SUPREME COURT NO. 102405-3

NO. 84247-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAMANTHA HALL-HAUGHT,

Petitioner.

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

The Honorable Carolyn Cliff, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Samantha Hall-Haught, appellant below, asks this Court to grant review of the Court of Appeals' unpublished decision in State v. Hall-Haught, No. 84247-1-I, (filed July 31, 2023),[1] pursuant to RAP 13.4.

B. ISSUE PRESENTED FOR REVIEW

The Confrontation Clause demands that the accused be afforded the opportunity to cross-examine a witness who creates incriminating testimonial evidence. Here, the prosecution failed to call as a witness the person who conducted the incriminating drug screen testing of Hall-Haught's blood for Tetrahydrocannabinol (THC). Instead, the prosecution called a surrogate witness who conducted no personal testing, did not create the chromatography samples, did not prepare any report, and could only assume the testing controls and equipment functioned correctly. Where the surrogate witness's

[1] A copy of the opinion is attached as an appendix. Hall-Haught's motion for reconsideration was denied on August 29, 2023.

"independent conclusion" as to Hall-Haught's THC value was a mere parroting of the quantitative test conclusions of her subordinate, violated Hall-Haught's confrontation rights, and the Court of Appeals opinion conflicts with precedent from this Court and the Court of Appeals, is review appropriate under RAP 13.4(b)(1), (b)(3), and (b)(4)?

C. STATEMENT OF THE CASE

1. Trial Evidence.

Kyra Hall was driving southbound on Camano Island toward her home on the evening of September 12, 2019. RP 254-56, 258. It was dark and had been raining off and on. RP 267-68, 287, 325, 344-45. The speed limit was 50 miles-per-hour (MPH), but a sign urged drivers to reduce their speed to 30 MPH before entering a blind curve on the road. RP 261, 264, 267, 323, 340-44, 359, 362-63, 395, 518-19, 554-55.

Hall entered the blind curve at 35 MPH. RP 269, 287, 381, 395, 523-24. The curve was not illuminated by any streetlights. RP 260, 266-68, 302, 323-24, 343-45, 359-60, 517. As Hall

rounded the curve, she saw headlights coming toward her at high speed from the opposite direction. RP 256, 270-73. Unable to pull off the road, Hall's car collided with the Honda Civic driven by Hall-Haught. RP 256, 272.

Hall temporarily lost consciousness and struggled to breathe and move when she awoke. RP 274-75. Hall was able to call her husband who in turn called 911. RP 274, 291-93. Hall-Haught meanwhile went to a nearby house and asked for help. RP 325-27. Hall-Haught was "panicking, crying, dramatic" and "hard to understand." RP 326-29, 305, 347-49.

Police observed extensive damage to both cars at the collision scene. RP 344-45, 519-21. The trunk contents of the Civic were strewn in the road, and included marijuana paraphernalia, packaging, and a pipe. RP 345-46, 363-65, 407-11, 431, 434, 520, 522. There was also a marijuana odor coming from the car. RP 524-25, 556. No actual marijuana was found. RP 433-34, 556.

The subsequent police investigation showed that both cars exceeded the suggested 30 MPH when entering the curve. RP 395-96. The tachometer of the Civic was recorded at 2300 to 2400 revolutions-per-minute (RPM) and the speedometer at 42 MPH. RP 374, 395, 524, 555. The tachometer of Hall's car was recorded at 1200 RPM and the speedometer at 35 MPH. RP 381, 395, 523-25, 551-52.

Data collected from Hall's car suggested that shortly before the collision, the brake pedal was engaged, but police could not determine "the amount of brake force or how much it slowed the vehicle." RP 539-40. Data could not be collected from the Civic due to the age of the car, but there was no evidence that it had attempted to break before the collision. RP 382-83, 550. A gouge in the southbound lane suggested to police the collision had occurred at that point, and that the Civic had straightened out the curve and crossed the center line. RP 384, 386-92, 406-07, 431-32, 551-52. Hall-Haught was not cited with any traffic violation at the scene. RP 435.

Hall was taken to the hospital after being removed from the car. RP 240, 277-78. Hall suffered three neck fractures, a broken rib, and a bruised lung. RP 244-48, 283. She was released from the hospital several days later RP 246, 278-79, 283, 310. Hall continued to experience occasional vertigo and panic attacks from the collision. RP 279-82, 284-85, 312-13.

Hall-Haught was also taken to the hospital where she was interviewed by police. RP 329-30, 413-15. Hall-Haught acknowledged being the driver and only occupant of the Civic. RP 348-39, 415-16, 432. Hall-Haught explained she was traveling north toward Stanwood when she saw headlights shortly before the collision. RP 349-50, 415-16, 432. She did not mention experiencing any mechanical issues with her car but did acknowledge crossing the road center line. RP 418. Police observed Hall-Haught's eyes were bloodshot and watery and that her pupils were "slightly dilated." RP 418. She denied consuming marijuana within the previous four days but said her boyfriend often smoked in the car. RP 416.

No field sobriety tests were administered to Hall-Haught. RP 419-20. Still, police obtained a warrant to collect Hall-Haught's blood for forensic testing. RP 420, 424, 435, 443-46. There was no evidence a similar sample was collected from Hall. RP 2484-50, 558. Testing revealed that Hall-Haught's blood contained 14 ng/mL of Carboxy-THC and 1.5 +/- 0.40 ng/ML of THC. RP 480-83, 486-87; Ex. 43. No alcohol was detected. RP 485.

Washington State Patrol toxicology lab supervisor, Katie Harris, did not complete the testing of Hall-Haught's blood sample, but testified to the results. RP 469, 476, 496; Ex. 43. Harris also opined that THC could affect a person's cognitive processing, which could lead to an increase in reaction times. RP 490. According to Harris these effects could decrease car handling, including an inability to maintain vigilance and misperceive space and time situations. RP 491-92, 494-94. Harris could not say what level of THC would affect any particular

person and could not opine what effects Hall-Haught might have experienced based on her THC level. RP 492, 497.

Based on this evidence, the Island County prosecutor charged Hall-Haught with vehicular assault nearly one and a half years later. CP 1-2. The prosecutor alleged that Hall-Haught had caused substantial bodily injury while driving her car in a reckless manner, and/or while under the influence of marijuana, and/or with disregard for the safety of others. CP 1-2.

A jury convicted Hall-Haught. CP 67; RP 650. The jury was not, however, unanimous as to any of the charged alternate means by which Hall-Haught allegedly committed vehicular assault. CP 62; RP 650-63, 670. Given the absence of unanimity, Hall-Haught was sentenced under the disregard for the safety others means of vehicular assault. CP 63 (citing RCW 46.61.522(1)(c)); RP 670.

2. Confrontation Violation & Court of Appeals Opinion.

Hall-Haught argued the trial court violated her constitutional right to confront witnesses by admitting testimony regarding her THC blood test results without presenting the lab technician who performed the test. Brief of Appellant (BOA) at 10-33.

Washington State Patrol forensic scientist, Mindy Krantz, tested samples of Hall-Haught's blood and concluded that it contained 14 ng/mL of Carboxy-THC and 1.5 +/- 0.40 ng/ML of THC. RP 480-83, 486-87; Ex. 43. At trial, the prosecution sought to introduce Krantz's testing conclusions through lab supervisor, Harris. Harris reviewed Krantz's test results and data and signed off on Krantz's report but did not conduct any independent testing and "didn't actually physically do the extraction -- and create the samples that went into the chromatography[.]" RP 469, 476, 496; Ex. 43.

Hall-Haught objected to the State's proposed use of Harris as a surrogate trial witness and argued that introducing the testing results through Harris would violate Hall-Haught's confrontation rights. RP 447-50.

Relying on State v. Lui,[2] the prosecution argued Harris's testimony did not violate Hall-Haught's confrontation rights because Harris could testify as to the testing procedures used and explain how she came to her own independent opinion based on the data prepared by Krantz. RP 453-56.

The trial court found that Harris could testify as to Krantz's testing procedures and conclusions reached, because she was "not merely going to be a mouthpiece for the conclusions of the absent analyst" and "a person with her expertise regularly relies upon [the information] in reaching her own conclusions about the tox results." RP 456-57.

Despite the recognizing that witness Harris had not been present during the testing and was only a supervisor who

[2] 179 Wn.2d 457, 315 P.3d 493 (2014).

reviewed the report prepared by a different lab technician, the Court of Appeals concluded Hall-Haught's confrontation rights were not violated because Harris testified that she came to her own independent conclusion. Op. at 6-7.

Hall-Haught now seeks review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Admission of testimonial drug testing results without testimony from the expert who conducted the testing, violated Hall-Haught's right to confront witnesses against her, and conflicts with precedent from this Court and the Court of Appeals.

A person accused of a criminal offense has the right to confront the witnesses against him. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The Confrontation Clause bars admission of testimonial statements by a witness who does not appear at trial, unless the witness is unable to testify, and the accused had a prior opportunity for cross-examination. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.

Ct. 1354, 158 L. Ed. 2d 177 (2004). This is so regardless of whether a document falls within a firmly rooted hearsay exception. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009).

Various formulations of testimonial statements exist, including pretrial statements that declarants would reasonably expect to be used prosecutorially. Crawford, 541 U.S. at 51. The Crawford Court explained that "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" are testimonial. Id. at 52. Statements made to "establish or prove past events potentially relevant to later criminal prosecution" also qualify as testimonial. Davis, 547 U.S. at 822.

In Melendez-Diaz, the United States Supreme Court concluded that a lab technician's certification prepared in connection with a criminal drug prosecution was testimonial and its admission at trial without the lab technicians testimony

violated the Confrontation Clause. 557 U.S. at 319-24. Similarly, in Bullcoming v. New Mexico, the Supreme Court held that "A document created solely for an 'evidentiary purpose'...made in aid of a police investigation, ranks as testimonial." 564 U.S. 647, 664, 131 S. Ct. 2705, 180 L.Ed.2d 610 (2011) (quoting Melendez-Diaz, 557 U.S. at 317-20).

Here, the blood tests results are unquestionably testimonial. The testing was specifically done to aid the prosecution's investigation and solely for the purpose of gathering evidence for Hall-Haught's trial. Exs. 42-43. Hall-Haught was entitled to confront a witness regarding the testing procedures and conclusions. The court erred however, when it concluded the right to confrontation could be satisfied through the testimony of surrogate witness, Harris.

The blood testing was conducted by Krantz, who also generated the data, lab notes, and conclusions concerning the THC amount. RP 459-63; Ex. 43. The surrogate witness, Harris, testified about Krantz's testing of the blood and her

conclusions, even though Harris did not personally conduct the extraction, create the samples that went into the chromatography, conduct any testing of the blood herself, and acknowledged that her "own independent conclusions" were based entirely on her review of Krantz's data, test results, and report. RP 460, 463, 468-69, 476-77, 496.

In reaching the conclusion that lab certificates could not be admitted without the analysts testifying in person, the Melendez-Diaz Court focused heavily on the fact that "serious deficiencies" existed in forensic evidence used in criminal trials. 557 U.S. at 319. As the Court explained, "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." Id. The Court noted that confrontation of the forensic tester and cross-examination of their training, honesty, proficiency, and methodology was vitally important to "assuring accurate forensic analysis." Id. at 318-20.

Similarly, the Bullcoming Court emphasized that cross-examination of a surrogate witness cannot convey what the testing analyst knew or observed about the events her report concerned, and cannot "expose any lapse or lies" by the analyst. 564 U.S. at 661-63. The Court explained that the Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Id. at 662. Furthermore, substituting a witness who can comment on work done by someone else but who did not personally test the substance or observe the testing as it occurred does not serve the purposes of confrontation, even when the "comparative reliability of an analyst's testimonial report [is] drawn from machine produced data." Id. at 661-62. "Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of

Mme. Curie and the veracity of Mother Teresa.'" Bullcoming, 564 U.S. at 661 (quoting Melendez-Diaz, 557 U.S. at 319, n.6).

As in Melendez-Diaz and Bullcoming, Harris's testimony did not serve the purpose of confrontation and does nothing to "assure the accurate forensic analysis" conducted by Krantz. As Harris acknowledged, she was the "reviewer" but not the tester. RP 467-69, 476, 496. Krantz was "the person that's going to be doing the extractions, putting the extracts on to an instrument for the actual testing. And then they would prepare the data for the review by a member of the technical team." RP 460, 463.

Harris's role was to merely review the contents of the case file, compare it to the generated reported, and "make sure that the data meets all the criteria for reporting." RP 467-68. Harris maintained that her "own independent conclusion" from reviewing the test results and data was that blood results were positive for both THC and Carboxy THC, with the THC value at 1.5 nanograms per millimeter and the Carboxy THC value at 14 nanograms per millimeter. RP 480-83, 486-87, 496. But

Harris's entire understanding of those results was based on "what I observed in the case file" and her belief that "extraction procedures for the cannabinoid screening were followed correctly." RP 477. Indeed, because the case file did not record the testing screen controls, Harris could only assume "the controls were used properly and the calibrators were used properly and the instrument was operating the way that it needed to[.]" RP 477, 479. Because Harris did not personally conduct or witness the testing, Hall-Haught was deprived of the opportunity to cross-examine anyone about discretionary decisions and how they may have influenced the testing outcome.

The Court of Appeals acknowledged that Harris was not present during the testing and only reviewed the report prepared by Krantz. Op. at 6. Nonetheless, the Court of Appeals cited this Court's opinion in State v. Lui, 179 Wn.2d 457, 490, 315 P.3d 493 (2014), for the proposition that "only the 'ultimate expert analysis, and not the lab work that leads into that

analysis,' is subject to the confrontation clause requirement." Op. at 5. As Lui makes clear, however, analytical care is required, in circumstances such as Hall-Haught's where a drug screening result has a more easily understood and potentially inculpatory meaning. Indeed, Lui draws a clear distinction between toxicology reports and other types of testing results.

Lui was charged with murder for allegedly strangling his girlfriend. Lui, 179 Wn.2d at 463-64. Associate medical examiner, Kathy Raven, performed an autopsy and prepared a written report, explaining her conclusions. Raven was unavailable to testify, however, so the prosecution presented testimony from chief medical examiner, Richard Harruff. Harruff reviewed Raven's report and all the supporting evidence. Harruff discussed the case with Raven and agreed with her conclusion about strangulation. Harruff cosigned Raven's report and testified he would not have done so unless he agreed with her conclusions. Harruff also testified to the conclusions of a toxicology report prepared by another analyst

and to temperature readings of the deceased's body taken by another doctor, which Harruff then used to estimate a range for the time of death. Id. at 464-65.

Additionally, Gina Pineda, supervisor of a DNA laboratory, testified regarding DNA testing she had not performed. Pineda did not personally participate in or observe the tests, although she did use the electronic data produced during the testing process to create a DNA profile that reflected "[her] own interpretation and [her] own conclusions ...'" Id. at 466. She offered a document summarizing the test results, which the trial court admitted solely for illustrative purposes. Based on the results of these tests, Pineda could not eliminate Lui as a major donor of the male DNA found on the decedent. Id. at 465-66.

On appeal, Lui argued that admission of the autopsy, toxicology, temperature readings, and DNA testing results violated his right to confrontation. Id. at 467, 507. Analyzing each piece of evidence individually, this Court concluded that

some of the evidence presented did violate Lui's right to confrontation. Id. at 463, 486.

Addressing the DNA and temperate reading tests, this Court held there was no confrontation violation because the testifying witness had engaged in direct analysis of raw data to reach the inculpatory conclusion presented in the trial court. 179 Wn.2d at 488-89. The Court explained the DNA testing process does not become inculpatory and invoke the confrontation clause until an analyst employs his or her expertise to interpret the machine readings and create a profile. Pineda used her expertise to create a factual profile that incriminated Lui, and therefore produced her own analysis, "an original product that can be tested through cross-examination." Id. at 489.

But this Court distinguished the toxicology and autopsy reports, where statements taken from the reports were used for the purposes of identifying the cause and manner of death. Id. at 494. In this instance, Harruff "did not bring his expertise to bear

on the statements or add original analysis -- he merely recited a conclusion prepared by nontestifying experts." Id. The court held this evidence violated Lui's right of confrontation. Id. at 495-97.

As in Lui, here Harris engaged in no such direct analysis of raw data. As already discussed, her subordinate was the one who evaluated Hall-Haught's blood and concluded that it contained a particular amount of THC. Krantz was the witness "against" Hall-Haught who could testify to facts concerning her THC levels, which are necessarily subject to scrutiny via confrontation. To conclude—as the Court of Appeals necessarily did—that a witness's inculpatory "independent conclusion" in the absence of any raw data analysis satisfies the Confrontation Clause, runs afoul of Lui and fails to engage in the careful analysis dictated by this Court.

The Court of Appeals opinion also conflicts with Division One's opinion in City of Seattle v. Wiggins, 23 Wn. App. 2d 401, 412, 515 P.3d 1029 (2022). There, the Court of Appeals

upheld the exclusion of a crime laboratory reviewer's testimony as to the blood alcohol content results of Wiggins blood draw, in the absence of the analyst who conducted the tests on the blood sample. Id. at 409-10. The analyst who actually performed the blood test which revealed Wiggins blood to have .11g/100mL of ethanol, was unavailable to testify. Instead, the city offered the testimony of the reviewing toxicologist who did not perform any testing on the blood vials, was not present during the testing, and merely reviewed the data the analyst generated and signed the report. But it was the analyst's work and resulting report which provided the inculpatory statements against Wiggins. Id. at 410-12.

It was on this basis that Wiggins correctly distinguished Lui. As Wiggins noted, "[t]he Lui court focused on the fact that it was only once the comparisons of the DNA profiles began 'that any element of human decision-making enter[s] the process.'" Wiggins, 23 Wn. App. 2d at 413 (quoting Lui, 179 Wn.2d at 488). Thus, the comparison itself is where the

necessary inculpatory element entered the equation and "alone, the DNA profile developed by the other analysts provided nothing inculpatory." Id. In contrast, "the BAC number attributed to Wiggins's blood was the inculpatory statement, and there was no further analytical work or comparison needed once the BAC was established[.]" Id.

Wiggins held the Confrontation Clause was violated because the witness did not add any original analysis to the work of the primary forensic scientist who rendered the evidence inculpatory against Wiggins. 23 Wn. App. 2d at 409-10. Significant to the Court of Appeals conclusion that reviewer engaged in no independent inquiry was the fact he performed no tests on the blood himself, did not observe the forensic scientist perform the test, and engaged in no direct analysis of raw data to reach the inculpatory conclusion. Thus, as Wiggins properly recognized, the BAC number attributed to Wiggins's blood by the primary forensic scientist was the inculpatory statement and the reviewer's testimony was inadequate because

"there was no further analytical work or comparison needed once the BAC was established[.]"

Here, the Court of Appeals distinguished Wiggins on the basis that Harris "came to [her] own independent conclusion" following her review of all the data in the file." Id. As such, the Court of Appeals reasoned the confrontation clause was not violated because "Harris only testified to her conclusion, and not the lab technician's." Id. at 7. This circumventing of Wiggins is problematic for several reasons.

First, Wiggins rejects the notion that a reviewer's mere turn of phrase "independent conclusion" is sufficient to cure a confrontation clause violation. The reviewer in Wiggins also "asserted he could form an independent opinion based on [the primary forensic scientist] results." 23 Wn. App. 2d at 409. As Wiggins recognized however, the reviewer's own testimony contradicted this assertion. Id. at 411. Rather, the reviewer's testimony demonstrated he did not actually engage in "the sort of independent inquiry required by the case law[.]" Id.

Here too, Harris uttered the phrase "my own independent conclusion" on a single occasion. RP 496. But, like the reviewer in Wiggins, Harris's testimony belies the basis on which any "independent conclusion" exists. Like Wiggins, "[t]here was no further analytical work or comparison needed once the [THC] was established" by someone other than Harris. 23 Wn. App. 2d at 413.

The Court of Appeals offered a block quote to support its conclusion that Harris testified only to her own conclusion about the THC number:

> Q: And based on your review of the file in – in this case, did it appear that the extraction and the testing protocols for the quantitative tests were done correctly?
>
> A: Yes.
>
> . . . .
>
> Q: And based on that review, what were the values for THC and carboxy THC that were found in the quantitative test?
>
> A: THC the value is 1.5 nanograms per mil and for carboxy THC, it was 14 nanograms per mil.

Op. at 7 (quoting RP 483).

Rather than distinguish Wiggins, this quote further evidences there is no distinction in Hall-Haught's case. Harris's testimony demonstrates her "independent conclusion" as to the THC value is based on the quantitative test results identified in the file she reviewed; a quantitative test she did not attend, perform, or issue a report on. RP 482, 496. In short, the inculpatory THC number attributed to Hall-Haught's blood was already established by the quantitative test; Harris's "independent conclusion" was based not on any original analysis of her own, but a mere parroting of the quantitative test conclusions of her subordinate.

Because the Court of Appeals decision presents a significant question of constitutional law, and conflicts with both this Court's opinion in Lui, and Division One's opinion in Wiggins, review is appropriate under RAP 13.4 (b)(1), (3), and (4).

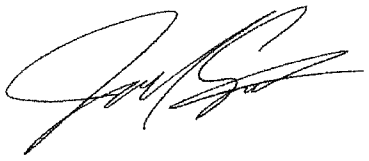
E. CONCLUSION

Hall-Haught respectfully asks this Court to grant review and reverse her conviction.

I certify that this document contains 3,979 words, excluding those portions exempt under RAP 18.17.

DATED this 20th day of September, 2023.

Respectfully submitted,
NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX

FILED
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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SAMANTHA HALL-HAUGHT, Appellant.	DIVISION ONE No. 84247-1-I UNPUBLISHED OPINION

DWYER, J. — Samantha Hall-Haught appeals from the judgment entered on a jury's verdict finding her guilty of vehicular assault. On appeal, she contends that she was deprived of her constitutional right to confront the witnesses against her when lab results indicating THC[1] in her system were admitted into evidence without the testimony of the technician who performed the test. Because the supervisor who testified and was available for cross-examination had independently reviewed the testing and the results and testified to her own opinions about them, we conclude that Hall-Haught's confrontation rights were not violated. The claims of error in Hall-Haught's statement of additional grounds are also without merit. Accordingly, we affirm Hall-Haught's conviction.

Hall-Haught further contends that the trial court conducted an inadequate inquiry into her ability to pay before imposing a crime lab fee and a criminal filing

[1] Tetrahydrocannabinol.

fee, and that a victim penalty assessment and DNA[2] collection fee should be stricken in light of recent statutory amendments. We agree that the DNA fee is no longer permitted and that the sentencing court's inquiry was insufficient with respect to the remaining fees and the penalty assessment. We therefore remand for the court to strike the DNA fee and to perform an individualized inquiry into Hall-Haught's ability to pay before imposing the criminal filing fee, crime lab fee, and victim penalty assessment.

I

On September 12, 2019, Samantha Hall-Haught's car collided with Kyra Hall's car as they each came around a curve on Camano Island. At the collision site, police found cannabis paraphernalia strewn from Hall-Haught's car, including packaging and a pipe. Hall and Hall-Haught were both taken to the hospital, where a police officer observed Hall-Haught as having bloodshot and watery eyes with dilated pupils. The officer then obtained a search warrant to test Hall-Haught's blood. A blood test was performed at the Washington State Toxicology Laboratory, and resulted in a finding that Hall-Haught had 1.5 ± 0.40 nanograms/milliliter of THC in her blood.

The State charged Hall-Haught with vehicular assault, on the grounds that she drove or operated a vehicle either (1) in a reckless manner, (2) while under the influence of a drug, or (3) with disregard for the safety of others. The case proceeded to a jury trial. At trial, the State called Katie Harris, a supervisor with the Washington State Toxicology Lab, to testify to the results of the blood test.

[2] Deoxyribonucleic acid.

Hall-Haught objected to Harris's testimony on the grounds that Harris was not the technician who conducted the blood test, and that introducing the results without the testimony of that technician violated Hall-Haught's right to confront the witnesses against her. The trial court overruled the objection, and the lab results were admitted into evidence.

The jury found Hall-Haught guilty of vehicular assault, but was not unanimous as to the means by which the crime was committed. Hall-Haught was sentenced to one month in jail. The sentencing court had the following exchange with Hall-Haught about her ability to pay legal fees and fines:

> [THE COURT:] Do you have any idea whether you will be able to resume your job when you get back [from confinement]?
>
> SAMANTHA HALL-HAUGHT: I don't know they're set in stone about it. I did let them know what could happen. And they told me that I can miss up to four weeks. But I wasn't sure if that was because they gave me a FLMA paper to fill out. So I don't know if they are going to allow to do that because I didn't get a paper filled out because the doctor wouldn't fill it out for me to miss four weeks.
>
> THE COURT: Okay. So let's try it this way. Are there any unusual bills or debts that you owe right now?
>
> SAMANTHA HALL-HAUGHT: I do.
>
> THE COURT: What is that?
>
> SAMANTHA HALL-HAUGHT: I owe rent and PUD.
>
> THE COURT: Okay. And I probably said it in a way that was confusing. I understand that you owe obligations. So does every person in this Court. Any unusual kinds of debts or obligations? Things that maybe most people don't have that you've got?
>
> SAMANTHA HALL-HAUGHT: Not that I'm aware of.
>
> THE COURT: Okay. The Court is not making a finding of indigency.

The sentencing court imposed a $500 victim penalty assessment, a $200 criminal filing fee, a $100 crime lab fee, and a $100 DNA collection fee.

Hall-Haught appeals.

II

Hall-Haught first asserts that the trial court violated her constitutional right to confront the witnesses against her by admitting testimony regarding the blood test results without presenting the lab technician who performed the test for cross-examination. We disagree. In Washington, expert witnesses may testify to their own conclusions, even when they rely on data prepared by nontestifying technicians. State v. Lui, 179 Wn.2d 457, 483, 315 P.3d 493 (2014). Because Harris testified to her own independent conclusion, Hall-Haught's confrontation rights were not violated.

A criminal defendant has the right to confront "the witnesses against him." U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. "We apply a two-part test to determine whether the lack of testimony from a witness who assisted in the preparation of forensic evidence testing implicates the confrontation clause." State v. Galeana Ramirez, 7 Wn. App. 2d 277, 283, 432 P.3d 454 (2019). An individual's statements come within the scope of the confrontation clause only if, first, the person is "a 'witness' by virtue of making a statement of fact to the tribunal, and second, the person [is] a witness 'against' the defendant by making a statement that tends to inculpate the accused." Lui, 179 Wn.2d at 462. "Even if a witness imparts facts to the court, the witness is not a witness 'against' the defendant unless those facts are adversarial in nature and have 'some capacity

to inculpate the defendant.'" Galeana Ramirez, 7 Wn. App. 2d at 284 (quoting Lui, 179 Wn.2d at 480-81).

This test does not permit "a laboratory supervisor to parrot the conclusions of his or her subordinates"; instead, it permits "expert witnesses to rely on technical data prepared by others when reaching their own conclusions, without requiring each laboratory technician to take the witness stand." Lui, 179 Wn.2d at 483. While the testimony of technicians "may be *desirable*, . . . the question is whether it is constitutionally *required*." Lui, 179 Wn.2d at 480. "[A] break in the chain of custody might detract from the credibility of an expert analysis of some piece of evidence, [but] this break in the chain does not violate the confrontation clause." Lui, 179 Wn.2d at 479. Thus, only the "ultimate expert analysis, and not the lab work that leads into that analysis," is subject to the confrontation clause requirement. Lui, 179 Wn.2d at 490.

This distinction is perhaps most clear in the context of DNA testing, wherein a lab technician may produce an allele table, a collection of numbers that does not "have any particular meaning to a nonexpert." Lui, 179 Wn.2d at 488. In such a case, an expert witness is necessary to "explain what the numbers represent[ ] . . . and why they [are] significant." Lui, 179 Wn.2d at 488. This analysis, unlike the allele table itself, is potentially inculpatory to the defendant, and therefore only the expert witness is conducting the ultimate analysis that implicates the confrontation clause. In the context of drug screening, in which a lab technician's result may have more easily understood and potentially inculpatory meaning, additional care in our analysis is required.

In City of Seattle v. Wiggins, a forensic scientist performed a toxicology analysis of the defendant's blood, determined his blood alcohol content, and prepared a final report of her results. 23 Wn. App. 2d 401, 404, 515 P.3d 1029 (2022). The City sought to admit the scientist's report through the testimony of a supervisor who had signed the report as the "reviewer." Wiggins, 23 Wn. App. 2d at 404. We upheld the exclusion of the supervisor's testimony, noting unchallenged findings that the supervisor was not present during the testing and did not give additional meaning to the raw data, and thus concluding that the supervisor's "own testimony demonstrates that he did not engage in the sort of independent inquiry required by the case law in order to permit his testimony as the inculpatory witness against Wiggins." Wiggins, 23 Wn. App. 2d at 410-11.

Here, as in Wiggins, Harris testified that she was a supervisor and had reviewed the report prepared by a different forensic scientist, rather than being present during the testing. However, unlike in Wiggins, Harris specifically testified that she "came to [her] own independent conclusion" following her review of all the data in the file. Thus, Harris was not merely "parrot[ing] the conclusions" of her subordinates, which is not permitted by the confrontation clause. Lui, 179 Wn.2d at 483. Instead, she was "rely[ing] on technical data prepared by others when reaching [her] own conclusions," which is permitted without the testimony of each analyst. Lui, 179 Wn.2d at 483.

In Wiggins, the court noted that "[t]he BAC number attributed to Wiggins's blood is the inculpatory statement against him," and that therefore the technician who reached that number was required to testify. 23 Wn. App. 2d at 413. Here,

the number establishing the THC concentration in Hall-Haught's blood was independently reached by both the lab technician and Harris. However, Harris only testified to her own conclusion about that number:

> Q: And based on your review of the file in – in this case, did it appear that the extraction and the testing protocols for the quantitative tests were done correctly?
>
> A: Yes.
>
> . . . .
>
> Q: And based on that review, what were the values for THC and carboxy THC that were found in the quantitative test?
>
> A: THC the value is 1.5 nanograms per mil and for carboxy THC, it was 14 nanograms per mil.

Because Harris only testified to her conclusion, and not the lab technician's, her testimony does not violate the confrontation clause. We affirm Hall-Haught's conviction.

III

Hall-Haught next asserts that several legal financial obligations (LFOs) should be stricken. She contends that the trial court conducted an inadequate inquiry into her ability to pay before imposing the criminal filing fee and crime lab fee, and that the DNA fee and victim penalty assessment should be stricken based on recent statutory amendments. We agree that the court's inquiry was insufficient and that the DNA fee must be stricken on remand.[3]

Former RCW 10.01.160(3) (2018) provides that a court shall not order an indigent defendant to pay costs. To make this determination, the sentencing

[3] Hall-Haught did not raise this issue below. However, because of the problems LFOs impose on indigent defendants, we "regularly exercise [our] discretion to reach the merits of unpreserved LFO arguments." State v. Glover, 4 Wn. App. 2d 690, 693, 423 P.3d 290 (2018). We do so here.

court must make an individualized inquiry on the record into a defendant's "(1) employment history, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) other debts." State v. Ramirez, 191 Wn.2d 732, 744, 426 P.3d 714 (2018). "If the trial court fails to conduct an individualized inquiry into the defendant's financial circumstances, as RCW 10.01.160(3) requires, and nonetheless imposes discretionary LFOs on the defendant, the trial court has per se abused its discretionary power." Ramirez, 191 Wn.2d at 741. We review de novo whether the court performed an adequate inquiry into the defendant's ability to pay. Ramirez, 191 Wn.2d at 741-42.

Here, the court asked Hall-Haught only two questions regarding her ability to pay—whether she expected to keep her job following incarceration, and whether she had any "unusual bills or debts." This was not an adequate inquiry. The court failed to perform the mandatory inquiry into "the defendant's income, as well as the defendant's assets and other financial resources" and "the defendant's monthly expenses." Ramirez, 191 Wn.2d at 744. We therefore remand for the court to perform this inquiry before imposing the criminal filing fee and the crime lab fee.[4]

Hall-Haught also contends that the victim penalty assessment (VPA) and DNA collection fee should be stricken based on recent statutory amendments.[5] The victim penalty assessment was recently addressed in State v. Ellis, No.

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[4] See RCW 36.18.020(2)(h) (the criminal filing fee "shall not be imposed on a defendant who is indigent"); RCW 43.43.690(1) (the crime lab fee may be suspended if "the person does not have the ability to pay the fee").

[5] Hall-Haught also contends that the trial court's imposition of the victim penalty assessment violated the constitutional excessive fines clause. Because of the statutory amendment, we need not address this issue.

56984-1-II, slip op. at 12 (Wash. Ct. App. June 13, 2023), https://www.courts.wa.gov/opinions/pdf/D2%2056984-1-II%20Published%20Opinion.pdf. There, Division Two of this court recognized:

> In the 2023 session, the legislature passed Engrossed Substitute House Bill 1169. LAWS OF 2023, ch. 449. ESHB 1169 added a subsection to RCW 7.68.035 that prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). LAWS OF 2023, ch. 449, § 1; RCW 7.68.035(4). The amended statute also requires trial courts to waive any VPA imposed prior to the effective date of the amendment if the offender is indigent, on the offender's motion. LAWS OF 2023, ch. 449, § 1; RCW 7.68.035(5)(b). This amendment will take effect on July 1, 2023. LAWS OF 2023, ch. 449.

Ellis, slip op. at 12. Although the amendment did not take effect until after Hall-Haught's sentencing, it applies to her case because this matter is on direct appeal. Ellis, slip op. at 12. Thus, if the court determines on remand that Hall-Haught is indigent, the court must strike the victim penalty assessment on remand pursuant to RCW 7.68.035(4).

In the same act, the legislature amended the statute governing the DNA collection fee to eliminate the fee for all defendants. LAWS OF 2023, ch. 449, § 4. This amendment also took effect on July 1, 2023. Thus, the court must strike the DNA fee on remand.

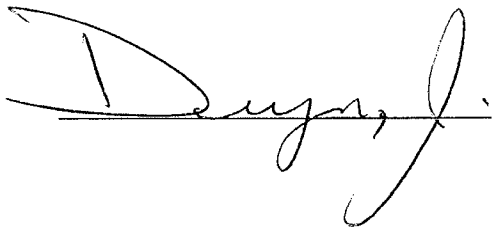
IV

Hall-Haught's pro se statement of additional grounds notes that only one police officer smelled cannabis at the collision, claims that she was not intoxicated, suggests that Hall's blood should have been tested, and says she feels her attorney did not fight for her. Because the statement does not refer to

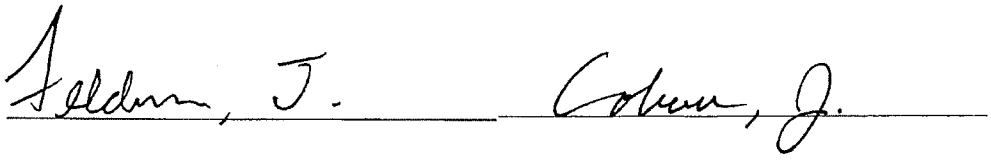
specific errors in the course of her prosecution, it raises no reviewable issues. RAP 10.10(c) ("[T]he appellate court will not consider a defendant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors.").

We affirm Hall-Haught's conviction. We remand for the trial court to strike the DNA fee and to reconsider its imposition of the criminal filing fee, crime lab fee, and victim penalty assessment after performing an individualized inquiry into Hall-Haught's ability to pay.

Affirmed in part, reversed in part, and remanded.



WE CONCUR:



NIELSEN KOCH & GRANNIS P.L.L.C.

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