

No. 92816-9

~~NO. 85459-9~~

72478-9

SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

SIONE P. LUI,

Petitioner.

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION


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A. AUTHORITY FOR RESTRAINT OF PETITIONER

Sione P. Lui is restrained pursuant to Judgment and Sentence in King County Superior Court No. 07-1-04039-7 SEA. Appendix A.

B. ISSUES PRESENTED

1. Whether Lui has failed to show ineffective assistance of counsel where the challenged actions were based on counsel's reasonable tactical decisions.

2. Whether Lui has failed to show prejudice from any alleged prosecutorial misconduct.

3. Whether Lui has failed to show prejudice from any alleged juror misconduct.

C. STATEMENT OF THE CASE

Petitioner Sione P. Lui was convicted by a jury of Murder in the Second Degree in the death of his fiancée, Elaina Boussiacos. Evidence showed that Boussiacos had been strangled, possibly with a ligature. Lui lived with Boussiacos at the time of her death, and was the last person known to have seen her alive. There was evidence that Boussiacos had planned to break off the engagement and end her relationship with Lui. Extensive circumstantial

evidence pointed to Lui as the murderer. Appendix B (Statement of the Case from Brief of Respondent).

The Court of Appeals affirmed Lui's conviction. State v. Lui, 153 Wn. App. 304, 221 P.3d 948 (2009). The Supreme Court accepted review (No. 84045-8), and oral argument was held on September 14, 2010. A decision is pending.

D. ARGUMENT

To obtain relief through a personal restraint petition, a petitioner must show that he was actually and substantially prejudiced either by a violation of his constitutional rights or by a fundamental error of law. In re Personal Restraint of Benn, 134 Wn.2d 868, 884-85, 952 P.2d 116 (1998). The petitioner must carry this burden by a preponderance of the evidence. In re Personal Restraint of Cook, 114 Wn.2d 802, 814, 792 P.2d 506 (1990).

A personal restraint petition is not a substitute for a direct appeal, and the availability of collateral relief is limited. In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992). "Collateral relief undermines the principles of finality of

litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." In re Personal Restraint of Hagler, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982).

1. LUI CAN SHOW NEITHER DEFICIENT PERFORMANCE OF COUNSEL NOR PREJUDICE THEREFROM.

Lui contends that his attorney rendered ineffective assistance of counsel in myriad ways. These claims fail because, in each instance, attorney Anthony Savage had a reasonable and legitimate strategy in mind for proceeding as he did.

To prevail on a claim of ineffective assistance of counsel, Lui must show that his attorney's performance in representing him fell below an objective standard of reasonableness based on all of the circumstances, and that there is a reasonable probability that the result would have been different but for counsel's conduct.

Strickland v. Washington, 466 U.S. 682, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. "Surmounting Strickland's high bar is

never an easy task." Harrington v. Richter, ___ U.S. ___,
131 S. Ct. 770, 788, 178 L. Ed.2d 624 (2011).¹

The Strickland standard encompasses a "strong presumption" that challenged actions were the result of sound trial strategy. Strickland, 466 U.S. at 689. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id. Thus, legitimate trial strategy or tactics cannot support a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Indeed, "strategic choices made after thorough investigation of law and facts relevant to plausible options are *virtually unchallengeable*." Strickland, 466 U.S. at 690 (emphasis added).

Competency of counsel is determined based on the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

¹ Richter is a federal habeas case, arising under 28 U.S.C. § 2254(d). The Supreme Court recognized that, in such a case, "[a] state court must be granted a deference and latitude that are not in operation when the case involves review under the Strickland standard itself" (as is the case here). The State accordingly does not rely herein on counsel's specific actions in Richter to justify counsel's actions in the present case, but rather relies on Richter solely for its citation to the general standards of Strickland.

a. "General Problems" With Counsel's Representation.

Lui complains that his attorney, Anthony Savage, did not discuss Lui's wife's ideas on trial strategy with her, and failed to respond satisfactorily to questions about trial strategy from one of Lui's high-school friends. Lui points to no authority establishing an attorney's obligation to discuss his strategy for trying his client's case with other interested parties.

Lui also claims that Savage "dozed off several times" during trial. PRP at 9. This claim is directly refuted by attorney Savage's declaration:

I never "fell asleep" during the trial of this case. Given the layout of the courtroom, if I were asleep it would have been in full view of the judge, lower bench, and prosecutors, none of whom raised a concern, which would have been apparent in the transcript of the trial. For the entirety of my career, I have at times closed my eyes during legal arguments. This blocks out visual distractions and allows me to listen and focus on the argument being made. I was attentive throughout this trial.

App. C (Declaration of Anthony Savage) at ¶ 2.

Lui's additional claim, that a fall near the end of the trial resulted in a significant deterioration of his attorney's physical and mental health, is similarly refuted by Savage:

I twisted my knee after court on Wednesday, April 16, 2008. It felt fine when I got home but by the following morning it had stiffened, making it difficult to walk. I appeared for court the morning of Thursday, April 17, 2008, using a walker for assistance. The trial judge recessed court until Monday, April 21, 2008, to allow me to recuperate. (Trial would not have been in session on Friday anyway, given King County's trial schedule.) I immediately went to a doctor, who gave me a knee brace, and recovered sufficiently over the weekend to appear in court on Monday with no problems that would have affected my ability to represent Mr. Lui. I did not receive or take any narcotic medication and felt perfectly comfortable and functional for the remainder of the trial. There was no mental impediment, and the injury did not affect my ability to represent Mr. Lui in any way.

Appendix C at ¶ 3.

- b. Alleged Failure To Challenge The State's Theory Of The Case.
 - i. Date on which Boussiacos's car appeared in WAC parking lot.

Lui claims that his attorney recognized before trial that the time that Boussiacos's car first appeared in the parking lot of the Woodinville Athletic Club ("WAC") was "critical to his case." PRP at 10. Lui faults counsel for not calling additional witnesses who he believes could have addressed that issue in a manner favorable to his defense. Lui also claims that his attorney failed to ask defense witness Sam Taumoefolau whether the car was in the WAC lot

when Taumoefolau and Lui distributed flyers during the week before Boussiacos's body was discovered in the trunk of her car.

Lui exaggerates his attorney's assessment of the importance of pinpointing when Boussiacos's car was first seen in the WAC parking lot. While Lui claims that counsel believed this piece of information to be "critical to his case," counsel's actual comment was that "the date that the car was found in the parking lot *may be important.*" RP 55² (italics added).

In fact, while the car's appearance in the WAC lot on the same morning that Boussiacos failed to board her flight to California fit nicely with the State's theory of the case (that Lui killed his fiancée sometime Friday night, put her body in the trunk of her car, and drove the car to the WAC lot), it was hardly the linchpin. Had Lui hidden the car elsewhere for a few days, then decided to dump it in the WAC lot, the State's case would have survived intact. In fact, the State's 50-page closing argument contains only a single brief reference to the timing of the car's appearance in the WAC parking lot. RP 1817.

² The verbatim report of proceedings in the trial court consists of 16 consecutively-paginated volumes, which will be referred to in this brief as "RP."

Counsel's decision to avoid making the car's appearance in the lot a central point of contention was sound trial strategy. Katherine Wozow was not merely a "WAC employee" (PRP at 10), she was the owner of the business. RP 736. As such, she presumably paid close attention to what went on there, and a jury was likely to give her testimony considerable weight. Wozow was clear that she first saw the black car in the WAC parking lot on Saturday morning, February 3rd, when she arrived to open the club. RP 742-44. She got there before the club opened, and the black car was the only one in the lot at the time. RP 744.

This testimony stands in stark contrast to the best that Lui's witnesses could offer -- testimony that they *did not see* the car in question in the WAC parking lot during the week of February 4, 2001. Aside from the fact that these were not disinterested witnesses like Wozow, but rather Lui's friends and acquaintances, these witnesses could at best seek to establish a negative. And there was no evidence that Paul Finau, a rugby friend of Lui's, had any idea what Boussiacos's car looked like, aside from what Lui may have told him.³ Moreover, the car was parked far to the back

³ Finau had lived out of the area for several years, and had known Boussiacos for only a couple of months before her death. PRP at App. 9, Ex. C.

of the side parking lot, and thus could easily have been overlooked. App. D (Ex. 31, 34, 37, 38). Under the circumstances, Finau's testimony that the car was not in the WAC lot on Monday, February 4th, would not likely have been very persuasive to the jury.

Lui further alleges that his attorney "forgot" to ask Lui's close friend, Semisi ("Sam") Taumoefolau, whether Boussiacos's car was in the WAC lot during the week of February 4th when Sam and Lui were distributing "missing person" posters to businesses in that area. PRP at 11. Again, it is difficult to argue a negative in the face of strong positive evidence and, for the above-stated reasons, such testimony would not likely have been persuasive. In any event, Sam testified on cross-examination that Boussiacos's car did not appear in the WAC parking lot until Friday (February 8th). RP 1775-76. Thus, Lui cannot meet the prejudice requirement for this claim of ineffective assistance of counsel.

Lui also faults his attorney for "inexplicably" failing to ask WAC employee Amber Mathwig when the black car first appeared in the WAC parking lot. PRP at 13. Lui's investigator, Denise Scaffidi, concluded from her interview of Mathwig that Mathwig first saw the car in the lot on Wednesday, February 7th. PRP at App. 9, ¶ 4. The problem with relying on Scaffidi's interview notes is that

Mathwig declares that those notes "are inaccurate and do not properly document what I recall about this event." App. E (Declaration of Amber Mathwig) at ¶ 5.

In fact, Mathwig maintains that she first saw Boussiacos's car in the WAC parking lot on Monday, February 5, 2001. App. E at ¶ 2. Mathwig further states that she conveyed this information to defense counsel just prior to her testimony and that, had she been questioned on this subject at trial, she would have answered in accordance with her declaration.⁴ App. E at ¶ 6, 7.

Mathwig's recollection is supported by counsel's own:

Before calling Amber Mathwig to the stand, I spoke with her in the hallway outside the courtroom. Prior to this discussion, I had been provided with the summary of an interview of her conducted by my investigator, Denise Scaffidi, and I believe I had spoken with Mathwig by telephone on at least two occasions. In speaking with Mathwig outside the courtroom, I learned that some of the information in the defense investigator notes was inaccurate, or that Mathwig was backing off what she had said. I cannot now recall exactly what she stated, but I do recall that she would not have testified that she did not see the victim's car in the gym parking lot on Monday, February 5. She could not say if the car was there all

⁴ Scaffidi's declaration also includes a "tip sheet" from the King County Department of Public Safety that contains the following information: "says the victim's veh was there by 0900 on 020701." PRP at App. 9, Ex. A. But Mathwig told Scaffidi that she had never seen the "tip sheet," and that she had never spoken to police about the case and did not know where they had obtained the information contained on the "tip sheet." PRP at App. 9, Ex. B at 1, 2, 3-4.

week or not. Consequently, I did not ask her any questions about how long the car had been in the lot as her testimony on this topic would have proven useless to counter the prior testimony of the gym owner. I never did believe that the location of the car on a particular morning was a "smoking gun." If Mr. Lui was responsible for the murder, he could have hidden the car over the weekend and driven to the location at some later time. In other words, the location of the car on Saturday, Tuesday, Thursday, etc., doesn't really convict or acquit him of the offense.

App. C at ¶ 9. Once the facts are known, defense counsel's decision not to question Mathwig on the timing of the car's appearance in the WAC parking lot is not "inexplicable," but rather was the only reasonable course of action under the circumstances.

Lui also points to another employee of the WAC who allegedly had information favorable to him concerning when Boussiacos's car appeared in the parking lot. PRP at 13; PRP at App. 9, Ex. A. Investigator Scaffidi, however, was unable to locate this anonymous employee. PRP at App. 9, ¶ 5.

In a more general sense, Lui's whole line of attack here is ably answered by defense counsel in his declaration:

Based on my experience [more than 50 years as an attorney, practice limited to criminal defense, hundreds of cases tried to verdict], I have developed a philosophy of trial that focuses on the "big picture" as the most effective means of combating the prosecution's case and holding the State to its burden

of proof beyond a reasonable doubt. I trust the jury to be filled with intelligent people who can spot red herrings or "rabbit trails" of peripheral, unconvincing evidence. Such evidence, if offered by the defense, diminishes the defense case. In addition, objecting to or raising issues that are not compelling may have the effect of the defense impliedly taking on a burden of proof that otherwise would not exist. Evidence or cross-examination that does not bear close scrutiny may be easily attacked and neutralized. It then has no probative value, and the jury's focus swings away from the State's case and onto the failings of the defense's presentation. I rely on my best judgment and strategy in this regard.

App. C at ¶ 1, 4.

ii. Dog track evidence.

Lui contends that his attorney did not sufficiently refute the evidence that a bloodhound tracked Lui's scent from Boussiacos's car in the WAC parking lot to the apartment that Lui shared with Boussiacos. He complains that evidence of his postering activity along the route that the dog tracked was inadequately presented, and he faults his attorney for not retaining an outside expert on dog tracking. None of these claims has merit.

Sam Taumoefolau

Lui's friend Sam Taumoefolau testified that he and Lui put up posters in and around Woodinville in the week between

Boussiacos's disappearance and the discovery of her body.⁵

Taumoefolau said that, on Tuesday, February 6th, he and Lui walked from Lui's house to the Woodinville business district and covered the entire area with flyers. RP 1739-40. They returned to the area on Wednesday, February 7th. RP 1742.

Taumoefolau used Exhibit 91 to illustrate this testimony. RP 1740; PRP at App. 8, Ex. A. He acknowledged that the defense attorney showed him the exhibit prior to his testimony. RP 1740. Ex. 91 contained the entire route of the bloodhound track. RP 1079.

Taumoefolau's testimony fulfilled the purpose for which he was called -- to establish that Lui had walked with Taumoefolau through the area where the bloodhound tracked. Attorney Savage explains this in his declaration:

Prior to calling Sam Taumoefolau to testify, I showed him a map that had already been admitted into evidence of the area where the victim's body was found. Taumoefolau indicated that the map would be sufficient for him to explain where he and the defendant walked while putting up missing person posters. The map I showed Taumoefolau covered the area of the dog track. The primary reason for calling Taumoefolau to testify was to establish that he and the defendant did, in fact, walk all over the area, including the area tracked by the dog, thereby

⁵ There was no real dispute that Lui put up "missing person" posters. App. K (Ex. 145).

undercutting the significance of the State's dog track evidence. Taumoefolau testified consistently with that explanation.

App. C at ¶ 8. Taumoefolau's testimony thus fulfilled its purpose.

Nevertheless, Taumoefolau now declares that he "[does] not feel that [his] testimony went well." PRP at App. 8, ¶ 3. His primary concern appears to be that the map that he used at trial to describe his postering route with Lui (Exhibit 91) did not show all of the locations at which they distributed "missing person" flyers. Id. Taumoefolau has now drawn the route that he wished to describe on a separate map, apparently prepared post-trial in support of this petition. Id. at ¶ 8 and Ex. C. While the route drawn on Ex. C is more detailed, and includes the additional destinations (such as Kinko's and a Mexican restaurant) that Taumoefolau and Lui allegedly visited on foot on the Tuesday after Boussiacos's disappearance, this more detailed route diverges from the bloodhound's route as to the crucial path from the WAC parking lot to the business area that contains the AT&T and Barnes & Noble stores. Id. at Ex. A, C.

Despite his post hoc misgivings, Taumoefolau's testimony accomplished its purpose, which was to provide an alternative to the State's theory for why the bloodhound followed a scent from the

WAC parking lot, where Boussiacos's body was found, back to Lui's house. Taumoefolau's testimony at trial that he and Lui walked from Lui's house to the Woodinville business district and "covered that whole area" while putting up flyers (RP 1740) allowed the jury to believe that the bloodhound was following a more recent scent laid down when Lui pursued this wholly legitimate activity. This likely diminished the significance of the State's dog track evidence in the minds of the jurors.

Dog Track Expert

Lui contends that his attorney was ineffective in choosing not to retain a "dog track" expert in response to the testimony of Richard Schurman, the handler of the bloodhound who trailed from the WAC parking lot to Lui's home. This claim fails, because Lui can show neither deficient performance nor prejudice.

Schurman had been a volunteer handler of bloodhounds for more than 15 years at the time of his involvement in this case. RP 1057-58. He described in considerable detail both his own training and the training of the bloodhounds. RP 1058-65. He explained the unique ability of the breed to trail a scent. RP 1061.

Schurman candidly acknowledged the limitations on such a trail. He described the deterioration of "SCURF," or microscopic

skin fragments, over time, in response to environmental factors such as warm weather and ultraviolet rays. RP 1062, 1068-69. He acknowledged that scent gets distributed in an increasingly wide swath over the course of seven or eight days. RP 1074.

On cross-examination, Lui's attorney asked Schurman a series of directed questions aimed at obtaining an admission that, when one person's clothes are in a hamper with another person's clothes, transfer of scent among clothing items is possible. RP 1083-87. Counsel got Schurman to admit that "anything over 15 days gets pretty dicey."⁶ RP 1087. Counsel got Schurman to admit that skin cells can be blown around by the wind. RP 1088-89. Counsel got Schurman to admit that he could not tell on what day the scent that his dog followed was deposited. RP 1105-06.

Anthony Savage, in his declaration, explained his strategy in not calling an expert in response to Schurman's testimony:

As part of my trial preparation in this case, a dog expert in California was consulted regarding the bloodhound evidence. The expert said a bloodhound cannot track a scent trail as old as the one in this case. I considered this to be an example of testimony that could damage the defense case by being easily discredited. The dog in this case clearly tracked

⁶ If the murderer had left Boussiacos's car in the WAC lot on the night of February 2 or the morning of February 3, 2001, when Boussiacos disappeared, the scent trail would have been more than 11 days old on February 14, the day of the bloodhound track. RP 1110.

something, because it traveled from the location of the victim's car to the defendant and victim's house. The handler and dog had no way of knowing where the defendant and victim lived. Even if the dog in fact tracked the victim's scent, rather than the defendant's, that argument would have inherently contradicted any defense expert testimony that the trail was too old to follow. Rather than rely on expert testimony that was easily attackable, it was better strategically to argue, as I did, that the scent trail was easily explained away by the defendant's efforts to distribute posters, and would have been made later than the State contended.

App. C at ¶ 5.

This strategy fit well into counsel's general philosophy of trying cases:

It has always been my general philosophy that it is preferable to explain circumstances rather than to directly confront them. By directly confronting a contention of the prosecution (other than that of guilt itself, of course) you set up a contest for the jury to weigh. If the jury weighs the contest against the defendant it dilutes the defense. If a reasonable explanation of the State's contention can be made (i.e., the dog was following Lui's scent which he laid down during the process of distributing posters) you avoid making the jury decide what the dog was following as would have been the case if you had completely denied the possibility that the dog was tracing Lui's path from the car itself to the house.

App. C at ¶ 4.

Given his attorney's clearly articulated and eminently reasonable trial strategy, Lui cannot show that counsel's

performance was deficient here. The United States Supreme Court, in its seminal case on ineffective assistance of counsel, reminded reviewing courts to refrain from second-guessing decisions like the one counsel made in this case: "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689.

The Supreme Court, in a case where the defendant claimed ineffective assistance based on his attorney's failure to call an expert witness, endorsed Savage's approach to trying cases: "To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." Richter, 131 S. Ct. at 790. The Court observed that "Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." Richter, 131 S. Ct. at 791.

Lui's attorney, through his focused cross-examination, raised questions about what scent the bloodhound was following, and when the scent was deposited. In this way, he cast doubt on the

State's theory, while avoiding taking on a burden that the defense had no obligation to carry. This was not deficient performance.

Nor can Lui show prejudice. The expert that Lui's appellate attorney consulted more than a year after the trial established little of use that was not presented to the jury through counsel's cross-examination of Richard Schurman.⁷

As to the ability of a bloodhound to follow a scent trail, Ha admitted that there is "very little hard, scientific data on the length of time and accuracy of dog, or specifically bloodhound, tracking accuracy." PRP at App. 14, ¶ 6. Ha relies on a "commonly-used rule of thumb" that posits a 10% decrease in accuracy for each day of delay, to conclude that the bloodhound in this case was not likely able to follow an 11-day-old trail, but was probably "following scent that had been laid down more recently."⁸ Id. at ¶ 6-8. This information, and the inference that follows from it, was put before the jury through Sam Taumoefolau's testimony about Lui's postering activities in the area, and through Schurman's

⁷ In his PRP, Lui relies on a declaration from James Ha, Ph.D., obtained more than a year after trial. PRP at App. 14. The expert consulted by investigator Denise Scaffidi during trial preparation was Van Bogardus. PRP at App. 13, ¶ 8. "[Bogardus] would have testified that it was very unlikely that a dog could follow a scent through an urban area 11 days after the fact." Id.

⁸ Ha acknowledges that his rule of thumb "is experience-based and has not been formally established in the scientific literature." PRP at App. 14, ¶ 6.

acknowledgment on both direct and cross-examination that a scent trail deteriorates over time. RP 1062, 1068-69, 1739-40, 1742.

Ha also states in his declaration that the biological material that carries a person's scent can be moved around after it leaves a person's body. PRP at App. 14, ¶ 9. Schurman acknowledged this in his testimony. RP 1074, 1088-89. Ha states that a dog cannot tell when the scent trail was laid down. PRP at App. 14, ¶ 10. Schurman admitted as much. RP 1105-06. Ha states that the scent item presented to the dog could have been contaminated by other items of clothing with which it came into contact. PRP at App. 14, ¶ 14. Schurman acknowledged this possibility. RP 1085-87.

Lui also argues that, had his attorney been diligent, he would have succeeded in having the bloodhound evidence excluded as irrelevant, citing State v. Lord, 161 Wn.2d 276, 165 P.3d 1251 (2007). PRP at 19. Lord does not control this issue in this case. First of all, the court in Lord did not find that the dog track evidence *should* have been excluded, but rather held that the trial court *did not abuse its discretion* in finding the dog handler's testimony irrelevant. Lord, 161 Wn.2d at 294-95.

Moreover, while there was an issue at Lui's trial, as there was in Lord, concerning *when* the scent was laid down, and the dog handler in neither case could answer that question, the trail in Lord followed a regular path that the victim had traveled on a regular basis. Lord, 161 Wn.2d at 283, 295. By contrast, the trail that the dog followed in Lui's case was anything but a normal pathway; rather, it started out "through the brush" that separated the back part of the WAC parking lot from the parking lot of an adjacent shopping center. RP 1072-73; PRP at App. 8, Ex. A. While Sam Taumoefolau testified that he and Lui had placed flyers at both the WAC and at stores in the adjacent shopping center, it strains credulity that they would *just happen* to have cut through right at the spot where Boussiacos's car was found with her body in the trunk. RP 1070-72. The State thus had a stronger argument for relevance in Lui's case than in Lord, and the trial court would not likely have excluded the evidence here.

c. Lui's Arm Injury.

Lui contends that his attorney was ineffective in not presenting an expert to support Lui's claim that an arm injury he had suffered approximately four months before Boussiacos's murder ruled him out as her killer. Lui ignores the evidence

indicating that a ligature was likely used to strangle Boussiacos, a method that would require considerably less hand or arm strength than manual strangulation.

Lui says in his declaration that he fractured his right arm on September 30, 2000, and that the arm was in a cast until the middle of November. PRP at App. 16, ¶ 2. He believes that Jaimee Nelson must have been mistaken when she testified that Lui moved a dresser for her in November or December of 2000. Id. at ¶ 3. Lui adds that his injury prevented him from playing guitar or ukulele at the luau he attended on February 3, 2001. Id. at ¶ 4, 5.

Attorney Savage articulates his thinking with regard to Lui's injury as follows:

I knew that the defendant had broken a bone in his arm several months before the murder. I also knew that the State had witnesses who would testify that, since breaking his arm, he had helped move furniture and was able to change a tire the night the victim was last known to be alive.⁹ Given this evidence, along with my knowledge of the defendant's athletic prowess (he was an avid rugby player and fitness buff), and his general strength and size, the argument that he would not have had the strength required to strangle the victim as a result of this injury seemed tenuous, at best, and another example of evidence that could hurt rather than help by diminishing the defense case. Moreover, the medical examiner

⁹ Sam Taumoefolau testified that Lui called him at 10:06 p.m. on Friday night, February 2, 2001, and that Lui was in the process of changing the tire on Boussiacos's car at the time. RP 1756-58.

testified that he could not rule out that the victim was killed by ligature strangulation, which requires far less strength and dexterity than manual strangulation.

App. C at ¶ 11.

Indeed, Dr. Harruff testified that there are two basic types of strangulation: ligature (using a rope, belt, cord, etc.) and manual (using the hands). RP 1386. The distinctive feature of ligature strangulation is a band on the surface of the neck, whereas the primary feature of manual strangulation is fingernail marks. Id.

Dr. Harruff did not say that Boussiacos's death was caused by manual strangulation ("I am not calling this a manual strangulation. I am just saying that fingers could be involved, either from the assailant or from the victim.").¹⁰ RP 1387. In fact, he described an abrasion on her neck as a "band." RP 1388, 1389. He also described a pair of abrasions lower down on the sternal notch as having "a linear quality." RP 1389. Ultimately, Harruff could not say conclusively whether this was a manual or ligature strangulation. RP 1390.

The declaration of Lui's expert, Theodore Becker, Ph.D., does not even acknowledge the possibility of ligature strangulation,

¹⁰ Harruff said that fingernail marks could come from the assailant digging fingernails into the neck, or from the victim as she tried to remove either a hand or a ligature from her neck. RP 1386-87.

and thus does not account for that possibility in concluding that Lui "could not have been the killer of Elaina Boussiacos." PRP at App. 15, ¶ 4. Moreover, Becker relies in part on Boussiacos's imagined ability to remove Lui's weakened right hand from her neck. Id. at ¶ 7. But Harruff described a blunt force injury to Boussiacos's head. RP 1392. This could easily have limited her ability to fight back.

And even if Lui's attorney had presented an expert like Becker, the State would likely have retained its own expert to rebut Becker's conclusions. See, e.g., Cullen v. Pinholster, 563 U.S. ____ (No. 09-1088, April 4, 2011) ("If Pinholster had called Dr. Woods to testify consistently with his psychiatric report, Pinholster would have opened the door to rebuttal by a state expert."). This expert might not have been as conservative as Dr. Harruff, and might well have testified more conclusively about evidence of ligature strangulation.

Once again, attorney Savage's strategic approach to defending his clients comes into play:

Based on my experience, I have developed a philosophy of trial that focuses on the "big picture" as the most effective means of combating the prosecution's case and holding the State to its burden of proof beyond a reasonable doubt. I trust the jury to be filled with intelligent people who can spot red herrings or "rabbit trails" of peripheral, unconvincing

evidence. Such evidence, if offered by the defense, diminishes the defense case. In addition, objecting to or raising issues that are not compelling may have the effect of the defense impliedly taking on a burden of proof that otherwise would not exist. Evidence or cross-examination that does not bear close scrutiny may be easily attacked and neutralized. It then has no probative value, and the jury's focus swings away from the State's case and onto the failings of the defense's presentation. I rely on my best judgment and strategy in this regard.

App. C at ¶ 4.

Given attorney Savage's clear and reasonable trial strategy, the decision not to call an expert on biomechanics cannot be found to be deficient performance. And in light of the strong likelihood that the State would have rebutted such expert testimony with its own expert, Lui cannot make the requisite showing of prejudice.

d. Other Suspect.

Lui contends that his attorney was deficient in failing to argue in support of introducing evidence that James Negrón, Boussiacos's former husband and the father of her son, murdered Boussiacos. This claim fails. The defense could not meet the standard for "other suspect" evidence as to Negrón. Lui thus cannot show the requisite prejudice, and this claim of ineffective assistance of counsel should be rejected.

While a criminal defendant has a constitutional right to present a defense, this right does not encompass a right to present irrelevant evidence. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). To be relevant, evidence connecting another person with the charged crime "must create a train of facts or circumstances that clearly point to someone other than the defendant as the guilty party." State v. Howard, 127 Wn. App. 862, 866, 113 P.3d 511 (2005), review denied, 156 Wn.2d 1014 (2006). This has been the standard for admission of such evidence in this state for almost 80 years. See State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932); State v. Kwan, 174 Wash. 528, 532-33, 25 P.2d 104 (1933).

The nexus between the "other suspect" and the crime is not established by evidence of a possible motive, even where the motive is accompanied by threats. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993); Kwan, 174 Wash. at 533. Nor does the addition of opportunity or ability create a sufficient nexus: "Not only must there be a showing that the third party had the ability to place him- or herself at the scene of the crime, there also must be some step taken by the third party that indicates an intention to act

on that ability." State v. Rehak, 67 Wn. App. 157, 163, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993).

The defendant has the burden of showing that the "other suspect" evidence is admissible. Howard, 127 Wn. App. at 866. The admission or refusal of "other suspect" evidence lies within the sound discretion of the trial court. Rehak, 67 Wn. App. at 162.

The facts of Rehak illustrate the high bar the courts have set for admission of "other suspect" evidence. While on trial for the murder of her husband, Anna Rehak wished to offer evidence that her husband's son could have murdered his father. Rehak, at 159, 160. Rehak offered to prove that father and son had quarreled, that the son might benefit financially if his stepmother were convicted of murder, that he knew where the murder weapon was kept, and that he was absent from work without explanation on the morning of the murder. Id. at 160-61.

The trial court rejected the "other suspect" evidence. Id. at 161. While it was theoretically possible that the son could have traveled to his father's home that day, there was no evidence of his intention to do so, and no evidence placing him anywhere near the murder scene. Id. at 161, 163. The appellate court found that the accusation of the son as his father's murderer was "nothing more

than speculation," and that the trial court had properly excluded the evidence as irrelevant and lacking in foundation. Id. at 163.

Lui relies on statements from various persons that Boussiacos's former husband, James Negron, had been a gang member in the past, had been violent toward Boussiacos and toward his son, and had a desire to maintain primary custody of his son.¹¹ This evidence falls well short of establishing the required nexus between Negron and the crime -- the murder of Elaina Boussiacos.¹² It is nothing more than evidence of a possible motive, and cannot meet the standard for "other suspect" evidence. See Condon, 72 Wn. App. at 647 (evidence that wife had been abused by her husband and was unhappy with a proposed property settlement not sufficient for required nexus between her and the murder of her husband).

As in Rehak, supra, there is no evidence here that Negron was anywhere near Boussiacos after they exchanged custody of their son, Anthony, in a parking lot in the University District on

¹¹ It is not clear why Lui includes the declaration of his divorce attorney, Richard Pope. PRP at App. 20. Pope's 9-page "timeline" is made up of irrelevant and inadmissible information. It appears that Pope is currently suspended by the Washington State Bar Association. App. F.

¹² In any event, Lui never explains how he would get around the rule against hearsay, which would likely keep out most of this evidence.

Friday night, February 2, 2001. And unlike the purported "other suspect" in Rehak, Negron had an alibi. PRP at App. 10, Ex. G at 3, Ex. H at 7-9, 14-15. The sole piece of evidence connecting Negron to the murder in any way was the presence of his *or his son's* DNA on Boussiacos's shoelaces. Given that there was no way to determine when the DNA was deposited, this single item was not sufficient to connect Negron to the murder. A trial court properly exercising its discretion would not have allowed Lui to argue that Negron was an "other suspect" in Boussiacos's murder.

Attorney Savage's explanation for not offering "other suspect" evidence shows that he well understood the legal requirement for a nexus between a third party and the crime:

I did not argue about admissibility of "another suspect" evidence because it was not legally colorable under current case law. The victim's ex-husband, James Negron, was a church pastor. He had been alibi'd by three people, and there was nothing to suggest they lied. There also was nothing to suggest a motive he might have to kill the mother of his son.^[13] Their child custody arrangements were in place, they rarely saw each other, and there was no evidence of a fight or disagreement. DNA on the victim's shoelaces could have been from Negron or his son and could have been deposited at any time by either one of them. Nothing beyond that tied him to

¹³ If Negron, who had full custody of Anthony, could not afford to keep him all the time (PRP at 23), it is difficult to see why he would want to eliminate Boussiacos, who was Anthony's backup caregiver.

the crime or crime scene. A proffer of him as another suspect would not have been allowed and, for the reasons discussed above,¹⁴ even if admitted could have diminished the defense case.

App. C at ¶ 7. This statement also reflects, in the last sentence, counsel's legitimate strategic reason for not offering the evidence.

Lui attempts to circumvent Washington's rigorous standard for admission of "other suspect" evidence by relying on federal constitutional protections. PRP at 28. But the Supreme Court's most recent opinion on "other suspect" evidence does not help Lui. In Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed.2d 503 (2006), the Court rejected a new state rule that in effect precluded "other suspect" evidence wherever there was "strong evidence" of the defendant's guilt. Id. at 324, 329, 331. The Court reasoned that, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." Id. at 331.

The Court noted that South Carolina's new rule "radically changed and extended" its previous, long-standing rule. Id. at 328. Like Washington's rule, South Carolina's long-standing rule had

¹⁴ See Savage's discussion of his general philosophy of trial. App. C at ¶ 4.

required that "other suspect" evidence be based on a clear nexus between the third party and the crime: "Before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." Id. (quoting State v. Gregory, 198 S.C. 98, 104-05, 16 S.E.2d 532 (1941)). The Supreme Court noted approvingly that "[s]uch rules are widely accepted." Id. at 327.

The prior South Carolina rule on "other suspect" evidence, noted with approval by the Supreme Court, is identical to Washington's rule. Washington's rule on the admission of "other suspect" evidence does not run afoul of federal constitutional protections.

Lui finally argues that the failure to redact all evidence of Negron's former gang ties from Lui's April 6, 2007 statement to police "opened the door" to evidence that Negron was "another suspect" in the murder of Boussiacos. PRP at 28-29. The record does not support this argument.

Just before playing for the jury the tape of Lui's April 6, 2007 statement, the prosecutor informed the court that references to a polygraph and to James Negron's gang involvement had been redacted from the tape. RP 1656-57. The prosecutor had given

Lui's attorney a copy of the redacted transcript. RP 1656. When the court asked attorney Savage if he had "any comment about the transcript, or the redactions, or anything like that," he responded "no." RP 1657-58.

One of Lui's references to Negron's former gang involvement was not redacted. PRP at App. 31. This appears to have been inadvertent.¹⁵ Lui argues that "[t]he State's purpose was apparently to suggest that Lui was making outlandish accusations against Negron to deflect blame from himself," and that Lui was entitled to rebut this inference and show that his statements about Negron "were not fabrications." PRP at 29. The problem with this "straw man" is that the State never argued to the jury that Lui was attempting to deflect blame from himself by making "outlandish accusations" against Negron.¹⁶ Thus, no door was opened -- there was nothing to refute.

The inclusion of Lui's discussion about Negron's gang involvement ultimately worked to Lui's advantage. While his "other

¹⁵ The trial court had granted *the State's* motion *in limine* to exclude reference to Negron's or Boussiacos's alleged gang connections. RP 51.

¹⁶ Even the reference to Lui's statements about Negron and gangs in the State's response brief on appeal, to which Lui cites, simply references the statement as a fact. The reference is in the facts section of the brief, and there is no argument associated with it. PRP at App. 10, Ex. C.

suspect" evidence could not have come in under the governing legal standard, evidence that Negron had been involved with gangs in the past, and Lui's opinion that Boussiacos was killed by someone "very professional," might well have planted the notion in at least some jurors' minds that Negron was a possible suspect.

In sum, Lui's attorney was not ineffective in not offering "other suspect" evidence as to James Negron, because the evidence did not establish the required nexus between Negron and the murder. See State v. Nichols, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007) (not ineffective for counsel to fail to bring motion that would not have succeeded in any event). Moreover, reference to Negron's gang involvement in his statement to police allowed the jury to infer that Negron could be "another suspect." Lui thus cannot prevail on either the performance or the prejudice prong in this ineffective assistance of counsel claim.

e. Failure To Impeach Detective Gulla's Credibility.

Lui also faults his attorney for declining to seek further impeachment material concerning Detective Denny Gulla, and for conceding that he saw no nexus between the alleged misconduct of Gulla in other instances and Lui's case. Counsel had a legitimate

tactical reason for his actions in this regard. In any event, Lui cannot show prejudice. The allegations against Gulla that related to dishonesty were too old to be admissible. Moreover, Lui's imagined motive on Gulla's part -- to trump up a case against Lui to save Gulla's job -- is wholly speculative.

Prior to trial, the State moved to exclude reference to disciplinary actions against Detective Gulla. RP 59. Attorney Savage's response was a thoughtful one:

I don't see any nexus between the alleged misconduct of Detective Gulla [in] other cases and this case. But the Court has been through this. The State produces the detective, and all of a sudden we go into all of these classes, and these expert [trainings], and "I have done this and I have done that." If I think that the door is opened, I will advise the Court and we can take it up in the absence of the jury before I get into it.

RP 59. The court responded that "[i]f the defense feels that it is the open door is opened [sic], we will take it up out of the presence of the jurors." RP 60.

Counsel's declaration reflects the approach he articulated at trial:

It was my belief that evidence regarding Det. Denny Gulla's background was not admissible. The finding that he made a false statement was remote, more than 20 years before the trial, and subsequent misconduct findings had nothing to do with honesty. All were unrelated to this case. I do not pursue an

argument simply for the sake of the argument when I believe it is not legally tenable. Even if admitted, this evidence could have diminished the defense case simply by it being offered by the defense, as it was clearly peripheral and unrelated. In this instance I told the prosecution that any attempt by the State to portray Gulla as particularly experienced or capable would result in my argument that the door was opened to his entire history. As a result, I believe, the State kept his testimony tightly constrained to avoid an open door.^[17]

App. C at ¶ 6.

Lui acknowledges that the two instances of conduct that reflected dishonesty on Gulla's part were "somewhat old."¹⁸ PRP at 35. And while he attempts to rely on Gulla's allegedly false testimony in a case that Savage handled in 2001, the federal district court concluded that the record did not reveal whether Gulla's testimony "was intentionally misleading or just carelessly inaccurate." PRP at 38. Lui fails to show that his attorney was incorrect in concluding that evidence regarding Gulla's behavior in other cases would not have been admissible in this case.

¹⁷ Indeed, the State asked Gulla no questions about his experience as a police officer, his qualifications, or his training. RP 940-41.

¹⁸ While the 2005 incident referenced in Lui's brief appears to have involved harassment, the incident itself did not include dishonesty. PRP at 35 and App. 22. Even had Gulla been *convicted* of a crime of dishonesty in the 20-year-old incidents, the convictions would have been presumptively inadmissible. ER 609(b).

Failing to show admissible instances of dishonesty, Lui goes to great lengths to imagine bias on Gulla's part. His argument that Gulla had a "motivation to trump up a case against Lui" to shore up Gulla's "tenuous status" with his employer (PRP at 33) does not withstand scrutiny. First of all, it is pure speculation; Lui cites to no actions that Gulla took that show evidence of "trumping up." And if Gulla, with his years of experience as a police officer, had really wanted to "trump up" a case against Lui, it is reasonable to assume that he would have done a better job. Lui was not even *charged* with Boussiacos's murder until more than six years after she was killed. App. G.

Gulla's most significant involvement in this case was his role in the bloodhound track. Gulla collected articles of men's clothing from Lui's house and tied them up in a plastic bag; these were the items that the bloodhound smelled before commencing the dog track. RP 961-62. Since Lui and Boussiacos had both lived in the same house, and because defense counsel established on cross-examination of the dog's handler that scent could be transferred among articles of clothing (RP 1085-87), the jury had available to them the reasonable inference that the dog might have been tracking Boussiacos's scent rather than Lui's.

Thus, even if Gulla had deliberately provided clothing that he knew contained the victim's scent, this would not have had a significant effect. And it is difficult to see how Gulla could have manipulated the dog track in some other way to profitable effect, if his goal was simply to "trump up" evidence against a suspect.

Lui also points to Gulla's testimony that, when Gulla went to Lui's house on February 8, 2001 (almost a week after Boussiacos was last seen alive), Lui's garbage can was empty and Lui's house was clean. PRP at 32; RP 942-44. This is hardly the sort of devastating testimony that an experienced detective would "trump up" if he were trying to manufacture a case against Lui. Similarly, the absence of debris on Boussiacos's tennis shoes does not seem worth lying about, especially since, if untrue, this evidence could have been refuted by photographs. RP 972, 988, 1334-35.

As further evidence of Gulla's alleged bias, Lui also places significance on what he describes as Gulla's "suggestions" that Lui was "faking concern for Elaina Boussiacos." PRP at 32. However, the trial transcript reveals that Gulla mostly responded with one-word answers ("no") to questions posed by the prosecutor about the interview with Lui. RP 954-56.

Lui has failed to show that evidence of Gulla's conduct in other cases would have been admitted. He has failed to show that, even had some evidence been admitted, his attorney was not correct that the evidence would have distracted from, and ultimately diminished, his case. He has failed to show a credible motive for Gulla to falsely implicate him. And he has failed to show that the evidence to which Gulla testified lent itself to fabrication, or that it was the sort of evidence that an experienced detective would lie about if he wanted to "trump up" a case against Lui.

In sum, Lui has not carried his burden to show both deficient performance and resulting prejudice with respect to counsel's handling of Gulla's testimony.

f. Failure To Object To Alleged Prosecutorial Misconduct.

Lui faults his attorney's decision not to object on several occasions. Because this is a classic example of trial tactics, and because Lui cannot show prejudice from the evidence at issue, this claim of ineffective assistance of counsel fails.

A reviewing court will not find ineffective assistance of trial counsel if the actions complained of go to the theory of the case or to trial tactics. State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139

(2004). The decision of when or whether to object is a "classic example" of trial tactics. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989).

i. Alleged reference to sexual assault.

Lui had told police repeatedly that he and Boussiacos had not had sex on Friday night, February 2, 2001, the night before she was to leave for the weekend. Ex. 43 at 20, 22; Ex. 169 at 13, 63, 107.¹⁹ Lui initially claimed that they had not had sex for two weeks, then later expanded that period to two months. Ex. 43 at 20, 22; RP 1321-22.

The evidence showed that Lui's denials were almost certainly false. Sperm found on the underwear that Boussiacos was wearing was inarguably Lui's. RP 1220-21. While Lui's attorney established on cross-examination that the forensic scientist could not say with certainty how long the sperm had been there, it was well established that Boussiacos had good hygiene and "took extremely good care of herself"; it was thus unlikely that she was wearing underwear that had been soiled weeks, or even months, earlier. RP 409, 1270-72; Ex. 169 at 49.

¹⁹ Lui's statements to police have been designated in the direct appeal.

Even more difficult to refute was Lui's DNA in the vaginal wash taken from Boussiacos. Lui's (or his five-year-old son's) DNA could not be excluded as the contributor of the male profile, while 99.8 percent of the population *could* be excluded. RP 1537, 1546-47; Ex. 43 at 6. Expert testimony established that sufficient spermatozoa to generate a DNA profile typically remain in the vagina for three days, and perhaps up to seven days. RP 1222.

Based on this evidence, the prosecutor argued that Lui "can't even admit to himself, even in the face of semen in her vagina, because whatever happened in that regard that night was very bad." RP 1828. The prosecutor continued: "Maybe it happened at the same time she was being strangled, maybe not. It is entirely possible that there was no completed sex act and that would have been the final humiliation for him." RP 1830.

Lui characterizes this as an argument that he committed a sexual assault against Boussiacos. PRP at 39-41. But he reads too much into it. It is just as possible that the prosecutor was suggesting that Lui and Boussiacos were having consensual sex, and Lui was unable to complete the act. Coupled with recent arguments caused by jealousy, and perhaps Boussiacos's threats to leave him, this failure could have been the "final humiliation" that

led Lui to strangle Boussiacos. These are reasonable inferences from the evidence, and they are not improper.

In any event, the prosecutor's statements were not pronouncements of fact, but merely suggestions to the jury of how they might interpret properly admitted evidence ("Maybe . . . maybe not." "It is entirely possible . . ."). This distinguishes the argument here from the improper arguments in the cases that Lui relies on. See State v. Boehning, 127 Wn. App. 511, 521, 111 P.3d 899 (2005) (prosecutor suggested that some of child victim's disclosures, which were not admitted at trial, would have supported rape charges that had been dismissed); State v. Rose, 62 Wn.2d 309, 382 P.2d 513 (1963) (prosecutor referred to defendant as a "drunken homosexual," where witnesses had said they did not believe the defendant was intoxicated, and there was no evidence that the defendant was a homosexual beyond the alleged activity for which he was on trial). Counsel likely did not object to the prosecutor's statements here because they were proper inferences from the evidence.

ii. Alleged opinion on Lui's truthfulness.

On cross-examination of Detective Bartlett, defense counsel asked the detective why she had contacted Lui in 2007, when she

had access to all of the evidence that had been collected over the previous six years.²⁰ RP 1447-49. Bartlett responded that Lui had "told so many lies and inconsistencies" that she wanted to see if she could either clear them up or catch Lui in even more inconsistencies. RP 1449. Attorney Savage, with a series of questions, got Bartlett to admit that she "misspoke," and that inconsistencies in the file did not necessarily come from Lui himself. RP 1450-51. Discrediting Bartlett's statement in this way was a more effective strategy than objecting to what had already been said.

Again on cross-examination,²¹ defense counsel asked Detective Peters whether it was "fair to say" that "the object of this long meeting on the 6th [22] was to see if you could get Mr. Lui to confess?" RP 1720. Peters responded, "I definitely would have

²⁰ Trial counsel appears to have been setting up the very point that appellate counsel has made several times now: that the crime remained "unsolved" until 2007; that the only "new" evidence consisted of Lui's statements, elicited by police through trickery; that Lui never confessed to the crime; and that Lui's lie about the ring showed nothing more than "ungentlemanly conduct." Appellant's Reply Brief at 1; PRP at 2; RP 1866-68 (defense closing argument).

²¹ Because both of the statements that Lui complains of in this section were made during cross-examination, Lui's assertion that "[a] prosecutor commits misconduct by eliciting this type of trial testimony" is puzzling. PRP at 42.

²² Counsel was referring to the three-and-a-half-hour interview that Detectives Peters and Bartlett had with Lui on April 6, 2007. Ex. 169.

loved to have a confession, the truth." Id. Savage persisted: "That was the object, to see if he would give you one?" Id. Peters responded that her "goal was to get the truth and a confession." Id. Savage responded with cross-examination aimed at showing that detectives had lied to Lui in the interview. Id. Countering Peters's statements about the "truth" by establishing that the goal of the interview was to gain a confession, and that the detectives were willing to lie to get it, is a patently more effective strategy than simply objecting to the comments.

iii. Comments on Lui's behavior.

During the direct examination of Detective Bartlett, the questioning turned to the unrecorded statement that Bartlett had taken from Lui over the telephone on March 14, 2007. RP 1422. The State asked Bartlett why she had mentioned the two "suspects" that police allegedly had in the murder. RP 1436-37. Bartlett responded: "Because I wanted to elicit any inquiry of whether or not he would ask about anybody who was a suspect in the death of his fiancée or what their relationship was or questions that I thought he would, anybody would ask." RP 1437.

After Bartlett clarified that Lui "never did ask," the prosecutor asked if Lui "ever appear[ed] angry, upset, or wonder[ed] why it

was taking so long to charge someone?" Id. Bartlett responded, "No." Id.

On cross-examination, after establishing that the police did not actually have any other suspects, defense counsel asked, "You felt that in order to get Mr. Lui comfortable with you, you had to lie to him?" RP 1453. Bartlett responded that she thought someone in Lui's position would want to know what happened, who was involved, how police had obtained the information, and whether relief would be forthcoming; Lui did not ask those questions. RP 1454. Counsel persisted in his line of questioning, insisting that Bartlett tell the jury exactly how many times that she had lied to Lui during the interview. Id.

Again, on cross-examination of Detective Peters, defense counsel highlighted the fact that the detectives had lied to Lui. RP 1720. Peters responded that some of the lies were "test questions" designed to see if he would respond as a grieving fiancé. Id. Rather than object, counsel began a series of questions emphasizing that it had been six years since the murder, that Lui had remarried and had two children with his wife, and that Lui felt that he had been healed. RP 1720-21. When Peters nevertheless said that she would have expected a "reasonable person" to ask

who the suspects were and when they would be arrested, counsel responded: "That is evidence that he was responsible?" RP 1722. Peters was forced to admit that it was not. Id.

In each instance, rather than simply object to what had already been said, counsel turned the matter to Lui's advantage, getting in evidence about Lui (new marriage, children, feeling "healed") that would perhaps not otherwise have come in without Lui himself taking the witness stand. This tactical decision cannot be deemed ineffective assistance of counsel.

Moreover, the principal case on which Lui relies does not establish that the detectives' statements were even improper. In State v. Haga, 8 Wn. App. 481, 507 P.2d 159 (1973), an ambulance driver who responded to the scene of a murder testified that, based explicitly on his years of experience in these matters, it was his belief that the husband was not acting in a manner that would be typical for someone whose wife had been strangled. Id. at 489-90. This was found to be reversible error. Id. at 492.

Here, the detectives made no such claim that their opinions were based on their years of experience as detectives, or on the

many spouses of homicide victims whom they had interviewed. Rather, they observed that Lui did not seem particularly interested in finding out more about the alleged suspects that police had, and that this struck them as unusual. This is an inference that a reasonable juror would likely draw in any event from Lui's failure to ask questions about the progress of the investigation.

Finally, the prosecutor's argument in closing that "an innocent man would have kicked and screamed over the length of this investigation" is nothing more than a reasonable inference from the evidence, and one that any reasonable juror would likely have drawn on her own. RP 1849. This was not improper argument.

iv. Questions about religion.

Lui injected his religion into the case from the start. During his statement given on February 8, 2001, Lui told police that he had been a missionary for two years with "the LDS church," immediately clarifying that this was "the Mormon church." Ex. 43 at 21. Lui said that he had tried to get Boussiacos interested in his religion, without success. Id. at 21-22. Lui saw his premarital sex with Boussiacos as a "weakness." Id.

Six years later, in support of his claim that he had been sleeping on the couch, Lui said that he and Boussiacos had both realized that premarital sex "wasn't the right thing." Ex. 169 at 12. This time, though, Lui told police that Boussiacos was embracing his religion ("she was getting really good at it"). Id.

On cross-examination of Sam Taumoefolau, the prosecutor established that both Taumoefolau and Lui were practicing Mormons. RP 1779. The prosecutor then asked what the "State Conference" was, and whether one was scheduled at Lui's church for Sunday, February 4th. RP 1779-81. The prosecutor also questioned Taumoefolau about the religion's prohibitions on premarital sex, smoking, alcohol and caffeine. RP 1783.

This line of questioning did not violate the Washington Constitution, which forbids questioning a witness about his religious beliefs "to affect the weight of his testimony." Wash. Const. art. I, § 11. That was not the purpose of the questioning. The scheduling of the State Conference showed that Lui's behavior on the weekend of Boussiacos's disappearance was unusual; he had skipped

church on Sunday in spite of the big event that was planned.²³

RP 1818. And the religious prohibitions were a cause of conflict between Lui and Boussiacos, as the State argued in closing. RP 1821-22. The questions were asked for a legitimate purpose.

g. Failure To Seek Additional DNA Testing.

Attorney Savage fully explains his strategy in choosing not to pursue further DNA testing:

The DNA testing and results provided by the State indicated the presence of the defendant's semen in the victim's vagina and underwear. Partial profiles of the victim's [former] husband and/or son were also detected on the victim's shoes. The presence of unidentified male profiles in any of these samples allowed me to argue that we don't know who else had been in contact with the victim (thus leaving behind his unidentified DNA profile) and, therefore, a reasonable doubt existed as to who killed her. Had I taken additional steps to have the unidentified DNA results further analyzed, there was a high probability that none of them would have matched each other, thereby weakening the argument that the unidentified male profiles belonged to the real killer. If the blood on the stick shift and the unidentified male profiles on the steering wheel, vaginal swabs, and the shoe laces did not match one another, then any argument that

²³ The defense raised a successful objection to the prosecutor's statement about the State Conference. RP 1818. The prosecutor believed that the evidence was contained in Lui's "to do" list, and in his statement to Detective Doyon. *Id.* This was in fact true. See Ex. 43 at 37; App. H (Trial Ex. 146).

another person committed this crime would be severely weakened.

App. C at ¶ 10.

This was a reasonable strategy. Thus, even in the unlikely (and as yet undemonstrated) event that Lui's post-conviction DNA testing should yield favorable results, he cannot make the requisite showing of deficient performance. See Strickland, 466 U.S. at 689 (courts must evaluate counsel's performance from counsel's perspective at the time, eliminating the "distorting effects of hindsight").

2. LUI CAN SHOW NEITHER PROSECUTORIAL MISCONDUCT NOR PREJUDICE THEREFROM.

Lui alleges several instances of prosecutorial misconduct. To prevail, he must show that the conduct at issue was both improper and prejudicial. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). And where he did not object below, any error is waived unless the conduct is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

a. Detective Gulla.

Suppression by the prosecution of evidence favorable to the defendant violates due process *where the evidence is material to guilt or punishment*, regardless of the good or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963). The duty to disclose includes impeachment evidence as well as exculpatory evidence. Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed.2d 286 (1999) (citing United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985)). The duty to disclose such evidence applies even where the defendant has not requested it. Strickler, 527 U.S. at 280 (citing United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed.2d 342 (1976)). In addition, the prosecutor has a duty to learn of and disclose any such evidence known to the police. Kyles v. Whitley, 514 U.S. 419, 437-38, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995).

Evidence is "material" under the Brady line of cases "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler, 527 U.S. at 280 (quoting Bagley, 473 U.S. at 682). A "reasonable probability" is one sufficient to undermine

confidence in the outcome. Bagley, 473 U.S. at 682. The *mere possibility* that undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial does not establish "materiality" in the constitutional sense. State v. Mak, 105 Wn.2d 692, 704-05, 718 P.2d 407 (1986).

Lui has failed to show a Brady violation. First of all, he has not shown that the State failed to disclose potential impeachment evidence concerning Detective Gulla. The record shows, and Lui does not dispute, that the defense was aware of the newspaper article extensively detailing Gulla's career. App. I. See In re Benn, 134 Wn.2d at 916-17 (no Brady violation where State provided summary of witness's statement, where defense could have obtained full text through due diligence); Lord, 161 Wn.2d at 293 (evidence that could have been discovered with due diligence does not support Brady violation).

Moreover, the State obviously understood, and took seriously, its Brady obligation. The State followed up on Gulla, as indicated by the e-mail sent from the prosecutor to defense counsel on January 29, 2008. App. I. Lui points to nothing in the material he received from the King County Sheriff's Office ("KCSO") in

response to his public records request that indicates that the State violated its responsibility under Brady.²⁴

Nor has Lui shown that any of the potential impeachment evidence concerning Gulla is "material." Any instances of dishonesty are peripheral to this case, and are in any event more than 20 years old. There is no reasonable probability that this evidence, even if admissible at trial, would have changed the outcome of this case.

Finally, Lui has fallen short of the showing required to gain a reference hearing. "Bald assertions and conclusory allegations will not support the holding of a hearing." In re Personal Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). The evidentiary prerequisite for such a hearing is stringent:

[T]he purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. Thus, a mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient. If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts

²⁴ Lui takes issue with the fact that KCSO withheld information as to "unsustained" allegations. PRP at 50. Unlike the authority that Lui cites, a finding by KCSO that an allegation is not sustained is not merely the opinion of an individual officer on credibility, or of an individual prosecutor on admissibility, but rather the result of a formal investigation of the underlying facts. See App. J.

that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

Id. (italics in original).

Lui offers nothing more than his own suspicions that, somewhere in the possession of either the police or the prosecutor, there is admissible evidence concerning Detective Gulla that would somehow change the result of this trial, or undermine confidence in its outcome. Such speculation is not sufficient to support remand for a reference hearing.

b. Questions Relating To Religion.

As previously discussed, the issue of religion was first injected into the case by Lui himself. The prosecutor's questions of Sam Taumoefolau concerning religion were related to legitimate issues in the case. Thus Lui has failed to show that the questioning was improper. Moreover, in light of the fact that there was no objection, Lui has failed to meet his obligation to show that any questioning about religion was "so flagrant and ill-intentioned that it

evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Gentry, 125 Wn.2d at 596. This claim of prosecutorial misconduct should be rejected.

3. LUI CANNOT SHOW PREJUDICE FROM ALLEGED JUROR MISCONDUCT.

Lui finally claims that one of the jurors improperly interjected personal knowledge about a mall in Woodinville into deliberations, and that this was misconduct that should result in, at the least, an evidentiary hearing. Lui has failed to establish misconduct, and has failed to meet the stringent requirements for an evidentiary hearing.

Lui's claim of misconduct is based on double hearsay. His investigator, Denise Scaffidi, states in her declaration that one juror, Clare Comins, told her that another juror related personal knowledge about a mall that Sam Taumoefolau allegedly described in his testimony about his postering activity with Lui in the days following the murder. PRP at App. 9, ¶¶ 9, 10. There is no declaration from juror Comins.

This does not meet the standard for a reference hearing. "If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative

evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify." In re Rice, 118 Wn.2d at 886.

The need for this rigorous standard is apparent here. In the same declaration in which she sets out what juror Comins told her, Scaffidi also declares what witness Amber Mathwig said to her. PRP at App. 9, ¶ 3-6 and Ex. B. Again, there is no declaration from Mathwig herself. In a declaration signed under penalty of perjury on March 15, 2011, Mathwig says that she reviewed Scaffidi's notes prior to testifying at trial; Mathwig declares that "[t]he notes from that interview are inaccurate and do not properly document what I recall about this event."²⁵ App. E at ¶ 5. This dichotomy illustrates why this Court should adhere to the rigorous standard set out in In re Rice, supra.

Even if the jury received extrinsic evidence about the existence of a mall, Lui cannot show actual and substantial prejudice. Taumoefolau's neutrality as a witness, and thus his credibility, had already been placed in question. Taumoefolau had

²⁵ Mathwig declares that she related her true observations to Lui's attorney just prior to her testimony at trial. App. E at ¶ 6, 7. This confirms attorney Savage's explanation of why he did not question Mathwig at trial in accordance with Scaffidi's notes. App. C at ¶ 9.

admitted that he thought of Lui as a "blood brother," and that he would do anything for Lui. RP 1748-51.

In any event, a misstatement of the sort described by juror Comins, especially since it described a mall that was outside the aerial photograph from which Taumoefolau testified,²⁶ could easily have been interpreted as a mistake by a reasonable juror. Lui cannot show that, had the jurors not had this information, the result of his trial would have been different.

E. CONCLUSION

For all of the foregoing reasons, this petition should be dismissed.

DATED this 19th day of April, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Deborah A. Dwyer
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

²⁶ PRP at App. 9, ¶ 9.

APPENDIX A

FILED

2008 JUN -3 PM 3:09

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

CERTIFIED COPY TO COUNTY JAIL JUN 03 2008

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

Vs.

SIONE P. LUI

Defendant,

No. 07-1-04039-7 SEA

**JUDGMENT AND SENTENCE
FELONY**

I. HEARING

I.1 The defendant, the defendant's lawyer, ANTHONY SAVAGE, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: see clerk

v. 010-01

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 **CURRENT OFFENSE(S):** The defendant was found guilty on 05/28/2008 by jury verdict of:

Count No.: I Crime: MURDER IN THE SECOND DEGREE
RCW 9A.32.050 (1) (a) Crime Code: 00147
Date of Crime: 02/02/2001 - 02/09/2001 Incident No. _____

Count No.: _____ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

Count No.: _____ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

Count No.: _____ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

Additional current offenses are attached in Appendix A

SPECIAL VERDICT or FINDING(S):

- (a) While armed with a firearm in count(s) _____ RCW 9.94A.510(3).
- (b) While armed with a deadly weapon other than a firearm in count(s) _____ RCW 9.94A.510(4).
- (c) With a sexual motivation in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A offense committed in a protected zone in count(s) _____ RCW 69.50.435.
- (e) Vehicular homicide Violent traffic offense DUI Reckless Disregard.
- (f) Vehicular homicide by DUI with _____ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
- (g) Non-parental kidnapping or unlawful imprisonment with a minor victim. RCW 9A.44.130.
- (h) Domestic violence offense as defined in RCW 10.99.020 for count(s) _____.
- (i) Current offenses encompassing the same criminal conduct in this cause are count(s) _____ RCW 9.94A.589(1)(a).

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

- Criminal history is attached in Appendix B.
- One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	0	XIV	123 TO 220		123 TO 220 MONTHS	LIFE AND/OR \$50,000
Count						
Count						
Count						

- Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE (RCW 9.94A.535):

- Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in Appendix D. The State did did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

- The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
 - Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.
 - Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
 Date to be set.
 - Defendant waives presence at future restitution hearing(s).
 - Restitution is not ordered.
- Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs; Court costs are waived; (RCW 9.94A.030, 10.01.160)
- (b) \$100 DNA collection fee; DNA fee waived (RCW 43.43.754)(crimes committed after 7/1/02);
- (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs;
 Recoupment is waived (RCW 9.94A.030);
- (d) \$ _____, Fine; \$1,000, Fine for VUCSA; \$2,000, Fine for subsequent VUCSA;
 VUCSA fine waived (RCW 69.50.430);
- (e) \$ _____, King County Interlocal Drug Fund; Drug Fund payment is waived;
(RCW 9.94A.030)
- (f) \$ _____, State Crime Laboratory Fee; Laboratory fee waived (RCW 43.43.690);
- (g) \$ _____, Incarceration costs; Incarceration costs waived (RCW 9.94A.760(2));
- (h) \$ _____, Other costs for: _____

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ ~~500 + restit.~~ The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied. Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

- Court Clerk's trust fees are waived.
- Interest is waived except with respect to restitution.

4.4 **CONFINEMENT OVER ONE YEAR:** Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: immediately; (Date): _____ by _____, m.

200 months/days on count 1; _____ months/days on count _____; _____ months/day on count _____
_____ months/days on count _____; _____ months/days on count _____; _____ months/day on count _____

The above terms for counts _____ are consecutive / concurrent.

The above terms shall run CONSECUTIVE CONCURRENT to cause No.(s) _____

The above terms shall run CONSECUTIVE CONCURRENT to any previously imposed sentence not referred to in this order.

In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: _____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The **TOTAL** of all terms imposed in this cause is _____ months.

Credit is given for _____ days served days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A.505(6).

4.5 **NO CONTACT:** For the maximum term of life years, defendant shall have no contact with James, Jessica, Anthony Negron; the family of Elaine Boussiacos; Jackie Difeman; Jaime Nelson; Eva Marie Gordon; Sina Packer

4.6 **DNA TESTING.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in **APPENDIX G**.
 HIV TESTING: For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in **APPENDIX G**.

4.7 (a) **COMMUNITY PLACEMENT** pursuant to RCW 9.94A.700, for **qualifying crimes committed before 7-1-2000**, is ordered for _____ months or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer, [24 months for any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 6-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against person defined in RCW 9.94A.411 not otherwise described above.] **APPENDIX H** for Community Placement conditions is attached and incorporated herein.

(b) **COMMUNITY CUSTODY** pursuant to RCW 9.94.710 for any **SEX OFFENSE** committed after **6-5-96 but before 7-1-2000**, is ordered for a period of 36 months or for the period of earned early release awarded under RCW 9.94A.728, whichever is longer. **APPENDIX H** for Community Custody Conditions and **APPENDIX J** for sex offender registration is attached and incorporated herein.

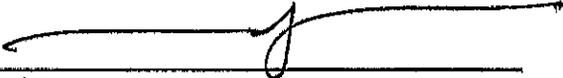
- (c) **COMMUNITY CUSTODY** - pursuant to RCW 9.94A.715 for **qualifying crimes committed after 6-30-2000** is ordered for the following established range:
- Sex Offense, RCW 9.94A.030(38) - 36 to 48 months—when not sentenced under RCW 9.94A.712
 - Serious Violent Offense, RCW 9.94A.030(37) - 24 to 48 months**
 - Violent Offense, RCW 9.94A.030(45) - 18 to 36 months
 - Crime Against Person, RCW 9.94A.411 - 9 to 18 months
 - Felony Violation of RCW 69.50/52 - 9 to 12 months
- or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer.
 Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.737.
- APPENDIX H** for Community Custody conditions is attached and incorporated herein.
 APPENDIX J for sex offender registration is attached and incorporated herein.

4.8 **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement. The defendant shall comply with all mandatory statutory requirements of community custody set forth in RCW 9.94A.700. **Appendix H** for Community Custody Conditions is attached and incorporated herein.

4.9 **ARMED CRIME COMPLIANCE, RCW 9.94A.475, 480.** The State's plea/sentencing agreement is attached as follows:

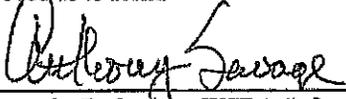
The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 6/3/08


 JUDGE
 Print Name: **JUDGE MICHAEL J. TRICKEY**

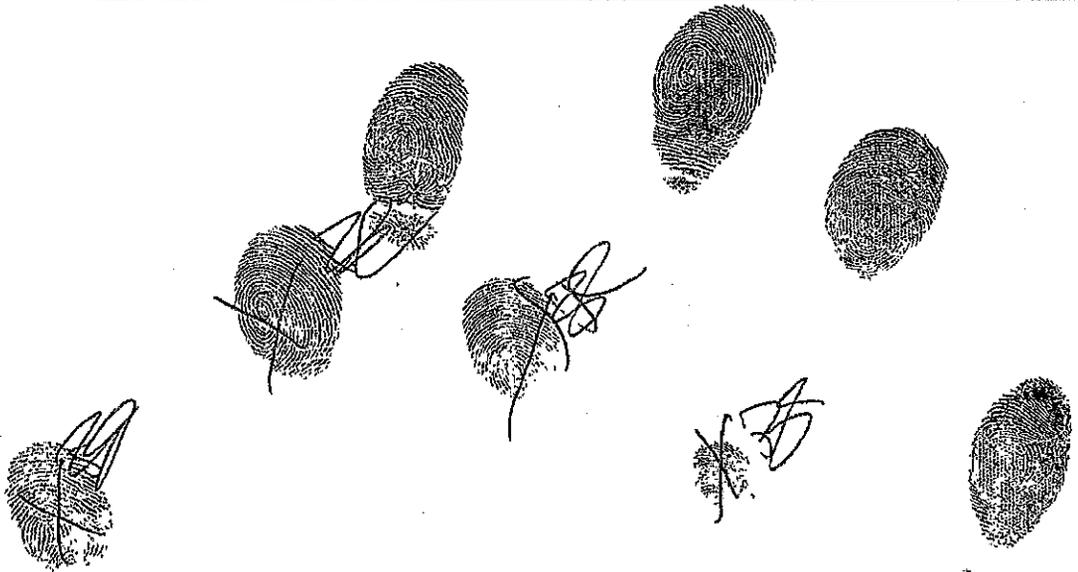
Presented by:

 Deputy Prosecuting Attorney, WSBA# 19042
 Print Name: K. Richardson

Approved as to form:

 Attorney for Defendant, WSBA # 2208
 Print Name: ANTHONY SAUSAGE

BEST AVAILABLE IMAGE POSSIBLE

FINGERPRINTS



RIGHT HAND
FINGERPRINTS OF:

SIONE P LUI

DATED: 6/3/08

DEFENDANT'S SIGNATURE:

DEFENDANT'S ADDRESS: 610 Dept of Corrections
Olympia, WA.

ATTESTED BY: BARBARA MINER,
SUPERIOR COURT CLERK
BY: [Signature]
DEPUTY CLERK

[Signature]
JUDGE, KING COUNTY SUPERIOR COURT
MICHAEL J. TRICKEY.

CERTIFICATE

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

CLERK

BY: _____
DEPUTY CLERK

OFFENDER IDENTIFICATION

S.I.D. NO.
DOB: MARCH 18, 1970
SEX: M
RACE: A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SIONE P. LUI

Defendant,

No. 07-1-04039-7 SEA

APPENDIX G
ORDER FOR BIOLOGICAL TESTING
AND COUNSELING

(1) DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2) HIV TESTING AND COUNSELING (RCW 70.24.340):

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: 6/3/07

JUDGE, King County Superior Court

JUDGE MICHAEL J. TRICKEY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SIONE P. LUI

Defendant,

No. 07-1-04039-7 SEA

JUDGMENT AND SENTENCE

APPENDIX H

COMMUNITY PLACEMENT OR

COMMUNITY CUSTODY

The Defendant shall comply with the following conditions of community placement or community custody pursuant to RCW 9.94A.700(4), (5):

- 1) Report to and be available for contact with the assigned community corrections officer as directed;
- 2) Work at Department of Corrections-approved education, employment, and/or community service;
- 3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- ~~4) Pay supervision fees as determined by the Department of Corrections;~~
- 5) Receive prior approval for living arrangements and residence location;
- 6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.720(2));
- 7) Notify community corrections officer of any change in address or employment; and
- 8) Remain within geographic boundary, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

OTHER SPECIAL CONDITIONS:

- The defendant shall not consume any alcohol.
- Defendant shall have no contact with: _____
- Defendant shall remain within outside of a specified geographical boundary, to wit: _____
- The defendant shall participate in the following crime-related treatment or counseling services: _____
- The defendant shall comply with the following crime-related prohibitions: _____
- (4) is waived

Other conditions may be imposed by the court or Department during community custody.

Community Placement or Community Custody shall begin upon completion of the term(s) of confinement imposed herein or when the defendant is transferred to Community Custody in lieu of earned early release. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions [RCW 9.94A.720] and may issue warrants and/or detain defendants who violate a condition [RCW 9.94A.740].

Date: 6/3/07

[Signature]
JUDGE
JUDGE MICHAEL J. TRICKEY

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

Stone P. Liu

Defendant.

No. 07-1-437-7 SEA

NOTICE OF INELIGIBILITY TO
POSSESS FIREARM AND
LOSS OF RIGHT TO VOTE

Pursuant to RCW 9A.047, you are not permitted to possess a firearm until your right to do so is restored by a court of record. You are further notified that you must immediately surrender any concealed pistol license.

If you have been convicted of a felony, the following **VOTING RIGHTS NOTICE** (RCW 10.64.140) applies: I acknowledge that **my right to vote has been lost** due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the Indeterminate Sentence Review Board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a crime, and after January 1, 2006, is a class C felony, RCW 92A.84.660.

Date:

6/5/08

[Signature]
Judge, King County Superior Court

[Signature]
DEFENDANT

White - Court
Yellow - Defendant
Pink - Prosecutor

APPENDIX B

COPY

NO. 61804-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SIONE LUI,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION ONE
JUN 10 2009

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. TRICKEY

BRIEF OF RESPONDENT

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A. ISSUES

1. Whether the testimony of the chief medical examiner based on an autopsy report prepared by another violates the Confrontation Clause, where the testifying witness contemporaneously reviewed the report, co-signed it, and drew his own conclusions from the objective facts and photographs, and the report itself was not admitted into evidence.

2. Whether the testimony of a lab supervisor based on DNA tests done by others violates the Confrontation Clause, where the testifying witness relied on the results to draw her own conclusions, and only the raw data were shown to the jury.

B. STATEMENT OF THE CASE

Defendant Sione Lui was charged by information with Murder in the Second Degree. Supp. CP ___ (sub #1, Information); CP 16. The State alleged that, sometime between February 2 and February 9, 2001, Lui intentionally caused the death of Elaina Boussiacos. CP 16.

The testimony of numerous witnesses at trial painted a picture of the relationship between Lui and Boussiacos as a troubled one, fraught with jealousy and mistrust. One of Boussiacos' best friends said that Lui had called her on more than one occasion to pump her for information

about Boussiacos, such as any men she might be seeing, or other things she might be doing behind his back. RP¹ 361, 363, 369-70.

When a male friend e-mailed Boussiacos to let her know that he had met a new woman, Lui sent an annoyed response, telling the friend to keep his business to himself. RP 420-21, 444-46; Ex. 4, 167. After a puzzled response from the friend, Lui sent another e-mail, telling the friend to "move on" because "Elaina is too busy with me, work and family," and adding, "You don't need her to help you hookup with anyone." RP 446-47; Ex. 4, 167.²

There was mistrust on both sides. After dating Lui for several months, Boussiacos came across pictures of him in wedding attire, indicating that he had been married before.³ RP 410. Shortly before her death, Boussiacos told a friend that there was no trust in the relationship, based on things Lui had done behind her back. RP 545.

As it turned out, these suspicions were not unfounded. Boussiacos' former boss said that Lui had put his hand on her leg and rubbed it inappropriately at a company Christmas party in 1999, while Boussiacos

¹ The verbatim report of proceedings includes 16 volumes, consecutively numbered.

² The parties argued at some length about what parts of the e-mails could be read to the jury. The trial court severely curtailed Lui's last e-mail, finding most of it too prejudicial to be admitted. RP 428-43; Ex. 4, 167.

³ In fact, Lui's divorce was not final until December 18, 2000, only about six weeks before Boussiacos' death. RP 682.

sat next to him on his other side. RP 454-55. A good friend said that Lui had followed her into a room at Boussiacos' house after a group night out at a club in February 2000, and tried to kiss her. RP 413.

Things apparently came to a head when Boussiacos found out about Sina Packer. Packer, a married woman with three children, had met Lui at a party in late 1997 or early 1998. RP 471. The two quickly began a sexual relationship, meeting at least two or three times a month, sometimes at Lui's apartment and sometimes at a motel. RP 475-78. Lui never mentioned another relationship other than his ex-wife. RP 479. Packer eventually got a second job, which left her tired and drained; as a result, sex with Lui started to taper off in mid-1999, although they continued to see each other into the summer of 2000, and Lui continued to call Packer into late 2000.⁴ RP 480-81.

Boussiacos discovered Packer's phone number on Lui's cell phone; she called Packer to let her know that she was Lui's fiancée. RP 482. Sometime in late January, Lui called Packer and told her that, if Boussiacos should call, Packer should tell Boussiacos that Packer had not talked to Lui in a long time. RP 485-86. Lui and Packer agreed to meet on the following Friday. RP 485, 487.

⁴ Lui and Boussiacos had gotten together in the spring of 1999. RP 424-25. They had lived together since July of 2000. Ex. 43 at 3.

Boussiacos called Packer, and they agreed to meet on Wednesday, January 30, 2001. RP 487-88. When they met, Boussiacos told Packer that she did not intend to go through with her planned marriage to Lui; in fact, she referred to Lui as her ex-fiancée. RP 497-98. Boussiacos showed Packer her engagement ring, which she had in a little black leather bag. RP 498-99. The two concluded that Lui was a liar. RP 499.

While they were together, Packer called Lui with the cell phone's speaker on so that Boussiacos could hear. RP 499-500. Lui again cautioned Packer to tell Boussiacos that he and Packer had not talked in a long time. RP 500. Boussiacos made her presence known to Lui, and the conversation ended shortly after that. RP 501-02. After the call had concluded, Boussiacos told Packer that it was over between herself and Lui, and that they would have to decide who would move out. RP 502.

Other testimony showed that, while Lui and Boussiacos were reportedly engaged to be married, the proposed wedding was in doubt even before Boussiacos found out about Sina Packer. A number of friends reported that, in late 2000 and early 2001, Boussiacos had expressed serious doubts about her impending marriage. RP 371-72, 394, 414, 530-31, 606-10. In late January 2001, when Boussiacos called her mother to talk about her upcoming visit to California, she told her mother that things

weren't working out with Lui and she was not going to marry him; she would not marry a man who was not trustworthy. RP 697-98.

Lui himself seemed to realize that the relationship was in trouble. In May of 2000, Boussiacos went to California for a wedding. RP 411. A friend who saw her just before she left found her seemingly distracted by problems with Lui. RP 411-12. The next day, Lui called the friend, distraught and crying because he feared that Boussiacos was leaving him. RP 412-13. Lui said that he had cheated on Boussiacos and had asked her to marry him. RP 413. He said he wasn't sure that she was coming back to him, and he didn't want to live without her. Id. When Lui spoke with his ex-wife on the evening of February 2, 2001, he told her that things were not going well with Boussiacos. RP 684-86.

Boussiacos mirrored the ups and downs of the relationship in her treatment of her engagement ring – sometimes she wore it, and sometimes it lay hidden in her purse. One friend observed that Boussiacos seemed to stop wearing her ring when she was mad at Lui. RP 371. When Boussiacos met with Sina Packer during the week before Boussiacos was murdered, clearly a low point in the relationship, Packer noticed that Boussiacos was carrying the ring in a small leather bag. RP 498.

One thing that Boussiacos' friends and acquaintances were unanimous about was the attention she paid to her personal appearance.

She always dressed nicely, and always wore makeup when she went out. RP 365, 377-78, 605. One friend said that Boussiacos was her "most put together friend" – she took "extremely good care of herself" and "always looked like she stepped out of the magazine." RP 409. She was "high maintenance," and "into style and looks." RP 533. She would "primp" before going out. RP 391. Her former husband recalled her spending two hours on makeup, hair and dress before going out. RP 655-56. Her mother said that Boussiacos always dressed nicely and wore makeup when she visited in California. RP 707.

Boussiacos would never wear sweatpants and a t-shirt outside the house, except at the gym. RP 411. According to a friend, she usually wore a t-shirt and shorts or sweatpants to bed. RP 365-66. Another friend never saw Boussiacos wear pajamas for sleeping. RP 390. Boussiacos' mother said that Boussiacos had visited her on several occasions, and she had seen what her daughter wore for bed – sweatshirts and sweatpants, or shorts and a shirt; she never knew her to wear pajamas. RP 691-92.

The one reported time that Boussiacos' appearance did not fit this picture was at her meeting with Sina Packer, after she had discovered Packer's relationship with Lui. Packer said that Boussiacos' hair was pulled back in a ponytail, she wore hardly any makeup, and she looked "maybe drained out." RP 502-03. The next time that Boussiacos'

appearance did not fit the norm was after her death – when she was found in the trunk of her car, dressed in sweatpants and a long-sleeved white t-shirt, supposedly on her way to the airport. RP 864-66; Ex. 169 at 14-15.

On Friday night, February 2, 2001, the last night she was seen alive, Boussiacos dropped off her 10-year-old son, Anthony Negrón, with his father, James Negrón, at a pre-arranged meeting place in Seattle. RP 657-60, 673, 675, 676. The exchange took place at around 9:30 or 9:45 p.m.; Boussiacos gave Anthony a hug and a kiss goodbye, and he got into the car his father was driving. RP 660, 671. Boussiacos was driving a truck; her upper body was clothed in something white. RP 660, 671.

The plan called for Negrón to drop Anthony off at school on Monday morning, and Boussiacos would pick him up after work. RP 658-59. Negrón did not hear from Boussiacos that weekend, but this was not unusual. RP 661. At about 5:00 – 5:30 p.m. on Monday, Negrón got a call from Anthony, who reported that his mother had not arrived to pick him up. RP 661-62. Shortly thereafter, Negrón received a phone call from Lui, asking if Lui could take Anthony home with him. RP 662. Negrón demurred, and went to pick Anthony up himself. RP 662-63.

Police met with family members on February 7, 2001. RP 730. Lui said that he believed someone "very smart and professional" was

responsible for Boussiacos' disappearance.⁵ RP 731. Lui volunteered that she was "very physically fit."⁶ Id. He speculated that she could have had car trouble, and some man might have grabbed her. RP 732.

In an interview with Detective Doyon on February 8, 2001, Lui reported that Boussiacos had returned home at around 10:00 – 10:15 p.m. on the previous Friday night (February 2nd). Ex. 43 at 8, 13.⁷ Boussiacos had driven Lui's truck to drop Anthony off, because her 1994 Nissan had a flat right front tire. Id. at 12. They put the small spare tire on; Boussiacos held the flashlight while Lui changed the tire. Id. at 12-15.

Lui said that they finished this task between 10:00 – 10:30 p.m., and watched the 11:00 news. Ex. 43 at 14-15. Boussiacos then went into the bedroom to put her clothes together for her trip; she was going to California the next day to visit her mother. Id. at 16-17. She changed into her nightgown, then came back out and sat on the couch with Lui and watched a little more television. Id. at 16. Boussiacos went to bed; Lui stayed up a while longer, and slept on the couch. Id. at 17, 19, 29-30.

⁵ Lui repeated this on April 6, 2007: "[T]his is, was done by somebody professional, someone that knows her, someone that had something in the past and ah, some, some sick, I don't, some very sick, sick person that [is] very professional." Ex. 169 at 28.

⁶ Even if physically fit, Boussiacos, at 5'4" tall and about 130 lbs, would hardly have been a match for an average man. Ex. 23 at 15. Lui, a rugby player, was 6'1" tall and weighed 230 lbs. RP 421-23; Supp. CP ___ (sub # 2, Finding of Probable Cause, at 4).

⁷ The State has numbered the pages of this transcript for ease of reference.

Lui said that when he awoke the next morning between 7:00 – 8:00, he saw that Boussiacos' car was gone. Ex. 43 at 33. He did not hear from her all weekend. Id. at 41. His first hint that anything was wrong was a call from her mother on Monday afternoon, informing him that Boussiacos had never arrived in California.⁸ Id. at 38-39.

Lui called 911 to report Boussiacos missing. Ex. 23. During the next few days, he distributed flyers around Woodinville with pictures of Boussiacos and her car. Ex. 169 at 37-38; RP 1739-43.

Lui said that he had heard nothing from Boussiacos since Friday night at around 11:30 p.m., when she went to bed. Ex. 43 at 41. He said that he and Boussiacos were engaged, and "highly in love." Id. at 2, 7. He said they had planned their wedding for February 15th, but had called it off because they had to "work on some things"; he mentioned her smoking. Id. at 20-21, 23-24. Lui was adamant that the two had not had sex in the last two weeks; premarital sex was against his beliefs as a Mormon, and he was trying to set a better example. Id. at 20-23. He minimized

⁸ While Boussiacos had been scheduled to arrive at her mother's house in California on Saturday, February 3rd, between 12:00 – 1:00 p.m., her mother did not have the phone number at the Woodinville house because the couple had moved in just recently, nor did she have Lui's cell phone number; consequently, she was only able to reach Lui after calling Boussiacos' workplace on Monday and getting his phone number. RP 700-03. She had tried repeatedly, in vain, to reach her daughter on her cell phone. RP 701-02.

Boussiacos' discovery of Packer, insisting that they had "put that aside."

Id. at 25-28.

Lui mentioned that his sister, Paini, had called him from Hawaii on Saturday morning (February 3rd) at around 1:00 a.m., after he had fallen asleep on the couch. Ex. 43 at 30-32. He acknowledged that she was returning a call from him; he speculated that he might have dialed her number from his cell phone by accident, and said that he could not remember anything about the conversation.⁹ Id. at 31-32; Ex. 169 at 53.

There was additional reason to believe that Lui had not slept quietly through that Friday night. His downstairs neighbor, a sound sleeper, was awakened at about 3:15 a.m. by the sound of someone walking around upstairs; his wife was awakened as well. RP 566, 583-84.

Police located Boussiacos' car on Friday, February 9th, in the parking lot of the Woodinville Athletic Club. RP 836-39, 950-51. The owner of the club, Kathryn Wozow, had first noticed the black car backed in close to the dumpster on Saturday morning, February 3rd, at around 7:00 a.m. when she arrived for work. RP 742-43. The car had a spare tire on it. RP 757. Both Wozow and her daughter, the club's manager, said that the car did not move all week. RP 745,758. Finally, on Friday, Wozow asked

⁹ Lui's "accident" explanation was belied by Paini's testimony. Paini said that, when she returned home on Friday evening, her grandmother told her that Lui had called. RP 809-10. The phone in Paini's home did not have caller I.D. RP 827.

a police officer who worked out at the club to run the license plate, and they learned that the car belonged to a missing person. RP 745-46.

Upon opening the locked trunk, police discovered Boussiacos' body. RP 860-61. She was clothed in black sweatpants, torn underwear, and a white long-sleeved t-shirt; her bra was stuffed up inside her shirt. RP 864-67. She had tennis shoes on her feet, with the laces tied somewhat oddly, over to the far side of each shoe.¹⁰ RP 914-16, 972. There was bruising on her neck, and a small amount of blood on her shirt. RP 865.

The interior of the car contained a number of items. On the front seat were a pair of black boots, a pair of jeans, a shirt, and a yellow flashlight. RP 886, 888. A green gym bag on the front floorboard contained a random array of toiletries, including a 24-ounce bottle of lotion, an almost empty bottle of hair gel, another bottle of gel with no top that was leaking, and a container of foundation powder with no lid; there was no mascara and no toothbrush. RP 897-99. Tossed in the back seat and on the floor were a white sweatshirt, a hair dryer, a red shirt and a black leather jacket. RP 900-01. There was also a neatly packed black suitcase; in addition to clothes, the suitcase contained another bottle of

¹⁰ There was no debris on the bottom of the tennis shoes, despite the fact that the driveway of the Woodinville house was carpeted in leaves and needles and other debris, and there was similar debris on the front floorboard of Boussiacos' car around the gas pedal and brake. RP 882, 972, 988.

lotion, another pair of black boots, and another pair of tennis shoes, these with the laces tied in the front. RP 905-11.

After discovering Boussiacos' body, police contacted Lui and took him downtown to interview him. RP 951-53. When they told Lui that her body had been found, he covered his face and moaned, but was not tearful. RP 953. He repeatedly said, "Let's go get her," but never asked where she had been found, or if police knew who had killed her. RP 954-55.

Police arranged for a bloodhound track on February 14th.¹¹ RP 959-60. Detective Gulla went to Lui's home and collected some clothing, which he took to the parking lot where the car had been found. RP 961. After smelling the clothes, the dog took off through the brush, tracked through a shopping center next to the Woodinville Athletic Club, through a Park-and-Ride lot and a condominium complex, up a grassy slope, along a road, and up a driveway to Lui's front porch.¹² RP 961-62, 1070-77.

¹¹ This bloodhound had followed a 12-day-old trail in the past. RP 1061. The best scent trails are laid in cool air. RP 1068-69. The weather was cold that February. RP 964.

¹² Lui's friend Sam Taumoefolau said that he and Lui had walked from Lui's house to the shopping center to distribute flyers on Tuesday, February 6th, after work. RP 1739-40. Sam added that, later that week, he and Lui had dropped off a flyer at the Woodinville Athletic Club and then walked home "through the cutoff there by the parking lot." RP 1772-74. Sam did not explain why they were walking in the dark and cold, instead of driving. Sam was certain that Boussiacos' car was not in the Athletic Club's parking lot when he and Lui walked through there. RP 1775-76. Wozow and her daughter testified that no one had come to the club that week asking to post a missing person flyer; the club had a bulletin board where they would have posted such a flyer if asked. RP 747, 763.

Jodi Sass, a forensic scientist in the DNA unit of the Washington State Patrol Crime Laboratory ("WSPCL") examined certain items of evidence related to the case. RP 1146, 1174. After obtaining a positive result for semen on the underwear found on Boussiacos' body, Sass was able to extract a DNA profile; the male component matched Lui's DNA,¹³ while the female component matched Boussiacos'. RP 1209-11, 1220-21. Sass obtained a trace male component from the shoelaces in the shoes found on Boussiacos' body, but not enough to generate a profile. RP 1228-33. While Sass could not get a full profile from the male component of the vaginal wash, Lui could not be excluded – all of the peaks that Sass was able to get lined up with his. RP 1237-38. Vaginal swab samples were sent to another lab for Y-STR testing; this technology, which targets only the Y-chromosome, was not in use at WSPCL. RP 1165, 1238-39. A blood drop from the stick shift of Boussiacos' car did not match Boussiacos, Lui, or James Negron. RP 1224, 1239-40.

The murder remained unsolved until 2007. Detective Bartlett called Lui in March 2007 and told him that she was reviewing the Boussiacos murder. RP 1313-14. Bartlett told Lui that she had information on two suspects; this was untrue, but she said it so that Lui

¹³ The likelihood of the male fraction being someone other than Lui was 1 in 8.6 quadrillion. RP 1221.

would feel comfortable talking with her. RP 1314-15. Lui never asked any questions about the supposed suspects, nor did he inquire as to the status of the investigation. RP 1315. Recounting the events surrounding the death, Lui told Bartlett that he and Boussiacos had been saving money to buy a home and were planning to get married; he specifically denied that the wedding had been called off. RP 1317-19. Lui repeated his assertion that they had been abstaining from sex, perhaps for as long as two months before her death.¹⁴ RP 1321-22. Lui said that Boussiacos was going to California to tell her mother about the upcoming marriage, and that it was an exciting time for them. RP 1322. Lui denied that his relationship with Packer was an issue. RP 1325-26, 1422-24.

Lui told Bartlett that he thought Boussiacos was killed by someone whom she knew; he said he had thought about her ex-husband, but James Negron was a born-again Christian.¹⁵ RP 1428. Lui said that Boussiacos was very jealous, while he described himself as "very laid back." RP 1429. He speculated that perhaps she had been sneaking out to smoke, and someone had followed her. RP 1430.

¹⁴ In a subsequent taped statement, Lui adamantly denied that he had had sex with Boussiacos on the night before her disappearance. Ex. 169 at 63, 107.

¹⁵ Lui alluded to James Negron's alleged gang connections in a later statement, asserting that Negron "used to kill people" and that Boussiacos was afraid of him. Ex. 169 at 27. Negron had established an alibi in relation to Boussiacos' murder. RP 1428.

Boussiacos' engagement ring was not found with her body. RP 1703. When asked, Lui said that he thought her mother had it. RP 1431. During a subsequent taped statement, Lui again denied having the ring. Ex. 169 at 50-51. He insisted that Boussiacos always wore the ring, and that he believed she was wearing it when she left for California. Id. at 80. Evidence introduced at trial established that Lui had given a ring identical to Boussiacos' ring to his current wife, who continued to wear it until police obtained it from her and placed it in evidence. RP 844-57, 1608-22, 1628-29, 1701-12.

Lui did not testify at his trial. A jury found him guilty as charged. CP 19. The trial court imposed a standard-range sentence of 200 months of confinement. CP 36-44.

C. ARGUMENT

Lui contends that his Sixth Amendment right "to be confronted with the witnesses against him" was violated by the State's introduction of scientific testimony through expert witnesses who did not themselves perform the scientific analyses about which they testified. U.S. Const. amend. VI. The Supreme Court has not addressed this type of scientific testimony since its landmark decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). However, based on

as set forth in Crawford v. Washington, 541 U.S. 36 (2004).¹⁷ The Supreme Court's opinion in Melendez-Diaz is unlikely to resolve this appeal, since it does not address a situation where a different expert appears for cross-examination.

1. THE TESTIMONY OF DR. HARRUFF ABOUT THE RESULTS OF THE AUTOPSY DID NOT VIOLATE THE CONFRONTATION CLAUSE.

Lui argues that, by calling Dr. Harruff in place of the pathologist who conducted the autopsy, the State violated his Sixth Amendment right of confrontation. This is not correct. The autopsy report, which was prepared pursuant to statute, contained contemporaneously recorded factual observations. The report itself was not admitted at trial. Dr. Harruff, who had contemporaneously reviewed the autopsy results and co-signed the report, reached his own conclusions based on the facts and photographs in the report. Lui's confrontation right was fully protected.

a. Relevant Facts.

The State called Dr. Richard Harruff, Chief Medical Examiner for King County, to testify based on findings from the Boussiacos autopsy, RP 1333. Dr. Harruff started by explaining the protocols and procedures of the King County Medical Examiner's Office for handling bodies and

¹⁷ This is the Supreme Court's formulation of the question presented, and may be found on the Court's website under docket No. 07-591.

related evidence, and for conducting autopsies. RP 1334-35. The office conducts over 1300 autopsies per year; Harruff personally conducts about 300 of these, and supervises many more. RP 1335. In homicide cases, Harruff reviews the report, the photographs and the evidence, and discusses the case with the principal pathologist; he then co-signs the report to indicate that he agrees with the findings. RP 1335-36.

While pathologist Kathy Raven had performed the autopsy in this case, Harruff had contemporaneously reviewed her work and co-signed the report. RP 1337-38, 1340-41, 1343. He agreed with Raven's findings; he would not have signed the report if he did not believe it was accurate. RP 1340. Raven no longer worked for the Medical Examiner; she had relocated to Reno, Nevada, and was testifying in another court on this date. RP 1337, 1343. In preparation for his testimony, Harruff reviewed the autopsy report, as well as relevant photographs and notes. RP 1341.

The defense objected to Harruff's testimony, arguing that it was based on hearsay. RP 1341-42. The State relied on ER 703.¹⁸ RP 1342. The trial court rejected the hearsay objection. RP 1346. The court noted

¹⁸ ER 703 provides that: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

that the autopsy report itself would not be admitted, but only Harruff's opinion, which could properly be based on hearsay. RP 1368. The court also relied on a Court of Appeals opinion that held that an autopsy report was a business record, and that testimony based on the report did not violate the Confrontation Clause.¹⁹ RP 1477-78.

The court questioned whether Lui's Sixth Amendment right to confrontation was at issue. RP 1346. The State responded that the autopsy report was not testimonial, in that it was not prepared for litigation but rather pursuant to a public health requirement that autopsies be done in unattended, unanticipated deaths.²⁰ RP 1346-47. Finding the autopsy report "part testimonial and part non-testimonial," the court nevertheless found that any confrontation right was satisfied because Harruff had co-signed the report at the time, and was in court and available for cross-examination. RP 1347, 1368-69.

Dr. Harruff explained in some detail how autopsy technicians are trained to handle and package evidence. RP 1348-51. He explained that the pathologist will generally go to the scene, to view the body in context

¹⁹ State v. Heggins, 55 Wn. App. 591, 779 P.2d 285 (1989).

²⁰ The relevant statutes, RCW 68.50.010 and 68.50.100, are discussed infra.

and take basic measurements such as body temperature.²¹ RP 1351-52.

The body is then loaded into a clean body bag, taking care to maintain the condition and positioning of any clothing. RP 1356. When the body arrives at the medical examiner's office, photographs are taken. RP 1357.

Photographs taken in the course of the autopsy showed the lower part of Boussiacos' body clothed in sweatpants. RP 1360. Her underpants were positioned above the level of the sweatpants, with the crotch riding up into the labia of the perineal region; the underpants were torn on the right side. RP 1360-61. She was wearing a long-sleeved white pullover shirt, pulled up toward the chest region; a bra was wadded up underneath the shirt. RP 1361-62. There was a small amount of red staining on the front of the shirt. RP 1361.²²

Photographs documented the positioning of the socks and the manner in which the left shoelace was tied. RP 1362-63. The socks were twisted up, not placed normally on the feet; the heel portion was pulled up

²¹ The internal temperature of Boussiacos' body, taken at the scene at 10 minutes after midnight on February 10, 2001, was 38.4 degrees Fahrenheit. The ambient air temperature was 30.5 degrees. The body warms and cools with its environment. While it is not possible to fix the time of death based on body temperature alone, the temperature of this body was not inconsistent with death occurring approximately 7 days earlier. RP 837, 1354-56.

²² These observations were virtually identical to those made at the scene by Detective Peters. RP 864-68.

too far, so that it was not over the heel. RP 1363-65; Ex. 86, 119. The shoelace on the left shoe was tied all the way over to the side. Ex. 86.

Photographs also detailed Boussiacos' injuries. There was blunt force injury to her face. RP 1376. There was bruising and scraping in the armpit areas, implying some downward pressure, possibly from knees positioned on the chest. RP 1379-81. Skin was scraped off the back of her left hand. RP 1382. There were large abrasions on her neck; taken together, they indicate an object or objects that applied force to the neck on both sides and on the front. RP 1383-84. There were smaller abrasions on the front of the neck, possibly made by fingernails. RP 1384-85.

Dr. Harruff testified to his particular expertise in strangulation injuries, arising primarily from his training as a forensic pathologist, and from giving trainings and providing information and testimony in recent years about such injuries. RP 1385. He described the two basic types of strangulation: ligature and manual. RP 1386. Boussiacos' injuries showed features of both; there was a band-like abrasion on the left side of the neck (indicating ligature strangulation), as well as little curve-type abrasions on the front of the neck that could be fingernail marks (indicating manual strangulation)²³. RP 1386-90. The scraping of the skin

²³ Fingernail marks could also result from the victim trying to remove a hand or ligature from her neck. RP 1386-87.

indicated movement between the object producing the force and the skin surface; this would generally indicate that the victim was struggling while the assailant applied pressure to her neck. RP 1388.

Dr. Harruff also noted petechiae – little dot-like red areas on the skin and on the mucous membranes of the eyes and mouth. RP 1392. These are due to the rupture of blood vessels in the skin, and are important indicators of strangulation. RP 1392-96.

Strangulation causes a lack of oxygen to the brain; the brain can continue to function for about 10 seconds before a person loses consciousness. RP 1396. Death generally results in about four minutes. RP 1397. The cause of death in this case was asphyxia due to neck compression. RP 1405.

Every autopsy includes testing of bodily fluids for the presence of drugs or alcohol; neither was found to be present in this case. RP 1397-98. Nicotine was not detected in the blood. RP 1398.

The autopsy report itself was not admitted into evidence. RP 1368 (court notes that "the report itself is not going into evidence"), 1372 (court directs that "a clean copy of the autopsy report [be] marked as an unadmitted exhibit"); Ex. 168 (Autopsy Report – "Identification only").

murder. As pointed out above, the issue in this case was not *how* Boussiacos died, but *who* killed her. Moreover, Lui used this testimony to his advantage, arguing that a fit of jealous rage would not likely last for the long minutes it would take for Boussiacos to die from strangulation.

2. THE TESTIMONY OF GINA PINEDA ABOUT THE RESULTS OF THE DNA ANALYSIS DID NOT VIOLATE THE CONFRONTATION CLAUSE.

Lui also challenges the testimony of an expert other than the one who performed the DNA analysis, as a violation of his confrontation right. This claim should be rejected. While the analysis was done with an eye toward trial, the scientific data are not testimonial. In any event, the testimony of the laboratory supervisor satisfied the right to confrontation.

a. Relevant Facts.

The State gave notice that Gina Pineda, the witness it intended to call to testify about DNA evidence, was a supervisor; if the State were required to call each person involved in the DNA testing, it would have to call five in all, all from out-of-state.³⁰ RP 1415-16, 1418-19, 1468-69. Lui objected based on the Confrontation Clause. RP 1419-20. Noting that

³⁰ It is standard procedure in private DNA laboratories for several different analysts to work on a given case. Typically, technicians perform the "wet bench" work and analysts interpret the results. RP 1571-72. In this case, for example, one person (Christine Ackerman) took cuttings from the victim's shoelaces and did the extraction and quantification of that DNA; another (Zoe Knesl) did the amplification; and a third (Hunan Nasir) interpreted the results and wrote the report. RP 1548-52.

the report itself would not be admitted, but only the testifying witness's expert opinion, the trial court allowed the testimony. RP 1421, 1478-80.

Pineda was the associate director and technical leader of Orchid Cellmark, a private DNA laboratory. RP 1483. Prior to her current employment, Pineda had worked for a different DNA company, Reliagene Technologies, in New Orleans, Louisiana; when Orchid Cellmark acquired Reliagene, operations were consolidated in Dallas, Texas. RP 1483-84.

Pineda had a strong educational background for her job. She had a Bachelor of Science degree from Louisiana State University in microbiology and chemistry. RP 1485. She also had a Master of Science degree in pathology, with a concentration in forensic DNA. RP 1485.

Pineda detailed her duties and responsibilities. She told the jury that she was responsible for maintaining standard operating procedures, method implementation, technical trouble-shooting, safety, and quality control. RP 1484. She supervised the daily duties of the forensic department at the Dallas facility. RP 1484. While Pineda did not routinely do testing on specific cases anymore, she regularly took proficiency tests to remain qualified to perform and review DNA testing. RP 1484-85. Pineda was also responsible for ensuring that each analyst at her lab kept up with the twice-yearly proficiency testing. RP 1485-86.

Before assuming her present duties, Pineda was an analyst herself, responsible for receiving cases, processing evidence, obtaining DNA profiles, interpreting the results, reporting the profiles, and testifying in court as needed. RP 1485. Pineda had previously testified as a DNA expert, although this was her first time in a Washington court. RP 1486.

As a private company, Orchid Cellmark does work for prosecution and defense alike. RP 1486. The company does considerable business outside the criminal area, including DNA profiles for donor purposes, identification of victims after natural disasters, and academic research. RP 1486-87. Both Reliagene and Orchid Cellmark are accredited by the American Society of Crime Laboratory Directors, Laboratory Accreditation Board. RP 1491-92. All analysts are in compliance with industry standards. RP 1492. The DNA method used at Orchid Cellmark, polymerase chain reaction ("PCR"), is in worldwide use. RP 1487.

Pineda described in detail the quality control procedures in her lab. The first level is designed to prevent contamination. Analysts wear lab coats and gloves, and they may open only one tube at a time. RP 1493. They are required to sterilize their work areas, as well as their instruments, between cases. Id. There are separate areas in the lab for different types of analysis. Id. The lab compares the DNA profiles of all analysts and employees to case results, to further guard against contamination. RP

1495. Profiles generated in a case are also compared to all samples that were processed around the same time in the lab. RP 1495-96. With these procedures in place, if contamination occurs, it is fairly evident. RP 1496.

The second level of procedures is aimed at the quality of the result. Analysts run control samples; if the controls do not produce acceptable results, the analyst must start over. RP 1493-94. It is apparent from the profiles generated whether the controls worked properly. RP 1495. While Pineda did not personally conduct the tests in this case, she saw the results. RP 1494. In both labs, all of the quality control measures were followed and all controls produced the expected results, indicating that the tests at both labs were performed successfully. Id.

Pineda also described procedures to guarantee chain of custody. When the lab receives samples, a specific case number is assigned to each case; each sample is then assigned a unique number within that case. RP 1508. As samples are received, they are logged into the lab's computer system, thus enabling the lab to keep track of who has custody of which evidence at what point in time, as well as when and how evidence is returned. RP 1508. Each time an envelope or a bag is opened and then resealed, the person handling the evidence must initial the seal. RP 1509.

Pineda handled both the technical review and the administrative review of this case for Reliagene. RP 1505-06. As technical reviewer, she

made sure that all standard protocols were followed and all controls produced expected results. RP 1506. She checked to make sure that the interpretation of the profile was adequate, as far as inclusion or exclusion of individuals in the case. Id. Pineda concurred with the case analysts' interpretation of the results, and therefore signed the report. RP 1506.

Pineda emphasized that every step taken in the lab had to be documented on work sheets so that a permanent record would be generated for the case file; in this case, Pineda reviewed every step, and satisfied herself that everything had been done properly. RP 1506-07. She did not simply rely on the analysts' conclusions, however. RP 1507. In DNA analysis, the data are reduced by the scientific instruments to an electronic format, known as an electropherogram; this plot has peaks and valleys, and any expert can look at the objective data. Id. Pineda looked at the electronic data from the samples in this case; she made her own interpretations and drew her own conclusions. Id.

Pineda explained the specialized type of DNA analysis, Y-STR,³¹ that was used on the evidence examined at Reliagene and Orchid Cellmark. This technique is performed specifically on the Y-chromosome, thus separating out a male DNA profile where there is a

³¹ "STR" stands for "short tandem repeats." RP 1496. Only males have a Y chromosome. RP 1496-97.

mixture of male and female DNA. RP 1496-97. DNA on the Y-chromosome is inherited only from the father. RP 1500. All of the males in a given family will have the same DNA on the Y-chromosome; Y-STRs are thus unique to a paternal lineage, rather than to an individual. Id.

There are significant advantages to this technique. First and foremost, by looking at the Y-chromosome only, a male profile can be obtained from a sample containing both male and female DNA, even if there is relatively little male DNA in the mixture. RP 1501-02. Also, the number of male contributors can easily be determined. RP 1502.

The Y-STR method is limited, however, in that individuals sharing the same paternal lineage cannot be differentiated based only on the Y-chromosome. RP 1502. Nor can this technique yield the high level of statistical significance that can be obtained with other methods of DNA analysis; since all of the testing is on a single chromosome, the analyst cannot multiply frequencies from different locations. Id.

While an analyst will try to get results at all 17 markers on the Y-chromosome, sometimes only a partial profile can be obtained; the weight of the statistical analysis for Y-STR testing thus depends on the number of markers from which results can be obtained. RP 1503-04. Y-STR testing is widely accepted in the scientific community, and has been admitted in various courts throughout the nation. RP 1505.

Pineda first discussed the results from testing done on Boussiacos' shoelaces.³² RP 1514. Reliagene obtained a partial Y-STR profile from each shoelace (10 of 17 markers from the left, and 8 of 17 from the right). RP 1516. These partial profiles were compared to the known samples from Sione Lui, Enoch Lui (Lui's son) and Anthony Negron (Boussiacos' son). RP 1514-15, 1517. Lui (and his paternal male relatives, including Enoch) could not be excluded as a major donor. RP 1517-18. The testing also detected minor male donors; Anthony Negron could not be excluded as one of these minor donors.³³ RP 1518-19. Statistical analysis revealed that, as to the left shoelace, 99.7% of the population could be excluded as contributors; as to the right shoelace, 99.8% of the population could be excluded. RP 1544-46.

The discussion then turned to the results of the vaginal swabs. Reliagene had received only the DNA extracts from these swabs. RP 1519-20. There was not enough DNA to obtain a male profile. 1532-33.

The final sample upon which Orchid Cellmark performed Y-STR testing was the vaginal wash.³⁴ RP 1535. The lab obtained a 10-locus

³² Raw data from the STR testing was admitted for "Illustrative Purposes Only." Ex. 136.

³³ A third male donor was present in very minor amounts; the lab was unable to determine the identity of this donor. RP 1553-54.

³⁴ Pineda did not supervise the testing of the vaginal wash; however, she reviewed all of the supporting documentation, as well as the results obtained. RP 1561-62. The lab report for the vaginal wash was marked for identification. Ex. 137.

profile, revealing a single male donor. RP 1536-37. Anthony Negron was excluded as a contributor; Sione and Enoch Lui could not be excluded. RP 1537. Statistical analysis showed that 99.8% of the population could be excluded as contributors to this male DNA. RP 1546-47.

b. The DNA Profiles Are Not Testimonial.

A number of courts have found that, at least insofar as raw data are concerned, DNA reports are not testimonial. These courts conclude that, so long as a qualified expert conveys the conclusions to be drawn from those reports and is available for cross-examination, the defendant's right to confrontation is fully protected.

The principal argument advanced in support of labeling a DNA report "testimonial" within the meaning of Crawford and Davis is that the report is prepared "under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52; see AOB at 17, 20.

This was precisely the argument advanced by the defendant in People v. Geier, 41 Cal.4th 555, 161 P.3d 104, 134, 61 Cal. Rptr. 3d 580 (2007).³⁵ After examining the reasoning of courts from other jurisdictions

³⁵ Geier has filed a petition for certiorari in the United States Supreme Court (No. 07-7770). The Court has neither accepted nor denied the petition, apparently holding it in abeyance pending the Court's decision in Melendez-Diaz, *supra*.

- cert. den.
(6-29-09)

B-3D

APPENDIX C

eyes during legal arguments. This blocks out visual distractions and allows me to listen and focus on the argument being made. I was attentive throughout this trial.

3) I twisted my knee after court on Wednesday, April 16, 2008. It felt fine when I got home but by the following morning it had stiffened, making it difficult to walk. I appeared for court the morning of Thursday, April 17, 2008, using a walker for assistance. The trial judge recessed court until Monday, April 21, 2008, to allow me to recuperate. (Trial would not have been in session on Friday anyway, given King County's trial schedule.) I immediately went to a doctor, who gave me a knee brace, and recovered sufficiently over the weekend to appear in court Monday with no problems that would have affected my ability to represent Mr. Lui. I did not receive or take any narcotic medication and felt perfectly comfortable and functional for the remainder of the trial. There was no mental impediment, and the injury did not affect my ability to represent Mr. Lui in any way.

4) Based on my experience, I have developed a philosophy of trial that focuses on the "big picture" as the most effective means of combating the prosecution's case and holding the State to its

burden of proof beyond a reasonable doubt. I trust the jury to be filled with intelligent people who can spot red herrings or "rabbit trails" of peripheral, unconvincing evidence. Such evidence, if offered by the defense, diminishes the defense case. In addition, objecting to or raising issues that are not compelling may have the effect of the defense impliedly taking on a burden of proof that otherwise would not exist. Evidence or cross-examination that does not bear close scrutiny may be easily attacked and neutralized. It then has no probative value, and the jury's focus swings away from the State's case and onto the failings of the defense's presentation. I rely on my best judgment and strategy in this regard.

It has always been my general philosophy that it is preferable to explain circumstances rather than to directly confront them. By directly confronting a contention of the prosecution (other than that of guilt itself, of course) you set up a contest for the jury to weigh. If the jury weighs the contest against the defendant it dilutes the defense. If a reasonable explanation of the State's contention can be made (i.e., the dog was following Lui's scent which he laid down during the process of distributing posters) you avoid making the jury decide what the dog was following as would have been the

case if you had completely denied the possibility that the dog was tracing Lui's path from the car itself to the house.

5) As part of my trial preparation in this case, a dog expert in California was consulted regarding the bloodhound evidence. The expert said a bloodhound cannot track a scent trail as old as the one in this case. I considered this to be an example of testimony that could damage the defense case by being easily discredited. The dog in this case clearly tracked something, because it traveled from the location of the victim's car to the defendant and victim's house. The handler and dog had no way of knowing where the defendant and victim lived. Even if the dog in fact tracked the victim's scent, rather than the defendant's, that argument would have inherently contradicted any defense expert testimony that the trail was too old to follow. Rather than rely on expert testimony that was easily attackable, it was better strategically to argue, as I did, that the scent trail was easily explained away by the defendant's efforts to distribute posters, and would have been made later than the State contended.

6) It was my belief that evidence regarding Det. Denny Gulla's background was not admissible. The finding that he made a

false statement was remote, more than 20 years before the trial, and subsequent misconduct findings had nothing to do with honesty. All were unrelated to this case. I do not pursue an argument simply for the sake of the argument when I believe it is not legally tenable. Even if admitted, this evidence could have diminished the defense case simply by it being offered by the defense, as it was clearly peripheral and unrelated. In this instance I told the prosecution that any attempt by the State to portray Gulla as particularly experienced or capable would result in my argument that the door was opened to his entire history. As a result, I believe, the State kept his testimony tightly constrained to avoid an open door.

7) I did not argue about admissibility of "another suspect" evidence because it was not legally colorable under current case law. The victim's ex-husband, James Negron, was a church pastor. He had been alibi'd by three people, and there was nothing to suggest they lied. There also was nothing to suggest a motive he might have to kill the mother of his son. Their child custody arrangements were in place, they rarely saw each other, and there was no evidence of a fight or disagreement. DNA on the victim's

shoelaces could have been from Negron or his son and could have been deposited at any time by either one of them. Nothing beyond that tied him to the crime or crime scene. A proffer of him as another suspect would not have been allowed and, for the reasons discussed above, even if admitted could have diminished the defense case.

8) Prior to calling Sam Taumoefolau to testify, I showed him a map that had already been admitted into evidence of the area where the victim's body was found. Taumoefolau indicated that the map would be sufficient for him to explain where he and the defendant walked while putting up missing person posters. The map I showed Taumoefolau covered the area of the dog track. The primary reason for calling Taumoefolau to testify was to establish that he and the defendant did, in fact, walk all over the area, including the area tracked by the dog, thereby undercutting the significance of the State's dog track evidence. Taumoefolau testified consistently with that expectation.

9) Before calling Amber Mathwig to the stand, I spoke with her in the hallway outside the courtroom. Prior to this discussion, I had been provided with the summary of an interview

of her conducted by my investigator, Denise Scaffidi, and I believe I had spoken with Mathwig by telephone on at least two occasions. In speaking with Mathwig outside the courtroom, I learned that some of the information in the defense investigator notes was inaccurate, or that Mathwig was backing off what she had said. I cannot now recall exactly what she stated, but I do recall that she would not have testified that she did not see the victim's car in the gym parking lot on Monday, February 5. She could not say if the car was there all week or not. Consequently, I did not ask her any questions about how long the car had been in the lot as her testimony on this topic would have proven useless to counter the prior testimony of the gym owner. I never did believe that the location of the car on a particular morning was a "smoking gun." If Mr. Lui was responsible for the murder, he could have hidden the car over the weekend and driven to the location at some later time. In other words, the location of the car on Saturday, Tuesday, Thursday, etc., doesn't really convict or acquit him of the offense.

10) The DNA testing and results provided by the State indicated the presence of the defendant's semen in the victim's vagina and underwear. Partial profiles of the victim's husband

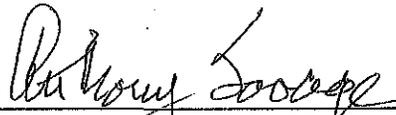
and/or son were also detected on the victim's shoes. The presence of unidentified male profiles in any of these samples allowed me to argue that we don't know who else had been in contact with the victim (thus leaving behind his unidentified DNA profile) and, therefore, a reasonable doubt existed as to who killed her. Had I taken additional steps to have the unidentified DNA results further analyzed, there was a high probability that none of them would have matched each other, thereby weakening the argument that the unidentified male profiles belonged to the real killer. If the blood on the stick shift and the unidentified male profiles on the steering wheel, vaginal swabs, and the shoe laces did not match one another, then any argument that another person committed this crime would be severely weakened.

11) I knew that the defendant had broken a bone in his arm several months before the murder. I also knew that the State had witnesses who would testify that, since breaking his arm, he had helped move furniture and was able to change a tire the night the victim was last known to be alive. Given this evidence, along with my knowledge of the defendant's athletic prowess (he was an avid rugby player and fitness buff), and his general strength and

size, the argument that he would not have had the strength required to strangle the victim as a result of this injury seemed tenuous, at best, and another example of evidence that could hurt rather than help by diminishing the defense case. Moreover, the medical examiner testified that he could not rule out that the victim was killed by ligature strangulation, which requires far less strength and dexterity than manual strangulation.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated by me this 30th day of March, 2011, at Seattle, Washington.



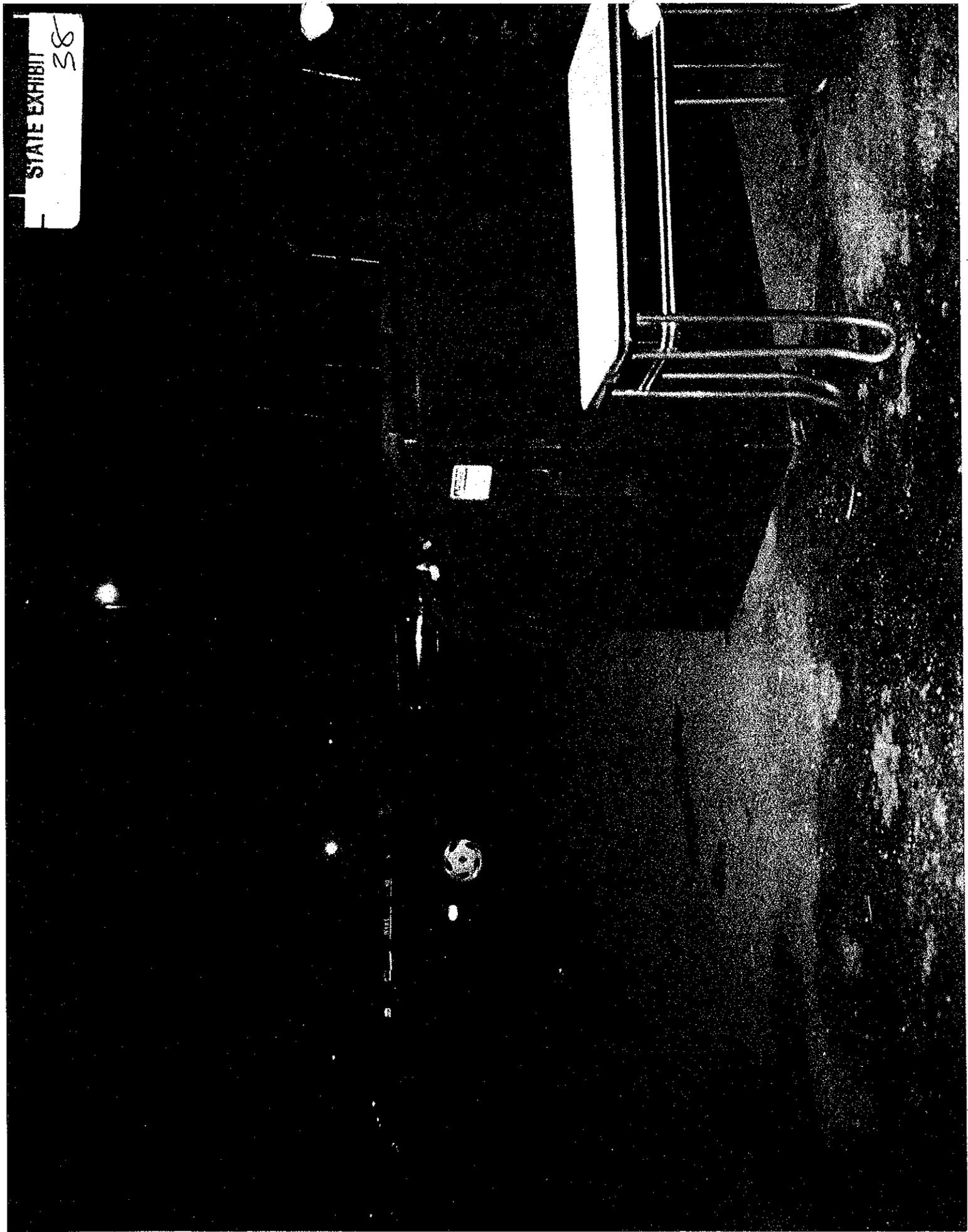
ANTHONY SAVAGE, WSBA # 2208
Defendant's trial counsel

APPENDIX D

STATE EXHIBIT

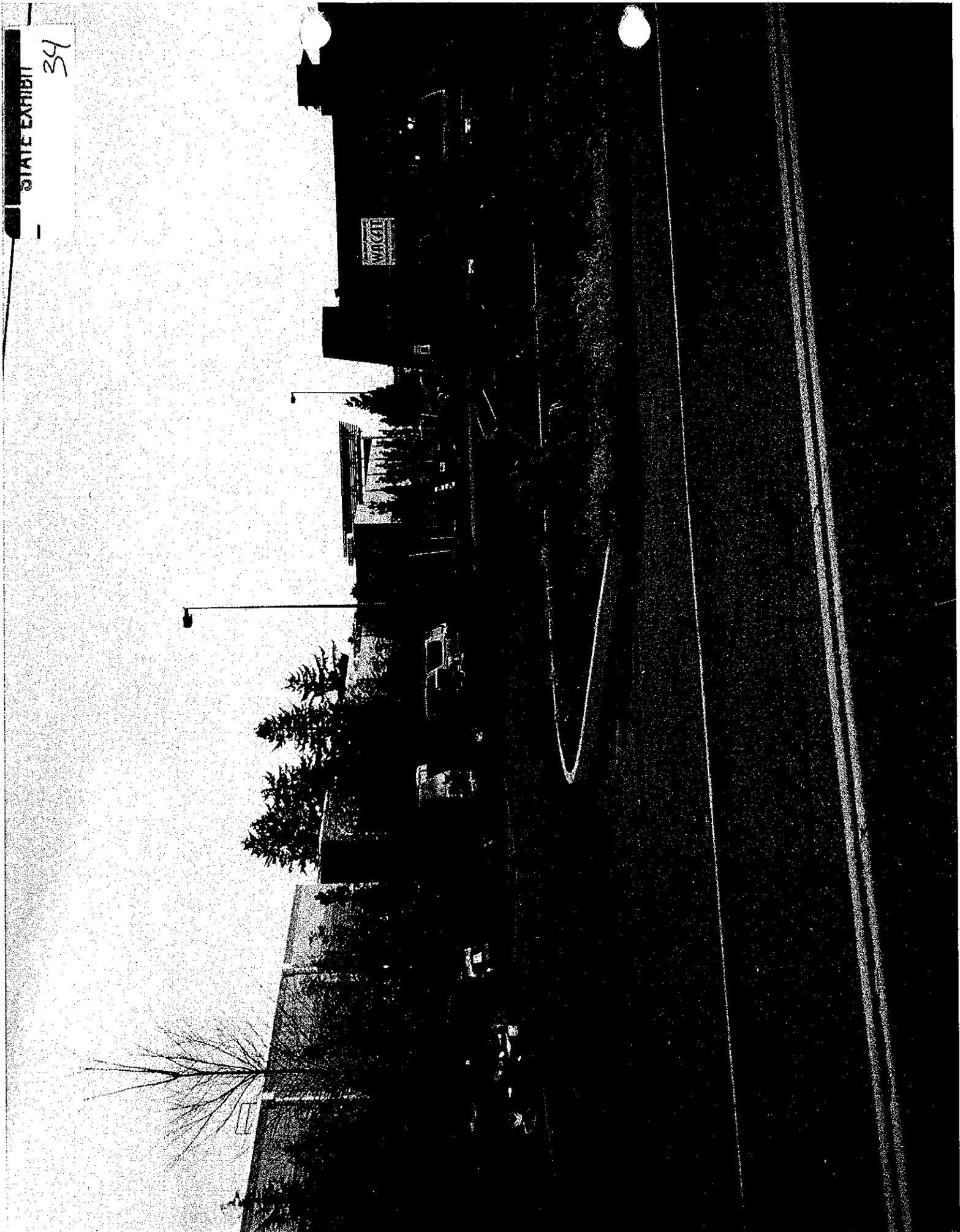
3

STATE EXHIBIT 38



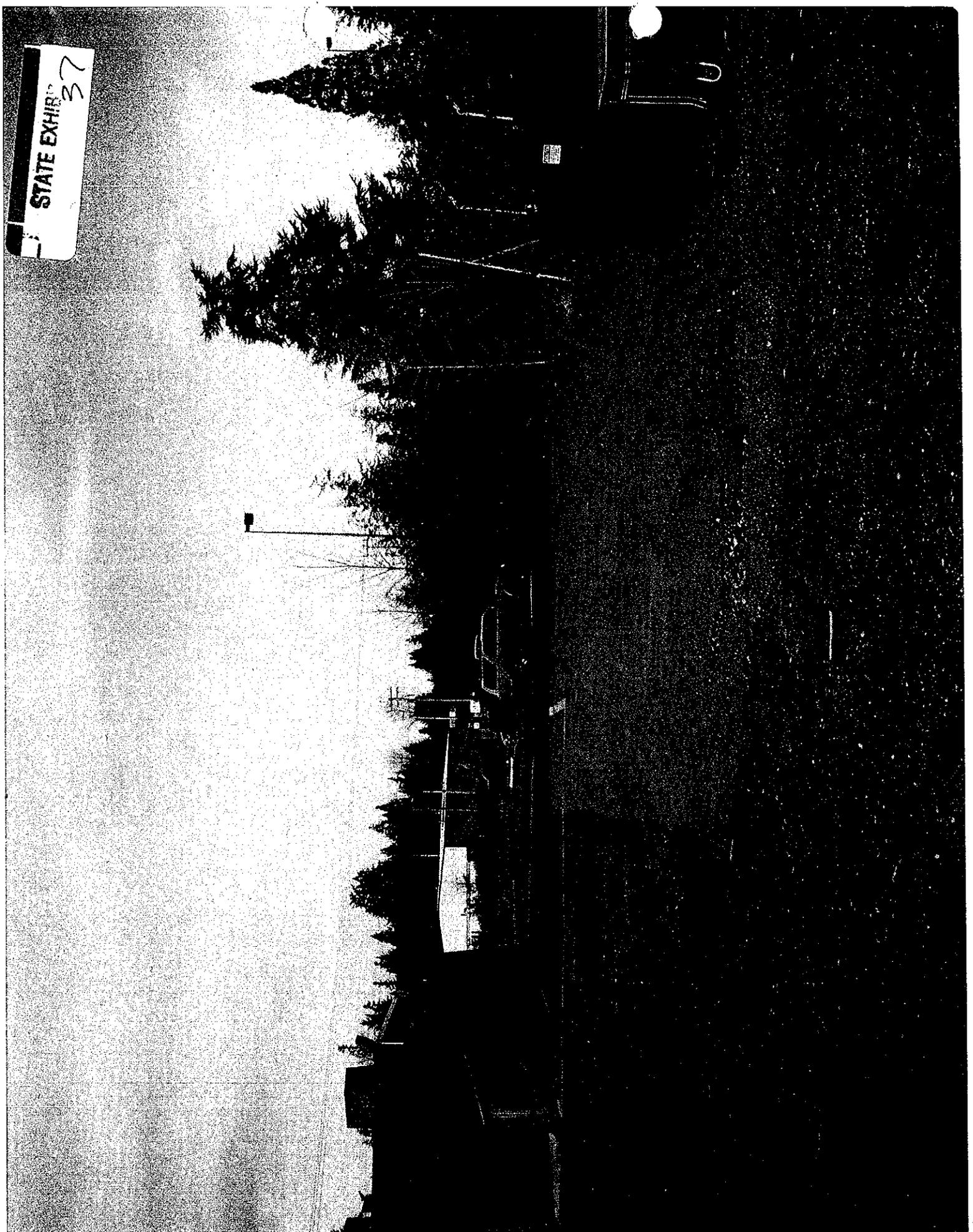
STATE EXHIBIT

34



STATE EXHIBIT

37



D-4

APPENDIX E

3) On Wednesday, February 7, 2001, I again saw this same car parked in the same spot. Finding it odd that the car appeared to have not moved since seeing it two days prior, I reported the car to one of the WAC employees working at the front desk.

4) I later learned that the front desk employee relayed my information to a gym member who was also a police officer. I learned that the police officer ran the plate and discovered that the car was reported missing.

5) I recall being interviewed by a female defense investigator in relation to this case. Prior to testifying, I was given the opportunity to review the notes from that interview. The notes from that interview are inaccurate and do not properly document what I recall about this event.

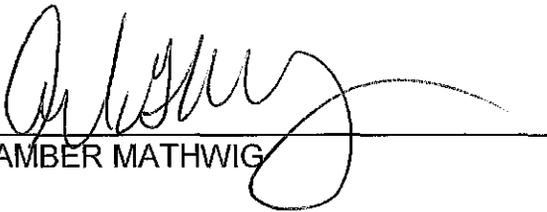
6) Just prior to being called to testify by the defense attorney, I recall him speaking with me in the hallway outside of the courtroom. I do not recall exactly what we discussed during this interaction, but I do remember telling him the above information about what I saw and when.

7) When I testified, I was not asked any questions by the defense attorney or the prosecutor about the dates I saw the car in

the lot. Had I been asked those questions, I would have testified as noted above.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated by me this 15 day of March, 2011, at Monroe, Washington.


AMBER MATHWIG

APPENDIX F



WSBA Lawyer Profile

Member Name:	Richard Lamar Pope JR	WSBA Bar#:	21118
Firm or Employer:		Admit Date:	11/13/1991
Address:	1839 151st Ave SE	Status:	Suspended
	Bellevue, WA 98007-6101 United States	Phone:	(425)747-4463
		Fax:	
		TDD:	
		Email:	RPope98155@aol.com
		Private Practice:	Yes
		Has Insurance?	No- Click for more info
		Last Date Reported:	04/02/2008
		Website:	

Only active members of the Washington State Bar Association, and others as authorized by law, may practice law in Washington.

The discipline search function may or may not reveal all disciplinary action relating to a lawyer. The discipline information accessed is a summary and not the official decision in the case. For more complete information, call 206-727-8207.

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F-1

APPENDIX G

FILED

07 APR 13 AM 10:30

KING COUNTY
SUPERIOR COURT WARRANT ISSUED
SEATTLE CHARGE COUNTY \$200.00

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

SIONE P. LUI,

Defendant.

No. 07-1-04039-7 SEA

INFORMATION

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse SIONE P. LUI of the crime of **Murder in the Second Degree**, committed as follows:

That the defendant SIONE P. LUI in King County, Washington, during a period of time intervening between February 2, 2001 through February 5, 2001, while committing and attempting to commit the crime of Assault in the Second degree, and in the course of and in furtherance of said crime and in the immediate flight therefrom, and with intent to cause the death of another person, did cause the death of Elaina Boussiacos, a human being, who was not a participant in said crime, and who died on or about February 2, 2001 to February 5, 2001;

Contrary to RCW 9A.32.050(1)(a) and (b), and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: K Richardson
Kristin V. Richardson, WSBA #19042
Senior Deputy Prosecuting Attorney

INFORMATION - 1

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

APPENDIX H

goals for this weekend

- 1 - spend time with little E.J.
- 2 - prep for the Liau set eve.
 - check w, Sam and Fam to come along.
- 3 - stake conference Sunday, take E.J.
- 4 - clean house, do laundry down below.
 - take Nina's tire to Firestone get it fix.
 - wash work van (if theres time)
 - check with James sun - about Anthony's way back to school.
 - send e-mail back to my brother congratulate the new born baby.
 - get firewood from Sam.
 - get misc. groceries
meat, etc.

APPENDIX I

Richardson, Kristin

From: Richardson, Kristin
Sent: Tuesday, January 29, 2008 12:04 PM
To: Tony Savage (loophole@integraonline.com)
Cc: Castleton, John
Subject: Denny Gulla

Tony - I wanted to let you know that we received some more specific information (beyond the newspaper articles) about the KCSO findings involving Det. Denny Gulla. There were two IIU cases that were sustained on "Conduct Unbecoming" violations. The underlying reason was that IIU concluded he made false statements about his interactions with two young women with whom he came into contact while on duty. These findings were in 1986. Our briefing on the subject would remain the same.

PLEASE NOTE my new e-mail address is
kristin.richardson@kingcounty.gov.
Kristin Richardson
Senior Deputy Prosecutor
King County, WA
(206) 296-9519

APPENDIX J

3.03.000 INVESTIGATION OF PERSONNEL MISCONDUCT

3.04.005

POLICY STATEMENT: 10/09

A law enforcement agency must maintain a high level of personal and official conduct if it is to command and deserve the respect and confidence of the public it serves. Rules and regulations governing the conduct of members of the Sheriff's Office ensure the high standards of the law enforcement profession are maintained. The purpose of this section is to provide guidelines concerning the investigations of member alleged misconduct. It is the Sheriff's Office policy to promptly, thoroughly and fairly, investigate alleged misconduct involving its members. Nothing in this policy prohibits a supervisor or command staff from taking corrective action if they observe a circumstance that requires immediate attention.

3.03.010

DEFINITIONS: 12/10

For the purpose of this policy:

"Administrative Leave" means when a member is placed on leave with pay and benefits after being involved in a traumatic incident, during an investigation involving the member's conduct or his/her ability to perform essential functions of his/her job, and it is determined that circumstances exist that make the immediate removal of the member in the best interests of the Sheriff's Office. Such leave is not a disciplinary action and is not subject to appeal.

"Emergency Leave" means when a member is placed on temporary leave with pay and benefits when it is determined that circumstances exist which make the immediate removal of the member in the best interests of the Sheriff's Office. Such leave is not a disciplinary action and is not subject to appeal.

"Formal Investigation" means steps taken by the investigator assigned to investigate a complaint of misconduct and prepare the final investigative report.

"Garrity Rights" means the member is required to fully cooperate with an administrative investigation and failure to cooperate may result in employment termination and the information obtained from the interview cannot be used in criminal proceedings. (Garrity v. N.J., 385 U.S. 493, 1967)

"Internal Investigations Advisory Committee" is made up of the Prosecuting Attorney's Office, Labor Relations and Sheriff's Office personnel which meets to advise the IJU Commander or other Sheriff Commanders on legal issues on cases they present to the committee.

"Inquiry" means any communication directed to a member of the department which alleges misconduct by any member of the Sheriff's Office.

"Loudermill Hearing" means when there is a proprietary loss (e.g., suspension, demotion, termination, etc.); the member has the right to meet with the Sheriff. The member will then be given the opportunity to speak on his/her own behalf as to why the recommended discipline should not be imposed in the matter. (Cleveland Board of Education v. Loudermill, 105 S. Ct 1487, 1985)

"Major Investigation" means the alleged violations, if sustained, would likely result in suspension, demotion, termination or the filing of criminal charges.

"Member" means any person whether paid, unpaid, temporary, permanent, intern, probationary, volunteer, appointed, non-appointed, commissioned, or non-commissioned, who is employed or supervised by the King County Sheriff's Office.

"Misconduct" means any violation of laws, ordinances, Sheriff's Office or King County rules, regulations or procedures.

"Personnel Complaint" means any allegation of member misconduct received from any source that is accepted as a complaint and investigated.

"Preliminary Investigation" means steps taken by a supervisor or IIU to determine if an alleged complaint is potential misconduct.

- Except in unusual circumstances, (i.e., complainant intoxicated, incapacitated, etc.) the preliminary investigation is not complete until an interview of the complainant has been conducted.

"Progressive Discipline" means the escalation in the level of discipline imposed on a member based on previous **sustained** incidents that are similar in nature and/or have a common theme.

"Representative" means an official of a member's collective bargaining agency.

"Supervisor" means any commissioned employee of the rank of sergeant or above or any professional staff employee who is designated as a supervisor by virtue of his/her job title.

"Weingarten Rights" means when a member reasonably believes an interview will result in discipline, the member has a right to Guild/Union representation. (NLRB v J. Weingarten, 420 U.S. 251, 1975)

3.03.015

EMERGENCY RELIEF FROM DUTY: 10/09

Any supervisor may relieve a member from duty in an emergency when it appears such action is in the best interest of the public and the Sheriff's Office. Conditions for emergency relief from duty may include but are not limited to:

1. Commission of a crime.
2. Under the influence of either alcohol or drugs.
3. Alcohol on breath.
4. Apparent psychological problem.
5. Apparent inability to perform the essential functions of his/her job.

The supervisor imposing the emergency relief from duty shall:

1. Notify the CDO, the member's Precinct/Section Commander, and the Division Commander of the action taken.
2. Complete a Supervisor's Incident Review before securing from duty.
 - a. Forward the original report **directly** to the Division Commander of the relieved member.
 - b. Forward a copy of the report to the Precinct/Section Commander via the chain of command.
3. Instruct the member to be available during regular business hours, unless excused from such requirement in writing by the Division Commander.
4. Members, subjected to emergency relief from duty, may be placed on paid administrative leave, with approval of the member's Division Commander.

3.03.020

ADMINISTRATIVE LEAVE: 10/09

A member is placed on administrative leave with pay and benefits because of a traumatic incident, or during an investigation involving the member's conduct or his/her ability to perform essential functions of his/her job, and it is determined that circumstances exist that make the immediate removal of the member in the best interests of the member and the Sheriff's Office. Such leave is not a disciplinary action and is not subject to appeal.

1. Administrative leave shall be approved by the member's Division Commander.
2. Notification of administrative leave shall be coordinated with the IIU Commander no later than the next business day if there is a likelihood of IIU involvement.
3. Members on administrative leave shall not engage in any law enforcement activities.
4. Members shall notify their supervisors as to where they can be reached, and must be available during regular business hours, unless excused from such requirement in writing by the Division Commander.
5. Any member placed on administrative leave for a drug or alcohol related incident will be required by the Division Commander to undergo a drug or alcohol assessment prior to being allowed to returning to duty.

3.03.025

INQUIRIES: 12/10

1. Inquires will be handled at the supervisory level whenever possible.
2. Members who receive an inquiry regarding their own performance, from a person who reasonably has a right to know, are responsible for responding to the inquiry.
 - a. If the inquirer is satisfied with the response and explanation, no further action is required.
 - b. When inquires are not satisfied, they shall be referred to the member's supervisor.
3. Any non-supervisory member who receives an inquiry regarding another member of the Sheriff's Office will refer the inquiry to an on-duty supervisor at the time of the inquiry.
4. A supervisor who receives an inquiry will attempt to resolve the issue at the time, or if a call back is necessary, resolve the issue at the earliest practical time. If the supervisor is able to resolve the issue, the supervisor will then document the inquiry in the Supervisor Action Log.
5. If the supervisor completes a preliminary investigation and determines that there is possible misconduct involved or further follow up is needed, the supervisor will then document the issue as an Inquiry and send it up the chain of command for review.

3.03.030

TOPICS OF INVESTIGATION: 10/09

1. All allegations of employee misconduct that include but not necessarily limited to, allegations of violations of Sheriff's Office procedures, rules and regulations, and violations of federal, state or local laws.
2. Any alleged violation of Sheriff's Office or King County rules or regulations shall be administrative and not criminal in nature.
3. When an alleged or observed policy infraction is minor, a supervisor may resolve these incidents and immediately take necessary corrective action **without** completing an IIU Complaint Report, but shall document the incident and steps taken in the Supervisor Action Log. Some minor infractions may include:
 - a. Tardiness.
 - b. Uniform and equipment violations.
 - c. Personal appearance infractions.

- d. Minor omissions in assigned duties.
 - e. Minor regulations concerned with efficiency or safety.
4. Complaints normally handled at the supervisory level.
- a. Abuse of sick leave.
 - b. Discourtesy.
 - c. Tardiness.
 - d. Unprofessional demeanor.
 - e. Use of discretion.
 - f. Neglect of duty.
 - g. Sleeping on duty.
 - h. Unavailable for calls.
 - i. Personal appearance.
 - j. Missed court appearance.
 - k. Driving complaints.
5. Complaints normally handled by IIU.
- a. Use of force.
 - b. Sexual misconduct.
 - c. Discrimination.
 - d. Criminal conduct.
 - e. Ethics violations.
 - f. Dishonesty.
 - g. Alcohol violations.
 - h. Insubordination.
 - i. There are controversial or sensitive circumstances.
 - j. Any complaint the IIU Commander deems appropriate to be investigated by IIU.
 - k. Any complaint the Sheriff directs IIU to investigate.
 - l. Egregious acts under performance standards.
 - m. Repeated violations listed in number four (4).
 - n. Policy violations not handled by supervisors.
6. When the allegation does not amount to misconduct, the supervisor shall explain the related Sheriff's Office policy or procedure and attempt to resolve the matter to the complainant's satisfaction.
- a. If the complainant is not satisfied or the supervisor feels additional investigation is necessary, the supervisor shall refer the complainant to IIU.
 - b. IIU will make the final determination if the complaint amounts to misconduct and if an investigation is necessary.
7. Information or documentation received that does not amount to misconduct, will not be classified as a "Personnel Complaint", but should be documented in the Supervisor Action Log.

3.03.035

PROCEDURES FOR ACCEPTING MISCONDUCT COMPLAINTS (NON CRIMINAL):

10/09

- 1. Members of the Sheriff's Office will accept all complaints of misconduct.
- 2. All members receiving complaint information shall maintain the confidential nature of such information.
- 3. Members receiving allegations shall refer all complaints to the member's supervisor or an on-duty supervisor at the member's work location.

3.03.040

COMPLAINT PROCEDURES WHEN RECEIVED BY A SUPERVISOR: 12/10

1. When a supervisor receives a misconduct complaint, the supervisor shall:
 - a. Take action to prevent aggravation of the incident.
 - b. Conduct a preliminary investigation.
 - c. Determine whether the allegation amounts to misconduct. If it does not amount to misconduct, the supervisor will then document the issue as a Supervisor Action Log.
 - d. If a complaint is serious and requires emergency relief from duty, CDO and the Precinct/Section Commander shall be notified.
 - e. Enter the details of the complaint and steps taken as an inquiry.
 - f. Obtain a statement from complainant, if practical.
 - An in person recorded interview is recommended.
 - g. Identify witnesses.
 - h. Forward the inquiry to the Precinct/Section Commander.

2. The Precinct/Section Commander shall:
 - a. Review personnel complaint forms and other reports pertaining to the preliminary investigation to ensure the reports are complete.
 - b. Ensure the proper steps were taken in the preliminary investigation.
 - c. Forward the original complaint and associated paperwork to IIU via the chain of command.

3.03.045

COMPLAINT PROCEDURE WHEN RECEIVED IN IIU: 10/09

Whenever IIU receives a complaint of misconduct, either directly or thru the chain of command, the IIU Commander shall determine if the complaint will be investigated in IIU or to be investigated at the Precinct/Section level.

- If the complaint is to be investigated at the Precinct/Section level, the Complaint Report with associated statements and paperwork shall be forwarded to the Precinct/Section Commander.

3.03.050

CRIMINAL CONDUCT COMPLAINTS: 10/09

1. It shall be the responsibility of **all** members to **immediately** notify an on-duty supervisor when, by observation or receipt of information, there is cause to suspect a member, whether on or off-duty, has committed a crime.
 - Normal criminal investigation procedures shall be followed during the investigation of all alleged criminal violations.

2. When an on-duty supervisor receives notification or information that a member has been arrested, charged, or is accused of committing a crime, the on-duty supervisor shall:
 - a. Immediately notify the CDO and the accused member's Precinct/Section Commander.
 - b. Ensure that appropriate law enforcement action has been initiated in a manner consistent with the appropriate guidelines in 3.04.220 or 3.04.225.

3. Any alleged violations of laws or ordinances shall be investigated by the appropriate police agency or assigned to the appropriate investigative unit.

3.03.055

INTOXICATION COMPLAINTS: 10/09

If a citizen or member alleges that an **on-duty** member is under the influence of either alcohol or drugs, the member taking the complaint shall immediately contact the accused member's supervisor.

The accused member's supervisor shall:

1. Immediately contact the accused to determine if there is a basis for the allegation and if so:
 - a. Take the accused to the nearest workstation with a BAC Datamaster.
 - b. In the presence of a witness, ensure a test for intoxication is completed.
 - c. If drugs are suspected, utilize a Drug Recognition Expert.
2. If the allegation is supported, the member refuses to test for intoxication, or there is reasonable belief the member is impaired by drugs or medications.
 - a. Pursuant to 3.04.015, relieve the member from duty.
 - b. Notify the CDO and Precinct/Section Commander.
 - c. Arrange for transportation to member's residence.
3. Complete a Supervisor's Incident Review before securing from duty.
4. Forward the **original** reports to IIU via the chain of command.

3.03.060

USE OF FORCE COMPLAINTS: 10/09

When a complaint alleges excessive use of force by a member, the on-duty supervisor shall:

1. Photograph the person's injuries or claimed injuries whether visible or not.
 - Documentation of the lack of visible injury can be very important evidence.
2. Obtain statements from complainant and witnesses.
 - If possible, obtain recorded statements.
3. Request that the person be examined immediately by a physician.
4. Request that the person sign a Release of Medical Information (KCSO Form #B-137).
5. Identify unavailable witnesses to the alleged misconduct who may be currently unavailable.
6. Forward the **original** Use of Force Report and copies of supporting documentation to IIU via the chain of command.

3.03.065

COMPLAINTS INVOLVING IIU PERSONNEL: 01/11

1. Complaints alleging misconduct involving IIU personnel shall be forwarded **directly** to the Chief Deputy.
2. The Chief Deputy shall appoint personnel from outside IIU to conduct the investigation.
3. Completed investigations shall be maintained in IIU.

3.03.070

COMPLAINTS AGAINST OTHER AGENCY MEMBERS: 09/04

On-duty members reporting alleged misconduct involving members of other agencies shall complete and forward an Officer's Report **directly** to IIU.

3.03.075

INTERNAL COMPLAINTS: 10/09

Members who have knowledge of alleged misconduct, committed by other members shall notify a supervisor or IIU in a timely manner.

3.03.080

ANONYMOUS COMPLAINTS: 10/09

In cases of anonymous complaints, receiving supervisors or IIU investigators will use their discretion in evaluating whether there is sufficient information for follow-up or further investigation.

1. If, after a preliminary investigation and when feasible, the complaint is not supported by some corroborating facts or evidence, the complaint will be entered as an inquiry.
2. If the preliminary investigation does develop some corroborating facts or evidence, it will be handled in the same manner as any other complaint.

3.03.085

IIU MONITORING AND OVERSIGHT RESPONSIBILITIES: 01/11

When a complaint of misconduct is received, the IIU Commander shall:

1. Ensure the Complaint Report and associated paperwork has been completed.
2. Ensure a preliminary investigation has been completed.
3. Ensure the Chief Deputy is notified when the complaint is:
 - a. Likely to be a news worthy event, regardless of whether or not the media has found out about it.
 - b. A use of force complaint that is criminal in nature.
 - c. A criminal investigation against a member regardless of whether it is internally or externally investigated.
 - d. Willful misconduct that could potentially result in termination
 - e. Involving a member of the command staff.
4. Assign the complaint for formal investigation.
 - If the complaint is not investigated by IIU, the member's Precinct/Section Commander will be notified by IIU that the investigation is to be assigned to a supervisor.

5. Ensure all alleged misconduct complaints are investigated in a timely manner.
 - Timely notification to a member is crucial so the member has the ability to recall the event.
6. Conduct an investigation of a complaint when required.
7. Monitor all complaint investigations and maintain all records, including dispositions and actions taken.
8. Monitor all criminal investigations on members and ensure an administrative investigation is complete once the criminal investigation is completed.
9. Assist other investigators in complaint investigations when necessary.
10. Conduct an investigation when appropriate for any member who justifiably feels threatened by a false accusation or a contrived situation.
 - Such members may report their situations directly to IIU without reporting to their superiors.
11. Prepare cases for administrative hearings.
12. Provide a monthly status update to the Chief Deputy of all open internal investigations.

3.03.090

INVESTIGATION CONFIDENTIALITY: 10/09

1. Personnel complaint investigators and those who review investigations, have a responsibility to preserve the confidentiality of investigations.
2. Release of information to unauthorized personnel is a serious breach of ethics and could be a violation of state law.
3. Release of information regarding an investigation shall be only to those who have a right and need to know and will be released by the IIU Commander, or designee.

3.03.095

CONFIDENTIALITY ORDER: 09/04

1. When any member is contacted regarding an internal investigation, the investigator will advise the member not to disclose any of the information discussed in the interview except with his/her representative or attorney.
2. The member will also be told that disclosure of any information, prior to the completion of the investigation, may result in disciplinary action.

3.03.100

MEMBER NOTIFICATION: 10/09

1. Accused or witness members will be notified of complaints by the Complaint Notification Report (KCSO Form A-150).
 - Members will be advised if a complaint is a major or minor investigation.
2. Accused and witness members are not entitled to disclosure of investigative information outside that contained in their Complaint Notification Report (A-150).

3.03.105

REQUIREMENT TO COOPERATE: 10/09

1. All members, when ordered to do so, shall fully cooperate in Sheriff's Office administrative investigations. Administrative investigations are non-criminal investigations into the conduct of Sheriff's Office members, conducted by either IIU or Sheriff's Office supervisors.
2. Failure to cooperate may result in discipline up to termination.

3.03.110

REPRESENTATION: 10/09

1. Whenever an interview focuses on matters that a member reasonably believes could result in disciplinary action against any member, the member shall have the right to representation.
 - The representative will be an official of the member's collective bargaining agency.
 - Non represented members may have another member or an attorney as a representative.
2. Members have the right to an attorney of their own choosing when they are the subject of a criminal investigation.

3.03.115

IMPARTIALITY: 09/04

1. Any accused member who feels an assigned investigator cannot be impartial during the investigation of a complaint shall forward his/her concerns in an Officer's Report **directly** to the IIU Commander.
2. Any assigned investigator who during the investigation of a complaint, has a potential conflict of interest, shall forward his/her concerns **directly** to the IIU Commander.
3. The IIU Commander shall review the concerns and if need be, assign the investigation to another investigator.

3.03.120

EXCULPATORY INFORMATION: 09/04

1. Investigators must ensure their completed reports contain all relevant information disclosed during the investigation.
 - This includes evidence that tends to disprove the allegations of misconduct by a member.
2. Omission of relevant information could cause irreversible damage to an otherwise proper investigation.

3.03.125

SEARCHES AND SEIZURES: 09/04

All searches and seizures conducted during the course of an administrative investigation must be in compliance with the law.

1. The search shall be approved by the member's Division Commander.
2. The IIU Commander should be present during any such searches.
3. The search should be conducted professionally with the member present if possible.
4. Photographs should be taken before and after the search.
5. An inventory of items seized shall be given to the subject of the search and or conspicuously placed at the scene.

3.03.130

FINANCIAL DISCLOSURE: 09/04

Sheriff's Office members shall not be required to disclose any item of his/her property, income, assets, source of income, debts or expenditures (including those of any member of his/her household) unless volunteered or obtained by proper legal procedure, (i.e., criminal investigation, subpoena).

3.03.135

MEDICAL OR LABORATORY EXAMINATIONS: 10/09

Sheriff's Office members shall not be required to submit to any medical or laboratory examination unless volunteered or obtained by proper legal procedures.

3.03.140

PHYSICAL LINE UPS: 10/09

Sheriff's Office members shall not be required to appear in a line up unless volunteered or obtained by proper legal procedures. Investigators have access to member photographs on file and may use those photos in an internal investigation.

3.03.145

FAMILY MEMBERS: 10/09

Members of the employee's immediate family shall not be contacted and/or asked to give statements in administrative investigations except when.

1. A crime is alleged to have been committed against a family member.
2. The accused member gives permission.

3.03.150

POLYGRAPH: 01/11

The Employer shall not require any employee covered by this Agreement to take or be subjected to a lie detector test as a condition of continued employment.

1. Washington State law prohibits the Sheriff's Office from compelling a member to submit to a polygraph examination.
2. **Members shall not be offered a polygraph examination during any administrative investigation.**
3. An accused member that requests a polygraph examination:
 - a. Must make such a request in writing through his/her bargaining unit representative; and
 - b. The request shall be approved or disapproved by the Chief Deputy.
4. Polygraph evidence of any kind shall not be admissible in disciplinary proceedings except by stipulation of the parties.
5. A Sheriff's Office approved polygraph operator shall be used.

3.03.155

DUE DATES: 10/09

1. Administrative Investigations must be completed within one hundred and eighty (180) days of the matter coming to the attention of the Sheriff's Office Command Staff/Captains.
2. In the event the Sheriff believes an extension beyond one hundred and eighty (180) days is necessary, and the County establishes an appropriate burden that it has acted with due diligence and the investigation could not reasonably be completed due to factors beyond the control of the Sheriff's Office (i.e., extended illness or other unavailability of a critical witness, such as the complainant or the deputy being investigated, or necessary delays in the processing of forensic evidence by other agencies), the Sheriff must contact the Bargaining Unit prior to the expiration of the one hundred and eighty (180) days seeking to extend the time period.
 - a. Any request for extension based on the unavailability of witnesses shall include a showing that the witness is expected to become available in a reasonable period of time.
 - b. A request for extension based upon the above criteria will not be unreasonably denied.
3. The one hundred and eighty (180) day period shall be suspended when a complaint involving alleged criminal conduct is being reviewed by a prosecuting authority or is being prosecuted at the local, state or federal level, or if the alleged conduct occurred in another jurisdiction and is being criminally investigated or prosecuted in that jurisdiction.
 - a. In cases of a deputy involved fatal incident, the one hundred and eighty (180) day period will commence when the completed criminal file is provided to the Prosecuting Attorney, and will only be tolled in the event criminal charges are filed.
 - b. In the event an outside agency conducts a criminal investigation of a matter within the jurisdiction of the County, and the Sheriff's Office receives the completed criminal file with less than sixty (60) days remaining for the administrative investigation, the Sheriff's Office will have up to an additional sixty (60) days to complete its administrative investigation.
 - However, in no event shall the investigation last more than two hundred and forty (240) days.
4. Compliance with this provision is required if findings are to be entered or discipline is to be imposed. Issuance of a Loudermill notice of intent to discipline will constitute conclusion of the administrative investigation for purposes of this section.
5. Nothing in this policy prohibits the County from disciplining (provided just cause exists) a deputy convicted of a crime.
6. The accused member(s) shall be notified of any extensions.

3.03.160

INVESTIGATIVE STEPS: 10/09

When initiating an investigation, the assigned investigator should:

1. Thoroughly review the Personnel Complaint Form and attached reports taking note of the due date and any impending statute of limitations issues.
2. Gather the facts and keep an open mind at all times.
3. Identify allegations and related issues to be addressed in the investigation.
 - The allegations should specifically list the actions taken, or behavior of the deputy. Allegations should not contain conclusive statements, (e.g. the deputy kicked the complainant vs. the deputy used excessive force.)

4. Gather and review all relevant reports related to the incident (e.g. CAD print outs, Incident Reports, Officer's Reports, etc.).
5. Send complaint notification (A-150) to the member(s) involved.
 - The notification must reasonably apprise the member of what the allegations are and what information is needed.
6. In summary, the investigator shall:
 - a. Gather evidence.
 - b. Obtain medical and financial releases if needed.
 - c. Schedule and conduct interviews if more information is needed.
 - d. Evaluate the facts of the investigation.
 - e. Complete investigative report.
 - f. Forward the completed report to the IIU Commander.

3.03.165

INTERVIEWING COMPLAINANTS AND WITNESSES: 10/09**1. RESEARCH BACKGROUND**

An investigator should know as much as possible about the person to be interviewed. The investigator should check records and other sources of information regarding the individuals to be interviewed.

- The investigator should also check to see if the complainant has filed complaints in the past and the nature of those complaints.

2. SCHEDULE INTERVIEW

All interviews, especially sensitive interviews, should be conducted in person.

- If this is not possible, a recorded telephonic statement may be taken.

3. DEFINE INTERVIEW OBJECTIVES

- a. Before the interview, the investigator should have a clear understanding of the interview objectives.
- b. A list of specific, relevant questions should be prepared prior to the interview.
- c. The typical interview may have one or more of the following objectives:
 - Determine the facts of the investigation.
 - Identifying other witnesses or accused members.
 - Clarifying allegations.
 - Resolving discrepancies and inconsistencies.
 - Obtaining information regarding motive or alibi.
 - Closing loopholes in previous statements.

4. INTERVIEW LOCATION

Citizen witnesses should be encouraged to come to a Sheriff's Office facility for their interviews. If this is not possible they may be interviewed at another location.

5. RECORDING STATEMENTS

- a. Except for minor offenses, all formal interviews should be recorded in their entirety.
 - This includes statements taken by telephone.

- b. If a written statement has already been taken, an audio statement may not be required if the needed information has been provided.
- c. If a complainant or witness refuses to allow the interview to be recorded, document the refusal and proceed with the interview, using a court reporter.
 - If a court reporter is unavailable complete a written statement.
 - This interview should be witnessed by another member.
- d. Mark each tape with the name of the person interviewed and the IIU file number and forward all transcribed tapes to IIU with the completed investigation.

6. BEGINNING THE INTERVIEW

- a. The investigator should begin the interview by:
 - Stating the date and time.
 - Identifying those present during the interview.
 - The reason for the interview.
- b. The investigator should allow the interviewee to describe what happened in his/her own words.
 - Each allegation and all relevant issues should be covered with the complainant and witnesses.
 - Each witness should be asked specific questions about each allegation that he/she can address.

7. UNCOOPERATIVE WITNESSES

If the complainant or civilian witness is unavailable, fails to appear, or refuses to be interviewed, the investigator should thoroughly document attempts to conduct the interview and then continue to attempt to complete the investigation.

8. SENSITIVE INTERVIEWS

When an interview involves a sensitive matter, including but not limited to a domestic violence, or a sexual matter, the interviewer should be sensitive to that fact, and if requested the interviewer should be the same sex as the person being interviewed. In such cases the interviewer should consider requesting the assistance of a person with expertise in such interviews.

9. CLOSING THE INTERVIEW

At the end of the interview the witness should be asked if there are any questions and if there is any other relevant information to add to the investigation.

3.03.170

ADMINISTRATIVE INTERVIEWS: 10/09

1. An administrative interview is an in-person inquiry with an accused or witness member that is conducted to investigate alleged misconduct. The following rules shall apply to all administrative interviews of Sheriff's Office members.
 - a. Interviews shall be conducted within a reasonable time after an allegation has been made.
 - b. Before interviewing the member(s), he/she shall be informed of the name of the person in charge of the investigation and the name of the person conducting the interview.

- c. Advise the member(s) whether he/she is the accused or a witness.
 - d. Interviews shall be held during the member's on-duty hours whenever reasonable or possible.
 - e. Advise the member(s) he/she are required to cooperate in an administrative investigation and that failing to do so may result in discipline up to and including termination from the department.
 - f. Advise an accused member he/she may have representation present during any interview. 3.04.110
 - g. The interview should take place at the member's workstation or in IIU unless prior arrangements have been made.
 - h. Members being interviewed shall be allowed reasonable intermissions.
 - i. The scope of the interview shall relate **only** to the specific allegation(s).
 - j. All interviews should be recorded in their entirety.
 - k. If a member refuses to allow the interview to be recorded, document the refusal and proceed with the interview, using a court reporter.
 - If a court reporter is unavailable complete a written statement.
 - This interview should be witnessed.
2. The following rules shall also apply to administrative interviews completed by IIU.
- a. Advise the accused member in writing of the allegations and the misconduct, if sustained, could be grounds for administrative disciplinary action.
 - b. Advise the member he/she may have representation present during any interview.
 - c. Provide all members with copies of their Garrity Rights.
 - d. Provide commissioned members with copies of the Peace Officer Bill of Rights.
 - e. Advise the member of the requirement to fully cooperate with the administrative investigation and that failure to cooperate may result in employment termination and that the information obtained from the interview cannot be used in a criminal case (Garrity v. N.J., 385 U.S., 493, 1967), and ask if the member understands Garrity.
 - The Garrity admonishment does not have to be read during the interview.
 - f. Allow commissioned members to read a copy of the Police Officer's Bill of Rights (King County Ordinance proposed number 89-595) and ask if the member understands the Bill of Rights.
 - The Peace Officer's Bill of Rights does not have to be read during the interview.
 - g. All interviews should be recorded in their entirety.
 - h. If an accused member refuses to allow the interview to be recorded, document the refusal and proceed with the interview, using a court reporter.
 - If a court reporter is unavailable complete a written statement.
 - This interview should be witnessed.
 - i. Upon request, provide the member with a copy of his/her statement.
3. This section does not apply to criminal investigation interviews.

3.03.175

PERSONAL INTERVIEWS, CRIMINAL INVESTIGATION: 10/09

1. Criminal investigation interviews shall be conducted by the appropriate police agency, or Sheriff's Office CID Unit.
 - The accused member **shall not** be ordered to meet with any criminal investigator and/or give a statement during any criminal investigation.
2. Before interviewing the accused, he/she shall be advised that he/she is suspected of committing a criminal offense and afforded all his/her constitutional rights.

3.03.180

INVESTIGATIVE REPORT FORMAT: 10/09

The investigative report will be submitted in a Follow-up Report format and should contain:

1. ACCUSED MEMBER ALLEGATIONS
Allegations should be specific and listed in chronological order.
2. EVIDENCE
 - a. Evidence is any statement, document, or item that will have a bearing on the investigation.
 - b. All evidence obtained during the investigation should be listed in the report.
3. PERSONS INTERVIEWED
List names, addresses and phone numbers.
4. INVESTIGATIVE STEPS
All entries should be prefaced by the date and time of the investigative step.
5. SUMMARY
The investigator will present the results of the investigation in a clear, logical sequence.

3.03.185

STANDARDS OF PROOF: 09/04

1. The standard of proof, in most cases, for an administrative investigation is generally "a preponderance of evidence."
2. The standard of proof in cases in which criminal or serious misconduct is alleged, and there is a likelihood of suspension, demotion or termination, the standard of proof is "clear and convincing" which is a higher standard than "a preponderance of evidence".

3.03.190

CLASSIFICATIONS: 09/04

1. **UNFOUNDED**

- The allegation is not factual and/or the incident did not occur as described.

2. **EXONERATED**

- The alleged incident occurred, but was lawful and proper.

3. **NON-SUSTAINED**

- There is insufficient factual evidence either to prove or disprove the allegation.

4. **SUSTAINED**

- The allegation is supported by sufficient factual evidence and was a violation of policy.

5. **UNDETERMINED**

a. The investigator is not able to use classifications 1 through 4.

b. This may involve the following:

- The complainant withdraws the complaint.
- The complainant cannot be located.
- The complainant is uncooperative.
- The accused member separates from the Sheriff's Office before the conclusion of the investigation and the investigator cannot reach another classification.

c. Notwithstanding the above situations, if enough information has been collected to close the investigation with a classification of 1 through 4, an undetermined classification will not be used.

3.03.195

REVIEW AND PROCESSING OF COMPLETED INVESTIGATIONS: 01/11

1. After completing the investigation, the investigator shall:

- a. Ensure reports are complete and in the proper format.
- b. Ensure all supporting documentation is present.
- c. Ensure all allegations have been identified.
- d. Forward the report and documents to the IIU Commander via their chain of command.

2. The IIU Commander shall:

- a. Review Complaint Reports for completeness and ensure that the guidelines of this chapter were followed.
 - Make recommendations for additional investigation/information if necessary.
- b. Forward completed major investigations or investigations that require special attention, to the Internal Investigations Advisory Committee.
- c. After Internal Investigations Advisory Committee review, forward completed investigations to the member's Precinct/Section Commander for review, recommendations of classifications and disciplinary recommendations if any.

- d. Ensure the accused member and his/her Precinct/Section Commander are notified in writing within ten (10) days of the disposition of the complaint.
 - e. Ensure that the complainant have been notified in writing within fifteen (15) days of the final disposition.
 - The specific nature of any action taken against him/her shall not be revealed to the complainant.
 - f. In cases where there is a proprietary loss (e.g., suspension, demotion, termination, etc.), notify the member that they have the right to meet with the Chief Deputy to explain the circumstances. (Cleveland Board of Education v. Loudermill, 105 S. Ct 1487, 1985)
 - This meeting is voluntary and no overtime shall be paid.
 - g. Ensure completed investigations are maintained in IIU locked files.
3. The Precinct/Section Commander shall:
- a. Review the completed investigation.
 - b. Return investigation if incomplete.
 - c. Ensure that all allegations have been identified.
 - d. Determine the classification of each allegation.
 - e. If needed, meet with the Advisory Committee.
 - f. Recommend the appropriate discipline.
 - g. Forward completed investigation and recommendations to the Division Commander within ten (10) working days.
4. The Division Commander shall:
- a. Review the completed investigation and make recommendations regarding the administrative actions to be taken.
 - b. Return the completed investigation and recommendations to the IIU Commander within ten (10) working days.
5. The Chief Deputy shall:
- a. Review those completed investigations that are presented to him/her by the IIU Commander.
 - The Chief Deputy may change any findings or decisions involving complaint investigations.
 - b. The Chief Deputy may order a reinvestigation into the complaint.
 - c. Conduct Loudermill Hearings.
 - d. Notify the member within fifteen (15) days in writing of either the recommendations and/or disciplinary action to be taken.

3.03.200

DISCIPLINARY AUTHORITY: 01/11

Except for oral reprimands, all disciplinary actions shall be approved by the Chief Deputy.

3.03.205

DISCIPLINE RECOMMENDATIONS: 01/11

1. Recommendations of discipline on **sustained** complaints will be made in writing by the member's Precinct/Section Commander.
 - If a member has transferred to a work location other than where the complaint was filed, the member's previous Precinct/Section Commander may be contacted for disciplinary recommendations.
2. Discipline should be corrective and not punitive in nature and will be based on the:
 - a. Seriousness of misconduct.
 - b. Member's complaint history.
 - c. Likelihood that the member's actions will be repeated.
3. The disciplinary history of the member can be obtained from IIU by the Precinct/Section Commander.
4. Recommendations for discipline made by the Precinct/Section Commander may be adhered to or changed by the Division Commander or the Chief Deputy.

3.03.210

DISCIPLINARY ACTION: 02/10

Disciplinary actions should be timely, corrective, and not punitive in nature.

1. Members are subject to disciplinary action consistent with the provisions of the following:
 - a. General Orders Manual.
 - b. Standard Operating Procedures.
 - c. State and Federal Laws.
 - d. Local Ordinances.
 - e. King County rules, including Civil Service Rules.
 - f. Collective Bargaining Agreements.
2. Disciplinary actions may include, but are not limited to:
 - a. Oral reprimands.
 - b. Written reprimands.
 - c. Transfer.
 - d. Suspension from duty.
 - e. Demotion.
 - f. Termination.
 - g. Or any combination of appropriate actions.
3. Training and/or professional counseling are not considered discipline.
 - a. The Sheriff's Office may make a training referral or order a member to participate in training or professional counseling as needed.
 - This includes memos of expectations.
4. Personnel actions, including but not limited to transfers, may also be taken when appropriate in non-disciplinary cases.

3.03.215

NOTICES OF DISCIPLINE: 01/11

1. SERVICE OF DISCIPLINE LETTERS

- a. It is important that discipline letters be served properly to ensure that the member may exercise the grievance process in a timely manner.
- b. Service of discipline letters should be served in person by managers or command staff.
 - If this is not possible, the letter will be sent to the member's mailing address via registered mail.

2. ORAL REPRIMANDS

- a. An oral reprimand is the first step in discipline.
 - It is used when the specific inadequate performance does not amount to a written reprimand but needs to be included in the disciplinary process.
- b. The oral reprimand will be documented by time, place, and a brief description of the discussion with the member and will be forwarded with the completed investigation to IIU.
- c. A copy of the documentation will be placed in the member's worksite personnel file.
 - The documentation shall remain in the member's worksite personnel file for three (3) years unless used in a subsequent disciplinary action within the same three (3) year time period.

2. WRITTEN REPRIMANDS

- a. A Written Reprimand is a formal written notice to the member regarding misconduct.
 - It is appropriate for specific inadequate performance or repeated offenses which an oral reprimand or corrective counseling has not corrected.
 - It is intended to provide the member with a written record indicating that the specific corrective action must be taken to avoid more serious disciplinary action.
 - It may be given as the first step in formal discipline.
- b. The Written Reprimand shall remain permanently in the member's personnel file.

3. SUSPENSION AND TERMINATION LETTERS

- a. The Internal Investigations Unit will prepare all suspension and termination letters for the Chief Deputy.
- b. Termination letters will include the reason for and effective date of the termination.
- c. Human Resources will provide the individual with information on their benefits after termination.

3.03.220

CRIMINAL CONDUCT, INSIDE UNINCORPORATED KING COUNTY OR CONTRACT CITY: 09/04

Criminal Conduct Non-traffic and in-Progress:

1. If a member is apprehended during or immediately following the commission of a crime, he/she will be afforded all their rights as any other citizen in King County.
2. The on-duty supervisor shall:
 - a. Screen the arrest to ensure it is appropriate and the appropriate documentation is completed correctly.
 - b. Ensure the member has been advised of his/her constitutional rights and allowed to exercise those rights.
 - c. Notify the CDO and Precinct/Section Commander.
 - d. Relieve the member from duty in accordance with 3.04.015.
 - e. Complete a Supervisor's Incident Review with a copy of the entire case file to IIU and a copy to the Precinct/Section Command staff before securing from duty.
 - f. Forward the original case packet to the appropriate CID Unit via the chain of command.

Criminal Conduct Non-traffic and not in-progress:

1. When there is probable cause to reasonably believe a member is responsible for the commission of an alleged crime that is non-traffic and not in-progress, an Incident Report shall be completed and submitted by the supervisor receiving the information.
2. Forward the original case packet to the appropriate CID unit.
3. Forward a copy of the case packet to IIU and the Precinct/Section Command staff.

Criminal Traffic:

1. Members, apprehended after the commission of a criminal traffic offense, shall be treated in the same manner as any other citizen in King County.
2. If a citation is to be issued, the on-duty supervisor shall conduct an on-scene review to ensure that proper procedures are followed.
3. Forward a copy of the citation and any related reports **directly** to IIU and the Precinct/Section Commander.

3.03.225

CRIMINAL CONDUCT OUTSIDE UNINCORPORATED KING COUNTY OR CONTRACT CITY: 10/09

1. When a member is notified that another member is or has been arrested by another jurisdiction, that member, receiving notification shall immediately notify IIU or any on-duty supervisor.
2. The on-duty supervisor shall:
 - a. **Immediately** notify the CDO and the appropriate Division Commander.
 - b. Ensure that normal criminal investigation procedures are followed during the investigation of all alleged violations of any law.
 - c. If needed, relieve the member from duty in accordance with 3.04.015.
 - d. Ensure that a preliminary administrative investigation is completed and forwarded to IIU whether or not the arresting agency pursues the criminal investigation.

3.03.230

PRESENTATION TO THE PROSECUTOR: 09/04

1. When a complaint involves criminal allegations, the completed investigation should be presented to the appropriate prosecutor for the consideration of filing charges prior to any IIU investigation.
2. If the prosecutor requests additional steps, before a filing decision is made, the investigator shall comply with the request and inform the IIU Commander if the requests are significant.
3. When a decision has been reached by the prosecutor, the investigator shall inform the IIU Commander and the member's Division Commander.

3.03.235

CORRECTIVE COUNSELING MEMORANDUM: 04/94

A Corrective Counseling Memorandum is written notification from a supervisor to a member addressing minor training deficiencies.

1. Corrective Counseling is:
 - a. **Not** disciplinary action.
 - b. Notification of undesirable conduct.
 - c. Documentation for evaluations.
 - If mentioned in an evaluation, the incident must be specifically stated.
 - d. Documentation for subsequent disciplinary action.
2. Corrective Counseling may be issued without an IIU investigation.
3. The memorandum shall contain:
 - a. A description of the conduct or behavior requiring counseling.
 - b. The steps taken to prevent recidivism.
 - c. Expectations of future performance.
4. Corrective Counseling Memoranda shall be retained in the member's personnel file for one (1) year from the date of issuance, unless used in a subsequent disciplinary action within the same one (1) year time period.
5. Corrective Counseling Memoranda shall be approved by the member's Precinct/Section Commander and Division Commander.

CORRECTIVE COUNSELING MEMORANDUM FORMAT: 04/94

TO: (Department Member Name) DATE:

FROM: (Supervisor Name) VIA: Chain

SUBJECT: CORRECTIVE COUNSELING

(Detailed description of conduct requiring counseling and expectations of future performance.)

This memorandum serves as documentation of the corrective counseling given and is not disciplinary action.

This memorandum shall be in your Department personnel file for one year (Refer to G.O. 3.04.235).

Approved: _____ Date: _____
(Precinct/Section Commander)

Approved: _____ Date: _____
(Division Commander)

I hereby acknowledge receipt of this Corrective Counseling Memorandum.

_____ Date: _____ Time: _____
(Department Member Signature)

cc: Personnel File (recepted copy)
Unit/Section File
Division Commander
Department Member

3.03.240

WRITTEN REPRIMANDS: 01/11

1. When disciplinary action requires a written reprimand, the following information shall be provided in a Memorandum:
 - a. Date(s) of the violation.
 - b. Type of violation.
 - Reference the specific authority covering the violation.
 - c. Concise and specific description of the violation.
 - d. Steps taken to prevent recidivism.
"This Written Reprimand will become part of your permanent file".
 - e. Written Reprimands require the approval of the member's Division Commander and the Chief Deputy.
2. The written reprimand will be prepared by the IIU Commander, Precinct/Section Commanders or Managers.
3. Written Reprimands shall be approved by the Division Commander and the Chief Deputy.
4. The Written Reprimand shall remain permanently in the member's personnel file.

WRITTEN REPRIMAND MEMORANDUM FORMAT: 01/11

TO: (Department Member Name) DATE:

FROM: (Submitting Authority) VIA: Chain

SUBJECT: WRITTEN REPRIMAND

Pursuant to your actions on May 1st, 2002 involving your off-duty participation without an Off-Duty Work Permit, a Department level investigation was conducted.

You have been found in violation of G.O. 4.03.015 in that you failed to obtain a Secondary Employment Permit for "The Flying Zamboni Circus."

The correct Department procedures regarding this violation have been reviewed by you and your supervisor.

This written reprimand will become part of your permanent Department personnel file. (Refer to G.O. 3.04.240).

APPROVED: _____ Date _____
(Division Commander)

APPROVED: _____ Date: _____
(Chief Deputy)

I hereby acknowledge receipt of the above written reprimand.

(Department Member Signature) Date: _____ Time: _____

cc: IIU File
Personnel File (recepted copy)
Division Commander
Department Member

3.03.245

GRIEVANCE PROCEDURE: 10/09

Members, who feel aggrieved, shall follow the grievance procedures outlined in either their applicable Collective Bargaining Agreements or Civil Service Rules.

3.03.250

ANNUAL ANALYSIS: 01/11

1. The Internal Investigations Unit Commander will compile an annual statistical summary report of all complaints and internal investigations to determine any trends or patterns.
2. The Commander will evaluate training needs or policy changes and make recommendations to the Sheriff.
3. Copies of the report will be given to the Chief Deputy for dissemination to the public and Sheriff's Office Members.
 - A copy of the report shall be placed in the accreditation files.

APPENDIX K

Missing Person



Case No: 01041133

Last seen 11-11:30 P.M. February 2nd, 2001
Address last seen: 14335 NE Woodinville Duvall Rd.,
Woodinville, WA 98072

Name: Elaina Marie Boussiacos
Date of Birth: 02/20/73
Height: 5'4"
Weight: 130 lbs.
Race: Hispanic
Hair Color: Dark Brown
Sex: Female

94 Nissan Altima
G.X.E.
Black 4 Door
License plate # 727 FQB
Car Driving!

ANY INFORMATION
CALL POLICE
206-296-7692
OR
425-260-8004

Kirkland Kinko's • (425) 889-2290 • (425) 889-9201

Customer Info	Customer Name or Account Name <i>Xiao, Siome</i>	Date <i>02-07-04</i>
	Contact Name <i>(if different than above)</i>	PTP Job # <i>?</i>
	Fax Number <i>(If review print is to be faxed)</i>	Pages

Review Print Type

■ Please review the attached:

Document Creation Order or Custom Printing Review Print
 This document was created according to your order specifications, and is ready for your review. Please check this final draft for correct dates, phone numbers, and other information. Once approved, check required due to changes.

Digital Output Review Print
 This review print is provided for your review. If you require any changes, please return it to Kinko's. This review print may be subject to additional charges.

Other _____

Special Instructions/Pricing:

TYPE: BBW COLOR: 150 Size %: 100% ETF Paper Code: W
 RTF
 1-1 1-2 2-1 2-2 1st-1st
 Collater: Yes NPC Front Back
 COL COMB TAPR VELO WIRE Spine: BK
 Trim booklet? Y N Restaple originals? Y N
 MIL Trim? Y N
 Cut Dimensions: X Yield: pieces

Time Due: *1:25 pm*

Customer: *Siome* Phone: _____ Courier: Key-op:

Approval

■ Provide feedback a

GO - I have reviewed this review print, I authorize Kinko's to output the remainder of the job at the agreed-upon specifications.

OK WITH CHANGES - I authorize Kinko's to make the noted changes to the review print and output the entire job according to the agreed-upon specifications, without any additional review prints for my approval.

NEW REVIEW PRINT REQUIRED - Please make noted changes and send me another review print.

REVIEW WAIVED (not recommended) - I choose not to receive a review print. Please complete order as indicated on envelope.

Customer Signature: *Siome* Date: *2/7/04*

Return

■ Return this form to Kinko's (via fax or in-branch):

Kirkland Kinko's • Project Coordinator • Fax (425) 889-9201

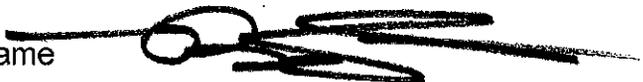
K-2

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **David B. Zuckerman**, the attorney for the petitioner, at the following address: **705 Second Avenue, Suite 1300, Seattle, WA 98104-1797**, containing a copy of the **STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION**, in **IN RE PERSONAL RESTRAINT OF SIONE P. LUI**, Cause No. **85459-9**, in the Supreme Court of the State of Washington.

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

Name



Date

04-19-2011

Done in Seattle, Washington