE
Attorneys at Law
1621-114th Ave. S.E. Suite 210
Bellevue, Washington 98004
(425) 451-1995

1 considerations in evaluating the circumstances of the destruction include, but are not limited to:
2 1) whether the State intends to offer the evidence in its case in chief, 2) whether there has been
3 a specific request for preservation of the evidence, 3) what knowledge the State had of the
4 evidentiary value of the type of evidence at issue, 4) whether the State misrepresented the status
5 of the evidence as preserved when in fact it was not, and 5) whether the State followed
6 established procedures in the destruction.⁸ See Arizona vs. Youngblood, 488 U.S. 51, 109 S.Ct.
7 333, 102 L.Ed.2d 281 (1988), United States vs. Elliot, 83 F.Supp.2d 637 (1999), U.S. vs.
8 Cooper, 983 F.2d 928 (1993), State vs. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992), State vs.
9 Boyd, 29 Wash.App. 584, 629 P.2d 930 (1981).

10 The State's response to this contention is simply to write off the deed as an
11 unintentional mistake, an "oops" that requires no remedy. This cavalier attitude ignores the
12 gravity of the misconduct, but even more troubling is the "explanation" provided for the
13 destruction. A careful review of the documents that have actually been produced raises serious
14 questions about claimed events that supposedly explain why the destruction was unintentional.
15 For example, after receiving Ms. Gordon's memorandum of explanation, Sergeant Lankford of
16 the Washington State Patrol Evidence and Records Division expressed concerns about Ms.
17 Gordon's recitation of events, and indeed her personal notes taken at that time question whether
18 the samples were in fact destroyed. (See Exhibit Seven). These documents reflect Sergeant
19 Lankford's suspicion that Ms. Gordon's destruction of the samples, if it indeed occurred, was:
20 1) not authorized, 2) not conducted in accordance with existing protocols, 3) not conducted in

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22 ⁸ Notably, the length of time during which an investigation or criminal matter remains pending is not a factor
23 to be weighed, nor is the conduct or the actions of the defendant.

1 the regular course of laboratory operations, and 4) predicated upon the improper placement of
2 the samples in question coupled with the reckless disregard for care in the destruction process.

3 Other inconsistencies are evident from the internal documents as well. First, in Ms.
4 Gordon's letter to Denis Tracy dated February 16, 2005, she informs him that "we have
5 concluded that they [the samples] were **most likely** destroyed on or about July 11, 2004."
6 (emphasis added). (See Exhibit Eight). This tacit acknowledgement that the State cannot
7 definitively say when, how or why the samples were destroyed confirms that the "explanation"
8 provided is nothing more than an unsubstantiated guess at the actual circumstances of the
9 destruction.

10 Further confusing is the existence of three separate log sheets presumably updated on or
11 about the same date relating to Mr. Russell's samples that have three entirely different
12 notations as to its status. (See Exhibit Nine). The first contains the notation "sample in
13 question," the second states "see IOC," while the third states "missing as of 3-24-05."
14 Presumably there is one master saved sample log, which the Quality Assurance Manager is
15 responsible for updating. Transcript at 31. According to internal documents, Ms. Clarkson was
16 the Quality Assurance Manager in March, 2005, and she participated, along with Ms. Gordon,
17 in the March, 24, 2005 audit. How or why three separate versions of the save sample log were
18 created is left unexplained.

19 Second, the State claims that the evidence was treated according to established
20 procedures for evidence of a similar nature in place at the time,⁹ yet the remarks contained

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22 ⁹ Notably, the State amended its procedures subsequent to this event in recognition that its policies were
23 woefully inadequate to ensure proper preservation of evidence as required under the law.

1 within the correspondence reveal otherwise. For example, Dr. Logan asserts that after it was
2 discovered that the samples had been destroyed, Ms. Gordon and Ms. Clarkson inventoried the
3 general population of samples and “transferred all remaining ‘save’ samples from general
4 storage into ‘save’ racks,” (See Exhibit Ten) yet in her July 11, 2004, communication regarding
5 “sample discard” Ms. Gordon indicates that “all saved samples were relocated to the save
6 sample racks in permanent storage.” (See Exhibit Eleven). If this were true, there would be no
7 need to move saved samples from the “general population” to the “save racks” sometime
8 thereafter.

9 Additionally, Dr. Logan testified at the July 23, 2007, motions hearing that in 2001
10 samples designated to be saved would be tagged but placed back into the general population of
11 other samples. (See Transcript at 39). This testimony is directly contradicted by Ms. Gordon’s
12 statement. According to Ms. Gordon, the saved racks were in use in 2004 at the time of the
13 alleged destruction of Mr. Russell’s blood samples. Despite a complete external audit
14 conducted by the Washington State Patrol in August, 2004, no information was revealed as to
15 the status of Mr. Russell’s samples.

16 Interestingly, the save racks were reorganized by Ms. Gordon and Ms. Clarkson in
17 March, 2005, after the destruction had been officially discovered, thereby preventing any type
18 of independent investigation into the situation. Additionally, Ms. Gordon’s March 3, 2005,
19 memorandum to Dr. Logan reveals that she had “concerns...about saved samples,” and thus
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1 test results themselves. Forthcoming testimony will establish that the State did not follow
2 established procedures in the administration of the test for drugs. Thus, any State obtained test
3 results are suspect not only as a result of the falsifications already unveiled, but also directly as
4 they were performed on Mr. Russell's samples.

5 Finally, the State itself reiterated the potentially useful value of the blood evidence as
6 illustrated by the February 16, 2005, letter from Prosecuting Attorney Denis Tracy to Ms.
7 Gordon wherein he admonishes that "the destruction of his blood sample by the State will have
8 an impact on that trial, and not for the better." (See Exhibit Fifteen). Importantly, the nature of
9 physical evidence of this type lends itself to independent analysis and testing, which may reveal
10 exculpatory results. Thus, the intrinsic exculpatory value of Mr. Russell's blood samples was
11 known to the State at the time of destruction.¹³ As the Washington Court of Appeals observed
12 in Henderson vs. Tyrrell, 80 Wash.App. 592, 910 P.2d 522 (1996):

13 "We have previously held on several occasions that where relevant evidence
14 which would properly be a part of a case is within the control of a party whose
15 interests it would naturally be to produce it and he fails to do so, without
16 satisfactory explanation, the only inference which the finder of fact may draw is
17 that such evidence would be unfavorable to him. In so holding we have noted
18 '[t]his rule is uniformly applied by the courts and is an integral part of our
19 jurisprudence' (internal citations omitted)."

17 The State's mishandling of Mr. Russell's case and the critical evidence therein has
18 resulted in prejudice to Mr. Russell's ability to receive effective assistance of counsel in

19 _____
20 ¹³ To the extent that the State suggests that a bad faith analysis turns on a showing that the State knew the
21 precise exculpatory value of these samples at the time of their destruction, such an evaluation would
22 circumvent federal and state case law since the predicate to engaging in a bad faith analysis is the lack of an
23 apparent exculpatory value, but rather the existence of a potentially exculpatory value.

1 exists for precisely this situation, and Mr. Russell is as entitled to its relief as any criminal
2 defendant would be given the circumstances described above.

3 CrR 8.3(b) authorizes a trial court to dismiss any criminal prosecution in the
4 furtherance of justice, and to ensure that an accused person is treated fairly. The rule reads,
5 in part, as follows:

6 The Court, in the furtherance of justice after motion and hearing,
7 may dismiss any criminal prosecution due to arbitrary action or
8 government misconduct when there has been prejudice to the
rights off the accused which materially affect the accused's right
to a fair trial.

9 Thus, a court may require dismissal under CrRLJ 8.3 when the defendant shows: (1)
10 governmental misconduct; and (2) prejudice affecting the defendant's rights to a fair trial.

11 State v. Michielli, 132 Wn.2d 229 (1997).

12 Concerning the first element, negligent case mismanagement falls within the standard
13 of government misconduct. State v. Blackwell, 120 Wn.2d 822, 831 (1993); State v.
14 Sulgrove, 19 Wn. App. 860, 863 (1978). Moreover, Washington courts have held that the
15 misconduct need not be intentional, evil, or dishonest, but that simple mismanagement is
16 indeed sufficient. State vs. Sherman, 59 Wn.App. 763, 801 P.2d 274 (1990). The underlying
17 purpose of CrRLJ 8.3(b) is fairness to the defendant. State v Stephans, 47 Wn. App. 600, 603
18 (1987). CrRLJ 8.3 exists to provide a trial court with the authority to dismiss any criminal
19 prosecution in the furtherance of justice and to ensure that an accused person is treated fairly.
20 State v. Wilke, 28 Wn.App. 590, 624 P.2d 1176 (1981). In the case at bar, the State's actions
21 of failing to timely disclose discoverable information, destroying evidence, and offering
22 testimony of a witness who has admittedly submitted false statements under oath, is conduct

1 that far exceeds simple mismanagement and is of such seriousness that it will negatively taint
2 the remaining proceedings, thereby making a fair trial impossible.

3 The type of prosecutorial misconduct addressed by CR 8.3(b) can take many forms,
4 including the proffering of false testimony, gross negligence in providing discovery,
5 destruction of evidence, and mismanagement resulting in undue delay. For example, in State
6 v. Sulgrove, 19 Wash.App. 860, 578 P.2d 74 (1978), the Court affirmed the trial court's
7 dismissal of the case pursuant to CrR 8.3(b) holding that the conduct of the State in failing to
8 allege the offense properly and to timely marshal admissible evidence was sufficiently
9 careless to be deemed misconduct and grounds for dismissal in furtherance of justice. Id. at
10 863. *See Also* State v Stephans, 47 Wn.App. 600, 603 (1987) (misconduct element met where
11 witnesses disobeyed a court order, where there was no indication that the State was ready for
12 trial, and where no remedy would have served interests of justice short of a dismissal); State
13 vs. Dailey, 93 Wash.2d 454, 610 P.2d 357 (1980) (State's negligence in complying with
14 discovery orders and failure to timely dismiss charges against a co-defendant supports trial
15 court's decision to dismiss under CrR 8.3(b)); State vs. Sherman, 59 Wash. App. 763, 801
16 P.2d 274 (1990). (State's failure to produce relevant records within control of its witness as
17 required by discovery order prejudiced defendant and a continuance was not the appropriate
18 remedy for discovery violations).

19 Turning to Mr. Russell's case, the misconduct here is egregious in all respects, and
20 should not be tolerated in our system of justice. The State has perpetuated a pattern of
21 disregard for Mr. Russell's rights as an accused person that has rendered him incapable of
22 exercising his Constitutional rights to confrontation and a fair trial free from falsehood and
23 deception. He is thus entitled to relief as is clearly mandated under both state and federal law.

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CONCLUSION

For all the reasons detailed above, Mr. Russell respectfully requests that this Honorable grant his motion to dismiss the action and/or suppress the blood test results.

Dated this 10th day of September, 2007.



FRANCISCO A. DUARTE
Attorney for Defendant
WSBA# 24056

EXHIBIT 1

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IN THE WHITMAN COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON

Plaintiff,

vs.

FREDERICK DAVID RUSSELL,

Defendant.

NO. 01-1-00083-1

DECLARATION OF FRANCISCO A.
DUARTE

I, Francisco A. Duarte, declare as follows:

1. I am over the age of eighteen and competent to testify.
2. I am a partner at the law firm of Fox, Bowman & Duarte.
3. On November 13, 2006, I filed a Notice of Appearance as counsel of record in the above-captioned matter.
4. On December 1, 2006, Mr. Bill A. Bowman and I, appeared in the Whitman County Superior Court for a case scheduling hearing in this matter. Ms. Weinmann was present for this hearing as well.
5. While traveling back to Seattle after the hearing, I had occasion to briefly discuss this case with Ms. Weinmann. The substance of this conversation was that the Attorney

1 General's Office would be reviewing its files and would be providing discovery shortly
2 thereafter.

3 6. No discussion whatsoever was held at that time regarding the blood samples or the fact
4 of their destruction.

5 7. In December, 2006, I received the State's Response to Discovery and I reviewed those
6 documents thoroughly. The only correspondence provided relating to the blood
7 samples concluded in January, 2005, with the confirmation from the toxicology
8 laboratory that the blood samples had been preserved. No documents reflecting the
9 destruction of the samples were included in this Discovery Response.

10 8. In May, 2007, I traveled to the Washington State Toxicology office in Seattle,
11 Washington, at which time I met personally with Ms. Ann Marie Gordon. I advised
12 Ms. Gordon that an attorney not associated with this case alluded to the possible
13 destruction of the blood samples and I asked Ms. Gordon to confirm or deny that fact.

14 9. Ms. Gordon advised me for the first time at that meeting that the samples had been
15 destroyed.

16 10. No documents or correspondence relating to the destruction of the blood samples was
17 provided to the defense until July 19, 2007, four days prior to the pretrial motions
18 hearing.

19 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE
20 OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

21 Dated at BELLEVUE, WA this 17th day of August, 2007.

22 
23 _____
FRANCISCO A. DUARTE

DECLARATION OF FRANCISCO A. DUARTE - 2

FOX BOWMAN & DUARTE
Attorneys at Law
1621-114th Ave. S.E. Suite 210
Bellevue, Washington 98004
(425) 451-1995

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IN THE WHITMAN COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON

Plaintiff,

vs.

FREDERICK DAVID RUSSELL,

Defendant.

NO. 01-1-00083-1

DECLARATION OF BILL A.
BOWMAN

I, BILL A. BOWMAN, declare as follows:

1. I am over the age of eighteen and competent to testify.
2. I am a partner at the law firm of Fox, Bowman & Duarte.
3. On December 1, 2006, Mr. Francisco A. Duarte and I appeared in the Whitman County Superior Court for a case scheduling hearing in this matter. Ms. Weinmann was present for this hearing as well.
5. While traveling back to Seattle after the hearing, I was present during a brief discussion between Mr. Duarte and Ms. Weinmann regarding this case. Ms. Weinmann advised us that her office would be reviewing the discovery files forwarded from the Whitman County Prosecuting Attorney in the near future, and would forward discovery to us.

DECLARATION OF BILL A. BOWMAN - 1

FOX BOWMAN & DUARTE
Attorneys at Law
1621-114th Ave. S.E. Suite 210
Bellevue, Washington 98004
(425) 451-1995

1 6. No discussion whatsoever was held at that time regarding the blood samples or the fact
2 of their destruction.

3 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE
4 OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

5 Dated at Bellevue, WA this 17th day of August, 2007.

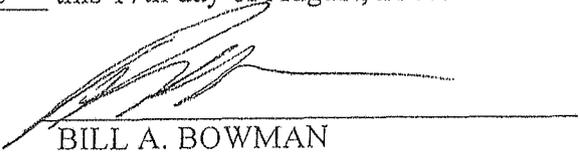
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7 
8 BILL A. BOWMAN

EXHIBIT 3

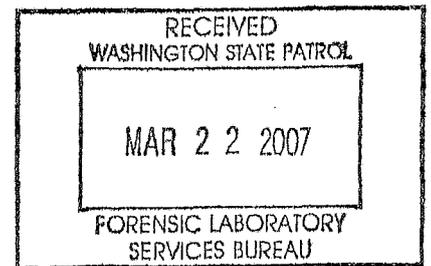
WASHINGTON STATE PATROL - MARCH 2007

THURSDAY, MARCH 15, 2007, 4:59 PM

MESSAGE #2585

Simulator solutions are being falsified as far as the certification.

END OF MESSAGE



COMPLETED

RECEIVED
MAR 16 2007
OFFICE OF THE CHIEF

THIS DOCUMENT TO BE ARCHIVED - RETURN TO THE OFFICE OF THE CHIEF

EXHIBIT 5

WASHINGTON STATE PATROL - JULY, 2007

MONDAY, JULY 9, 2007, 7:26 PM

MESSAGE #2606

Ann Marie Gordon doesn't really certify all those simulator solutions. If you look in the file you'll find a grammatigram with her name on it, but if you also check over the years of where she really was on the days that those things were certified you'll find once in a while she was in DC or Alaska, or somewhere else. She had somebody else do it and then she'll sign the forms that says, under penalty of perjury I analyzed this. If you don't think that's a big deal just think what Francisco Duarte would think of that.

END OF MESSAGE

EXHIBIT 6

WASHINGTON STATE PATROL



TO: Ms. Ann Marie Gordon, Toxicology Laboratory Division
FROM: Dr. Barry Logan, Forensic Laboratory Services Bureau
SUBJECT: Administrative Reassignment to Residence
DATE: July 19, 2007 FILE: OPS Case Number 07-1127

Effective immediately, you are placed on administrative reassignment with pay at your residence. While on administrative reassignment, you will not conduct agency business unless directed by your supervisor. If you have remote access to a WSP server, this access will be suspended during this assignment.

This administrative reassignment is necessary because of the nature of the allegations in your case. The citizens of the state hold the Washington State Patrol accountable for the acts and omissions of our employees. We have an obligation to you, your fellow employees, the Agency, and the citizens of this state to thoroughly investigate allegations of misconduct and substandard performance.

You are required to call Ms. Kitty Jacobs at (206) 262-6000 at the Forensic Laboratory Services Bureau daily between 10:00 and 10:30 a.m. and again between 1:30 and 2:00 p.m., Monday through Friday, excluding holidays. A log will be maintained of each call and any messages the department has for you will be provided to you at that time. You shall remain at your residence, available by telephone, able to respond to the Toxicology Laboratory Division within one-hour notice between the hours of 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m. This administrative reassignment is not a disciplinary action.

During this period of time, your Washington State Patrol identification, and keys will be temporarily retained by Dr. Barry Logan. No overtime, compensatory time, or shift differential will be incurred during this period. You are not required to call the office on state designated holidays, nor will these holidays be considered as days worked. You are directed not to appear at any Washington State Patrol facility without official authorization from your division commander.

You shall continue to complete and submit Time and Activity Reports (TARS) in accordance with department policy, while on administrative reassignment. Your TARS should be submitted to arrive at your supervisor's office at least three working days prior to the end of each pay period. The Time and Activity code for administrative reassignment to residence is 9509. You will utilize accumulated sick leave for medical appointments. Sick leave and annual leave usage must be approved by your supervisor.

If you previously had authorization for off duty employment, this authorization is rescinded. This directive will remain in effect until either the adjudication or conclusion of this administrative investigation.

INITIAL _____ DATE _____



INITIAL _____ DATE _____

Ms. Ann Marie Gordon

Page 2 of 2

July 19, 2007

Failure to comply with any part of this directive shall constitute insubordination, which shall result in discipline up to and including termination. Any questions regarding this administrative assignment shall be directed to Dr. Barry Logan at (206) 262-6000.

BKL:dfp

cc: Chief John R. Batiste
Captain G. Curt Hattell, Office of Professional Standards
Assistant Chief David J. Karnitz, Investigative Services Bureau
Captain Marc W. Lamoreaux, Human Resource Division
Mr. Karl Nagel, Labor and Policy Office
Mr. Dan Parsons, Information Technology Division

INITIAL _____ DATE _____

INITIAL _____ DATE _____



STATE OF WASHINGTON
WASHINGTON STATE PATROL

PO Box 42611 • Olympia, Washington 98504-2611 • 360-704-4220 • www.wsp.wa.gov

July 19, 2007

ORIGINAL FAXED, NOT MAILED

Ms. Ann Marie Gordon
Washington State Patrol
2203 Airport Way S, Ste 360
Seattle WA 98134-2027

Dear Ms. Gordon:

On July 11, 2007, the department received information alleging that from June 2006 through July 2007, you were involved in criminal misconduct.

This complaint will be referred to the Criminal Investigation Division to monitor and/or conduct a criminal investigation. The Office of Professionals Standards (OPS) administrative investigation case number 07-1127 regarding this complaint has been placed on hold pending the completion of the criminal investigation.

The Internal Affairs Section has been assigned the responsibility of investigating the above-mentioned allegation(s) upon completion of the criminal investigation. You will be notified of the conclusion of the criminal case and the initiation of the administrative investigation in writing.

Note: Effective immediately, you are directed to have no communication regarding this matter, either on-duty or off-duty, with any person who is a potential witness or may be materially involved with the criminal investigation, suspended administrative investigation, or during the administrative investigation when it is initiated.

This directive means you are prohibited from communicating to these individuals about this matter by any means to include: fax, telephone, mail, electronic messaging, in-person, person to person relay, or any other form of communication.

Failure to comply with this directive shall be considered a violation of regulations 8.00.120 Insubordination II. Policy (A) Requirement to Obey Orders, and 12.00.020 Complaints; II. Policy (G) Interference with Discipline, which may result in discipline up to and including termination. You are not prohibited from discussing this matter with your union representative and/or legal advisor.

EMPLOYEE INITIAL _____ DATE _____ WITNESS INITIAL _____ DATE _____



Ms. Ann Marie Gordon

Page 2 of 2

July 19, 2007

This directive will remain in effect until either the adjudication or conclusion of the administrative investigation. *Note: Adjudication or conclusion of the case is when either the employee has been advised in writing by the appointing authority of a non-adverse finding, contemplated proven finding, or a settlement agreement has been reached. If a settlement agreement is reached, the directive will no longer be in effect on the date of the last signature of the settlement agreement.*

If you have any questions regarding this complaint, please contact Acting Lieutenant James Hays at (360) 704-2343, reference OPS case number 07-1127.

Sincerely,



Captain G. Curt Hattell
Office of Professional Standards

GCH:dfp

EMPLOYEE INITIAL _____ DATE _____ WITNESS INITIAL _____ DATE _____

EXHIBIT 7

Lankford, Patti (WSP)

From: Lankford, Patti (WSP)
Sent: Thursday, March 17, 2005 2:25 PM
To: Logan, Barry (WSP)
Cc: Jacobs, Kitty (WSP); Davls, Steve (WSP); Sorenson, Don (WSP)
Subject: RE: Response on Toxicology Lab Evidence Incident

Dr. Logan;

I would be happy to meet with you and Ms. Gordon. I will be in Spokane most of next week for an audit. I will be in the office on Monday if Ms. Jacobs wants to call and look at dates and times.

Sgt. Patti Lankford
Evidence & Records Division
(360)407-0174 Office/(360)790-3171 Cell
Patti.Lankford@wsp.wa.gov

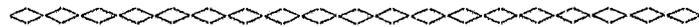
This message and any attachments may be confidential. Dissemination, distribution, or copying of this communication without prior approval is prohibited. If this message is received in error, please notify the sender and delete the message. Thank you.

From: Logan, Barry (WSP)
Sent: Wednesday, March 16, 2005 4:16 PM
To: Lankford, Patti (WSP)
Cc: Jacobs, Kitty (WSP)
Subject: RE: Response on Toxicology Lab Evidence Incident

Patti; Thanks for your insights. Ann's IOC is a little convoluted. I have requested some clarification of my own from Ann, and I think it would be helpful for the three of us to meet and review this incident. I'll have Kitty schedule that with you. Ann discussed the audit date issue with me but did not include all the details. She did raise a concern about the timing of this years audit as it occurs during her planned vacation, but we can discuss that during our meeting.

Thanks

BKL



Barry K Logan PhD, DABFT
Washington State Toxicologist
Director, Forensic Laboratory Services Bureau
Washington State Patrol
2203 Airport Way S.
Seattle WA 98134

Phone: 206 262 6000



-----Original Message-----

From: Lankford, Patti (WSP)
Sent: Tuesday, March 15, 2005 2:57 PM

To: Logan, Barry (WSP)
Cc: Davis, Steve (WSP); Sorenson, Don (WSP)
Subject: Response on Toxicology Lab Evidence Incident

Dear Dr. Logan;

I have reviewed the incident report provided to me by Ms. Ann Marie Gordon involving the two missing blood vials (ST 013211). An additional piece of data has been requested by my office, namely, a LIMS Chain of Custody Report.

Issues and questions of merit raised by this review include:

1. Ms. Gordon states in paragraph two that the sample "should have been placed into the save sample rack but apparently was returned to the original sample rack . . ." The basis for this conclusion is unclear. She provides no evidence attesting to where the sample was placed.
2. In the same paragraph, Ms. Gordon states that the laboratory had an "internal procedure" regarding the handling of samples, but there is no indication that the procedure was put into writing. Ms. Gordon continues: "This policy was not documented in writing." In this instance, is she referencing the procedure above, or some other unnamed policy? All policies must be updated annually.
3. In paragraph three, Ms. Gordon refers to an annual evidence audit that was scheduled for November 2004 and moved up to August 2004. She states that her request for a delay of the audit was denied. Her statement was partially correct. Ms. Gordon made a request to delay a scheduled audit. That request was honored and the audit was rescheduled. She then requested a delay of this second audit date. This delay request was denied.
4. Ms. Gordon states later in the paragraph: "it was decided that the number of retained samples was too large and that the 2001 samples should be discarded . . ." It is unclear who made this determination. Further, it is unclear who made the decision to discard the samples.
5. In paragraph four, Ms. Gordon states that in November 2004, the QA/Technical Lead conducted a quarterly audit. This audit concluded with no apparent findings per the issue at hand. A review of the audit file, and all associated working papers, are necessary to determine if a complete audit of the saved samples was conducted per Ms. Gordon's direction. Ms. Gordon is not specific about her indicated concerns about the saved samples.
6. Finally, in looking at the Sample List for 2001, a second sample (ST 012914) is listed as "missing." There is no explanation provided regarding the disappearance of the second sample. This raises additional concerns relative to internal, evidentiary controls and practices.

Please consider these my initial comments in this ongoing review. I have yet to consider the proposed changes to the Washington State Patrol's Toxicology Lab Policy Manual. If you have any questions concerning this update, please do not hesitate to give me a call.

Sgt. Patti Lankford
Evidence & Records Division
(360)407-0174 Office/(360)790-3171 Cell
Patti.Lankford@wsp.wa.gov

This message and any attachments may be confidential. Dissemination, distribution, or copying of this communication without prior approval is prohibited. If this message is received in error, please notify the sender and delete the message. Thank you.

EXHIBIT 8



STATE OF WASHINGTON
WASHINGTON STATE PATROL
WASHINGTON STATE TOXICOLOGY LABORATORY

2203 Airport Way South, Suite 360 • Seattle, Washington 98134-2027 • (206) 262-6100 • FAX (206) 262-6145

February 16, 2005

Denis P. Tracy
400 North Main Street
PO Box 30
Colfax, WA 99111-0030

And by FAX (509) 937-5659

RE: Tox Lab Sample ST013211

Dear Mr. Tracy:

This is in response to your letter of February 16th 2005, with respect to blood samples submitted to the Washington State Toxicology Laboratory in the above case. We received these samples on June 9th, 2001.

This office received a request from your office on February 28th 2004 to retain these blood samples. Although our policy is to discard blood samples nine months after receipt as indicated on the report, at the time of your request we did still have these samples in our possession.

Our records indicate that the sample was marked to be saved, and assigned number "Save 0892". A search of our freezers today indicates that we no longer have the samples, and we have concluded that they were most likely destroyed on or about July 11th, 2004, along with other outdated specimens.

We are conducting a further review of our policy and procedures for saving samples and if any further information comes to light we will notify you immediately.

Sincerely,

CHIEF JOHN R. BATISTE

Ann Marie Gordon, M.S.
Laboratory Manager
Washington State Toxicology Laboratory

Cc: Barry K. Logan, PhD

RECEIVED

FEB 17 2005

PROSECUTOR'S OFFICE



EXHIBIT 9

ST #	Subject's Name	Red Sticker #	Date Saved	Requested by	Analyst	Date Given to Tox	Checked March-05
014978	Plummer, Mark	0457	12-5-03	Det. Scott Witman			2 Gray top Vials-Blood
014006	Harmon, James	0508	9-8-03	Joan Cavagnaro			2 Gray top Vials-Blood
014421	Detrick, Kenneth	0522	11-7-03	Adrienne McEntee			2 Gray top Vials-Blood
011472	Brown, Gallen	0604	4-10-03	Arne Denny			1 Gray top Vial-Blood
011730	VanHee, Linda	0624	3-29-04	Jayn Kellar			3 Gray top Vials-Blood
012573	Anderson, Dick	0666	6-23-03	Lana Stephenson			2 Gray top Vials-Blood
016328	Brine, Alan	0693	7-25-03	Lana Stephenson			Transferred to Prosecutor
012914	Kane, David	0730	8-26-03	Joni Njos			Missing Pros- Contacted No Pending Trial
017041	Hyde, Bruce	0742	9-8-03	John L. O'Brien			
012403	Long, Garry	0775	9-26-03	Karen Peck			2 Gray top Vials-Blood
015842	Mueller, David	0811	11-7-03	Bridget E. Casey			2 Gray top Vials-Blood
013211	Russell, Frederick	0892	2-17-04	Carol La Verne			Sample In Question
014518	Hammer, Rosa	0917	3-19-04	Martin Singleton			1 Yellow top Vial Blood
014526	Baskins, Tessa	0918	3-19-04	Martin Singleton			1 Red top Vial Urine
015398	Skylstad, Scott	0922	3-26-04	Tim Durkin			2 Gray top Vials-Blood
010701	Tucker, Christopher	0937	4-28-04	Carl Munson			2 Gray top Vials-Blood

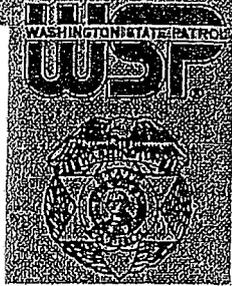
ST #	Subject's Name	Red Sticker #	Date Saved	Requested by	Anal yst	Date Given to Tox	Checked March-05
013211	Russell, Frederick	0892	2-17-04	Carol La Verne			See IOC
014518	Hammer, Rosa	0917	3-19-04	Martin Singleton			1 Yellow top Vial Blood
014526	Baskins, Tessa	0918	3-19-04	Martin Singleton			1 Red top Vial Urine
015398	Skylstad, Scott	0922	3-26-04	Tim Durkin			2 Gray top Vials-Blood
010701	Tucker, Christopher	0937	4-28-04	Carl Munson			2 Gray top Vials-Blood

WSTL Saved Sample Log (as of 7/2007)

ST #	Subject's Name	Red Sticker #	Date Saved	Requested by	Analyst	Date Given to Tox	Saved By	Comments
000511		0250	11-30-01		RL			Resaved 2vg on 12/14/05 BEA, not in database prior to 2005 saving. resaved 2vg 2/5/2007 BEA, Resaved 5/4/2007 AB
002849		0251	12-00-00		GC			Resaved 2vg on 12/14/05 BEA, not in database prior to 2005 saving.resaved 2vg 2/5/2007 BEA
005212		0241	9-26-03					
005854		0318	9-8-03					resaved 2vg on 12/14/05 BEA, resaved 2vg 2/2/2007 MP
006145		0311	8-6-01			11/5/2004		re-requested
010322		0335	10-18-01					
010387		0361	1-17-02					
010516		0315	8-17-01					
010701		0937	4-28-04					
010796		0355	12-31-01					
010837		0357	12-13-01					
010852		0320	9-10-01					
010916		0370	2-1-02					
011034		0349	11-15-01					
011116		0303	6-26-01					
011235		0342	5-13-02					
011269		0299	5-31-01					
011406		0367	1-29-02					
011468		0368	1-29-02					
011472		0604	4-10-03					
011504		0442	7-9-02					
011611		0332	10-5-01					
011622		0323	9-18-01					
011711		0310	5-7-02					
011721		0429	June 2002					released to court on 1/18/2002
011730		0624	3-29-04					
011765		0300	6-11-01					
011768		0369	1-29-02					
011816		0302	6-26-01					
011901		0312	8-6-01					
011969		0350	11-26-01					
012403		0775	9-26-03					
012475		0453	9-23-02					Blood tubes destroyed 7/20/04 BF
012483		0430	6-25-02					
012573		0666	6-23-03					
012910		0730	6-26-03					Missing as of 3/24/2005
013217	Russell, Fredenck	0692	2-17-04	Garold LaVerne				Missing as of 3/24/2005
014006		0508	9-8-03					
014421		0522	11-7-03					
014518		0917	3-19-04					
014526		0918	3-19-04					
014978		0457	12-5-03					
014979		0456	11-7-03					
015398		0922	3-26-04					
015842		0811	11-7-03					
016328		0693	7-25-03					Missing as of 3/24/2005
016501		0419	12-18-03					
016754		0384	5-13-04					
017041		0742	9-8-03					
017042		0415	9-8-03					
020115		1132	2/14/05		MP	2-8-05		
020899		1125	2/14/05		MP	2-8-05		
021009		1111	1/27/2005		WM	1/25/2005		
021088		1126	2-9-05		EM	2-8-05		
021302		1112	2-9-05		EM	1/24/2005		
021426		1127	2-9-05		WM	2-8-05		

EXHIBIT 10

WASHINGTON STATE PATROL



TO: Record

FROM: Ann Marie Gordon, Toxicology Laboratory Manager *AMG*
Jayne Clarkson, QA Technical Lead *JAC*

SUBJECT: Quarterly Audit – 1st Quarter 2005

DATE: May 5, 2005

On March 24, 2005, an audit of the Washington State Toxicology Evidence Freezers was conducted by Ann Marie Gordon and Jayne Clarkson. The audit included all saved samples. Saved samples which had previously been saved in the racks by ST number were moved to the saved sample racks.

Findings:

The findings of the audit are on the attached pages.

All original stoppers which had come off during storage were replaced with snap caps

For all identified cracked tubes, if possible the labels were photocopied and the blood transferred to new tubes. The photocopied labels were placed in the case file and appropriate annotations were made in the case files.

All supplemental samples were accounted for and transferred to the supplemental sample receipt racks. The database for these was updated.



EXHIBIT 11

INTEROFFICE COMMUNICATION

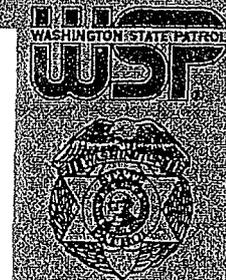
WASHINGTON STATE PATROL

TO: File

FROM: Ann Marie Gordon, Toxicology Laboratory Division *AMG*

SUBJECT: Sample Discard

DATE: July 11, 2004



Samples from cases ST010001 through ST014559 were removed from permanent storage on this date. All saved samples were relocated to the same sample racks in permanent storage.

All other samples were discarded into biohazardous waste.



EXHIBIT 13

TO: Dr. Barry K. Logan, Forensic Laboratory Services Bureau

FROM: Captain Stephen M. Davis, Evidence and Records Division

SUBJECT: Toxicology Laboratory Annual Evidence Audit - 2004

DATE: August 18, 2004

On August 17, 2004, an audit of the Washington State Patrol Toxicology Laboratory was conducted. The audit team consisted of members of the Audit/Inspection Division (Dr. A. Donald Sorenson), Evidence and Records Section (Sergeant Patricia Lankford), Public Disclosure Office (Ms. Gretchen Dolan), and Records Retention Section (Ms. Kristin Young). Sergeant Lankford and Dr. Sorenson inspected the open cases submitted for examination by user agencies to the Toxicology Laboratory. Ms. Dolan and Ms. Young examined files and databases maintained by Laboratory personnel.

This audit complies with Regulation 21.00.020 and CALFA 84.1.6, requiring an annual inventory of evidence held by the agency.

AUDIT SCOPE

The purpose of one portion of the audit was to ensure the integrity of the evidence system by determining if the evidence system and related records were being administered and handled in accordance with Crime Laboratory Division policies, rules, regulations and statutory requirements. The audit included a random sample of 373 (of 12,897) evidence samples. The random sampling provided for a 95% confidence level with a +/-5% confidence interval. When samples were not found, the respective evidence files were examined to ensure proper documentation of their location.

The purpose of the second portion of the audit was to ensure compliance with the proper administration of public disclosure and records retention policies, rules, regulations and statutory requirements.

ACCOUNTABILITY OF EVIDENCE

The Toxicology Laboratory holds blood vials and urine samples submitted for testing. After the testing is completed, these samples are either destroyed or held longer per the request of the originating agency.

Evidence submitted by user agencies for analysis is physically located either in the refrigerators or in the long-term storage freezers. Representative cases were selected and inspected for integrity of seals and proper documentation.

FINDINGS-EVIDENCE

The examination of all property revealed no apparent evidence of theft, tampering, or misappropriation. However, there were one hundred and twenty one (121) tubes that were unaccounted for following the transfer of tubes from the old freezers to the new frost-free ones. Auditors were told by the Lab Manager that the tubes were destroyed during the transition. A review of the case files revealed that there are no notations in the respective files as to this occurrence. Another one hundred and twenty two tubes (122) were destroyed during the transition but the date of that destruction is "unknown." Finally, another two hundred ninety five (295) tubes were broken during the transition. The Lab Manager indicated that this was due to the fact that tubes had frozen together in blocks of ice over time and the force necessary to retrieve them from the old freezers resulted in mass breakage and destruction of the samples. The Lab Manager stated that she did not believe this to be a problem in that the cases were from 2003 and past the nine month retention time frame.

A marked improvement was noted in the storage of tubes in metal trays as opposed to plastic trays that were prone to flex and break during retrieval of samples for testing. Of the seventy five trays examined, fully two-thirds had been converted to metal and it is recommended that the Laboratory continue with replacing metal for plastic trays in conjunction with the manufacturer's delivery of these items.

Glass tube breakage was an issue as well but one that must be dealt with on a continual basis. Of the three hundred seventy three (373) samples examined, seventeen (17) were cracked and set aside to thaw so that the sample could be transferred to a new tube. Approximately ten additional tubes not included in the random sample were observed to be cracked during the course of the audit and these too were set aside to be thawed and transferred at a later time.

Test tube tops that came off due to pressure build-up occurring in the interior of the tube were noted in a dozen cases. The current policy is to replace any top that comes off with a plastic cap and this appears to be occurring.

There were two instances of tubes that were in the wrong locations (03-1798 and 03-2171) and one instance of a basket of tubes that had been placed backwards in the metal tray. All three of these items were corrected on site.

During a cross check of case files, the location of two of four tubes for case 03-2203 could not be determined when comparing the number of tubes on record versus the number of tubes located in the freezer.

Overall, the level of cleanliness in the freezer compartments was very good. Less than a third of the trays contained tubes whose tops had small amounts of blood and urine residue on them or leakage from either the tube itself or nearby tubes whose contents had expanded during freezing.

The first freezer unit had several trays with accumulated ice build-up that would require thawing prior to removal of tubes for testing purposes.

The Lab's Administrative Policies and Procedures Manual is somewhat confusing in that Section K, Subsection 2, indicates that all visitors to the laboratory must sign in on a visitor log and specifically references auditors. Subsection 3 states that WSP employees need not sign in on the visitor's log. In any case, neither of the auditors who entered the lab were asked to sign in on the visitor's log. While protective apparel was offered for the morning session of the audit, safety glasses were not offered for the afternoon session and neither of the auditors were encouraged to review a Bio-Safety card (Section K, Subsection 2-c).

Renovation of the testing areas of the lab is continuing and so only a cursory examination of that area occurred. Again, the overall cleanliness of the lab appeared good in spite of the disruption caused by the movement of equipment to allow for construction work to progress.

The Lab Manager was asked for copies of the first two Quarterly Audits (WSP Regulation 21.00.020, /CALEA 84.1.2, 84.1.6) and stated that the audits were not conducted.

FINDINGS-RECORDS

The two audit team members reviewing the Toxicology Laboratory's handling of documents, records retention, and public disclosure requests provided the following information.

Destruction File

Non-Compliant

Violation: RCW 40.14.060

No file was available for review

One (1) "Destruction Authorization Form" was found. Ms. Gordon indicated that she has not had time to file it.

Recommendation: Review all files and follow prescribed procedures for destruction or archiving as necessary. Develop and maintain a "Destruction Authorization" file.

Databases

Non-Compliant

Violation: RCW 40.14.060.

A current listing of databases used at the Toxicology Lab was provided by Linda Collins. The list includes:

- Tox Database
- Discovery Excel (PD Tracking)
- Saving Samples Database

No databases were able to be audited for retention as no retention schedule has been established.

Recommendation: Schedule immediately.

Disclosure Requests

Non-Compliant

Violations: RCW 42.17.260

Regulation Manual 6.01.040 Public Records Requests
CALEA 46.1.4, 54.1.1, 54.1.3, 82.1.1, 82.2.5.

Ms. Gordon refers to all records requests received by the Toxicology Lab as Discovery requests. Under WSP Regulation, all such requests are all to be retained and tracked as disclosure requests. Toxicology Lab's SOP Manual indicates adherence to WSP regulations for disclosure. Ms. Gordon indicated that she did not have time to follow WSP policies and therefore would not be doing it.

- Redactions are being made without exemptions being explained to requestor.
- Not using WSP database for tracking – using excel spreadsheet.
- Not keeping requests in proper files, but rather in binders all together, or in envelopes.
- No tracking # assigned.
- Inappropriate filing of Blood work and BAC requests.
- No billing being done for non subpoenaed requests.

Recommendation: That the Bureau Director be informed of the gravity of these matters and request a mitigation plan within thirty (30) days.

Performance Records (DOC Books)

Non-Compliant

Violations: Regulation Manual 7.01.030, 15.00.030
CALEA 26.1.8, 35.1.10, 35.1.13

- No signed SCAN logs were found in the files.
- Two (2) of four (4) records reviewed contained materials past the retention period.
- One (1) Doc book was not transferred with employee when he transferred out of the Tox Lab.

Recommendation: Review all DOC books for proper contents and take appropriate inclusion or purging actions.

Case Files

Non-Compliant

Violations: Regulation Manual 10.04.100.

CALEA 11.4.2, 11.5.1, 11.5.2, 11.5.1, 11.6.4

Multiple sets of copies were found in the files.

Form numbers were present on only a few of the forms utilized.

Recommendation: Clarify and identify what documents are to be included in case files. Ensure that all forms utilized have been assigned a WSP form number.

TARs

Non-Compliant

Violation: TAR Manual

- TARs are stored in various places, with majority being stored in three-ring binders.
- TARs are unsecured.
- January 1, 2000 to June 30, 2000 TARs were discovered in an off-site storage area.
- Copy of an original TAR found with an attached note that read: "Original at HRD?"

Recommendation: Secure all TARS at one location at the respective employee's duty station. Create and utilize consistent filing system, either by date or employee.

Simulator Solution Logbooks

Status: Non-Compliant

Violation: Retention: Ten (10) years for in-house records. No copies of archived files/records are to be kept locally.

A random sample of the Simulator Solution Logbooks (records of quality control results for simulator solutions produced by the lab) dating from 1991-1992, 1995-1997, and 2001-2003, were examined.

- Thirteen (13) years worth of records were found on file.
- All files examined were copies; no originals found.
- Ms. Gordon indicated that the originals were archived. This has not been confirmed.

Recommendation: Originals files/records are to be retained for full retention period, and then archived. Copies are to be destroyed.

Email
Violation: Retention

Status: Non-Compliant

Checked four (4) employee's email systems. All four (4) had emails on the server more than a year old. Two (2) had emails 2-3 years old.

Recommendation: Review retention rules related to email and perform required compliance-driven activity.

Visitor Book

Compliant

Recommendation: There is a five (5) year retention requirement. Current visitor book is a bound volume with multiple years of records. It contains pages which cannot be easily removed for destruction. Therefore it is recommended that the lab use a binder with removable pages.

Forensic Toxicology Case Files

The technical content of the files prohibited the auditors from determining a measure of accuracy for file contents.

Recommendation: A master list of required file components is to be prepared.

Correspondence Files

No correspondence files were located for review.

ADMINISTRATIVE INSIGHT

The Lab Manager expressed frustration with the level of workload lab personnel must deal with while still complying with the various policies and procedures that the agency has in place. The Lab Manager stated that she exceeds the forty-hour work week on a frequent basis and is forced to work most weekends in order to meet current workload demands. When asked for suggestions to overcome these challenges, the Lab Manager indicated that she needed more personnel in order to keep up to date with all of the requirements.

It is apparent that case management, case turn-around time, and successful case prosecutions are top priorities for the lab. WSP policies and required procedures appear to be of secondary concern to lab personnel. Achievement in top priority areas is commendable. Accurate recordkeeping and quarterly auditing as required by Patrol policies and CALEA standards is severely deficient.

It is therefore recommended that the Lab Manager address the conflicting entries in the Lab's Standard Operating Procedures manual. When the manual has been updated, laboratory personnel need to review and implement those procedures. The Lab Manager is to ensure the case files for all five hundred and thirty eight tubes referenced earlier in this report are updated with notations regarding the status of the tubes. The Lab Manager is to arrange immediately for a quarterly audit to be conducted per department policy prior to September 30, 2004. In addition, quarterly audits are to be conducted per department policy from that point forward.

The Forensic Laboratory Commander is asked to respond to this IOC by September 30, 2004. Questions concerning this audit are to be directed to Sergeant Patti Lankford, Evidence Section, at (360) 404-0174.

SMD:pal

cc: Ms. Anne Marie Gordon, Toxicology Laboratory
Deputy Chief Steven T. Jewell, Investigative Services Bureau
Chief Lowell M. Porter
Dr. Donald Sorenson, Audit/Inspection Division

Tox Lab Audit-Talking Points

Findings-Evidence:

- 1) Tube Accountability-Case File Management
 - a. 121 tubes-unaccounted for
 - b. 122 tubes-destroyed but date of destruction is unknown
 - c. 295 tubes-broken
 - d. No case file notations
- 2) Metal Trays-marked improvement
- 3) Glass Tube breakage-audit showed 17 cracked (add'l 10 found cracked)
- 4) Test Tube Tops-plastic caps-improvement
- 5) Lab SOPs not being followed by all employees on consistent basis

Findings-Records:

- 1) Destruction File -non-existent
- 2) Databases – no retention schedule on file
- 3) Disclosure Requests – **numerous issues of major concern**
- 4) Performance Records –three issues (one over retention period time frame)
- 5) Case Files –multiple copies of documents in files, no indication as to what should be in file
- 6) TARs – unsecured
- 7) Simulator Solution Logbooks -13 years worth on file-only copies on site
- 8) Email – some communication past the two year limit
- 9) Forensic Tox Case Files – no master list of components anywhere
- 10) Correspondence Files –none located

Overall, a marked improvement on the handling/cleanliness of tubes. Lab manager is resistant to change. States that she is too busy to do things the way the Patrol wants them done.

EXHIBIT 14

Batiste, John (WSP)

From: Sorenson, Don (WSP)
Sent: Monday, July 30, 2007 4:22 PM
To: Beckley, Paul (WSP)
Cc: Batiste, John (WSP)
Subject: RE: FSLB

Chief,

From past audits conducted, we've found that Anne Marie kept the most complete database for the saved samples (those that were requested / required to be saved). Depending upon that database's condition and access, it is highly probable that we will be able to determine if other samples have been improperly destroyed through a 100% audit. FYI - Late last year there were over 20,000 test tubes in cold storage, so undertaking a 100% audit may require additional personnel. With your approval, we would like to begin thinking about putting together (drafting) a couple of extra people to assist.

Don

From: Beckley, Paul (WSP)
Sent: Monday, July 30, 2007 4:04 PM
To: Sorenson, Don (WSP)
Cc: Batiste, John (WSP)
Subject: RE: FSLB

Will any of those steps reveal if we have improperly destroyed any other samples in the past couple of years?

PSB

From: Sorenson, Don (WSP)
Sent: Monday, July 30, 2007 1:09 PM
To: Beckley, Paul (WSP)
Cc: Batiste, John (WSP)
Subject: FSLB
Importance: High

Chief,

As you directed at the Executive Staff meeting this morning, Dr. Logan, Director Perry, Shannon Inglis and I discussed conducting an audit of the Tox Lab to address your concerns and those of Chief Batiste. After much discussion, the group recommends that the audit be conducted internally, led by RMD with the assistance of FLSB personnel.

We hope the following scope will meet your expectations:

Recommended Audit Scope

Time Period: Two-year look-back.

Work to include:

1. Review accreditation audit results and follow-up actions.
2. Interview scientists regarding solution testing practices. Review solution testing documentation to confirm compliance with requirements found in SOPs.
3. Confirm (via random sampling) evidence handling SOPs are being followed, especially as related to destruction processes. Compare SOPs with WSP evidence handling manual to determine

differences.

4. Conduct 100% audit of saved specimens.

Providing your approval, we will move forward getting it accomplished. Thanks!
Don

Dr. Donald Sorenson, CFE
Risk Management Division
Management Services Bureau
Washington State Patrol
PO Box 42600
Olympia, WA 98504-2600
Phone: (360) 753-0549
Fax: (360) 664-0663

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EXHIBIT 15



WHITMAN COUNTY PROSECUTING ATTORNEY

Denis P. Tracy

400 North Main Street - P.O. Box 30, Colfax, WA 99111-0030
voice (509) 397-6250 fax (509)397-5659

February 16, 2005

Ann Marie Gordon
Laboratory Manager
Washington State Toxicology Lab
2203 Airport Way South, Suite 360
Seattle, WA 98134-2027

COPY

and by FAX 206-262-6145

URGENT - REQUEST IMMEDIATE ATTENTION

RE: State v. Fred Russell, Vehicular Homicides and Assaults
Tox Lab Report # ST013211

Dear Ms. Gordon:

My chief deputy prosecutor, Carol Laverne, has just told me that you informed her today that, despite our multiple requests to have the blood sample preserved in this case, and despite the assurances from your office that the blood would be saved, that it has in fact been destroyed. Before I overreact, I would appreciate you writing to me directly with an explanation of what has happened. Of course, if the information I have from Ms. Laverne is a mistake, just a phone call will be fine. But otherwise, I would appreciate your response in writing. I am enclosing copies of relevant letters and a phone message between your office and mine.

This case involves multiple counts of vehicular homicide and vehicular assault. The defendant absconded before trial. VERY MANY State, Federal, and foreign agencies have spent a LARGE amount of resources on hunting him down. I am expecting that he will be apprehended and brought to trial. The destruction of his blood sample by the State will have an impact on that trial, and not for the better. It is in this context that I am asking my questions of you. Please let me know as soon as possible.

Sincerely,


Denis Tracy
encl

cc: Chief John Batiste, WSP, PO Box 42601, Olympia, WA 98504-2601

Carol La Verne
Chief Deputy Prosecutor

Byron Bedirian
Senior Deputy Prosecutor

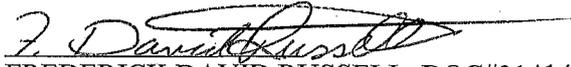
Sharea Moberly
Deputy Prosecutor

Shane Greenbank
Deputy Prosecutor

Kristina McKennon
Rule 9 Legal Intern

Containing a SIGNED copy of the *STATEMENT OF ADDITIONAL GROUNDS* totaling forty-five pages and its *APPENDIXES, A - G*.

SUBSCRIBED AND SWORN to before me this 14th day of September, 2009.


FREDERICK DAVID RUSSELL, DOC#314145
Defendant / Appellant, I-B33-U
Coyote Ridge Corrections Center
PO Box 769
Connell, Washington 99326-0769

SUBSCRIBED AND SWORN to before me this 14th day of September, 2009.




Melisa Kathleen Gilbert
NOTARY PUBLIC in and for the
State of Washington,
Residing in Connell.
My commission expires: 10-10-2012