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Supreme Court No. ~~85459-9~~
King County Superior Court No. 07-1-04039-7SEA

IN THE WASHINGTON SUPREME COURT

In re the Personal Restraint of:

SIONE P. LUI,

Petitioner.

REPLY ON PERSONAL RESTRAINT PETITION

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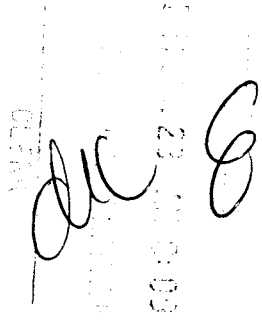

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I. INTRODUCTION

The State's response to the personal restraint petition (PRP) mirrors its response to Lui's opening brief on appeal. Whenever a piece of trial evidence is attacked, the State says that it was not important anyway. On direct appeal, Lui challenged the testimony from the medical examiner and a DNA expert. The State responded that any error was harmless because the forensic evidence was not an important part of its case. Brief of Respondent (BOR) at 33-36; 50-51.

The State takes the same approach in the PRP regarding multiple challenges to the State's evidence. For example, the State now says that the date Elaina Boussiacos's car appeared in the Woodinville Athletic Club (WAC) lot was "hardly the linchpin" of its case. State's Response at 7. It does not explain what that linchpin might be, since it cannot point to any evidence that was particularly damning.

Similarly, the State now maintains that defense witness Sam Taumoefolau's testimony was effective, obviating the need for other witnesses to explain that Lui was postering in the area of the dog track, and that Boussiacos's car was not in the WAC lot on the day she disappeared. State's Response at 12-15. In response to Lui's expert testimony that the dog tracking did not show that Lui walked from Boussiacos's car to his home, the State maintains that the jury was already aware of that. State's Response at 15-20. In regard to defense counsel's failure to challenge Detective Denny Gulla's testimony regarding how he obtained scent articles, the State maintains that the jury was already aware

that the dog might have been following Boussiacos's scent rather than Lui's. State's Response at 36. As for Gulla's testimony that Lui appeared unconcerned about Boussiacos, that the garbage can was suspiciously empty, and that there was no debris on Boussicos's shoes, the State maintains that it was all insignificant. State's Response at 37. Contrary to its implication in the BOR at 14, N.15, the State now maintains that Lui's comments about James Negron should not be taken as an attempt to deflect blame from himself. State's Response at 32.

Lui does not mean to suggest that any of this trial evidence was highly incriminating. But the State certainly portrayed it that way at trial, and the jury apparently bought the State's arguments. If the State is right that none of these points mattered very much, then what was the key evidence against Lui? Essentially all that remains is that Lui was living with Boussiacos on the night she disappeared and that the two of them were having some problems in their relationship (but with no history of domestic violence). That is hardly proof beyond a reasonable doubt.

II. REPLY ARGUMENT

A. LUI WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

1. Introduction

The State has presented a declaration from trial attorney Anthony Savage in which he denies many of Lui's allegations. The State is apparently asking this Court to find as fact that Mr. Savage's statement is

correct and that the many declarations supplied by Lui are incorrect. That is not the correct procedure in a PRP. This Court has three options:

> 1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;
> 2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;
> 3. If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the Personal Restraint Petition without remanding the cause for further hearing.

In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

Lui has certainly made a least a prima facie showing that his right to effective assistance of counsel was denied. It is hardly unusual for a trial attorney to defend himself against such claims, and the mere fact that he disputes them does not require dismissal of the PRP. Rather, at most, the existence of material, disputed facts require an evidentiary hearing at which the superior court can sort out the truth.

In his declaration, Mr. Savage excuses his lack of attention to detail by saying that he wished to concentrate on the "big picture." App. C-2 to State's Response. The problem with that approach in this case is that there was no big picture. As the State conceded in its BOR at 51, "no one piece of evidence was dispositive, but the picture as a whole convinced the jury beyond a reasonable doubt that Lui was guilty." By the same token, the defense had no "blockbuster" piece of evidence – such as

an alibi – to prove that Lui did *not* commit the crime. The only way to defeat the State's case was to pick apart its circumstantial evidence piece by piece. As Lui has explained, Mr. Savage failed to do that.

2. General Problems with Defense Counsel

Lui submitted declarations from several people, including Mr. Lui and his wife, Celese Lui, confirming that Mr. Savage would not directly answer questions about trial preparation and strategy, and would not respond to significant points brought to his attention. *See* PRP at 8. The State suggests that Savage may not have wished to discuss his strategy with anyone other than his client. State's Response at 5. Of course, the client insists that Savage spent very little time discussing the case with him as well. App. 3 to PRP. Although Savage provided a lengthy declaration to the prosecutor, he never denies that point.

Further, Savage's declaration for the State does not support the State's speculation that he felt it inappropriate to discuss the case with others. In fact, he has now expressly rejected the State's position on this point:

> Sione's wife, Celese, spent considerable time at my office during the pretrial stage of this case. I permitted her to review the discovery, make notes on it, and ask me questions about our preparation for trial. I had no concern about sharing confidential information with her. It was well understood between Sione and me that I was free to share privileged information with her. Sione clearly wanted his wife to be involved in the preparation of our case.

Declaration of Anthony Savage (6/15/11). App. 1 to this brief. This is consistent with Celese and Sione Lui's accounts.

One of the people who noted Savage's "hands-off" approach to this case was his own investigator, Denise Scaffidi. *See* App. 13 to PRP. Neither the State nor Mr. Savage has suggested any reason that an attorney would not wish to share information with his investigator.

3. Counsel Failed to Challenge the State's Theory of the Case

The State maintains that Katherine Wozow was "clear" that she first saw Boussiacos's car in the WAC lot on the morning of Saturday, February 3, 2001. State's Response at 8. But Ms. Wozow was testifying to an event that took place over seven years earlier, and she acknowledged that she was not relying on any written records to refresh her recollection. RP 749-50.

The State suggests that Sam Taumoefolau and Paul Finau could not be sure that Boussiacos's car was *not* in the WAC lot later in the week of February 5 because they might not have known what it looked like. State's Response at 8-9. Both witnesses maintain, however, that their purpose in canvassing the area was two-fold: to search for Boussiacos and her car; and to put up posters asking whether others had seen her. App. 8 and 11 to PRP. The poster itself contains a detailed description of the car. *See* App. K to State's Response. It is a reasonable inference that Finau and Taumoefolau knew what they were looking for.

The State never responds to Lui's point that Paini Harris could have confirmed his postering in the area of the WAC. As Lui has noted, she gave her statement to the Honolulu police at a time when she could not have known the significance of the postering activities. *See* PRP at 15-16.

Although Mr. Savage defends his presentation of Sam Taumoefolau's testimony, he does not explain why he failed to call Finau and Harris for corroboration.

The State also suggests that the car was well hidden in the "side parking lot" of the WAC lot such that Taumoefolau and Finau would not likely have seen it there. In fact, as App. D to the State's Response shows, the car was parked near a dumpster close to the *main* entrance to the gym. Further, Taumoefolau has explained why he and Lui had to walk by that very spot in order to return to the Kinko's for more copies. *See* App. 8 to PRP at para. 11.

As discussed in the PRP at 13, a police report indicates that both Amber Mathwig and an unnamed co-worker of hers confirmed, shortly after Boussiacos's car was found, that it did not appear in the WAC lot until Wednesday, February 7, 2001. The State characterizes this report as a "tip sheet" and notes that Mathwig does not recall speaking with the police. It is unfortunate that the police failed to obtain a full interview from Mathwig and her co-worker back in 2001. Obviously, the defense could not follow up at the time because Lui was not charged with the crime until 2007.

When the defense investigator did approach Mathwig in 2007, however, she gave an account fully consistent with the police report. Mathwig understandably did not claim to recall the exact date she saw the car in the lot. She was clear, however, that she worked only on Mondays, Wednesdays and Fridays. She saw the car on two consecutive workdays

and, finding that strange, reported the matter to WAC management on the second of those days. The police showed up on the same day Mathwig voiced her concerns. *See* App. 9 to PRP. Because it is undisputed that the police arrived on Friday, February 9, 2001, Mathwig must have first seen the car the previous Wednesday. This is, of course, fully consistent with the contemporaneous police report.

Anthony Savage now states that, just prior to her testimony at trial, Mathwig was "backing off what she had said" to the investigator, and "would not have testified that she did not see the victim's car in the gym parking lot on Monday, February 5." This is likely due to confusion on Mr. Savage's part regarding what Mathwig could or could not confirm. If, for example, he said to her, "So, you'll testify the car wasn't in the lot on Monday, right?", she would have demurred because she had no such specific recollection. Rather, Savage would have had to walk her through the circumstantial chain of events discussed above to confirm when Mathwig first saw the car.

The State has now obtained a declaration from Mathwig flatly stating that she first saw the car in the lot on Monday, February 5, 2001. It seems inconceivable, however, that she could suddenly have become certain of that date – ten years after the fact – when in 2007 she could place the date only circumstantially, and the only recording of her recollection from 2001 has the car appearing on Wednesday, February 7. Mr. Savage does not claim that Mathwig made such a firm statement at the time of trial, and if she had, the State would undoubtedly have brought that

to the attention of the jury, as it did with Ms. Wozow. Mathwig now refuses to meet with a defense investigator so the matter can be cleared up only through a reference hearing.

Mr. Savage defends his failure to call an expert regarding dog tracking because, in his view, the expert testimony would not be credible. His explanation demonstrates a misunderstanding of the evidence. Savage states: "The expert said a bloodhound cannot track a scent trail as old *as the one in this case*." Ex. C-4 to State's Response (emphasis added). Savage suggests that the expert's testimony would be incredible because "[t]he 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." *Id.* This phrasing assumes that the State's theory is correct, that is, that the dog was following an 11-day-old trail laid down on February 1, 2001, shortly after Boussiacos disappeared. But the purpose of the expert testimony was not to dispute that the dog tracked someone's scent but rather that the scent was laid down more recently than the State maintained.

Savage further states: "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." *Id.* Again, Savage misses the point. The expert would maintain that the scent could be Boussiacos's *and* that the trail was younger than 11 days. That would be consistent with Boussiacos safely leaving her home

on the morning of February 1 being waylaid, and ultimately transported to the WAC lot.

An expert could also have explained – contrary to the State's arguments – that the trail of scent particles was not likely the same path followed by the person who produced those particles. The scent particles could have been emitted at different times and in various areas between the WAC and the Lui/Boussiacos home, and then been moved about by wind and traffic. Yet as long as the areas of scent were not too far apart, the dog would be able to piece them together. *See* PRP at 17-18. The declaration of Dr. Ha shows how powerful the expert testimony would have been. *See* App. 14 to PRP.

The State does not refute any point Dr. Ha makes. Rather, it claims that its own expert admitted as much on cross-examination. State's Response at 19-20. But then, in arguing that the dog tracking evidence was admissible, the State inconsistently argues that the path followed by the dog must have been the precise one Lui took.

> [T]he 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 . . . 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.

State's Response at 21 (emphasis in original). This argument repeats the very fallacies that the trial prosecutors argued to the jury and that the State

now claims were refuted by the defense at trial. Mr. Schurman's dog "started out" near where Boussiacos's car was found because that is where Detective Gulla told him to start. RP 961-62. The dog could just as easily have begun his trail from many other points in and around the mall and the park-and-ride. Further, scent particles are easily blown about by wind and would naturally tend to collect in wind-protected areas such as brush. App. 14 to PRP at para. 9. That does not mean that any person walked through the brush.

4. Defense Counsel Failed to Present Evidence that Lui's Injury Precluded Him From Committing the Crime

In her declaration, Celese Lui maintains that she told Mr. Savage that Lui broke his arm close to the time of the murder, and that his physical therapy records and expert testimony would prove that he could not have strangled Boussiacos. Savage insisted that Sione Lui must have been strong enough to commit the crime because of his size, and refused to view the physical therapy records or consult an expert. App. 2 to PRP at para. 10. Savage essentially admits these points. App. C to State's Response at para. 11. Savage excuses his refusal to consult an expert because a witness said Lui moved a dresser close to the time of the murder, Lui changed a tire on the night Boussiacos disappeared, and the medical examiner could not rule out the possibility that a ligature was used in the killing. *Id.*

Had Savage consulted an expert, however, he would have realized that these concerns were not valid. First, although Dr. Harruff did not rule

out the use of a ligature, a more careful analysis shows that the killer clearly used his hands. *See* Declaration of Dr. Theodore Becker (App. 15 to PRP) at para. 9-10; Reply Declaration of Dr. Becker (App. 2 to this brief). Second, it is true that Jaimee Nelson testified that Lui moved a heavy dresser in November or December of 2000. As Dr. Becker explains (and Dr. Harruff would surely have agreed) that would have been physically impossible. Lui's cast was not removed until November 13, 2000, and the arm would have been severely atrophied and weakened after the cast was removed. In fact, even as late as March, 2001, physical therapy tests showed that his dominant right hand was only about half as strong as his left. App. 15 to PRP at paras. 5-6.

Of course, there is a simple explanation for Jaimee Nelson's testimony: she did not get the date quite right. At the time of trial, Nelson was attempting to recall the time of a relatively insignificant event that took place nearly eight years earlier. She did not mention any documentation, such as a calendar entry, that would help her pin down the date. In fact, she did not even claim to know the month with certainty. She testified only that it "probably" was November or December. IV RP 374-75. In fact, if Lui moved a heavy dresser for her in 2000, it must have happened before September 30, the day he broke his arm. That is only a month or two before Nelson's estimate.

That Lui changed a tire near the time of the murder proves little. The task does not take great strength when done with a good jack and tire iron. Sam Taumoefolau has explained that Lui took a long time to change

the tire on that day because he was working the jack with his left arm. App. 8 to PRP at para. 20.

The State maintains that "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." State's Response at 24. It does not suggest that it has found such an expert. If it believes it could rebut Dr. Becker, it is obligated to present some confirmation along with its response brief, just as the petitioner is required to support his PRP with documentation rather than with mere speculation. Further, even if the State did produce a contrary opinion from an expert, that would at most be grounds for a reference hearing, and not for dismissal of the PRP.

The State suggests that it would have been risky to contact an expert because that would open the door to a potential State expert. But such a decision cannot be made before the defense at least *consults* with an expert to see how helpful his testimony might be. *See, e.g.*, *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003) (defense counsel could not reasonably choose an alibi defense over a diminished capacity defense before fully investigating his client's mental state); *Douglas v. Woodford*, 316 F.3d 1079 (9th Cir.), *cert. denied*, 540 U.S. 810 (2003) (same). If the medical opinion regarding Lui were unfavorable it need not be disclosed. If favorable, it would be disclosed and the State would likewise have to disclose any counter-expert. At that

point, the defense would be free to forego the expert testimony, obviating the need for rebuttal.[1]

5. Defense Counsel Failed to Present Evidence Pointing to Another Suspect

The State maintains that Lui could not have met the standards for "other suspect" evidence regarding James Negron. Lui certainly agrees that such evidence must be relevant to be admissible. In fact, a fair summary of Washington case law concerning "other suspect" evidence is that it simply reflects the usual requirement under ER 402 that evidence be relevant, and requirement under ER 403 that the probative value outweigh the prejudicial effect. *Cf. Smithart v. Alaska*, 946 P.2d 1264, 1275-78 (1997) (Alaska follows same rule as Washington; the rule is "in essence, an attempt to apply this balancing of probative value against prejudicial impact [under Rule 403] in the specific context of evidence offered to show that a third party committed the crime."). Perhaps because the leading cases on this issue arose long before the current codification of the rules of evidence,[2] the courts have continued to quote the language of prior cases rather than the evidence rules. But certainly the legal standard is not so restrictive that it would prohibit other suspect evidence even when the evidence is relevant and the probative value is *not* "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

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[1] To the extent the State might use an expert in its case in chief, that risk existed independently of any actions of the defense.

[2] *See, e.g., State v. Kwan*, 174 Wash. 528 (1933); and *State v. Downs*, 168 Wash. 664 (1932).

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See* ER 403.

In this case, the evidence against Negron was not merely speculative. Many of the people closest to Boussiacos tried to explain to the police why he was likely the killer. Boussiacos lived in fear of Negron, a violent gang member subject to severe outbursts of anger. He had assaulted Boussiacos and their son in the past. According to Boussiacos's best friend, Evamarie Gordon, Negron and Boussiacos very recently had a "huge fight" because Boussiacos was pressing Negron for more child support and a change in the parenting plan. Negron knew Boussiacos's travel plans and could have lain in wait for her. Further, DNA matching Negron's profile was found on the victim's shoelaces[3]. *See* PRP at 23-28.

The State maintains that Negron had an alibi. State's Response at 29, citing App. 10 to PRP, Ex. G at 3 and Ex. H at 7-9, 14-15. In fact, all these pages show is that Negron claimed to have been home at the time Boussiacos disappeared and his wife (who was interviewed simultaneously) confirmed his story. A prosecutor would scoff at such an alibi if it were presented by a defendant.

The State presents Mr. Savage's explanation for declining to present Negron as an alternate suspect, but his declaration merely confirms that Savage did not understand the facts. *See* State's Response at 29,

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[3] To be sure, the DNA could also have belonged to Negron's son.

quoting App. C. at para. 7. First, Savage notes that Negron was a "church pastor," apparently suggesting that he would therefore be beyond suspicion. But if the State were permitted the bolster Negron's character with his current position, the defense would have been free to inquire at length about his long history of violent crime as a gang member. Second, Savage says that Negron was "alibi'd by three people and there was nothing to suggest they lied." In fact, the only confirmation came from Negron's wife, who had an obvious motive to protect him. Third, Savage says Negron had no motive to kill Boussiacos because "the child custody arrangements were in place . . . and there was no evidence of a fight or disagreement." But as discussed above and in the PRP, Negron and Boussiacos had recently fought over their son. In fact, Negron admitted to the police that Boussiacos had recently spoken to him about changing the parenting plan and child support. App. 10 to PRP, Ex. G at p. 3 (LUI 2233). Clearly Mr. Savage did not carefully review the discovery.

Lui also maintains that, even if the evidence pointing to Negron was not initially admissible, it became so when the State presented Lui's comments about Negron's gang membership and then had the case detective confirm that Negron had an alibi. The State maintains that it inadvertently failed to redact that portion of the statement, but it offers no declaration from the trial prosecutors on this point. In any event, however the matter came into evidence, the jury was left with the impression that Lui was making outlandish accusations against Negron to deflect blame from himself. Mr. Savage should have taken the opportunity to show that

Negron really was a gang member and that he did not have much of an alibi.

6. Defense Counsel Failed to Impeach Detective Gulla's Credibility

Mr. Savage now claims that he did not wish to bring up Detective Gulla's history of misconduct, but held that out as a threat in the event the State attempted to bolster his credentials. "As a result, I believe, the State kept his testimony tightly constrained to avoid an open door." App. C to State's Response at para. 6. If that was indeed Savage's strategy then he failed miserably in pursuing it.

Savage began his cross-examination of Detective Gulla by asking: "Mr. Gulla, in February of 2001, what had been your experience with the King County sheriff's office." RP 991. Savage then asked Gulla about his training. RP 992. With Savage's encouragement, Gulla went on for four pages of transcript about his apparently impressive experience, training and credentials. RP 991-94. That is precisely the sort of evidence that the State claims Savage was trying to keep *out*. *See* State's Response at 33-34.

Savage also apparently believed that there were no incidents involving dishonesty within the last 20 years. App. C. to State's Response at para. 6. In fact, Gulla's career is peppered with instances of dishonesty, such as deliberately sabotaging a breath test, bragging to a man he threatened that he would lie about his conduct afterwards, and presenting

testimony at a suppression hearing that was found to be either "intentionally misleading" or "carelessly inaccurate." *See* PRP at 30-38.

As discussed above, the State now minimizes the importance of Gulla's testimony against Lui. For example, the State says it matters little if Gulla deliberately or accidentally obtained a scent article contaminated with Boussiacos's scent because "the jury had available to them the reasonable inference that the dog might have been tracking Boussiacos's scent rather than Lui's." State's Response at 36. Further, it finds it "difficult to see how Gulla could have manipulated the dog track in some other way to profitable effect." *Id.* at 37. In fact, it is not difficult at all. Gulla could simply have taken an item of Lui's clothing from his home and walked it directly to the WAC parking lot and back again to the home before driving it to the WAC for his meeting with dog handler Schurman. Gulla testified that he used extreme care to avoid laying such a scent trail, RP 959-61, but the jury had only his word for that.

7. Defense Counsel Failed to Object to Prosecutorial Misconduct

(a) The Prosecutor Argued, Without Evidence, that the Defendant Committed a Sexual Assault

The State suggests that the trial prosecutor might not have been arguing that Lui committed a sexual assault. It is undisputed, however, that the prosecutor argued that sexual intercourse took place on the night Lui killed Boussiacos, that "whatever happened in that regard was very bad," and that "[m]aybe it happened at the same time she was being

strangled, maybe not." *See* PRP at 39. No jury could possibly interpret this as a mere reference to consensual sex.

(b) Two Detectives Opined that Lui was Lying

The State does not deny that the detectives gave improper opinion testimony that Lui was lying to them. Its only response is that an objection would not have helped very much. Even if that were true, it supports the freestanding claim of prosecutorial misconduct. *See* PRP at 52-53.

(c) The Detective and Prosecutor Opined that Lui Showed his Guilt by Failing to Act Like an Aggrieved Fiancée

Again, the State's response is that an objection would not have helped very much, which supports the freestanding claim of prosecutorial misconduct. The State further suggests, however, that the statements may not have been improper. It characterizes *State v. Haga*, 8 Wn. App. 481, 507 P.2d 159 (1973), as precluding only *expert* testimony about a suspect's reaction to his wife's death. In the State's view, the ambulance driver in *Haga* testified as an expert.

It is clear, however, that the *Haga* court did not limit its holding to expert testimony because it quoted at length and with approval from *Harrelson v. State*, 217 Miss. 887, 65 So.2d 237 (1953), a case involving non-expert officer testimony.

> The demeanor, acts and conduct of an accused, at the time and subsequent to the crime are admissible. However, this should be limited to a statement of the facts by the witness or witnesses, leaving the jury free to form its own conclusions. The admission of the opinion of the officers who investigated the killing that the appellant showed no signs of grief, over the objection of the appellant, was

> improper and highly prejudicial. The opinion of the sheriff, a prominent official of the county, that the appellant showed no signs of grief conveyed to the jury the impression that the sheriff thought the appellant was guilty, and it was calculated to, and undoubtedly did, influence the jury in reaching its verdict. We are unable to say that the appellant in this case received a fair and impartial trial.

Haga at 491-92, quoting *Harrelson.* Similarly, in this case, the detectives and prosecutors went beyond describing the defendant's statements and demeanor by giving their opinions that he did not act as a grieving spouse should. As in *Haga*, this amounted to an opinion that the defendant was guilty, particularly in view of the same detectives' testimony that the defendant was lying to them when he denied committing the crime.

(d) The Prosecutor Violated Lui's Right to Religious Freedom by Questioning a Witness About the Religious Beliefs He and Lui Shared

The State notes that Lui mentioned his religion during a police interview. It was the prosecutor's choice, however, to play that portion of the interview for the jury. In any event, the trial prosecutor did not suggest that he needed to rebut Lui's statements with an expert on Mormon tenets, and he noted no witness on that issue. Rather, after Sam Taumoefolau testified for the defense on matters that had nothing to do with religion, the prosecutor grilled him on Mormonism. *See* PRP at 45-46.

The State notes that, in addition, the prosecutor questioned Taumoefolau at length about the Mormon "state"[4] conference that Lui did

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[4] In fact, the event is called a "stake" conference. *See* App. H-1 to State's Response. Such conferences deal with mostly administrative matters, and there does not appear to be

not attend on Sunday, February 4, 2001. RP 1779-81. This had no relevance because Taumoefolau explained that the conference was not particularly important to most church members.

The Washington Supreme Court recently made a strong statement in *State v. Monday*, -- P.3d -- , 2011 WL 2277151 (Wash. June 9, 2001), that racial stereotypes should play no role in a criminal trial. The same should be true of religious stereotypes.

8. Counsel Failed to Seek Additional DNA Testing

Lui is still awaiting final results from Orchid Cellmark and therefore cannot yet respond to the State on this topic.

B. THE STATE'S MISCONDUCT VIOLATED LUI'S RIGHTS TO DUE PROCESS AND TO RELIGIOUS FREEDOM

1. The State Violated its Obligation to Provide Impeachment Information Regarding Detective Gulla

The State notes that the trial prosecutor provided a brief email to Mr. Savage giving him a bit more information about the misconduct discussed in the newspaper article. App. I to State's Response. The email, however, does not begin to cover the massive materials in Detective Gulla's personnel file, only some of which have now been obtained through public disclosure requests. As the State seems to concede, the trial prosecutors had a duty to learn the contents of that file themselves in

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any pressure on individual church members to attend. *See* http://en.wikipedia.org/wiki/Stake_(Latter_Day_Saints)#Stake_conference

order to satisfy their *Brady* obligations. The State does not contend that they did so.

2. The State's Misconduct During the Trial Violated Lui's Rights to Due Process and Religious Freedom

Lui's points are covered above in section II(A)(7).

C. JUROR MISCONDUCT VIOLATED LUI'S CONSTITUTIONAL RIGHTS

The State contends that Lui has not made out a prima facie case because he has not provided a first-hand declaration from juror Clare Comins, who spoke with the defense investigator, or from other jurors. As Lui has explained, however, Mr. Comins refuses to sign a declaration and Lui cannot even reach most of the jurors because the trial court denied him access to the jurors' contact information. *See* PRP at 53-54. There is no mechanism in the PRP rules for Lui to compel discovery unless a reference hearing is ordered. Essentially, the State's position is that Lui cannot have a reference hearing until he submits first-hand declarations, but he cannot obtain first-hand declarations until he has a reference hearing. It cites *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 113 S. Ct. 421 (1992), as establishing this "Catch-22."

The central holding in *Rice* was that "a mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient." *Id.* at 886 (emphasis in original). Instead, the petitioner "must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." *Id.* To show that one's claims are *based* on competent evidence, however, is not necessarily

the same thing as *presenting* that evidence. The Court acknowledged that when the critical evidence is in the possession of others, a petitioner may present "other corroborative evidence" in lieu of their affidavits. *Id.* A hearsay statement of a witness, for example, may strongly "corroborate" what that witness would say if called to the stand, particularly when the statement is taken by a licensed investigator. To present a reliable quote from a witness who refuses to sign an affidavit is a far cry from merely stating an unsupported "belief" about the witness's testimony.

Certainly *Rice* does not overrule ER 1101(c)(3), which states that the rules of evidence need not be applied to, among other things, "habeas corpus proceedings." A PRP is now the only vehicle for asserting habeas corpus claims in an appellate court. *See* RAP 16.3; *In re Runyan*, 121 Wn.2d 432, 440, 853 P.2d 424 (1993).

The State's interpretation of *Rice* raises constitutional concerns under Const. Art. I, section 10. "[The] right of access to courts includes the right of discovery authorized by the civil rules. As we have said before, it is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense." *Putman v. Wenatchee valley Med. Ctr.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (citations and internal quotations omitted). "Requiring medical malpractice plaintiffs to submit a certificate [of merit from a medical expert] prior to discovery hinders their right of access to courts. Through the discovery process, plaintiffs uncover the evidence necessary to pursue their claims. Obtaining the evidence necessary to obtain a certificate of

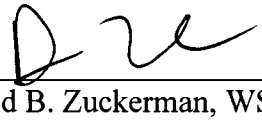
merit may not be possible prior to discovery, when health care workers can be interviewed and procedural manuals reviewed." *Id.* (citation omitted). It follows with greater force that requiring a prisoner to support his claims with first-hand, sworn statements – before he has an opportunity for discovery – violates his right of access to the courts.

V. REQUEST FOR RELIEF

Based on the foregoing, Lui asks this court to reverse and remand for a new trial. In the alternative, he requests a reference hearing.

DATED this 22nd day of June, 2011.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Sione Lui

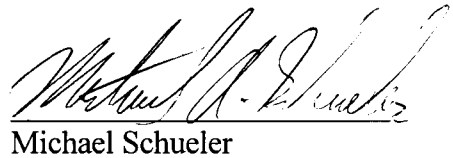
CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing Reply on Personal Restraint Petition on the following:

Ms. Deborah Dwyer, Senior DPA
King County Prosecutor's Office
Appellate Unit
516 Third Avenue, W554
Seattle, WA 98104

Mr. Sione P. Lui #319129
Monroe Corrections Center
Washington State Reformatory
PO Box 777
Monroe, WA 98272-0777

June 22, 2011
Date


Michael Schueler

Appendix 1

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF: SIONE P. LUI, Petitioner.	SUPREME COURT NO.: 85459-9 **DECLARATION OF ANTHONY SAVAGE**

Anthony Savage declares as follows:

1) I was the trial attorney for Sione Lui.

2) Sione's wife, Celese, spent considerable time at my office during the pretrial stage of this case. I permitted her to review the discovery, make notes on it, and ask me questions about our preparation for trial. I had no concern about sharing confidential information with her. It was well understood between Sione and me that I was free to share privileged information with her. Sione clearly wanted his wife to be involved in the preparation of our case.

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

6/15/2011
Date

Anthony Savage
Anthony Savage WSBA # 2208

Signed in Seattle, Washington

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DAVID B. ZUCKERMAN
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Seattle, Washington 98104
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Appendix 2

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff/Appellee, vs. SIONE P. LUI, Defendant/Appellant.	KING COUNTY NO.: 07-1-04039-7SEA **REPLY DECLARATION OF THEODORE J. BECKER, Ph.D.**

Dr. Theodore J. Becker declares as follows:

1) I have been informed that the prosecutor questions why my analysis did not include the possibility that Elaina Boussiacos was strangled by a ligature.

2) I am well aware that the medical examiner, Dr. Richard Harruff opined that the victim might have been strangled either with bare hands or with a ligature. As noted in my earlier declaration, I reviewed the discovery from the medical examiner's office and the trial testimony of Dr. Harruff.

3) As I stated in my declaration, however, "several of Boussiacos's injuries are clearly caused by the hands of her attacker." *See* Declaration at para. 9. I made that determination based, in part, on my knowledge of biomechanics. In particular, symmetric abrasions on the left and right sides of the inferior aspect of the chin are consistent with a bilateral pressure abrasion from pressure over the carotid artery, caused by the thumb tips of the attacker. These marks are consistent with a lower, triangular bruise, corresponding with thenar eminence, the body

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of muscle on the palm of the human hand just beneath the thumb. The distance between the upper and lower marks is consistent with a flexed distal interphalangeal joint (first knuckle) leaving a gap until the thenar eminence is reached. *See* Declaration at paras. 9-10. Aligning the hands in this manner is an effective way to cause death by strangulation because it enables the thumbs to apply significant pressure to the carotid artery.

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

6/8/2011
Date

Theodore J. Becker, Ph.D.

Signed in Everett, Washington

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