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THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JULIO DAVILA,

Petitioner.

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

PETITIONER'S SUPPLEMENTAL BRIEF

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ORIGINAL

TABLE OF CONTENTS

A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 5

The State's failure to disclose a scathing report documenting the long-term incompetence of the original DNA handler and tester violated its obligation under *Brady v. Maryland* 5

1. The prosecution is constitutionally obligated to disclose favorable evidence to the defense 5

2. Olson's long term "serious" errors in her work as a government scientist constituted favorable evidence for which the State had a duty to disclose 7

3. Olson's "documented history of serious technical and administrative errors" when testing DNA was material under *Brady* 10

a. Evidence is material under *Brady* when it is reasonably possible the undisclosed evidence would have led to a different result 10

b. Because DNA was the crux of the case, incompetence by the original DNA analyst would have put the entire case in a different light 13

4. Reversal is required 20

D. CONCLUSION 20

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Pers. Restraint of Stenson, 174 Wn.2d 474, 276 P.3d 286 (2012) 12, 13, 20

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) 8

Washington Court of Appeals Decisions

State v. Davila, 183 Wn.App. 154, 333 P.3d 459 (2014), *rev. granted*, 182 Wn.2d 1002 (2015) 5, 8, 10, 13, 18, 19, 20

United States Supreme Court Decisions

Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) 8

Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) 6

Brady v. Maryland, 373 U.S 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) 5, 6, 8, 9, 10, 11, 12, 18, 20

Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009) 14, 15

Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) 5, 8, 9, 10, 13, 20

Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). 6, 7

Federal Court Decisions

Aguilar v. Woodford, 725 F.3d 970 (9th Cir. 2013), *cert. denied sub nom. Beard v. Aguilar*, 134 S.Ct. 1869 (2014) 9, 11

Amado v. Gonzalez, 758 F.3d 1119 (9th Cir. 2014) 6, 11, 20

Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002) 11

Carriger v. Stewart, 132 F.3d 463 (9th Cir.1997) 8, 11

Leka v. Portuondo, 257 F.3d 89 (2d Cir. 2001) 9

Milke v. Ryan, 711 F.3d 998 (9th Cir. 2013) 5, 6

United States v. Jackson, 345 F.3d 59 (2d Cir. 2003) 7

United States v. Olsen, 737 F.3d 625 (9th Cir. 2013) 6

United States Constitution

Fourteenth Amendment 5

Sixth Amendment 5

Washington Constitution

Article I, § 3 5

Article I, § 22 5

Other Authorities

Brief of Innocence Network as Amicus Curiae, *Williams v. Illinois*, U.S. Supreme Court No. 10-8505 (filed Sept. 7, 2011) 14, 15

W. Thompson, et al, "Forensic DNA Statistics: Still Controversial in Some Cases," The Champion, at 22 (Dec. 2012) 13

A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED

Julio Davila was convicted of murder based on a claim that his DNA was found on a baseball bat used to strike the fatal blow. After his trial, he learned that the person who originally handled, extracted, and documented the DNA evidence was fired from the Washington State Patrol Crime Lab because her years of faulty testing DNA samples and repeated documentation errors meant her work "cannot be trusted."

When DNA evidence is the crux of the case, does an undisclosed report showing the government scientist who handled and tested the DNA was fired due to long-term performance deficiencies constitute material evidence that the State was obligated to provide to the defense?

B. STATEMENT OF THE CASE

On June 17, 2007, John Allen was fatally injured inside the adult bookstore he owned in Spokane, having received two blows to the head from a baseball bat. 1RP 116-18, 127; 3RP 421-22.[1] A police officer found a bat under Allen's body and put it on a stack of

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[1] The verbatim report of proceedings (RP) is contained in five consecutively paginated volumes of transcripts.

magazines in the store. 1RP 129. There was no evidence this bat was Allen's. An investigator swabbed four areas of the bat for testing. 2RP 293, 374. According to DNA extraction and testing performed by Washington State Patrol (WSP) Crime Laboratory scientist Denise Olson, swab A contained only Allen's DNA; there was no DNA profile available from swabs B and C; and swab D was a mixture of DNA from at least two people, including Allen and a partial profile of an unknown individual. 3RP 445, 453-55.

Jeramie Davis admitted he "hit a lick" at Allen's store on the evening Allen was killed, stealing cash, checks, magazines, "sex toys," and other items. 1RP 137; 2RP 227, 242. He claimed Allen was already lying on the ground, bloody, when he got there and did not know how Allen was killed. *Id.* Based on Davis's connection to the crime scene, he was convicted of first degree murder and burglary in 2008. 2RP 286.

Investigating police officers found fingerprints from many different people in the store, although none from Davis even though he rifled through the store stealing items and even the cash register was taken. 1RP 131; 2RP 227-28; 244-45, 312. Police found gloves in Davis's car with the stolen items and assumed he wore them in the store. 1RP 190-91; 2RP 227, 266-67, 312. Davis said he tried not to

leave fingerprints inside. 2RP 228. Olson did not find Davis's DNA on the baseball bat. CP 275.

In 2011, investigators checked a DNA database for the unidentified profile from Olson's report of the baseball bat's "swab D." 2RP 290. The database showed Julio Davila's DNA was similar. *Id.* No one saw Davila at Allen's store, but police found a few of his fingerprints inside the store along with many others. 2RP 331-37, 352-53, 363-64. When interrogated by police, Davila said he had not been in the store. 2RP 296, 299.

Lorraine Heath, Olson's supervisor, tested a reference sample from Davila and "the remaining portion" of "swab D" Olson handled and used. CP 314; 3RP 436, 448, 453-54. Heath found a mixture of two people's DNA. She subtracted the DNA profile Olson generated for Allen and concluded Davila's DNA "matched" the remaining profile. 3RP 436-37; 457. She relied on Olson's reports of Davis and Allen's DNA profiles and Olson's reports of other DNA swabs from the bat. 3RP 453-57. Heath retested one sample from Allen's car that was inconclusive for Davila, but without retesting, she relied on Olson's report that excluded Davis from this sample and Olson's report of

another steering wheel sample that said both Davila and Davis were excluded as possible contributors. 3RP 447-48, 45-57.

Heath told the jury that WSP Crime Lab complies with a rigorous accreditation program and all forensic scientists are tested for their proficiency twice a year. 3RP 440-43. Heath knew, but did not tell Davila or the jury, that Olson had made numerous errors in proficiency tests. CP 238-40; 4RP 620. In 2007, when Olson tested evidence collected from Allen's store, Olson's errors triggered a review her work, finding errors in 21 of 27 cases. CP 245, 255, 274. The WSP Crime Lab fired Olson in 2011 due to years of persistent errors, before Davila's trial. 4RP 620. The director of the Crime Lab concluded, "her work cannot be trusted." CP 459.

After Davila's trial, he learned of an internal affairs investigation report explaining Olson's termination.[2] He filed a motion for a new trial. CP 162-260. The trial court denied Davila's motion, reasoning the prosecutor did not know about the report and Davila had not shown Olson contaminated the DNA. 4RP 596, 622-24. The Court of Appeals found Olson's misconduct went to "the crux of the case"

and should have been disclosed, but it did not undermine the verdict. *State v. Davila*, 183 Wn.App. 154, 171-73, 333 P.3d 459 (2014), *rev. granted*, 182 Wn.2d 1002 (2015).

C. ARGUMENT

The State's failure to disclose a scathing report documenting the long-term incompetence of the original DNA handler and tester violated its obligation under *Brady v. Maryland.*

1. The prosecution is constitutionally obligated to disclose favorable evidence to the defense.

"*Brady* and its progeny require the state to disclose all material evidence that could exculpate the defendant, including evidence that could be used to impeach one of the prosecution's witnesses or undermine the prosecution's case." *Milke v. Ryan*, 711 F.3d 998, 1003 (9th Cir. 2013); *Brady v. Maryland*, 373 U.S 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 22.

This duty obligates the "individual prosecutor ... to learn of any favorable evidence known to the others acting on the government's behalf." *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Material impeachment evidence available to the

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[2] Davila received this report from a public disclosure request he filed

government "must be disclosed unilaterally as a matter of constitutional right." *Milke*, 711 F.3d at 1006.

This "inescapable" and "broad obligation" for prosecutors to disclose information to the defense stems from "the special role" the prosecution plays in criminal trials. *Amado v. Gonzalez*, 758 F.3d 1119, 1133-34 (9th Cir. 2014) (quoting *Strickler v. Greene,* 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). "The prosecution is trusted to turn over evidence to the defense because its interest 'is not that it shall win a case, but that justice shall be done.'" *Id.* (quoting *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)). "A robust and rigorously enforced *Brady* rule is imperative" because prosecutors have an incentive "not to discover or disclose" *Brady* evidence when the wrongdoing may never come to light. *United States v. Olsen*, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, J., dissenting from denial of en banc review).

There are three components of a *Brady* claim: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed

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after his trial. A copy is attached as Appendix A.

by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Strickler,* 527 U.S. at 281-82. All three components are present here. The undisclosed information undercut the credibility of the person who first handled, extracted, amplified, and tested the DNA samples from the crime scene and impeached the carefulness of the Crime Lab. It was known to governmental officials and other prosecutors. It would have fundamentally altered the defense strategy, opened a new avenue of investigation, and changed how the jury weighed the evidence in the case. The failure to disclose this evidence violates *Brady*.

2. *Olson's long term "serious" errors in her work as a government scientist constituted favorable evidence for which the State had a duty to disclose.*

Evidence is favorable to the accused if it either "tends to show that the accused is not guilty" or "impeaches a government witness." *United States v. Jackson*, 345 F.3d 59, 71 (2d Cir. 2003). The contents of the report criticizing Olson's long term poor job performance as a DNA analyst would have impeached not only Olson's proficiency, but also the proficiency of the State's forensic analysis program. As the Court of Appeals found, "Olson's extensive history of poor

performance and incompetence would have been favorable evidence that should have been disclosed." *Davila*, 183 Wn.App. at 169.

A prosecutor's "duty to learn of any favorable evidence" includes information "known to the others acting on the government's behalf." *Kyles,* 514 U.S. at 438. An individual prosecutor's personal knowledge and good faith are irrelevant to its duty to disclose favorable information to the defense. *Carriger v. Stewart,* 132 F.3d 463, 480 (9th Cir.1997). It is a self-executing, affirmative obligation placed on the prosecution, independent of any defense action. *Banks v. Dretke*, 540 U.S. 668, 697-98, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). The Court of Appeals correctly found the prosecutor had a duty to disclose Olson's "unacceptable" work conduct. *Davila*, 183 Wn.App. at 170.

The WSP Crime Lab is a division of the Washington State Patrol whose role is to gather evidence for law enforcement. *State v. Gregory*, 158 Wn.2d 759, 829 n.37, 147 P.3d 1201 (2006). It recognizes its *Brady* obligation. CP 256 n.46. It had sent "*Brady* letters" to "eleven prosecuting attorneys notifying them of [Olson's] problems and her faulty results" after a 2008 review of her DNA handling and reporting errors. CP 256. Knowledge of evidence "held by other prosecutors" is imputed under *Brady*. *Aguilar v. Woodford*, 725

F.3d 970, 982 (9th Cir. 2013), *cert. denied sub nom. Beard v. Aguilar*, 134 S.Ct. 1869 (2014). Davila had not received any information with which to impeach Olson prior to trial. 4RP 620.

WSP Crime Lab DNA supervisor Lorraine Heath was Olson's "immediate supervisor" at the WSP Crime Lab and Heath testified for the State. She prepared the very job performance plan that led to Olson's termination after Olson continued to make errors despite an easy caseload designed to rehabilitate her. CP 238-29. The director of the WSP Crime Lab's forensic laboratory services bureau, Larry Herbert, wrote the report terminating Olson. CP 237. The prosecution is imputed with knowing the information known by these and other governmental officials. *Aguilar,* 725 F.3d at 982.

The prosecution's duty to disclose favorable evidence includes witnesses who do not testify. *Jackson*, 345 F.3d at 70 (impeachment information about nontestifying witness "presents no obstacle to application of *Brady* and its progeny"); *see e.g., Leka v. Portuondo,* 257 F.3d 89, 99 (2d Cir. 2001) (*Brady* violation where prosecution did not disclose crime scene observations of nontestifying officer that were "favorable to the defense" and contradicted other witnesses); *Kyles*, 514

U.S. at 445 (*Brady* violation where undisclosed impeachment evidence included inconsistencies from a nontestifying informant).

Although the Court of Appeals agreed the reasons for Olson's termination should have been disclosed to Davila, it concluded Davila was not entitled to relief unless he proved Olson contaminated the DNA sample on "swab D." *Davila*, 183 Wn.App. at 170. This reasoning misapplied the test for materiality under *Brady*.

3. *Olson's "documented history of serious technical and administrative errors" when testing DNA was material under Brady.*

   a. *Evidence is material under Brady when it is reasonably possible the undisclosed evidence would have led to a different result.*

"Prejudice has ensued" under *Brady* when the withheld information is "material," i.e., there is a reasonable probability of a different result. *Kyles*, 514 U.S. at 434. It occurs when the government's failure to disclose favorable impeachment evidence "undermines confidence in the outcome of the trial." *Id.* Materiality "is not a sufficiency of the evidence test" and the defendant does not need to show he would have been acquitted if the information was available at trial. *Id.* at 434-35.

For example, evidence that impeaches a central witness on a new and different ground, even when there was already significant impeachment evidence available, is material under *Brady*. *Benn v. Lambert*, 283 F.3d 1040, 1055 (9th Cir. 2002). Undisclosed evidence is material when it shows a key witness had been unreliable in the past, *Carriger,* 132 F.3d at 479; or an eyewitness was on probation and had a reason to curry favor with the police or prosecution. *Amado v. Gonzalez*, 758 F.3d 1119, 1139 (9th Cir. 2014).

In *Amado*, the defense questioned eyewitness Hardy about his ability to observe the incident as he claimed, but had they known he was on probation for a robbery, this "suppressed information would have added to the force of the cross-examination and defense counsel's closing argument." 758 F.3d at 1139. It was material under *Brady* because it is reasonably probable that the jury would have viewed "Hardy's implication of Amado with a great deal more suspicion." *Id.*

In *Aguilar*, dog scent tracking was used to link the defendant to the scene and corroborate eyewitness testimony. 725 F.3d at 984. The jury heard "no evidence about the reliability of Reilly as a scent dog" and "had no reason to question the accuracy of Reilly's identification of Aguilar." *Id.* After trial, counsel learned this dog was found unreliable

in other cases. *Id.* This new evidence constituted a material *Brady* violation because it gave the defense a tool for impeaching the dog scent identification and would have changed counsel's strategic decision to concede his client's connection to the scene. *Id.* at 984-85.

In *In re Pers. Restraint of Stenson*, 174 Wn.2d 474, 487, 276 P.3d 286 (2012), one of the material *Brady* violations was forensic analyst Peele's false implication that he personally performed gunshot residue tests, when another analyst, Lundy, had done so. This Court concluded that "[i]f Stenson's trial counsel had known that Lundy performed the GSR tests, they could have attempted to undermine the veracity of Peele's testimony." *Stenson*, 174 Wn.2d at 489. The defense had not questioned "Lundy regarding her qualifications to perform the GSR testing," because it was unaware of her involvement. *Id.* There is recognized value in cross-examining forensic analysts to probe whether they lacked proper training or had other deficiencies. *Id.* "Had the defense trial team been privy to the suppressed evidence at issue here, the integrity and quality of the State's entire investigation, evidence handling procedures and case presentation would have been called into question." *Id.* at 491.

As the *Stenson* Court remarked, undisclosed "sloppiness" in a police investigation will "diminish" the prosecution's claim of conscientious police work. *Id.* at 492 (citing *Kyles*, 514 U.S. at 446). There is no question that Olson was routinely sloppy in her handling and testing of DNA, Davila was never told that this sloppiness occurred at the time she tested evidence in this case and led to her termination, and this evidence would have opened a new avenue for attacking what the Court of Appeals agreed was "the key piece of evidence" against him. *Davila*, 183 Wn.App. at 157.

b. Because DNA was the crux of the case, incompetence by the original DNA analyst would have put the entire case in a different light.

Generating a DNA profile from a swab of bodily fluid is an intricate, multi-level process that requires precision and attention to detail. The accuracy of DNA "test results are largely dependent on the methods used by the analyst." W. Thompson, et al, "Forensic DNA Statistics: Still Controversial in Some Cases," The Champion, at 22 (Dec. 2012); Brief of Innocence Network as Amicus Curiae, *Williams v. Illinois*, U.S. Supreme Court No. 10-8505, at 6-7 (filed Sept. 7,

2011).[3] Olson's persistent problems following protocols and paying attention to detail would have caused the jury to view her results and the Crime Lab's work with a great deal more suspicion.

Olson extracted DNA from "swab D" and Heath "removed and extracted" material from this same swab. CP 281. "The extraction process is probably where the DNA sample is more susceptible to contamination in the laboratory than at any other time in the forensic DNA analysis process." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 82, 129 S.Ct. 2308, 174 L.Ed. 2d 38 (2009) (Alito, J., concurring, quoting J. Butler, Forensic DNA Typing 42 (2d ed. 2005)). Swab D was the only DNA connection between Davila and the crime scene, and Heath used the "the remaining portion of this swab" used first by Olson. CP 281. Having consumed this swab, no further DNA testing of it may be performed in the future. *Id.* There was a second swab of the "D" area of the bat, but Heath did not test it. *Id.*

Because DNA testing technology "is sensitive enough to pick up such trace amounts of DNA," it is affected by "even the slightest,

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[3] Available at:

unintentional mishandling of evidence." *Osborne*, 557 U.S. at 82. After extracting DNA, the analyst must "measure the amount of DNA in the sample accurately" which is "essential" because later stages of DNA analysis require a specific concentration of DNA. Brief of Innocence Network at 17. Too much or too little DNA used in the test can result in an inaccurate profile. *Id.* at 17-18. Olson's errors included loading samples into testing instruments "out of order," and "perform[ing] incorrect mixture interpretations and calculations." CP 249.

Generating DNA profiles requires amplifying the extracted alleles, which is a "challenging" process. *Id.* at 19. Amplification requires the analyst add chemicals to water in a "proper volume and concentration," "precisely set" the temperature in the thermal cycler machine, and pay close attention to the number of cycles run. *Id.* at 18-19. This process "is very sensitive to small amounts of DNA, [and] even minute contamination can skew the results." *Id.* at 19.

Olson's "attention to detail is very poor" when conducting DNA tests, according to the internal affairs investigation. CP 243. She was

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http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-8505_petitioneramcuinnocencenetw.authcheckdam.pdf (last viewed March 23, 2015).

careless in labeling samples and switched the names, case numbers, and item numbers. CP 248. She amplified the wrong amount of DNA. CP 239. She "mixed up the samples" from two different cases. CP 256. She "contaminated one sample with a non-adjacent sample." CP 257. She "makes numerous mistakes on a routine basis." CP 252.

Heath, Olson's supervisor at the WSP Crime Lab, told the jury that the lab complies with a rigorous accreditation program, including regular proficiency testing of all DNA testers. 3RP 439-43. She said the DNA lab is regularly audited by external forensic experts and must meet more than 100 pages of criteria to maintain accreditation. 3RP 442. Accreditation includes biannual proficiency testing "for every DNA scientist" and this testing is conducted by an external agency. 3RP 443. They must show "anything we do in the lab" is validated. *Id.*

Heath did not reveal to the jury or Davila that Olson made multiple errors in proficiency tests, including during the 2006-07 period, which is the same time Olson handled, extracted, and tested the DNA taken from the crime scene. CP 245, 255, 272; 4RP 620.

In his closing argument to the jury, the prosecutor emphasized the "great care" with which the government handled the bat and extracted DNA. 3RP 537. He repeated by name the police officers who

handled the bat and meticulously wore gloves, secured the evidence, and submitted the DNA swab for testing with "great care." 3RP 537-38. He did not mention Olson's work with the evidence. He proclaimed that Heath, "the head of the crime lab," described the quality of the sample of DNA taken from the bat and showed it was Davila who swung the bat. 3RP 539. Yet Olson was a critical link in the State's chain of custody whose reported work Heath relied upon in testing profiles for Davis, Allen, and remaining swabs from the baseball bat. 3RP 434, 444, 448, 453-556. The jury did not learn of Olson's ineptitude in following DNA protocols and documenting her work.

DNA expert Gregory Hampikian explained during the post-trial motion that "having a careless worker continue on casework for more than two years (of documented problems) [sic] is unconscionable," given the sensitivity of DNA testing. CP 311. Had the defense known to question the lab's competence, the defense would have called an expert to explain the risk of error generated by an analyst who does not strictly adhere to procedures, who has admitted poor attention to detail when testing DNA, and who may have mislabeled or contaminated samples in the case at bar. CP 250, 310-11; 4RP 620. The defense could have explored whether Heath had a motive to downplay Olson's

incompetence, out of fear that it would reflect poorly on her supervision or would open the door to challenges Olson's work in other cases. The prosecutor conceded that the report documenting Olson's firing "would cause a great deal of concern" about her work. 4RP 582.

The Court of Appeals relied on Olson's own reports to find she did not contaminate "swab D" because the reports showed she tested the samples from Allen's steering wheel, which could have included Davila's DNA, on a separate day than she tested the bat. 183 Wn.App. at 173; 3RP 446; 4RP 618-20. But Olson's persistent errors in recording her work was one of her cited failings. *See* CP 243 ("there's so many mistakes and issues with the documentation and the case file notes"). The "quality of her work is inadequate" because of her "poor attention to detail." *Id.* Heath was not working at the WSP Crime Lab in 2007, so she could not say whether Olson misreported her work as she had in other cases. CP 256-57, 2RP 399; 3RP 431.

Brady does not require a defendant to prove suppressed evidence was exculpatory to be "material," contrary to the Court of Appeals' conclusion. Undisclosed evidence is material if it "could have led to the discovery" of additional evidence that could have made a difference in the outcome of the trial. *Johnson v. Folino*, 705 F.3d 117,

130 (3d Cir.), *cert. denied*, 134 S.Ct. 61 (2013). The report would have led the defense to offer expert evidence critiquing the WSP Crime Lab. CP 257, 310-11. It would have explored Olson's failings which had triggered B*rady* letters in 2007. CP 256. It also undermined Olson's credibility, impeached Heath's insistence that WSP Crime Lab scientists pass regular proficiency tests, and undercut the State's theory that "great care" was taken by the Lab in testing the DNA.

The DNA evidence was "the crux of the State's case"; without it, Davis was the prime suspect. *Davila*, 183 Wn.App. at 172.[4] And even with it, the case against Davila was thin. No one saw him inside the store. There was no evidence Allen owned this baseball bat. 1RP 194. At Davis's earlier trial, the State ridiculed the notion that the DNA on the bat was from the perpetrator. The prosecutor argued that Davis wore gloves inside the store; the baseball bat was old; DNA could have been left on the bat at any time. CP 91, 105, 106.

In a prosecution predicated on DNA evidence, Olson's persistent errors in follow DNA testing protocols would have undercut the reliability of the evidence and caused the jury to view the State's

case with far more suspicion. *See Amado*, 758 F.3d at 1139. Because this evidence "could reasonably be taken to put the whole case in a different light," it is material under *Brady*. *Stenson,* 174 Wn.2d at 487.

4. Reversal is required.

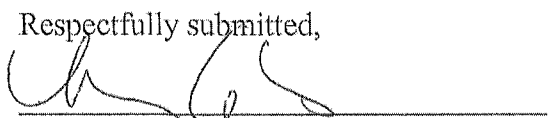
If the undisclosed evidence is material, "there is no need for further harmless-error review." *Kyles*, 514 U.S. at 435. Davila is entitled to a new trial because he did not receive material evidence to which he was entitled before his trial.

D. CONCLUSION.

Julio Davila respectfully requests this Court reverse his conviction due to the State's failure to disclose material evidence favorable to the defense.

DATED this 25th day of March 2015.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Petitioner

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[4] Davis's murder conviction was overturned by the trial court after Davila's trial. *Davila*, 183 Wn.App. at 162.

APPENDIX A

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INTEROFFICE COMMUNICATION

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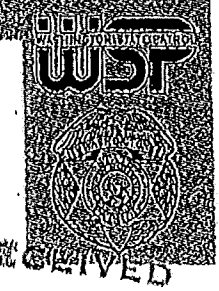

TO: Captain Michael DePalma, Office of Professional Standards

FROM: Mr. Larry D. Hebert, Forensic Laboratory Services Bureau

SUBJECT: Administrative Insight - Code 23 [redacted]

DATE: February 25, 2011 OPS Case No. 10-0454

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OPS

SYNOPSIS:

On May 25, 2010, Internal Affairs initiated an administrative investigation into an allegation that Forensic Scientist 3 Code 23 [redacted] DNA Section, Spokane Crime Laboratory, engaged in the following misconduct:

> It is alleged that on May 7, 2010, Code 23 failed to meet the requirements of her 90-day Job Performance Improvement Plan that was initiated on February 8, 2010.

I have reviewed the complete investigative file and determined that the allegation has been proven. The proven allegation represents violation of agency policy as shown in these findings:

2010 WSP Regulation	Title	Finding
8.00.030	Employee Conduct (A) Unacceptable Conduct	Proven
8.00.110	Unsatisfactory Performance (A) Unsatisfactory Performance	Proven

The investigation in this case is complete, comprehensive, and fair. All available evidence was considered in making these findings. The Eleven Elements of Just Cause have been met and all due process rights were provided to Code 23 I am contemplating termination.

A complete copy of the investigative file, OPS Case No. 10-0454, is incorporated herein by this reference and is being provided to the Code 23 [redacted] with the Administrative Insight.

NARRATIVE:

Documentation supporting the above allegations can be found within the administrative investigation conducted by Investigator Daniel E. Eikum, Office of Professional Standards, in OPS Case #10-0454. The allegation in this case stems from Code 23 failure to meet the requirements of her 90-day Job Performance Improvement Plan initiated on February 8, 2010. To investigate the allegation seven individuals were interviewed:

FS5 Lorraine Heath, Spokane DNA Supervisor

Attachment 4

FS5 Lisa Turpen, Spokane DNA Supervisor
DNA Technical Leader Dr. Gary Shutler
FS3 Kristi Barr, Spokane DNA
FS3 Stephen Greenwood, Spokane DNA
FS3 Anna Wilson, Spokane DNA
Code 23 Spokane DNA

FS5 Lorraine Heath

Code 23 Job Performance Improvement Plan was written by Heath, Code 23 immediate supervisor. In this plan, Code 23 was expected to:

1. Independently complete 15 non-probative DNA STR cases in the 90 days of the plan.
2. Thoroughly review all of her case files to ensure there were no errors and then submit the case files for technical peer review.
3. Find and fix her errors, both administrative and technical, and correct them prior to peer review to help reduce the burden on the peer reviewers. The peer reviewers were not expected to catch administrative case file errors.
4. Correct any errors discovered by the peer reviewers within two days of receiving case files back from the peer reviewers.
5. Complete her Time and Activity Reports by the payroll system cutoff date without having to be reminded by her the supervisor.
6. Refrain from volunteering or participating in any duties other than those already assigned to her by her supervisor.
7. Complete her assigned non-casework duties within the timeframe given to her by her supervisor.
8. Complete all of her work within the normal workweek with no overtime or compensatory time.
9. Provide her supervisor with weekly reports outlining the work activities she performed in the previous week and her work plan for the following week. In addition, Code 23 was to meet monthly with her supervisor to discuss her progress in toward completing her Job Performance Improvement Plan.
10. Improve the quality of her casework by not rushing through the casework and by scheduling sufficient time in her work plan so that she could thoroughly review all of her calculations and accurately transcribe her data prior to commencing the next step in the analysis process and/or completing the case.
11. Carefully review the relevant procedure manual before beginning work to ensure that she was in compliance with all of the procedural requirements at all times.[1]

Heath stated the following in the final paragraph of Code 23 Job Performance Improvement Plan:

[1] OPS Investigative File10-0454, Addendum A, Job Performance Improvement Plan dated 02/08/2010, see "Expectations" and "Methods Outlined to meet Those Objectives", pages 2-3.

"It is my goal to provide you every opportunity to be successful in your position. You will need to convey if you need any assistance, clarification, or information to assist you in a positive outcome. If you feel that personal issues may be impacting your ability to perform your job, you are encouraged to contact the Washington State Employee Assistance Program (EAP) by way of the Department of Personnel at (360) 753-3260, or you may contact our staff Psychologist, Dr. Dan Clark."[2]

A key component of the plan required Code 23 to receive 15 routine cases to work for the purpose of assessing her competency. The 15 cases were subsequently reduced to 14 cases due to a sample problem with one of the cases. These competency cases were not considered complex or difficult, but rather were chosen because they were routine and straightforward. Code 23 competency case files were reviewed independently by two DNA supervisors and three experienced DNA forensic scientists. These five scientists consistently gave negative feedback regarding the quality of Code 23 case documentation and file preparation. This led Heath to conclude on May 7, 2010, that Code 23 had failed to successfully complete her job improvement plan. Heath wrote:

"You have failed to meet this expectation. Your files were reviewed by 5 different scientists including your supervisor, the other DNA supervisor, and three peers. All gave negative feedback regarding the quality of your documentation and case file preparations. They all commented that the cases took far longer than expected to peer review, especially given the simple nature of the cases involved and that it was often difficult to determine and follow the analyses that were performed. There was an overall general impression of a lack of attention to detail throughout the case files. The mistakes ranged from small administrative errors to larger errors such as: inclusion of the wrong statistic in a report; incorrect mixture interpretations and calculations being performed; incorrect wording of conclusion; poor documentation of your examination of evidence items, their condition and the QA/QC of reagents; and a general lack of consistency in documentation. A number of technical mistakes were also identified such as: leaving the caps on the extract tubes during robotic extraction, resulting in a serious risk of both sample loss and possible instrument damage; amplifying the wrong amount of target DNA, resulting in extensive additional work and expensive reagents being required to obtain usable profiles; selecting inappropriate screening tests, wasting time and reagents; using the incorrect number of reagent blanks, resulting in unnecessary waste of expensive reagents and demonstrating a lack of understanding and an unwillingness to seek guidance regarding this policy; and being unfamiliar with allowable analysis method changes, resulting in extensive time and expensive reagent wastage. Most, but not all, of these errors were a result of you being unfamiliar with changes made to protocols in the last 12-18 months. However, you have been present during the numerous conversations within the section regarding the changes and specifically requested, and were granted, time prior to and during the JPIP to review the

[2] OPS Investigative File10-0454, Addendum A, Job Performance Improvement Plan dated 02/08/2010, see "Support", page 3.

manuals to update your knowledge. In addition, the opportunity to seek guidance on any procedural issues or changes from supervisors and other case-working scientists on any procedural issues or changes from supervisors and other case-working scientists was available throughout your JPIP, and you did not avail yourself of these resources. Finally, a few errors similar to those made during your previous JPIP and Corrective Action Report (CAR) were made, such as an incorrect calculation on the amplification sheet resulting in the incorrect quantity of DNA being amplified. Fortunately, the error did not result in additional work being required, unlike similar errors in the past. At the start of the JPIP, you were specifically instructed to ensure that you reviewed each complete case as if you were a peer reviewer, prior to submitting it to your supervisor. You indicated in person and via email that you were performing this step, yet still an extremely high number of errors were found by each peer reviewer in each case. In addition, you completed the peer review checklist as if you had reviewed all the points listed, but it seems apparent that you failed [to] do so at the appropriate level and rather completed the form for the sake of completing the form."[3]

This synopsis by Heath provides evidence that Code 23 failed to meet the requirements of her Job Performance Improvement Plan and that Code 23 poor performance and critical work deficiencies prevail despite numerous opportunities to improve.

FS3 Kristi Barr - Cases 205-0079 and 207-0529

Barr said the cases she reviewed were not difficult or complex. Barr stated that the cases she reviewed were very simple cases.[4] According to Barr, Code 23 did not ask her any questions or request assistance during the course of Code 23 Job Performance Improvement Plan. Barr stated:

"After looking at all of these, um, a lot of – a lot of the mistakes that I found were small, um, and mostly insignificant, the grammar type things. But, to me these little things can add up and can give you an overall picture of, of just kind of sloppiness. Um, and then also, uh, even after finishing these, um, uh, it felt like there were so many changes and so much stuff that I wasn't sure how confident I was that I actually found everything that I needed to. Uh, I didn't feel incredibly comfortable with these. If I – if I would have been—if I would have been sending these out into the world, um, I probably would have wanted to look over them another time or two, uh, just because it was hard for me to feel like I was finding everything when there was so much to look at."[5]

FS3 Stephen Greenwood – Cases 201-0350 and 208-1245

Greenwood said the cases were not overly complex. According to Greenwood, Code 23 did not

[3] OPS Investigative File10-0454, Addendum A, Job Performance Improvement Plan dated 02/08/2010, "Final Formal Review" conducted on May 17, 2010, pages 1-2.
[4] OPS Investigative File 10-0454, statement of Kristi Barr, page 13, line 18.
[5] OPS Investigative File 10-0454, statement of Kristi Barr, page 34, lines 26-30, and page 35, lines 1-5.

ask him questions or request assistance during the course of her Job Performance Improvement Plan. Greenwood said that Code 23 attention to detail on both cases he peer reviewed was lacking and her conclusions in Case 201-0350 were incorrect.[6]

Greenwood said during his peer review of Case 201-350 Code 23 had the wrong case number, incorrect agency number, wrong victim and suspect names, wrong item numbers, and on the conclusions were wrong. Greenwood stated in regards to Code 23 Case 201-350:

> *"There's no header that says 'conclusions.' And it goes into, uh, several conclusions. And these conclusions are actually, uh, um, all, all wrong. Um, they're the wrong conclusions. I think they were probably copied and pasted from another report. Um, yeah, the first one was com- -- completely wrong. I'm not sure where that was from. Um, and, yeah, there's, there's, there's different, different, uh, uh, on the first page of the report. And that looks like a, a copy-and-paste error. Um, I think – I, I, I noted down the correct conclusions are, are supposed to be at the – at the bottom and Item No. 3 matches Item No. 2, and Item No. 4 matches Item No. 1. But, uh, obviously, she copy and pasted a different conclusion, but it would be wrong. Um, so, uh, that was a – that was a big thing from the report having an incorrect conclusions and incorrect individuals."*[7]

FS5 Lisa Turpen – Cases 205-1534, 207-1555, and 209-0899
Turpen said the cases she reviewed were straight forward and not complex cases. Code 23 did not ask her questions or request assistance during the course of her Job Performance Improvement Plan.

Turpen described Code 23 quality of work and attention to detail as okay. Turpen stated in referring to her peer review of Case 205-1534:

> *"It's okay. I mean, Dan, I'm gonna be really honest with you. You know, I've worked with her for so long that – I mean, she's improved. Um, I mean, her cases were a nightmare, I mean, previously. I, I guess – and I'm kind of going off on a tangent here, so you can stop me. But I just know the expectation that was made of her, which she was had to, to do a really great job. I don't really think it falls into that. Um, I'm disappointed because I think it was made pretty clear to her that she needed to do, like a spot-on job, which I don't think this is. . ."*[8]

The expectation is that Code 23 must perform high quality work. This is a normal expectation of all forensic scientists. Turpen stated:

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[6] OPS Investigative File 10-0454, Investigation Report, page 6, paragraph 1.
[7] OPS Investigative File 10-0454, statement of Stephen Greenwood, page 5, line 3, and page 6, lines 1-12.
[8] OPS Investigative File 10-0454, statement of Lisa Turpen, page 13 lines 28-30, and page 14 lines 1-5.

"You know, that she understood that she could really produce, you know, high quality, you know, casework. Um, and I think reporting out an incorrect stat (Note: stat used in this context means a forensic DNA statistic) *is, is pretty egregious, actually. Um, that would have required – if that would have gone out and not caught on peer review, which is an absolute possibility, um, 'cause she knew to do what humans do, right, but that would have been an amended report. You know it, it does affect things. I think that, uh, screening for semen from female clothing is not wrapping your brain around what you need to be doing. You, you know, you can't – females don't produce semen, so why are you screening for it on a suspect's shirt?* (Note: In this case both the suspect and the victim are female) *I just think – you know, I think she kind of lost perspective. And I think it's unfortunate, 'cause, like I said, I think she's a very bright individual. But, um, I, I think when you're, uh – you know, I know that – her history of of, you know, documentation errors and that kind of thing. So that does scare me with, with the incorrect stat, and then something like a no-brainer in terms of your amplification sheet, you know, being, you know, incorrectly filled in and, and that kind of thing. You know, those are kind of really – those are the things she's been documented on before and needed to make and effort. And I, I – you, it's, it's still there."*[9]

FS3 Anna Wilson – Case 207-1172, 208-1696, and 209-0065

Wilson stated that Code 23 did not ask her questions or request assistance during the course of her Job Performance Improvement Plan. When asked about Code 23 work, Wilson said the quality of the work was not what she expected to see. Wilson stated:

"It's not as clean as most of the cases that I, I normally see coming through my desk. There, there was, um, more than normal issues with the, the report. And the biggest thing, I think, would, would be the conclusions, because the conclusions are, are what detectives would see, if they read her Code 23 *report. And those really need to be spot-on, um, when you're writing your report. And even if you have to walk away for a day, come back and reread them before you print them out and send them in for peer review, that – that what needs to be done so that we can get a quality product out."*[10]

Wilson said Code 23 attention to detail in the cases she reviewed was lacking. Wilson stated:

"I would say that she – it, it seems to me that she probably just threw it together."[11]

"So putting the case file together, I think, again, she, she just didn't do those double-checking that you need to do; the, um, attention to detail that needs to happen before you send the case file out to peer review. Because, I mean, I can catch a lot of things, but you sh- -- you shouldn't rely on your peer reviewer to do your case – you know, make sure all

[9] OPS Investigative File 10-0454, statement of Lisa Turpen, page 15, lines 23-30, and page 16, lines 1-9.
[10] OPS Investigative File 10-0454, statement of Anna Wilson, page 11, lines 4-11.
[11] OPS Investigative File 10-0454, statement of Anna Wilson, page 11, lines 13-14.

your documentation is there. I'm there to double- -- as a double-check, but I can't catch everything."[12]

Dr. Gary Shutler
Shutler is responsible for ensuring the crime laboratories maintain their accreditation under ISO Standard 17025 and work in compliance with FBI quality assurance standards with respect to the forensic DNA services they provide on a statewide basis. Shutler monitors DNA corrective actions and system-wide issues encompassing the work of 48 DNA scientists involved in casework and DNA databanking. Shutler also reviewed Code 23 competency cases. Shutler stated:

"These are the very s- --simple, straightforward cases. Somebody at, um, forensic scientist level 2 should be able to do these cases quite easily."[13]

Code 23 a 12-year veteran forensic scientist, is at the Forensic Scientist 3 level. This is a rank reserved for journey level forensic scientists with significant experience in complex casework. As such, Code 23 should have been readily able to analyze the case samples, develop the correct conclusions, organize the case files, and review her work for both technical and administrative errors. The evidence shows that Code 23 is unable to demonstrate the knowledge, skills, and abilities she needs to satisfactorily perform her assigned duties.

Shutler's assessment is that Code 23 case work is not at the level he would expect from a qualified forensic scientist. Code 23 attention to detail is very poor and the quality of her work is inadequate. As for her technical ability, Shutler did not think she knew what she was doing.

Shutler said the quality of Code 23 work affected the courts, prosecuting attorneys, law enforcement, the public, and the DNA functional area. Shutler stated:

"Even if, um, the work she does is, is, um, uh, are, are, are right, and, and I believe that the peer review process would ensure that, it's just that all of the mistakes that she would make in the file, uh, once they're reviewed, would detract from the quality of, of the work, and, um, cause, uh, disrepute. And we could actually lose, um, a, a, a, court case, um, based on, on the sloppiness of, of her work. And the, the impact, uh, it would, would be huge, um, on the crime lab, and on, on the um, WSP, just a lack of – lack of credibility, lack of confidence in, in the quality of the work."[14]

"She can, uh, generate DNA profiles, uh, okay, but it's the, um – there's so many mistakes and issues with the documentation and the case file notes that, um, um, I just feel, um, feel sorry for the, the peer reviewer that has to, uh, uh, slog through that file to make it, um, uh,

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[12] OPS Investigative File 10-0454, statement of Anna Wilson, page 21, lines 7-12.
[13] OPS Investigative File 10-0454, statement of Gary Shutler, page18, lines 4-5.
[14] OPS Investigative File 10-0454, statement of Gary Shutler, page 33, lines 28-30, and page 34, lines 1-5.

acceptable in the end. It's just, um – unfair to that, that peer reviewer to have to, uh, work that hard to, to, uh, make that file, uh, acceptable."[15]

According to Shutler, Code 23 relies entirely on the peer reviewer for her to successfully complete her casework. Shutler explained that when peer reviewers review Code 23 DNA cases it places them at risk. A traumatic level of responsibility is paced upon the reviewers because of the numerous mistakes Code 23 makes. Shutler stated:

"They, they have to do, um, uh, a, a, a good level of, of, uh, peer review, which is, uh, uh, expected and done by everybody else. And then there's Code 23 files, which require, um, so much more work, uh, from the peer reviewer that the peer reviewer is, is, um, is placed at risk, uh, having to, uh, go through that file and, and identify all those, those issues. It's a traumatic experience to, uh, review one of Code 23 files and, and have your name associated with that. Um, so I'm sure they're, they're terrified of, of reviewing her files."[16]

Shutler explained that when another scientist gives Code 23 a case file to review they cannot rely on the quality of her review. Shutler stated:

"Well, if she can miss that much in her own file, I can't imagine what she would miss in other people's files. So I don't think she'd be all that helpful."[17]

Peer review is one of the essential functions of a forensic scientist and is one of the guiding principles in any quality system. Scientists must therefore be able to critically evaluate the work of their peers with the same high level of quality they build into their own casework. There is sufficient evidence in the investigative file and in the statements of the personnel interviewed to demonstrate that Code 23 cannot perform her own casework or peer review the work of others in a competent manner. Allowing Code 23 to continue work at a forensic scientist at any level jeopardizes the quality and reputation of the Crime Laboratory Division's work product. Worse yet, Code 23 incompetence puts crime victims and accused suspects at risk of injustice and reduces the agency's ability to deliver public safety.

Code 23

The statements that Code 23 provided during her interview support the findings of proven in this investigation. Code 23 Position Description Form for her position describes her job expectations. Code 23 reviewed these job expectations and signed her form in 2008. In the portion of the form labeled "Essential Functions" there appears the following:

[15] OPS Investigative File 10-0454, statement of Gary Shutler, page 35, lines 16-21.
[16] OPS Investigative File 10-0454, statement of Gary Shutler, page 35, lines 25-30, page 36, lines 1-2.
[17] OPS Investigative File 10-0454, statement of Gary Shutler, page 36, lines 19-20.

1. Scientifically analyzes biochemical evidence in routine, non-routine, and complex casework in an area(s) in which they have been validated. . . . The analyses must be of high quality, performed using forensically accepted scientific methods and in accordance with the Crime laboratory Division SOP, the Biochemical Procedures Manual and the STR Technical Manual.
2. Demonstrates an understanding of the theory and working knowledge of the analytical interpretation and techniques as they are related to biochemical and DNA analysis. . .
3. Applies laws, policies, and procedures, as specified in the RCW, the WAC and federal regulations as they relate to biochemical/DNA analysis.[18]

When asked about these essential functions during her interview Code 23 replied:

Q. *"Okay.* Code 23 *do you feel you have met the job requirements of the essential functions of your job position?"*
A. *"(Sighs) I think the, uh, answer to that is no, or I would not be here."*

Q. *"And can you explain why you feel that way?"*
A. *"Um, (long pause) I would say that the quality and quantity of the work I have been producing in recent months has not been up to my standards or the standards of the State Patrol."*

Q. *"And why do you think that?"*
A. *"I have made some, frankly, really stupid errors.[19]"*

It must be noted that the Code 23 problems are not a development of just the past few months. Code 23 performance issues date back to September 2006 as proven in OPS Case 08-765, continue as proven in OPS Case 09-576, and continue to the present investigation. Code 23 has been unable to improve along the way despite over four years of labor intensive effort.

When asked about her training Code 23 stated:

"Uh, since my employment with the State Patrol, I have been extensively trained in the techniques and procedures used in the crime laboratory. Um, specifically, uh, polarized light microscopy; bloodstain pattern analysis; specific coursework on DNA analysis by short tandem repeats, which is just simply the name of the technology that we are currently using. Um, there has been training in new procedures as they come aboard, uh, and just continuing education throughout the process. "[20]

[18] OPS Investigative File 10-0454, Employee History, Code 23 Position Description Form.
[19] OPS Investigative File 10-0454, statement of Code 23 page 7, lines 8-16.
[20] OPS Investigative File 10-0454, statement of Code 23 page 7, lines 26-30, page 8 lines 1-2.

In an effort to explain some of her errors Code 23 stated that there had been numerous changes in the DNA manual in the last 18 months:

> *"In the past 18 months since our most recent manual was adopted, there have been 53 changes to that manual. During that time period, I was not performing casework on a daily basis, and I do not feel I was given adequate time in the JPIP process to familiarize myself with these new procedures."*[21]

During this time period Code 23 was on her Job Performance Improvement Plan and did not carry the burden of casework and peer review as did her peers. Code 23 therefore had more time than her peers to assimilate the new information which should have been easy given her 12 years of experience. Code 23 peers successfully absorbed the manual changes, carried full caseloads, and provided quality peer review while Code 23 was free to focus on her improvement plan and assimilate the manual changes. Still Code 23 failed.

The evidence shows that Heath provided Code 23 with sufficient time to work through the manual changes. During Heath's interview she replied:

Q. *"And did you go over this plan?"* (With Code 23
A. *"Yes, we did."*

Q. *"And did you – at the time when you went over the plan, was it a two-way discussion as to how you can help her improve?"*
A. *"Yes. We discussed the expectations and what the purpose was, much like we've done here in this interview. Um, I offered her any opportunity for questions or concerns or comments. Um, she generally had, had none. Um, I ensured that everything was clear with her. And so it was, uh, offered as a two-way dialogue in, in terms of how, how we can proceed to a successful outcome."*

Q. *"So she, she could have provided input as to what she would have liked to have seen in the plan?"*
A. *"Yes. . . ."*[22]

Q. *"Okay. And did* Code 23 *provide input into the plan?"*
A. *"Um, not prior to its implementation, uh, necessarily. Although, we had discussed, um, uh, after following the, the previous plan and the conclusion of the relevant OPS investigation that, that results from that, I had discussed what was going to happen, that there would be another plan, the basic outlines of the plan. So, so we had discussed it quite a bit before the official document, if you like, was issued. So she, she was aware and could have provided input if she felt anything was inappropriate or unfair, that she*

[21] OPS Investigative File 10-0454, statement of Code 23 page 9, lines 8-11.
[22] OPS Investigative File 10-0454, statement of Lorraine Heath, page 20, lines 1-12.

required, um, anything additional. And that is why she had requested the additional time to examine the protocols, um, prior to February 8th, because we'd already discussed what the basic content of the job performance plan was going to be."

Q. *"Okay. And did* Code 23 *make any comments about the plan?"*
A. *"No, she did not, other than she understood what was expected."*[23]

Code 23 was asked during her interview:

Q. *"And the information we have is you were granted time prior to and during the JPIP to review the manuals to update your knowledge. Is that correct?"*
A. *"Um, yes."*[24]

Q. *"Did you have any questions or concerns with any portion of the JPIP when you first received it? I believe you actually signed it on February 10th."*
A. *"(Long pause) No. It seemed perfectly reasonable."*[25]

CONCLUSIONS:

Code 23 has worked for the Crime Laboratory Division for 12 years. Code 23 has received extensive training over the life of her forensic career including conducting STR DNA analysis in criminal casework. She has been assigned this work since February 2001.

Code 23 had been provided with constructive information regarding how to improve her job performance, opportunities for engaging in counseling, and unfettered access to her supervisor and peers during previous Job Performance Improvement Plans including the most recent plan which is the centerpiece of this investigation. At no time during her improvement plans did Code 23 request workplace accommodations. Likewise, Code 23 never asked for clarification or assistance from her supervisor or peers in assimilating new procedures. The plan instructed her to seek clarification or assistance whenever she was unclear as this was one of the cornerstones of the plan designed to help her improve.

Code 23 continues to make numerous major and minor errors on a routine basis and struggles to perform a minimum amount of casework. The cases Code 23 worked on during her Job Performance Improvement Plan were simple in nature and the assignment was designed in such a way that she should have been able to complete them within the designated time period. At the midpoint of her improvement plan Code 23 was seriously behind schedule and barely managed to meet the quota.

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[23] OPS Investigative File 10-0454, statement of Code 23 page 20, lines 18-30.
[24] OPS Investigative File 10-0454, statement of Code 23 page 44, lines 9-11.
[25] OPS Investigative File 10-0454, statement of Code 23 page 14, lines 2-3 and line 20.

Code 23 had significant resources available to her including her supervisor, other experienced peers, and technical leaders. Despite numerous opportunities, Code 23 failed to interact with her resource personnel, did not ask questions, and did not seek clarification on any of her issues. During her interview Code 23 was asked:

> Q. *"So why didn't you ask your coworkers?"*
> A. *"Um, uh, there's two reasons: One is because I'm a very stubborn, independent person and, um, don't like asking for help on things that I think I should be able to figure out myself. And the other one is in –item 1 of my expectation was that I was expected to independently complete 15 nonprobative DNA STR cases. Um, I put too much emphasis on "independently."*[26]

Heath made it clear in Code 23 Job Performance Improvement Plan that Code 23 was expected to ask for assistance or clarification when it was needed. As quoted earlier the plan stated:

> *"It is my goal to provide you every opportunity to be successful in your position. You will need to convey if you need any assistance, clarification, or information to assist you in a positive outcome."*[27]

The review of Code 23 work shows that she disregarded those work instructions and continued along her error-prone path without any attempt to mitigate her deficiencies. Some representative examples of Code 23 errors and her comments about those errors are shown below:

- Code 23 loaded samples on the capillary electrophoresis instrument out of order.
- Code 23 listed the wrong names of suspects and victims, wrong case numbers, and wrong item numbers in her work. When asked to explain, Code 23 stated:
  - *"I think that that, um, was – let me explain a little bit about the process that I go through. I write the report and print it out and review it; um, review the case file; go back a couple of days later and write the re- -- or review the report again and make corrections to it. I think what happened on that instance was that I printed out two reports at the same time and simply got the incorrect page into the incorrect file. There were a couple of instances where, in using the report template, um, not every name was changed."*[28]
- Code 23 forgot to remove the caps from the elution tubes during an automated extraction process.

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[26] OPS Investigative File 10-0454, statement of Denise Code 23 page 42, lines 22-26.
[27] OPS Investigative File 10-0454, Addendum A, Job Performance Improvement Plan dated February 8, 2010, see "Support" page 3.
[28] OPS Investigative File 10-0454, statement of Code 23 page 56, lines 25-30 page 57 line 1.

- *Q. "Do you agree that leaving the caps on the extract tubes during a robotic extraction could result in serious risk of both sample loss and possible instrument damage?"*
- *A. "Yes."*[29]

- Code 23 reported the wrong statistics in a crime laboratory report. About that Code 23 stated:
  - *"I read the statistics report and misread one line and thought it was the most conservative when it was not the one I reported, but another line."*[30]
- Code 23 performed incorrect mixture interpretations and calculations. She stated:
  - *"Um, with regard to the incorrect, uh, calculations, I got confused about what calculation I was doing, and I ended up, I think, going down the CPI road when I was just trying to do major/minor (inaudible)."*[31]
- Code 23 incorrectly worded her conclusions. Code 23 commented:
  - *"That specifically is so embarrassing. When I first started working for the Patrol, we could call blood, blood. Um, about three years into my career with the State Patrol, we got an audit finding. We could no longer call it blood, but 'staining consistent with blood." Um, I wrote the report. I said blood was detected. Uh, uh, I have no idea where that came from."*[32]
- Code 23 documentation of her examination of evidence items was poorly done. She said:
  - *"Um, the only specific that comes to mind was a failure to note previous damage in a couple of instances. Um, for example, I'm looking at a piece of cloth this big. I failed to note that it had previously been sampled."*
  - *Q. "And so why wouldn't you have noticed that?"*
    A. "Um, I don't know. I should have noted that."
- Code 23 disregarded the condition and the quality assurance/quality control of her reagents.
  - *Q. "Would there be anything related to expiry dates or lots?"*

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[29] OPS Investigative File 10-0454, statement of Code 23 page 39, lines 20-22.
[30] OPS Investigative File 10-0454, statement of Code 23 page 34, lines 11-12.
[31] OPS Investigative File 10-0454, statement of Code 23 page 35, lines 3-5.
[32] OPS Investigative File 10-0454, statement of Code 23 page 35, lines 14-18.

A. *"(Sighs) I don't recall. Um, I know that because I was doing nonprobative casework at one point, I chose to use a different, uh, (sighs) control DNA than the kit I was using, because there was something prepared already. Uh, but the lot number for the (inaudible) kit that it came with was gone, so it was just essentially extra, leftover. So instead of staying within the same lot number of kit components, I used one from a different* [kit]."[33]

- Code 23 exhibits a general lack of consistency in her case documentation to which she stated:
  - *"Um, my documentation, uh, I think, was anal to the point of redundant in the beginning – or redundant to the point of being anal in the beginning. And trying to back off on that a little bit, I may have gone a little too far the other direction."*[34]

During her interview Code 23 commented on the quality of her work:

Q. *"Code 23 the information we have is the quality of your documentation and case file preparation is described as poor. How do you respond?"*
A. *"In seeing what the, uh, peer reviewers had to say, I would have to agree. Yes."*[35]

Q. *"Code 23 the JPIP states they all commented that the cases took far longer than expected to peer review, especially given the simple nature of the cases involved, ant that it was often difficult to determine and follow the analyses that were performed. How would you describe the complexity of these cases?"*
A. *"Um, they were not complex cases."*[36]

Q. *"Okay. The JPIP states "there was an overall general impression of a lack of attention to detail throughout the case file. The mistakes ranged from small administrative errors to large errors such as inclusion of the wrong statistic in a report; incorrect mixture interpretations and calculations being performed; incorrect wording of conclusions; poor documentation of you examination of evidence items, their condition, and the QA/QC of reagents; and a general lack of consistency in documentation."*

Q. *"Code 23 how would you describe your attention to detail with the cases you handled?"*
A. *"Not good."*[37]

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[33] OPS Investigative File 10-0454, statement of Code 23 page 37, lines 6-13.
[34] OPS Investigative File 10-0454, statement of Code 23 page 37, lines 24-26.
[35] OPS Investigative File 10-0454, statement of Code 23 page 31, lines 20-22
[36] OPS Investigative File 10-0454, statement of Code 23 page 31, lines 23-27
[37] OPS Investigative File 10-0454, statement of Code 23 page 32, lines 13-22

Q. "Code 23 *can you explain why there were so many administrative errors in your case files?"*
A. *"No, I really can't."* [38]

Q. *"Did you thoroughly review each case file yourself before having it peered?"*
A. *"I felt I did."*

Q. *"What does that mean?"*
A. *"That means I went through it page by page looking for omissions: cross-outs; reading over the information there, seeing if it, uh, made sense to me; you know, looking to make sure every case -- uh, page had a case number, page number, all of that. Yeah."*

Q. *"Now looking back, do you think you thoroughly reviewed your cases?"*
A. *"No."* [39]

During her interview Code 23 was asked a critical question that speaks directly to the issues that are the focus of this investigation:

Q. "Code 23 *how can the State Patrol Crime Lab law enforcement community trust your analysis and testimony when they see the lack of attention to detail reflected in your JPIP?"*
A. *"(Very long pause) Um, (long pause) I have to, um, state that I find this question incredibility [sic] difficult to answer because you're asking me to speculate how someone other than myself thinks or feels."*

Q. *"Okay."*
A. *"But, um on the, I think, point that the question is trying to make, um, I think that the community would have to have reservations about the quality of my work."* [40]

To Code 23 credit she does not deny the allegations and indicates some understanding of the agency's concerns.

Throughout the progressive discipline process, Code 23 has been encouraged to obtain union representation but has not elected to do so prior to this investigation.

Code 23 has, since 2007, availed herself of the state's Employee Assistance Program. Code 23 stated in her interview that she has been counseled since 2007 and commented:

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[38] OPS Investigative File 10-0454, statement of Code 23 page 32, lines 23-25
[39] OPS Investigative File 10-0454, statement of Code 23 page 34, lines 21-29
[40] OPS Investigative File 10-0454, statement of Code 23 page 58, lines 1-9.

> *"Um, I really thought that I would be successful this time, because I'd overcome the hump of my illness, but I can see now that I'm not quite there yet."*[41]

Code 23 admitted refusing to discuss any health issues with her supervisor and only brought it up in the last investigation. Since then Code 23 has not requested FMLA leave for any reason nor has she used extensive sick leave. Likewise she has not requested any accommodation.

Clearly, the person standing in the way of improvement is Code 23 herself. The Crime Laboratory Division and its staff have made a significant and labor intensive effort to assist Code 23 overcome her issues and become successful. While she has a right to privacy regarding any personal health issues she may have, she also has an obligation to come to work and perform her duties in an acceptable manner and a professional responsibility to communicate her work related needs to her supervisor

The depth of Code 23 problems evidenced in this investigation combined with the long term persistence of these problems demonstrate that the job of a forensic scientist is a poor fit for Code 23 As Heath noted, Code 23 is a well-liked and bright individual, but is not suited for a stressful, highly detailed profession that is critical to public safety. The bottom line is that the work of the Crime Laboratory Division is far too vital to the proper administration of justice for it to be in the hands of someone who makes numerous mistakes on a routine basis.

The evidence obtained in this investigation substantiates that Code 23 violated 2010 WSP Regulation 8.00.030 Employee Conduct when she personally failed to acquire the knowledge, skills, and abilities required by her job with said failure impeding the ability of the department to effectively fulfill its responsibilities.

The evidence obtained in this investigation further substantiates that Code 23 violated 2010 WSP Regulation 8.00.110 Unsatisfactory Performance when she failed to maintain sufficient competency to properly perform her duties and assume the responsibilities of her position, failed to perform her duties in a manner that maintains the highest standards of efficiency in carrying out the functions and objectives of the department, and failed to conform to the work standards established for her position.

Contemplated Sanction
The allegations of misconduct on the part of Code 23 are therefore proven and I am contemplating termination.

ELEMENTS OF JUST CAUSE

The contemplated discipline is termination. In making this determination I have considered the Eleven Elements of Just Cause as they pertain to this case.

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[41] OPS Investigative File 10-0454, statement of Code 23 page 65, lines 4-5.

1. **Have the allegations against the employee been factually proven?**

   Yes, the allegations are proven based upon a large volume of consistent evidence obtained in the interviews of Heath, Turpen, Shutler, Barr, Greenwood, Wilson, and Code 23

   Evidence obtained from the interview of Code 23 corroborate the statements of her supervisor, her peers, and the DNA Technical Leader. Code 23 did not deny the allegations. Code 23 admitted to making mistakes, failing to review her work, having poor attention to detail, and failing to ask for assitance. Code 23 stated that the community should have reservations about her work.

2. **Is the discipline considered proportionate to the offense?**

   Yes, the sanction of termination is progressive and is proportionate to the offense considering the long term nature of Code 23 difficulties, Code 23 personal failure to improve in spite of the enormous effort made by division management to salvage her career, and Code 23 knowing disregard for proper analytical and quality procedures. The work of the Crime Laboratory Division is too important and too impactful to our citizens' public safety to be entrusted to Code 23

3. **Was the investigation conducted fairly?**

   Yes, the investigation was conducted fairly with due regard given to all sides. All of the appropriate witnesses were interviewed including Code 23 The investigative file contained a significant amount of documentation all of which was considered.

4. **Is the discipline contemplated non-discriminatory or similar to what another employee in a comparable situation would receive?**

   Yes, the discipline is free of any discrimination or bias against Code 23 The sanction of termination is consistent with what any other employee would receive given this set of circumstances. The discipline in this case is progressive in nature and comes only after a long term effort to help Code 23 get to where she needs to be.

5. **Is it the employee who is at fault?**

   Yes, Code 23 is personally responsible for her failures. Code 23 has been a forensic scientist for 12 years and a journey level forensic scientist for the last seven years. Consequently she should already be performing at the level of her peers who have received the same training and professional opportunities in the same environment.

The evidence clearly shows that when Code 23 failures became apparent, management embarked on a long journey of rehabilitation that involved job performance improvement plans, reduced job responsibilities, additional time, retraining, and unlimited access to

supervisory and peer support. Despite this costly effort Code 23 failed to gain the essential knowledge, skills, and abilities that would have allowed her to do what all of her peers are doing successfully in the very same environment.

6. **Have mitigating circumstances been considered?**

Yes. Code 23 WFSE Representative Dal Roberts has stated that Code 23 should have had representation during her last two investigations. The facts are that Code 23 was given every opportunity to have representation but she steadfastly refused representation saying that she did not want it.

Code 23 has been reluctant to talk about her personal issues which is her right and completely up to her discretion. Following her last investigation Code 23 did speak to Heath about some of her issues but on a very limited basis. Code 23 never requested any accommodations under the Americans with Disabilities Act. Roberts discussed the ADA issue and stated:

> *"And the reasonable accommodation process is, again, something for the employer. And it's up to the employee to bring it forward and make the request."*[42]

In her job performance improvement plans Code 23 was always offered access to the Employee Assistance Program ad well as access to State Patrol Psychologist Dr. Daniel Clark. Code 1

Code 1

Roberts stated that he was disappointed that Family Medical Leave Act opportunities have not been made available to Code 23.[45] It is important to note that FMLA is unpaid leave of up to 12 weeks per year provided by the employer to employees for:

- the birth and care of a newborn child of an employee;
- placement with the employee of a child for adoption or foster care;
- caring for an immediate family member with a serious health condition; or
- medical leave when the employee is unable to work because of a serious health condition or complication due to pregnancy.

[42] OPS Investigative File 10-0454, statement of Code 23 page 64, lines 3-5.
[43] OPS Investigative File 10-0454, statement of Code 23 page 63, lines 2-5.
[44] OPS Investigative File 10-0454, statement of Code 23 page 654-5., lines
[45] OPS Investigative File 10-0454, statement of Code 23 page 63, lines 22-23.

Code 23 did not make any request for an accommodation nor did she ever request FMLA leave due to any of the reasons for which FMLA is offered. It must be stressed that with or without FMLA, an employee still bears the responsibility for performing the essential functions of their job. To say that years of poor performance is now due to an as yet undisclosed illness or to a lack of taking any type of leave is clearly not reasonable.

Code 23 stated that there were many changes in the DNA protocols which made it difficult to be successful. While there were changes in the DNA protocols, Code 23 was provided with the appropriate training in order to assimilate the changes. Code 23 peers were successful within the same parameters yet Code 23 failed despite the fact that she was given more time than anyone else.

7. **Has the employee's complete work record been considered?**

Code 23 has had many problems over the years. Examples of these problems documented in the Crime Laboratory Division's DNA exception files are shown in the table below:

Date	Case No.	Problem Area
06/2002	101-00678	Code 23 recorded insufficient information in the case file during footwear analysis. Complaint received from detective and
Date	Case No.	Problem Area
		prosecutor. Evidence retested by private laboratory.
07/2002	102-01782	Code 23 violated analytical protocol by processing reference samples prior to evidence samples increasing risk of contamination.
12/2002	102-01644	Code 23 issued a verbal report prior to peer review stating that suspect was included in a mixture of DNA. Peer review showed that Code 23 was wrong and that the suspect was not included. Complaint received from detective.
11/2004	Proficiency	Code 23 made a typographical error when reporting her proficiency results in an allele table.

Code 23 poor performance and propensity to make serious mistakes continues and ultimately rose to the level of having to conduct administrative investigations.

OPS Case 08-0765

This was the original investigation which was initiated on May 22, 2008. It arose out of two years of poor evaluations dating back to 2006 and an error in Code 23 proficiency test. As this was her third proficiency error over the last few years and it triggered a full case review audit for 2007.

The audit reviewed 27 cases of which only six did not have errors. The errors ranged from administrative errors to technical errors and violation of standard protocols. This resulted in "Brady letters" being sent to eleven prosecuting attorneys notifying them of Code 23 problems and her faulty results.[46] DNA evidence if often the pivotal physical evidence in a case. Since Code 23 cases involved DNA analysis her problems in the laboratory could result in the exclusion of her report and/or testimony or even the dismissal of charges against a guilty subject. The allegations in this case were proven and are as follows:

WSP Regulation	Title	Finding
8.00.010	Rules of Conduct (A) Employees Required to Obey Rules of Conduct	Proven
8.00.030	Employee Conduct (A) Unacceptable Conduct	Proven
8.00.110	Unsatisfactory Performance (A) Unsatisfactory Performance	Proven

Code 23 received a 5-day suspension in this case.

OPS Case 09-0576

On February 9, 2009, Code 23 was placed on a 60 day JPIP (Job Performance Improvement Plan) because of continued poor performance. Due to continued areas of concern in the first 60 days, she was given an extension of 30-days in the hopes that these performance issues could still be resolved. Her output still remained below minimum acceptable levels. Based on the casework she was assigned, she made the following errors:

1. Two mathematical errors on the "quant" sheets of two competency cases. The error was a cut-and-paste issue based on the error in the first competency. This caused her to amplify more DNA than she intended.

2. Code 23 targeted an inappropriately low amount of DNA for amplification due to not concentrating a sample.

3. Code 23 diluted the wrong sample. She had two samples #5 from two different cases and she mixed up the samples.

[46] The Crime Laboratory Division must report problems/issues that could be exculpatory to an accused person to the affected prosecuting attorney who in turn must provide that information to defense counsel. The "Brady letter" is the formal written notification from the division to the prosecuting attorney. See U.S. Supreme Court ruling in Brady v. Maryland, 373 U.S. 83 (1963).

4. The incorrect preparation of quantification standards during a group quant (quantization). This resulted in less accurate quant results for multiple analysts impacting not just Code 23 work but the Spokane DNA Unit's work.

5. Code 23 used an expired DNA reagent kit during a group quant preparation. This affected all the scientists who used had samples in the quantitation. This is a protocol violation.

6. The error was a sample switch. The DNA casework questioned sample improperly ended up in the reagent blank.

7. Code 23 contaminated one sample with a non-adjacent sample during the setup of the amplification in her EZ1 competency.

8. The allegations in this case were proven and are as follows:

WSP Regulation	Title	Finding
8.00.030	Employee Conduct (A) Unacceptable Conduct	Proven
8.00.110	Unsatisfactory Performance (A) Unsatisfactory Performance	Proven

Code 23 received a 15-day suspension in this case.

OPS Case 10-0454

This is the current case in which Code 23 continues to demonstrate her poor performance and lack of job competency that has become her trademark.

1. Leaving the caps on the extract tubes during robotic extraction resulting in a risk of both sample loss and instrument damage.

2. Amplifying the wrong amount of target DNA resulting in additional work and expensive reagents to get a usable profile.

3. Selecting inappropriate screening tests, wasting time and reagents.

4. Using the incorrect number of reagent blanks, resulting in waste of reagents and demonstrating a lack of understanding of policies.

5. Incorrect calculation on the amplification sheet resulting in the wrong quantity of DNA being amplified.

6. Wrong statistics in the report.

7. Submitting a competency with the wrong victim, suspect names, and case number. Also, the evidence items were wrong.

8. Incorrect wording on conclusion.

The impact of Code 23 past performance can be profound. During his interview Shutler discussed an incident involving Code 23 at the Whatcom County Courthouse June 19, 2009. Shutler described a comment Code 23 had made in 2004 which was used by a defense attorney to attack the division's motion to exclude a defense expert from the laboratory. The motion was lost due to Code 23 poor performance. Shutler stated:

> *"And it was interesting to note that the defense counsel actually used a quote from* Code 23 *from the PI article of 2004,. . . and featuring a quote from* Code 23 *where she had, uh, mixed up two samples in, in a case and, and she said she, uh, 'must have had a brain fart." And so, anyhow, the defense lawyer quoted her, and the, the quality variance – or the corrective action investigation that we did on her at, at, at that time and – which ended up getting published in, in the PI.*
>
> *And, uh, so that, that is a good example of the kind of damage that the type of work that she has had in the past and the type of mistakes that were evident in that 90-day succession of JPIPs, and, and, you know, the damage that, that that can cause to the reputation of the WSP and the Crime Lab Division and, and, and the DNA labs. And, subsequently – well, anyhow, we, we ended up losing that, that motion and, the defense expert is going to be in there – in the Marysville lab* (Code 23 from the Spokane Lab)*– on a non-consumption case watching every move our analyst makes on, on doing that and affecting our efficiency and effectiveness on processing that, that particular case and, and others that would have been going on around that time, which – you know, since the lab pretty much has to shut down when a defense expert comes through in, in Marysville, this being such a small lab. So, so that's on other comment I'd like to throw in there of what the impact of, of work of that caliber can;, can have on us."*[47]

8. Is the discipline progressive?

Yes. Code 23 has received extensive counseling from her supervisor. She received a 5-day suspension in OPS Case 08-0765 and a 15-day suspension in OPS Case 09-0576.

[47] OPS Investigative File 09-0576, statement of Gary Shutler, page 15 lines 10-30.

9. Is the discipline free from anti-union sentiment?

Yes. There is no anti-union sentiment involved in the contemplated sanction of termination.

10. Can the employee be rehabilitated?

No. Code 23 has received intense intervention by two supervisors over four years with no sign of improvement. She has a documented history of serious technical and administrative errors in her casework, in her proficiency tests, and in her competency casework despite intensive attention paid to her by her supervisor and peers. She has failed all of the job performance improvement plans she has been given. She has failed to assimilate new information despite being given a reduced workload and more time than any of her peers.

Code 23 has received discipline consisting of a 5-day suspension and a 15-day suspension, neither of which provided her with sufficient motivation to improve her performance and job competency.

Agency Risk
Code 23 is a loose cannon and her work cannot be trusted. The work product of the Crime Laboratory Division is too vital to the administration of justice to allow Code 23 to place her hands on evidence. The risk of a wrongful conviction or the erroneous exclusion of a guilty subject because of Code 23 incompetence is far too great for the agency to undertake. The reputation and public confidence in the agency's ability to fulfil its mission would be seriously compromised if Code 23 were to continue her association with the agency.

Public Risk
Code 23 incompetence poses an unacceptable risk to public safety. If a guilty subject is improperly released through one of Code 23 casework errors or omissions, that subject could continue to commit crimes placing our citizens at risk. Likewise, if an innocent subject is not excluded or is wrongfully convicted through one of Code 23 casework errors or omissions, that person's life and liberty are destroyed.

Personal Risk
Code 23 is a decent person and has never denied the fact that her work does not meet agency standards. Nevertheless, Code 23 has irreparably damaged her reputation through her long term poor performance which has now become known to both prosecuting and defense attorneys. In so doing, Code 23 has sealed her own fate and even if she were able to return to criminal casework, attorneys and the courts would not be able to use her work product. Attempting to work around that fact would only leave Code 23 open to harsh public and legal criticism and potential lawsuits.

11. Was the accused employee afforded procedural due process?

Yes. [redacted] has received all of her contractural and due process rights up to this point in the proceedings. [redacted] will continue to receive all of her future contractural and due process rights as the process continues.

LDH:ldh

Acting FLSB Director: _____ Date: 3/8/2011

OPS Commander Concurrence: Michael DePalma Date: 03/18/11

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 90839-7
	)	
JULIO DAVILA,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] JULIO DAVILA 318404 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF MARCH, 2015.

X_____

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Supplemental Brief of Petitioner

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