

NO. 35186-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBIN TAYLOR SCHREIBER,

Appellant.

STATE OF WASHINGTON
BY  DEPUTY

07 JUL 10 PM 12:55

COURT OF APPEALS
DIVISION II

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

The Honorable Robert L. Harris, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
B. STATEMENT OF THE CASE.....	3
C. ARGUMENT.....	14
1. THE TRIAL JUDGE’S REFUSAL TO RECUSE HIMSELF DEPRIVED THE PROCEEDINGS OF THE APPEARANCE OF FAIRNESS, AND REVERSAL IS REQUIRED.	14
a. <i>The trial judge attended Crawford’s funeral with the county prosecutor.</i>	14
b. <i>The judge’s conduct raised reasonable questions about his ability to remain impartial.</i>	16
2. THE COURT’S UNREASONABLE RESTRICTION ON DEFENSE COUNSEL’S CROSS EXAMINATION OF A KEY PROSECUTION WITNESS DENIED SCHREIBER HIS RIGHT OF CONFRONTATION.	23
a. <i>The trial court limited cross examination on matters directly relating to the witness’s testimony when the witness invoked the psychologist-client privilege.</i>	23
b. <i>Because Boynton’s testimony was crucial to the state’s case, the statutorily created privilege must yield to Schreiber’s constitutional right of confrontation.</i>	26
3. EXCLUSION OF EXPERT TESTIMONY ON PERCEPTION AND MEMORY VIOLATED SCHREIBER’S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.....	32
a. <i>Expert testimony was offered to help the jury evaluate witness credibility in light of inconsistent and evolving recollections. .</i>	32
b. <i>The court’s erroneous exclusion of Loftus’s testimony requires reversal.</i>	36

D. CONCLUSION 43

TABLE OF AUTHORITIES

Washington Cases

<u>Sherman v. State</u> , 128 Wn.2d 164, 905 P.2d 355 (1995).....	17, 18, 19, 20
<u>Smith v. Behr Process Corp.</u> , 113 Wn. App. 306, 54 P.3d 665 (2002) ...	20, 21
<u>State v. Allery</u> , 101 Wn.2d 591, 682 P.2d 312 (1984).....	39
<u>State v. Bilal</u> , 77 Wn. App. 720, 893 P.2d 674, <u>review denied</u> , 127 Wn.2d 1013 (1995)	17
<u>State v. Burri</u> , 87 Wn.2d 175, 550 P.2d 507 (1976)	37
<u>State v. Carlson</u> , 66 Wn. App. 909, 833 P.2d 463 (1992), <u>review denied</u> , 120 Wn.2d 1022 (1993)	16
<u>State v. Cheatam</u> , 150 Wn.2d 626, 81 P.3d 830 (2003).....	38, 39, 40, 41
<u>State v. Darden</u> , 145 Wn.2d 612, 41 P.3d 1189 (2002)	26, 38
<u>State v. Davis</u> , 154 Wn.2d 291, 111 P.3d 844 (2005), <u>aff'd by Davis v.</u> <u>Washington</u> , 126 S. Ct. 2266 (2006).....	31
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983).....	26
<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	22
<u>State v. Madry</u> , 8 Wn. App. 61, 504 P.2d 1156 (1972)	16, 17
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996)	37, 38, 43
<u>State v. Romano</u> , 34 Wn. App. 567, 662 P.2d 406 (1983).....	16, 20
<u>State v. Taylor</u> , 50 Wn. App. 481, 749 P.2d 181 (1988)	39
<u>State v. York</u> , 28 Wn. App. 33, 621 P.2d 784 (1980).....	37

Federal Cases

Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)..... 36

Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)..... 37

Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) 26, 27, 28, 29, 30, 31

In re Murchison, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955)..... 16

Jaffee v. Redmond, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996) 27

Offutt v. United States, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954)... 16

Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927) 22

United States ex rel. Perry v. Cuyler, 584 F.2d 644 (3rd Cir. 1978), cert. denied, 440 U.S. 925 (1979)..... 22

United States v Nixon, 418 U.S. 683, 94 S Ct 3090, 41 L Ed 2d 1039 (1974)..... 27

United States v. Cardillo, 316 F.2d 606 (2d Cir.), cert. denied, 375 U.S. 822, 11 L. Ed. 2d 55, 84 S. Ct. 60 (1963) 30

Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).....26, 37, 38

Other Cases

People v. Bridgeland, 19 A.D.3d 1122, 796 N.Y.S.2d 768 (2005)..... 27

Richardson v. State, 83 S.W.3d 332 (Tex. App. 2002) 22

State v. Heemstra, 721 N.W.2d 549 (Iowa Sup. 2006)..... 27

Statutes

RCW 10.95. 020(1)..... 9

RCW 18.83.110.....	27
RCW 9A.32.030(1)(s).....	9
RCW 9A.32.050(1)(b).....	10
Rules	
CJC Canon 3(A)(4).....	18
CJC Canon 3(D)(1).....	16
ER 401.....	38
ER 402.....	38
ER 702.....	38, 39, 40
Constitutional Provisions	
U.S. Const. amend. VI.....	16, 26
Wash. Const. art. I, § 22.....	16, 26, 37

A. ASSIGNMENTS OF ERROR

1. The trial judge's refusal to recuse himself denied appellant a fair trial before an impartial tribunal.

2. The trial court unreasonably limited cross examination of a key prosecution witness.

3. By limiting cross examination of a key state witness as to matters directly impacting the credibility of the witness's testimony on direct examination, the trial court violated appellant's constitutional right of confrontation.

4. The trial court erroneously concluded that expert testimony offered by the defense would not be helpful to the jury.

5. The trial court's exclusion of relevant, admissible, and helpful expert testimony denied appellant his constitutional right to present a defense.

Issues pertaining to assignments of error

1. Appellant was charged with first degree murder of a deputy sheriff. The trial judge attended the victim's funeral, traveling to and from the ceremony with the county prosecutor and his chief deputy. The judge attended the funeral in his role as superior court presiding judge and was not assigned to the case at the time. Although the judge and prosecutors did not discuss details of the case, after the funeral they had a conversation

about the tragic circumstances of the officer's death. Based on these circumstances, appellant moved for recusal, but the judge denied the motion. Even if no actual prejudice is demonstrated, does the judge's participation in the case violate the appearance of fairness doctrine, requiring reversal? (Assignment of Error 1)

2. A police officer who responded to the incident which led to the victim's death was a key witness for the state. This officer had been traumatized by the incident and sought psychological counseling to deal with that trauma. The trial court denied appellant's motion to disclose the counseling records and also precluded the defense from cross examining the officer regarding the nature and extent of his treatment, relying on the psychologist-client privilege. Where information about the officer's treatment was directly relevant to the credibility of his testimony on direct examination, must the statutorily created privilege yield to appellant's constitutional right of confrontation? (Assignments of Error 2 and 3)

3. The state relied substantially on eyewitness testimony at trial. Because the witnesses' recollections were inconsistent, and because in several instances, the witnesses' recollections changed over time, the defense offered testimony from memory and perception expert Geoffrey Loftus. Loftus would provide a scientific explanation as to how memories are formed, including the effects of expectations and after-acquired

information. The court excluded this testimony, however, finding the information was a matter of common understanding and would be a comment on the witnesses' credibility. Where the scientific explanation, which was contrary to commonly held beliefs, would have helped the jury assess the defense theory, did exclusion of the expert testimony deny appellant his right to present a defense? (Assignments of Error 4 and 5)

B. STATEMENT OF THE CASE

Appellant Robin Schreiber is the father of two children. After he and his wife divorced in 1995, they shared custody of the children. 7RP¹ 1303-04. Schreiber remained in the family home, and the children lived with him half the time. 7RP 1304, 1307. In addition, Schreiber paid his ex-wife, Debra Phares, child support, never missing a payment. 7RP 1305, 1316. He is a devoted father who loves his children very much. 7RP 1317.

Schreiber's son turned 18 in January 2004, and when he finished high school in June, he began living with Phares full time. 7RP 1308. Phares talked to Schreiber about increasing the child support payments to account for this change and also to provide a clothing allowance for

¹ The Verbatim Report of Proceedings is contained in 19 consecutively-paginated volumes, designated as follows: 1RP—8/8/06, 4/12/06; 2RP—5/22/06; 3RP—6/5/06; 4RP—6/6/06; 5RP—6/7/06; 6RP—6/8/06; 7RP—6/9/06; 8RP—6/12/06; 9RP—6/13/06; 10RP—6/14/06; 11RP—6/15/06; 12RP—6/16/06, 6/19/06; 13RP—6/20/06; 14RP—6/21/06; 15RP—6/22/06; 16RP—6/23/06; 17RP—6/26/06; 18RP—6/27/06; 19RP—6/28/06, 7/27/06.

Schreiber's daughter, who was then 15 years old. 7RP 1308-10. On the evening of July 29, 2004, Schreiber talked to his daughter about this proposal, even though he and Phares had agreed not to involve their children in child support discussions. 7RP 1311. Their conversation was intense, and Schreiber's daughter was upset. 8RP 1545. She left to go to a friend's house after Schreiber went to sleep, leaving a note for her father. 7RP 1314-15.

Schreiber was distressed by the note when he found it the next morning. He was afraid of losing his children to Phares, and he thought they hated him because of her. 8RP 1552-53. That day, July 30, was a very emotional day for Schreiber. 8RP 1555. He called his girlfriend, Kim Mortensen, from work several times, sounding upset and depressed. 8RP 1555. As she was driving home, she received another call from Schreiber. He told her he "just couldn't do this anymore" and sounded very upset. 8RP 1557.

Although Schreiber drinks regularly, he was drinking more than usual that day. 8RP 1574-75, 1614; 14RP 2817-18. In the ten years she had been with him, Mortensen had never seen him so drunk. 8RP 1605. When Mortensen arrived home, she found Schreiber in the master bedroom with a shotgun and a bag of ammunition. 8RP 1558-60. She took the gun away from him and had her son call 911. 8RP 1562-63.

When she found Schreiber heading toward the closet where a rifle was stored, she stepped in front of him and yelled that she would not allow him to hurt himself. 8RP 1566. He got past her, and she left the house. 8RP 1566-67. Schreiber had attempted suicide in the past, and Mortensen was worried he would succeed this time. 8RP 1603.

Schreiber called Phares around 7:30 or 8:00, saying she did not have to worry about him anymore, there were deputies at his house, and he had his gun with him. 7RP 1312. She, too, was afraid Schreiber was suicidal, so she called 911. 7RP 1315-16.

Shortly after 7:00 pm, a call went out dispatching units to a reported disturbance with weapons. 3RP 589. Everyone in the squad room at the time of the call headed to the scene. 4RP 707. Several police cars parked along the road and in and around Schreiber's driveway. 3RP 591; 4RP 710, 769. Clark County Sheriff's Sergeant Brad Crawford was in charge of the scene. He set up a containment area and requested that the SWAT team, hostage negotiators, and an armored vehicle respond. 4RP 710, 712-13.

While the call initially went out as a disturbance with weapons, police were soon informed that the concern was a suicidal man with a gun. 4RP 718; 6RP 1198. Mortensen talked with police and explained the situation when she came out of the house. 3RP 595; 4RP 771. She gave

them Schreiber's cell phone number as well as the land line number. She also gave a description of the inside of the house and drew a sketch. Although Mortensen pleaded with the police to talk to Schreiber, no calls were ever made into the house. 4RP 749; 8RP 1607-08.

Schreiber's mother was also present at the scene. Like Mortensen, she too was very distraught and wanted to ensure that the police did not hurt Schreiber. 4RP 659, 709, 738-39. Without addressing her concerns, police ordered her and other family members to go to another location away from the house. 5RP 1004. One officer threatened to handcuff Schreiber's mother and place her in a patrol car if she continued to yell at them. He then half-dragged her down the driveway. 4RP 657-58.

Police officers surrounded the house, taking positions in the trees, behind patrol cars, and in a neighbor's house. 3RP 599-600; 4RP 711, 814; 7RP 1405. The screens in the upper windows of Schreiber's house had been removed, and Schreiber was observed walking from room to room, pointing a rifle out the windows, and drinking beer. 3RP 601-02, 607; 4RP 817-18; 7RP 1407. He was then seen coming out of the house, crawling on elbows and knees, carrying a rifle. 3RP 611. He stopped periodically to look through the scope, eventually reaching a pickup truck parked in front of the garage. 4RP 830-31, 834-35; 5RP 1008. When

officers heard the truck start, they headed to their patrol cars to pursue. 3RP 614; 4RP 715.

Crawford was the first to leave, driving his unmarked patrol car. 4RP 742, 773, 776. Schreiber's driveway intersects with 114th Street. A short distance to the west of the driveway, 114th Street curves 90 degrees to the south, becoming 124th Avenue. 4RP 776; 10RP 2074. Crawford stopped his car at the curve in the road. 5RP 930.

Schreiber, unable to drive down his driveway because it was blocked by patrol cars, drove the truck west through a field, turned left onto a neighbor's driveway, then turned right onto 114th Street, heading west. 5RP 1017, 1023-24; 6RP 1268; 13RP 2596. He was going very fast through the field, slipping in the grass and out of control. The truck fishtailed onto 114th Street, bounced onto the road in a jarring motion, crossed to the wrong side of the road, and almost hit a mailbox. 3RP 618; 4RP 842; 5RP 1024; 6RP 1247, 1262, 1268; 13RP 2593.

As Schreiber drove through the field, the truck tore through a barbed wire fence, severing the right front brake line and reducing the truck's braking capacity to 37 percent. 9RP 1808, 1869; 10RP 1951. Schreiber's truck picked up speed as it proceeded on 114th Street. 3RP 618. At about 8:15, just seconds after turning onto 114th, Schreiber's truck collided with Crawford's patrol car. 4RP 670; 7RP 1396; 16RP 3113.

Several patrol cars had been following Schreiber down 114th Street, and they reached the scene of the collision almost immediately. 3RP 617, 620. Schreiber was ordered out of the truck and placed under arrest. 3RP 621. A rifle was found in the cab of the truck. 4RP 635.

A group of officers pushed the truck away from the patrol car, then used the truck's winch to pull the car away from a utility pole. 4RP 639, 641, 779-80; 5RP 941-43. Crawford was removed from the patrol car and flown to a hospital. 4RP 642. He died as a result of blunt force injuries sustained in the collision. 3RP 569-70.

When Schreiber was taken to the hospital as well, the officer transporting him noticed a strong odor of intoxicants and noticed that Schreiber's speech was slurred. 7RP 1417, 1423. While Schreiber was at the hospital, his blood was drawn two times. The first blood draw at 9:40, tested by the hospital, indicated a blood alcohol level of .17. 14RP 2818-19. When Schreiber's blood was drawn at 10:10, almost two hours after the collision, he still smelled of alcohol, his eyes were bloodshot and watery, his face was flushed, and he had some difficulty talking. 10RP 2067, 2069; 11RP 2245. Schreiber's blood alcohol level at that time, as determined by the Washington State Patrol Toxicology Lab, measured at .14. 12RP 2410. Those measurements indicate that Schreiber's blood

alcohol level at time of collision was as high as .18. 12RP 2421; 14RP 2821; 16RP 3117.

Police began their investigation of the collision that night. 10RP 2064-65. Numerous photographs were taken at the collision site and in Schreiber's home. 10RP 2121. A mark from one of the patrol car's tires was found on the road. 10RP 2106. Scratches in the road indicated a portion of the patrol car had come into contact with the pavement. 10RP 2110. Tire impressions were discovered in the field the next day. 10RP 2130. And there was a curved tire mark from where Schreiber turned off of his neighbor's driveway onto 114th Street. 10RP 2135. In addition, officers discovered and photographed a 34-foot-long trail of brake fluid behind the truck. 10RP 2103, 2120; 11RP 2249.

Vancouver Police traffic collision investigator Stephen Capellas was one of the lead investigators in this case. 10RP 2039, 2057. In his investigation report filed in January 2005, Capellas concluded that the trail of brake fluid resulted from Schreiber's attempt to brake prior to impact. 11RP 2253, 2332. Clark County Sheriff's collision investigator Hirada reached the same conclusion in his report. 13RP 3564; 15RP 2889.

The Clark County Prosecuting Attorney charged Schreiber with aggravated first degree murder. CP 2-3; RCW 10.95. 020(1); RCW 9A.32.030(1)(s). The information was amended twice, and the case

finally proceeded to jury trial before the Honorable Robert L. Harris on charges of aggravated first degree murder, or, in the alternative, second degree felony murder. CP 182-85; RCW 9A.32.050(1)(b). The jury was also instructed on the lesser included offenses of second degree intentional murder and first and second degree manslaughter. CP 410. In addition, the prosecutor alleged that Schreiber was armed with a firearm and sought an exceptional sentence based on allegations that Schreiber knew the victim was a law enforcement officer performing his official duties. CP 182-85, 428, 429.²

At trial, both the state and the defense called experts and eyewitnesses in an attempt to establish what happened during the collision. There was no dispute that the truck was traveling somewhere between 30 and 40 miles per hour at the time of the collision. 10RP 1943; 11RP 2242; 14RP 2720, 2724. Further, while witnesses did not remember seeing the truck's brake lights prior to the collision, 3RP 620; 5RP 940, 1047; 6RP 1273; 7RP 1338, even the state's expert testified that if Schreiber had hit the brakes at the start of the brake fluid trail, he still would not have been able to slow to any significant degree, due to the damage to the braking system. 11RP 2342.

² In the amended information, the state also alleged that Schreiber's conduct manifested deliberate cruelty and that Crawford was particularly vulnerable. Only the law enforcement aggravator was submitted to the jury. CP 182-85, 429.

There was conflicting testimony as to most other aspects of the collision, however. For instance, the witnesses did not agree whether Crawford's emergency lights were on at the time of the collision. Some remembered seeing lights. 7RP 1452; 8RP 1497; 12RP 2462 . Another mistakenly thought the lights were on the roof of the unmarked patrol car. 7RP 1470. And still others could not identify Crawford's car as a police car, because they had seen no lights or other markings. 6RP 1283; 7RP 1401, 1433; 13RP 2615.

Similarly, some witnesses remembered seeing Crawford pull completely off the road, while others testified that it looked like Crawford was trying to block the road with his car. 6RP 1259, 1284; 7RP 1333; 13RP 2599. Capellas testified that he believed Crawford's car was mostly off the road at the time of the collision. 11RP 2354. The defense experts determined, however, that the patrol car was in the road, blocking the westbound lane. 13RP 2637-40, 2652-53; 14RP 2747, 2755; 15RP 2969.

Despite the police investigation findings that the brake fluid trail resulted from pre-impact braking, the state's theory at trial was that the trail of brake fluid was deposited when the officers used the truck's winch to move the patrol car after the collision. 11RP 2233. The state had conducted two sets of tests attempting to replicate the fluid pattern to support this preferred conclusion. 10RP 1944-48, 1958-59; 11RP 2195-

99. Defense experts testified that state's tests failed to replicate the fluid trail, however. 13RP 2666-71; 14RP 2751-53; 15RP 2986, 2990. These experts found that the physical evidence supported the initial police determination, concluding that the brake fluid trail was deposited when Schreiber attempted to brake prior to impact. 13RP 2655-65; 14RP 2749-50; 15RP 2985.

The effects of Schreiber's intoxication were also disputed. Although the state's theory was that Schreiber was not so impaired that he lacked the ability to make decisions, the state's expert testified that even a person with a significant degree of alcohol tolerance cannot compensate for unexpected events which occur while driving. 12RP 2456. Capellas agreed that someone with a BAC level of .14 or higher would be unsafe to drive, his vision and perception would be impaired, and his reaction time would be noticeably lessened by the blood alcohol level. 11RP 2339-40. Defense experts testified that, due to his level of intoxication and the short amount of time Schreiber could have been aware of Crawford's presence in the road, Schreiber could not have formed the intent to kill Crawford. 14RP 2837; 16RP 3104.

In closing, the state argued that Schreiber intentionally steered and accelerated the truck into the side of Crawford's patrol car, resulting in the collision which killed Crawford. 18RP 3294-95.

Defense counsel argued that Crawford's death was not murder but a very tragic accident. 18RP 3322. Schreiber was emotional and suicidal, as well as grossly intoxicated. 18RP 3328, 3331. His behavior was stupid and irrational, but there was no evidence of intent to kill Crawford. 18RP 3334. Crawford's car was blocking the road, and in his intoxicated condition, Schreiber could not react quickly enough to avoid the collision. 18RP 3350, 3371, 3387-88. Nor was he capable of forming the intent to kill Crawford. 18RP 3406-07. Counsel argued that Schreiber was negligent, or at most reckless, and the jury should convict him of the lesser included offense of second or first degree manslaughter. 18RP 3416.

The jury found Schreiber guilty of second degree intentional murder. CP 433; 19RP 3451. It also found by special verdict that Schreiber was armed with a firearm at the time of the offense and that he knew the victim was a law enforcement officer performing official duties. CP 434-35; 19RP 3452.

With an offender score of 0, Schreiber's standard range was 123 to 220 months. CP 460; 19RP 3558. At sentencing, the court stated that the jury's finding as to the aggravating factor should not go unrecognized, and it therefore imposed an exceptional sentence of 287 months, plus a 60-month firearm enhancement, for a total of 347 months. CP 463; 19RP 3558.

Schreiber filed this timely appeal. CP 473.

C. ARGUMENT

1. THE TRIAL JUDGE'S REFUSAL TO RECUSE HIMSELF DEPRIVED THE PROCEEDINGS OF THE APPEARANCE OF FAIRNESS, AND REVERSAL IS REQUIRED.

a. **The trial judge attended Crawford's funeral with the county prosecutor.**

Sergeant Crawford's funeral was held in Southeast Portland, Oregon, on August 5, 2004. The emotionally compelling ceremony was well publicized in the local and regional media, including television, radio, and newspaper. CP 50-51.

Trial judge Robert Harris attended Crawford's funeral. He traveled to and from the funeral with the Clark County prosecuting attorney, his chief deputy prosecutor, and a Clark County District Court Judge. CP 50.

On the way to the funeral, the group stopped at a restaurant for lunch. CP 51, 53. On the ride home, the judges and prosecutors discussed the funeral and how well attended it was. They were all emotionally affected by the service, and they discussed the tragic circumstance which brought them together. CP 52, 53.

Clark County Superior Court Judge Roger Bennett, who was the trial judge initially assigned to the case, declined to go to the funeral. He

felt that, since he was the assigned trial judge, his attendance at Crawford's funeral would be inappropriate, and he wished to avoid any appearance of bias or lack of impartiality. CP 53.

Judge Bennett ultimately recused himself when he learned that his children were associated with the Schreiber children. CP 54. Another judge had had conversations about the case with defense counsel and therefore could not be assigned, Schreiber filed an affidavit of prejudice against another judge, and still others were unavailable for medical reasons or inexperience. CP 54-55. In the end, Judge Harris assigned himself to the case. CP 55.

Prior to trial, the defense moved for Judge Harris to recuse himself, arguing that the judge's attendance at the funeral of the person Schreiber was charged with murdering created an appearance of impropriety. CP 29. In response, Judge Harris noted that he attended the funeral in his capacity as Presiding Judge for Clark County, and he was not the assigned trial judge at the time. CP 54. Judge Harris did not believe Crawford had ever appeared before him in court, he did not know the Crawford family, and he had no contact with them at the funeral or any other time. CP 55.

Judge Harris denied the motion for recusal, concluding that since he attended the funeral in a purely ceremonial role and had no personal issues of grief, there were no grounds for disqualification. CP 38.

Schreiber filed a motion for discretionary review with this Court, which was denied. CP 57-59.

b. The judge's conduct raised reasonable questions about his ability to remain impartial.

Criminal defendants have a due process right to a fair trial by an impartial judge. Wash. Const. art. I, § 22; U.S. Const. amends. VI, XIV. To protect this constitutional right, the Code of Judicial Conduct requires judges to disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. CJC Canon 3(D)(1). The canon recognizes that situations may arise where the appearance of fairness might be compromised by the judge's participation in the decision. State v. Carlson, 66 Wn. App. 909, 918-19, 833 P.2d 463 (1992), review denied, 120 Wn.2d 1022 (1993). As the United States Supreme Court has acknowledged, "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)).

"The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972); see also State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983) ("Next in importance to rendering a

righteous judgment, is that it be accomplished in such a manner that no reasonable question as to its impartiality or fairness can be raised.”).

The effect on the judicial system can be debilitating when "a trial judge's decisions are tainted by even a mere suspicion of partiality." Sherman v. State, 128 Wn.2d 164, 205, 905 P.2d 355 (1995); Madry, 8 Wn. App. at 70 (“The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice.”). Thus, under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonable person, knowing and understanding all the relevant facts, would conclude that all parties obtained a fair, impartial, and neutral hearing. Sherman, 128 Wn.2d at 206; State v. Bilal, 77 Wn. App. 720, 893 P.2d 674, review denied, 127 Wn.2d 1013 (1995).

No Washington case has addressed whether a judge who attended the funeral of a decedent may preside over the trial of the man accused of murdering the decedent without violating the appearance of impartiality. A comparison to cases involving analogous fact patterns is helpful, however.

For example, the Supreme Court has held that a trial judge’s refusal to disqualify himself can violate the appearance of fairness doctrine, even when there is no indication in the record of actual prejudice.

Sherman, 128 Wn.2d at 206. In Sherman, a doctor challenged his termination from a residency program. The trial court granted summary judgment and awarded Sherman compensatory and punitive damages. Sherman, 128 Wn.2d at 168-69. The Supreme Court reversed and remanded to another judge, finding the trial court had violated the appearance of fairness doctrine. Sherman, 128 Wn.2d at 206.

Sherman had become chemically dependent on narcotics while working as a resident, and he was receiving long-term treatment from the Washington Monitored Treatment Program (WMTP). Sherman, 128 Wn.2d at 169-70. In the course of reviewing Sherman's treatment records in camera to determine whether to release them to appellants, the trial judge directed his extern to contact the WMTP for information about the process used to monitor recovering physicians. The extern was provided information about general monitoring procedures but no information specific to Sherman. Once the judge received this information, he determined that Sherman's records needed to be turned over to appellants. Sherman, 128 Wn.2d at 203-04.

Upon learning of the judge's action, appellants moved for recusal, but the judge ruled that recusal was unnecessary. Sherman, 128 Wn.2d at 204. The Supreme Court disagreed. It held that the judge's investigation into the WMTP's monitoring process violated CJC Canon 3(A)(4), which

prohibits a judge from initiating or considering ex parte or other communications concerning a pending or impending proceeding. Sherman, 128 Wn.2d at 205. Moreover, even though appellants suffered no apparent prejudice as a result of the ex parte communication, recusal was required. Sherman, 128 Wn.2d at 206.

Actual prejudice need not be demonstrated, because even a mere suspicion of partiality taints the judge's decision. Thus, the judge is disqualified if a reasonable person knowing all the relevant facts would question his impartiality. Sherman, 128 Wn.2d at 205-06. The court found that by contacting the WMTP for information about the monitoring process, the trial judge may have inadvertently obtained information critical to a disputed issue. A reasonable person might therefore question his impartiality, and recusal was necessary. Sherman, 128 Wn.2d at 206.

In this case, as in Sherman, the judge's pre-trial actions created an appearance of unfairness which required recusal. Judge Harris attended Crawford's funeral in his capacity as Presiding Judge of Clark County Superior Court, knowing that Crawford's death was the subject of an impending criminal prosecution in that court. Not only did he attend the funeral, but he also traveled to and from the ceremony with the county prosecutor, who would be bringing charges in that prosecution. A reasonable person knowing these facts would have questions regarding

Judge Harris's ability to remain impartial when he later assigned himself to preside over the trial in which Schreiber was charged with murdering Crawford.

The question is not whether the trial record indicates any actual bias or prejudice on the part of Judge Harris. See Sherman, 128 Wn.2d at 20; Romano, 34 Wn. App. at 569 (reversal required where the record revealed not even the slightest hint of actual bias, because judge's ex parte investigation created appearance of unfairness). By attending the funeral, traveling with the prosecutor, and participating in a conversation about the "very tragic, and emotional circumstance that brought all of them together,"³ the judge may have inadvertently obtained information critical to a disputed trial issue. His impartiality might therefore reasonably be questioned, and he should have recused himself. See Sherman, 128 Wn.2d at 206.

By contrast, where a trial judge had inadvertent contact with a class representative before trial on a class action lawsuit, this Court found the judge did not violate the appearance of fairness in denying a motion to recuse. Smith v. Behr Process Corp., 113 Wn. App. 306, 341, 54 P.3d 665 (2002). In Smith, the judge explained that after helping a neighbor move, the moving party accepted an impromptu dinner invitation from his

³ CP 53.

neighbor's sister. The judge was introduced to the sister and her husband by their first names, and he discovered only after the gathering that they were parties in a currently pending case. Smith, 113 Wn. App. at 339.

The judge denied a motion for recusal, stating he was not even sure that his hosts were parties in the case at the time of his contact with them, the case was not discussed, and he had no part in arranging the contact. Smith, 113 Wn. App. at 340. This Court held that it was unlikely a reasonable person knowing these facts would question the judge's impartiality, and the judge was therefore not required to recuse himself. Smith, 113 Wn. App. at 340-41.

While the judge's pretrial contact with the parties in Smith was inadvertent, Judge Harris consciously chose to travel with the county prosecutor to Crawford's funeral. Although there was no discussion about the details of the case against Schreiber, the judge participated in a conversation with the prosecutor, deputy prosecutor, and district court judge about Crawford's tragic death. Unlike the clearly innocuous circumstances in Smith, the judge's actions here raise questions about his ability to remain impartial while trying Schreiber for Crawford's murder.

There is no question that if a prospective juror had traveled to the funeral with the prosecutor and then discussed with him the emotional ceremony and the tragic circumstances of Crawford's death, that

prospective juror should not serve on the jury. Even if the potential juror held no conscious prejudice against Schreiber or personal feelings of grief for Crawford, the appearance of unfairness and the likelihood of unconscious animosity would be too great. This same potential for prejudice and appearance of unfairness disqualify Judge Harris from presiding over Schreiber's trial. See United States ex rel. Perry v. Cuyler, 584 F.2d 644 (3rd Cir. 1978) (Adams, J., dissenting) (majority held judge's attendance at funeral of victim did not create substantial probability of unfairness), cert. denied, 440 U.S. 925 (1979); but see Richardson v. State, 83 S.W.3d 332 (Tex. App. 2002) (error for judge to deny recusal motion where judge's wife was acquaintance of victim and attended victim's funeral).

Because the trial judge's refusal to disqualify himself denied Schreiber his right to a fair trial before an impartial judge, the proper course is to remand for a new trial before a different and impartial trial court judge. See State v. Levy, 156 Wn.2d 709, 724, n.3, 132 P.3d 1076 (2006) (denial of the right to a fair trial before impartial judge is never harmless) (citing Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927)).

2. THE COURT'S UNREASONABLE RESTRICTION ON DEFENSE COUNSEL'S CROSS EXAMINATION OF A KEY PROSECUTION WITNESS DENIED SCHREIBER HIS RIGHT OF CONFRONTATION.

a. **The trial court limited cross examination on matters directly relating to the witness's testimony when the witness invoked the psychologist-client privilege.**

Vancouver Police Corporal Duane Boynton was a key witness for the state. He testified at trial that he responded to the 911 call in his role as a hostage negotiator, although he never got around to attempting contact with Schreiber. 5RP 998-99, 1079. Boynton testified that he saw Schreiber come out of the house and move to the truck, and, believing Schreiber would try to drive off, Boynton drove his patrol car up the driveway to head him off. 5RP 1008, 1013. As Schreiber started to drive, he made eye contact with Boynton and then changed direction, heading west through the field. Boynton saw that Schreiber had an object in his right hand, which he raised up in the air when he looked at Boynton. 5RP 1018. Boynton then headed west on 114th Street, joining the line of patrol cars following Schreiber's truck. 5RP 1022-23.

According to Boynton, as he followed Schreiber behind two other patrol cars, he was able to see Crawford inside his vehicle at the corner. 5RP 1043-44. Prior to trial Boynton gave several different estimates of

how far he was from Crawford's car, ranging from 100 to 250 yards. 5RP 1093-94. He testified at trial, however, that he was only 50 yards from the corner when he saw Crawford. 5RP 1092. Boynton said he could tell Crawford was trying to shift gears but could not get the car to move. 5RP 1044. He could also tell that, just prior to impact, Crawford knew he was going to get hit, and he turned away. 5RP 1045. Boynton then saw the truck veer sharply toward the center of Crawford's patrol car. 5RP 1044.

Boynton was traumatized by the incident which resulted in Crawford's death, and he sought professional help to deal with the trauma. 6RP 1127. Defense counsel learned prior to trial that Boynton had seen a counselor regarding the incident, and he moved to compel disclosure of Boynton's psychological records. CP 101-02. Counsel argued that Boynton was a key witness and the effects of the trauma he experienced on his ability to observe and recall were relevant to his credibility. Thus, the defense had a right to confront Boynton about the records of his counseling and what they disclosed. 1RP 16.

The trial court recognized that the defense needed to determine whether Boynton had been affected in such a way that he could no longer give a fair and just account of what he observed. When the court expressed concern that the records were covered by the psychologist-client privilege, however, defense counsel suggested that the court could review

the documents in camera. 1RP 17, 24. The court followed counsel's suggestion and ordered that the records be produced for in camera review. CP 126-27.

Without ordering the disclosure of any of Boynton's records or making any ruling as to their relevancy to the defense, the court further ruled that Boynton could assert the psychologist-client privilege on cross examination. 2RP 235; 3RP 415. Although defense counsel argued that Schreiber's constitutional right to confront and cross examine Boynton should prevail over Boynton's statutory privilege, the court limited cross examination to the fact that Boynton had seen a psychologist. 5RP 1034-35, 1041. The court would not permit defense counsel to elicit the name of Boynton's treatment provider, that a diagnosis had been reached, or what that diagnosis was. 5RP 1034. The court agreed that its ruling precluded the defense from exploring Boynton's ability to relate events accurately and noted that Boynton's records would be sealed for the Court of Appeals. 5RP 1037-38; CP 247.

Following the court's ruling, Boynton testified on cross examination that the City of Vancouver offers a counseling program for officers involved in traumatic incidents. He took advantage of that, seeing a counselor three or four times. 6RP 1127.

- b. **Because Boynton's testimony was crucial to the state's case, the statutorily created privilege must yield to Schreiber's constitutional right of confrontation.**

Both the state and federal constitutions guarantee a criminal defendant the right to confront and cross-examine adverse witnesses. Wash. Const. art. I, § 22; U.S. Const. amend. VI; Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The primary and most important component of the constitutional right of confrontation is the right to conduct a meaningful cross examination. Davis, 415 U.S. at 316; State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

The purpose of cross examination is to test the perception, memory, and credibility of witnesses, thus assuring the accuracy of the fact finding process. Davis, 415 U.S. 316; Darden, 145 Wn.2d at 620. "Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question.... As such, the right to confront must be zealously guarded." Darden, 145 Wn.2d at 620 (citations omitted).

In Washington, confidential communications between psychologists and their clients are statutorily privileged against

compulsory disclosure. RCW 18.83.110. Although society may have a significant interest in guarding the confidentiality of communications between psychologist and client, that interest does not outweigh the need for effective cross examination of a key state witness in a criminal trial. See Davis, 415 U.S. at 320. But see Jaffee v. Redmond, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996) (recognizing federal common law psychotherapist-patient privilege, court held confidential communications were protected against compelled disclosure in civil wrongful death action); cf. State v. Heemstra, 721 N.W.2d 549, 563 (Iowa Sup. 2006) (in criminal case where confidential communications might reasonably bear on claim of self defense, medical privilege must yield to constitutional right to present a defense); People v. Bridgeland, 19 A.D.3d 1122, 1124-25, 796 N.Y.S.2d 768 (2005) (statutory psychologist-client privilege must yield to defendant's constitutional right of confrontation where witness's credibility was crucial to case).

This statutory privilege must be balanced against a criminal defendant's constitutional rights of confrontation and cross examination. Davis, 415 U.S. at 319-20 (confrontation right prevails over juvenile proceedings privilege statute); United States v Nixon, 418 U.S. 683, 709, 94 S Ct 3090, 41 L Ed 2d 1039 (1974) (executive privilege yields to need for criminal evidence). The state cannot, consistent with the right of

confrontation, require Schreiber to bear the full burden of vindicating the state's interest in the confidentiality of psychologist-client communications. See Davis, 415 U.S. at 320.

In Davis, the defense sought to question a key prosecution witness concerning the fact that he was on probation as a juvenile offender and thus could be under pressure from the police to shift the blame from himself and identify a perpetrator. The trial court disallowed this cross-examination, on the basis of a statute protecting the secrecy of juvenile records. Davis, 415 U.S. at 311, 313-14. The Supreme Court reversed, holding that the defendant's Sixth Amendment right of confrontation was violated when application of the juvenile proceeding privilege statute prevented him from establishing the factual record necessary to argue his bias theory. Davis, 415 U.S. at 318-20.

As the Supreme Court explained, “[c]ross examination is the principle means by which the believability of a witness and the truth of his testimony are tested.” Davis, 415 U.S. at 316. The jury was entitled to have the benefit of the defense theory so that it could make an informed judgment as to the weight to place on the key witness's testimony. Thus, defense counsel should have been permitted to expose the jury to facts from which it could determine the reliability of the witness. Application

of the statutory privilege denied the defendant the right of effective cross examination. Davis, 415 U.S. at 318.

The Court recognized that the state may have a legitimate policy interest in keeping juvenile records confidential. Nonetheless, where the juvenile was a key witness for the state, and the excluded evidence would have raised serious questions as to his credibility, the defendant's right of confrontation was paramount to the state's interest in protecting the juvenile offender. Davis, 415 U.S. at 319. The state's desire to have the juvenile testify free from embarrassment must fall before the right of a criminal defendant to seek out the truth in the process of defending himself. Davis, 415 U.S. at 320.

Here, as in Davis, defense counsel's cross examination of a key state witness was unfairly limited due to the exercise of a statutory privilege. Boynton testified for the state that he witnessed every action necessary to the state's case against Schreiber. He saw Schreiber get into his truck with a rifle. He made eye contact with Schreiber, ensuring that Schreiber was aware of the police presence. He saw Schreiber raise something, by inference his rifle, while he was driving the truck. And, most importantly, Boynton testified that, from his position behind Schreiber's truck, he could see Crawford inside the patrol car as Crawford braced for impact. The prosecutor argued in closing that if Boynton, who

was behind Schreiber, saw Crawford in his car put his hands up in a defensive motion prior to impact, then Schreiber saw it too. 18RP 3291. Boynton's testimony was thus crucial to the state's proof that Schreiber intentionally struck and killed Crawford, while armed with a firearm, knowing Crawford was a law enforcement officer performing his official duties.

And the defense was not trying to gain access to confidential communications merely to delve into collateral issues. See United States v. Cardillo, 316 F.2d 606, 611 (2d Cir.), cert. denied, 375 U.S. 822, 11 L. Ed. 2d 55, 84 S. Ct. 60 (1963) (privilege invoked as to collateral matters might not prejudice defendant). The excluded cross examination was necessary for the jury to reach an informed decision as to the reliability of Boynton's testimony for the state. Boynton was traumatized and sought counseling as a result of the matters to which he testified on direct examination. The nature and extent of the psychological impact of those events is directly relevant to the credibility of his testimony. As in Davis, the state's desire to protect the confidentiality of Boynton's communications with his treatment provider must fall to Schreiber's right to seek out the truth in the process of defending himself. See Davis, 415 U.S. at 320.

A violation of the Confrontation Clause is subject to harmless error analysis and requires reversal unless the error was harmless beyond a reasonable doubt. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), aff'd by Davis v. Washington, 126 S. Ct. 2266 (2006). Here, the court's erroneous ruling kept from the jury information regarding the nature of Boynton's treatment and diagnosis. Because Boynton's records were not released to defense counsel, and because the court limited cross examination, it is not possible to determine on the record presented whether the undisclosed information would have cast sufficient doubt on Boynton's testimony as to affect the jury's verdict. That does not preclude a decision that reversal is required, however. Creating such a doubt would have been one of the objectives of cross examination had it been permitted. The state cannot meet its burden of proving the court's error harmless beyond a reasonable doubt by relying on the fact that the record does not contain evidence the state successfully sought to exclude. See Darden 145 Wn.2d at 625-26 (refusal to disclose surveillance location not harmless). The violation of Schreiber's right to cross examine a crucial state witness requires reversal. See Davis, 415 U.S. at 320-21.

3. EXCLUSION OF EXPERT TESTIMONY ON PERCEPTION AND MEMORY VIOLATED SCHREIBER'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.

- a. **Expert testimony was offered to help the jury evaluate witness credibility in light of inconsistent and evolving recollections.**

The state relied substantially on eyewitness testimony at trial, calling several officers who were present that night, neighbors who watched the scene unfold, and passersby who witnessed the collision. Not only did these witnesses' recollections differ from each other, but in several instances, the witnesses' recollections changed over time.

For example, during their initial interviews, all the officers were very clear that, after the collision, Schreiber's truck was never pushed back from the patrol car as far as the start of the brake fluid trail. 15RP 2889. This was one of the factors which led the investigating officers to conclude that the trail was the result of Schreiber's attempt to brake prior to impact. 1RP 2332-33; 15RP 2889. By the time of trial, however, the witnesses' recollections had changed, and they testified that the truck had been pushed back to the center of the road. 4RP 679-83, 856; 5RP 893, 941; 6RP 1210. This new estimate supported that state's trial theory that the brake fluid trail was deposited on the road during the post-collision winching process.

Another example of changed recollection was Boynton's testimony that he was 50 or 75 yards from the collision when it occurred. 5RP 1092. Boynton had initially told the investigating officer that he was 200 to 250 yards away when he first recognized Crawford, and in his interview with Capellas he had estimated he was 100 to 200 yards from the corner. 5RP 1093-94. In closing, the prosecutor argued that if Boynton, who was three cars behind Schreiber's truck, could see Crawford in his patrol car, Schreiber must have seen him as well. 18RP 3291. Thus, it was critical to the state's case that the jury believed Boynton's changed recollection regarding how close he was to the corner.

There were other inconsistencies as well. One neighbor testified that she saw lights on Crawford's car, but in her initial interview with police she had said she did not recall seeing lights or hearing sirens. 6RP 1260. Two neighbors standing right next to each other testified that they saw different things. One said she did not see the collision because other police vehicles obstructed her view, while the other testified that she saw the collision clearly. 6RP 1249, 1261, 1273, 1283. And more than one officer remembered being the one who wrestled Schreiber to the ground and handcuffed him, 5RP 1053; 7RP 1346, or being the one who jumped in the truck to try to move it after the collision. 4RP 635, 779.

In an attempt to help the jury evaluate the testimony in light of these inconsistencies, defense counsel planned to call Geoffrey Loftus, an expert in the field of human perception and memory. CP 162. Loftus would testify that memory and perception are subject to outside influences in ways not commonly known to the average person. CP 162.

In his report, Loftus explained that he would not give an opinion as to the credibility of any witness. Rather, he would describe the scientific understanding of how perception and memory are known to work, in hope that this information would assist the jury in its credibility determinations. Supp. CP (Sub. No. 120, Memorandum in Support of Motion to Exclude Testimony of Geoffrey Loftus, Filed 5/19/06, Attached Report of Geoffrey Loftus at 1)⁴.

Loftus explained that a common misunderstanding is that memory works like a video recorder. In actuality, a person witnessing a complex event acquires fragments of information from the environment. These fragments are then integrated with information from other sources, such as previously stored information, expectations, and after-acquired information. This amalgamation of information becomes the person's memory of the event. Loftus Report, at 1.

⁴ A copy of Sub. No. 120, which has been designated in a Supplemental Designation of Clerk's Papers, is attached as an appendix to this brief. The Report of Geoffrey Loftus, included in that document, is hereinafter referred to as "Loftus Report."

Loftus further noted that a person's ability to perceive and recall an event accurately can be affected by environmental factors, such as poor lighting and obscured vision, as well as the state of the observer at the time of the event. A suboptimal observer is one who is under a high level of stress, who witnesses directly inflicted violence, or who has his attention diverted. Loftus Report, at 1. After-acquired information can be incorporated into a person's memory, making it more complete, although not necessarily more accurate. And bias introduced at the time the memory is being recalled can also potentially change the memory. Loftus Report at 2.

The state moved to exclude Loftus's testimony, arguing that everything to which Loftus would testify was within the common experience of jurors, the testimony was not necessary, and it was routinely excluded. 2RP 339. Defense counsel responded that the scientific data Loftus would present would help the jury understand and evaluate the eyewitness testimony and allow defense counsel to argue his theory of the case. 2RP 344-54.

The court excluded the offered testimony, ruling that the information was well within the common experience of the jurors. The court believed the proposed testimony would invade the province of the jury, since the jury had to determine witness credibility. 3RP 425.

When the state rested its case, defense counsel renewed his motion to permit Loftus's testimony, arguing that the eyewitness evidence was so incredibly confusing that the jury should be told from a scientific standpoint why the memories were so divergent. 12RP 2546. The court ruled that if the jury reviewed all the evidence presented, it would be able to make the necessary determination. It opined that Loftus would only be commenting on the witnesses' memories. The court stated that the reasons memories might be skewed are within the range of common experience, and counsel could make that argument without presenting expert testimony. 12RP 2548-49.

Following the verdict, defense counsel moved for a new trial and arrest of judgment. Among other issues, he argued that the jury's evaluation of eyewitness evidence was critical, and given the court's improper exclusion of Loftus's testimony, the jury was not given the chance to make an informed decision. 19RP 3459. The court upheld its previous ruling. 19RP 3466.

b. The court's erroneous exclusion of Loftus's testimony requires reversal.

An accused is assured the right to fairly defend against the state's accusations. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The right to present a complete defense is

protected by the Sixth and Fourteenth Amendments to the United States Constitution. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).

These constitutional protections include the right to offer the testimony of witnesses, to present one's own version of the facts, and to argue one's theory of the case. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The state constitution protects these rights as well. Wash. Const. art. I, § 22; State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). "The guarantee of compulsory process is 'a fundamental right and one which the courts should safeguard with meticulous care.'" State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976) (citations omitted).

The right to a fair trial "would be an empty one" if the prosecution could exclude competent, reliable evidence bearing on the credibility of an accusation central to the case against the defendant. Crane, 476 U.S. at 689; see also State v. York, 28 Wn. App. 33, 37, 621 P.2d 784 (1980) (finding "curious" any rule of evidence that would allow one party to bring up a subject and then bar the other party from further inquiries on the topic when disadvantageous).

The right to question the accuracy, reliability, or truthfulness of a witness's allegations is not limited to cross examination. Maupin, 128 Wn.2d at 924.

Just as the accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Maupin, 128 Wn.2d at 924 (quoting Washington v. Texas, 388 U.S. at 19) (reversing felony-murder conviction where trial court unfairly excluded testimony of defense witness that countered state's evidence).

"The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." Darden, 145 Wn.2d at 621. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable" ER 401. "All relevant evidence is admissible" unless it violates the constitution or is barred by other evidentiary rules or regulations. ER 402.

Admission of expert testimony is governed by ER 702. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003). That rule provides,

if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702.

In interpreting ER 702, the Supreme Court has held that expert testimony is admissible where (1) the witness qualifies as an expert; (2) the expert's theory is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact. Cheatam, 150 Wn.2d at 645; State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984).

There is no dispute in this case that the first two requirements are satisfied; the only question is whether Loftus's testimony would have been helpful to the jury. Washington courts have recognized that "expert testimony on the unreliability of eyewitness identification can provide significant assistance to the jury beyond that obtained through cross examination and common sense." State v. Taylor, 50 Wn. App. 481, 489, 749 P.2d 181 (1988); see also Cheatam, 150 Wn.2d at 649, n.5 ("expert testimony on eyewitness identification may be very helpful to a jury on subjects that are not, contrary to popular thinking, commonly known").

In Cheatam, the court affirmed the exclusion of Loftus's testimony on eyewitness identification, finding that because the victim testified that she realized she would need to memorize the face of her attacker to identify him later, she closely examined his face, and with a police sketch artist she later produced a drawing of the defendant that was nearly photo

perfect, the expert's testimony would have been of marginal relevance and debatable help to the jury. Cheatam, 150 Wn.2d at 649-50. Under those circumstances, the refusal to admit Loftus's testimony was not so untenable as to constitute an abuse of discretion. Cheatam, 150 Wn.2d at 650. See also Id. at 657 (admission of the testimony would also have been an appropriate exercise of the trial court's discretion) (Chambers, J., concurring).

Cheatam employed a highly fact specific analysis to decide whether, under ER 702, Loftus's testimony would have been helpful to the jury. In finding the proposed testimony was of debatable help, the court considered the following factors: (1) because the victim saw the weapon only briefly, weapon focus was of minimal relevance; (2) the effect of lighting conditions on perception is an matter of general understanding; (3) information about cross racial identification was minimally probative given the strong resemblance between the police sketch and the defendant. Cheatam, 150 Wn.2d at 650. The Court's analysis demonstrates that whether an expert's testimony was erroneously excluded turns on the facts of the case on review.

In this case, as in Cheatam, the trial court excluded Loftus's testimony, finding it would constitute a comment on other witnesses' credibility and would not be helpful to the jury because the information he

would provide was well within common experience. 3RP 425. As to the first concern, Loftus explained in his report that he would express no opinion as to the credibility of any witness. Loftus Report at 1. Rather than commenting on credibility, Loftus's testimony would provide an informed framework within which the jury could make its own credibility determinations.

The court never addressed the specific subjects about which Loftus proposed to testify. To the extent the court was expressing the view that expert testimony on perception and memory is never helpful to the trier of fact because it is a matter of common experience, the court was wrong. See Cheatam, 150 Wn.2d at 649, n. 5. While this might be a valid reason to exclude expert testimony as to a specific subject in a particular case, it does not justify excluding Loftus's testimony in its entirety here.

Of critical importance to the defense case was the scientific explanation as to how memories are formed and the possible effects of expectations and after-acquired information, which is contrary to common understanding. A prime example is the change in the officers' memories as to how far the truck was moved after the collision. When they were initially interviewed shortly after the collision, the officers did not remember Schreiber's truck being moved any great distance, and all were sure that the truck was never pushed back from the patrol car as far as the

start of the brake fluid trail. But as the state's case developed and the possibility that Schreiber did not apply his brakes prior to impact was explored, the officers remembered moving the truck back as far as the center of the road before it moved forward during the winching process. Loftus's testimony that memories can be influenced or completed by expectations as to what happened or information provided from other sources would have helped the jury evaluate the credibility of the witnesses' memories at trial.

In addition, the jury heard Boynton's claim that as he was driving at a high rate of speed behind Schreiber's truck and two other patrol cars, he could tell that Crawford was trying to shift gears and that Crawford knew he was going to get hit. 5RP 1044-45. In a similar vein, two witnesses testified that they saw Schreiber scowl and grip the steering wheel tightly just before impact. 8RP 1500; 12RP 2467. Loftus's testimony that a witness's memory may be created post hoc on the basis of inferences about what probably occurred would help the jury evaluate the credibility of this testimony. See Loftus Report at 3.

The trial court's error in excluding Loftus's testimony cannot be considered harmless. Since denial of meaningful opportunity to present a complete defense is violation of a constitutional right, the erroneous exclusion of defense testimony is presumed prejudicial, and reversal is

required unless the prosecution proves the error is harmless beyond a reasonable doubt. Maupin, 128 Wn.2d at 928-29. The state cannot meet its burden in this case.

As defense counsel argued below, the state's case was rife with contradictory and confusing eyewitness testimony relating to sharply disputed issues. The state relied on this testimony to prove that Crawford was visible in his patrol car, that Schreiber appeared to be acting deliberately, and that Schreiber did not apply his brakes prior to the collision. These conclusions were necessary to the jury's verdict that Schreiber intentionally killed Crawford, knowing he was a police officer performing his official duties. The assistance of expert testimony could have tipped the scales in the jury's evaluation of witness credibility and resulted in a different outcome. The erroneous exclusion of this crucial evidence was not harmless beyond a reasonable doubt, and reversal is required.

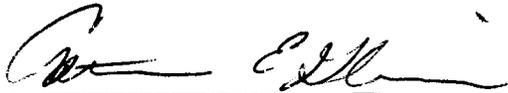
D. CONCLUSION

The trial judge's refusal to disqualify himself after attending Crawford's funeral violated the appearance of fairness doctrine, and Schreiber is entitled to a new trial before a different judge. In addition, the court denied Schreiber his right of confrontation by limiting his cross examination of Boynton and denied him his right to present a defense by

excluding qualified, relevant expert testimony. Schreiber's conviction should be reversed and the case remanded for a new trial.

DATED this 10th day of July, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Catherine E. Glinski', written over a horizontal line.

CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

APPENDIX

?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

FILED

MAY 19 2006

JoAnne McBride, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

ROBIN TAYLOR SCHREIBER,

Defendant.

No. 04-1-01663-1

MEMORANDUM IN SUPPORT OF MOTION TO
EXCLUDE TESTIMONY
OF GEOFFREY LOFTUS.

1. Relevant Testimony.

Defense Counsel has provided Mr. Geoffrey Loftus's purported testimony in a written report. The areas he purports to explain are that 1) a person's memory is affected by the lighting conditions and other environmental factors at the time of the observation, 2) the lighting conditions, 3) the focus of attention of the person at the time, 4) the length of time the person saw the item, the distance from the incident and ability to perceive details at the respective distances, 4) the emotional state and stress level of the person at the time of the incident and 5) that they may infer additional information or add it to it later on which can affect or change their memory. A copy of his report, where he relates the only potential tie into facts, that being, the ability of the two witnesses to see the Defendant's facial features prior to the collision is attached.

During an interview with Mr. Loftus on May 17, 2006, Mr. Loftus was specifically asked if he considered any of the facts in the instant case in forming an opinion about which he was to testify. He responded that he was not relying on any statements, reports, witness information and that he had no factual information upon which he relies to make the assertions above. He further indicated that he

MEMORANDUM IN SUPPORT OF MOTION TO
EXCLUDE TESTIMONY OF GEOFFREY LOFTUS

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98686-6000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

1510
28

1 learned of and has no information to suggest that the witnesses had changed their statements, made
2 additional inferences or altered their opinions on what happened that night.

3
4 2. Argument

5 The admission or exclusion of expert testimony is a matter left to the trial court's discretion. ER
6 702 states:

7 If scientific, technical, or other specialized knowledge will assist the trier
8 of fact to understand the evidence or to determine a fact in issue, a
9 witness qualified as an expert by knowledge, skill, experience, training,
or education, may testify thereto in the form of an opinion or otherwise.

10 For expert testimony to be admissible under ER 702, (1) the witness must qualify as an expert,
11 (2) the expert's theory must be based upon an explanatory theory generally accepted in the scientific
12 community, and (3) the expert testimony would be helpful to the trier of fact. State v. Allery, 101 Wn.2d
13 591, 596, 682 P.2d 312 (1984); ER 702. Where the jurors are as competent as an expert to reach a
14 decision on the facts presented without an expert's opinion, the expert's opinion is not helpful because it
15 "does not offer the jurors any insight that they would not otherwise have." 5A K. Tegland, Wash. Prac.,
16 Evidence sec. 292, at 397 (3rd ed. 1989), citing State v. Smissaert, 41 Wn.App. 813, 815 708 P.2d 647
17 (1985) ("If the issue involves a matter of common knowledge about which inexperienced persons are
18 capable of forming a correct judgment, there is no need for expert testimony."). Where, however, expert
19 testimony on an issue is counterintuitive and difficult for the average juror to understand, the testimony
20 may be admitted on the ground that it is helpful to the trier of fact. State v. Ciskie, 110 Wn.2d 263, 271,
21 751 P.2d 1165 (1988) (finding it counterintuitive and difficult for average juror to understand why a
22 battered woman remains in an abusive relationship rather than leave the batterer).

23 The court has routinely dealt with the admissibility of expert testimony on the reliability of
24 eyewitness identifications. Each case must be evaluated by the factors it presents. Excluding expert
25 testimony on eyewitness identification for the reason that it would not be helpful to the trier of fact is a
26 proper exercise of discretion "in the great majority of cases." State v. Johnson, 49 Wn.App. 432, 439
27 (1987) quoting from State v. Chapple, 135 Ariz. 281, 660 P.2d 1208, 1220 (1983). Admissibility of

MEMORANDUM IN SUPPORT OF MOTION TO
EXCLUDE TESTIMONY OF GEOFFRY LOFTUS

Page 2 of 4

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

1 evidence lies within the sound discretion of the trial court and will not be reversed absent an abuse of that
2 discretion. State v. Ellis, 136 Wn.2d 498, 523, 963 P.2d 843 (1998). Where the trial court's reasons for
3 admitting or excluding opinion evidence are 'fairly debatable,' exercise of that discretion will not be
4 reversed on appeal. State v. Ward, 55 Wn.App. 382, 386, 777 P.2d 1066 (1989).

5 The courts in Washington have excluded testimony of Mr. Loftus on numerous occasions.¹ In
6 State v. Cheatam, 150 Wn.2d 626 (2003), the court held that the trial court properly excluded Mr. Loftus
7 testimony, which was along the same lines as proposed in the present case. In that case, the defense
8 sought to have Loftus about the effect of stress and violence, weapon focus, lighting and cross-racial
9 identification on perception and memory. The court noted that, just as in the present case, Loftus had
10 undertaken no investigation, had never met, tested or observed the witness testify and had no knowledge
11 of the true conditions under which the witness had observed the event.

12 In Cheatam, the Supreme Court stated that as to lighting conditions, the court held "the testimony
13 offered on this point was within the common understanding of the jury."

14 Regarding the weapon, the court indicated that that witness did not focus on a weapon, and "Dr.
15 Loftus's testimony would have provide little help to the jury on that point." As to other evidence such as
16 the facial appearance of the suspect and whether or not he had facial hair, the court stated that whether
17 Loftus's testimony was even relevant and helpful "is debatable".

18 Dr. Loftus would like to educate the jury on how witness motivation, learning new evidence,
19 and/or inferring information may consciously or unconsciously alter a witness' memory. He believes that
20 this is beyond the common sense of jurors. This is preposterous.

21 It is common sense that if a witness has a particular motivation for testifying that the motivation
22 can and sometimes does color and shape their testimony. Any and all motivations may and should be
23 brought out during testimony, so the jury may evaluate each witness' credibility.

24
25
26 ¹ A search of cases in Washington revealed 9 unpublished Court of Appeals cases affirming the exclusion
27 of Mr. Loftus's proposed testimony, including 4 cases in Division II, 3 cases in Division III and 2 cases in
Division I.

1 It is common sense that witnesses' memories may be altered by suggestive questions that
2 interject new information or infer new information. This is the driving principle behind the requirement of
3 using non-leading questions during direct examination. Everyone knows that memories of children as
4 well as adults can be reshaped if they are fed new information or suggestions. This theory is not novel
5 and does not require a Ph.D to explain. To even suggest that jurors do not understand these concepts is
6 beyond comprehension and would certainly be insulting to the average juror.

7 Dr. Loftus' proposed testimony does not meet ER 401 and 401 not to mention ER 702. This court
8 should exclude Dr. Loftus as a witness.

9 In addition to being irrelevant, or not subject to expert opinion, Mr. Loftus's testimony becomes
10 irrelevant when considered against the other evidence posited by the defense in this case. Defense
11 counsel has provided reports by Dr. Julien, which indicates that he is asserting an alcohol intoxication
12 defense to the crime. Said report further explains that Defendant agrees to coming out of the house,
13 agrees driving through the field, agrees crashing into the car. As he admits the gist of the incident, the
14 testimony of Mr. Loftus becomes irrelevant.

15
16 3. Conclusion

17 Mr. Loftus's testimony in this case is irrelevant. He adds nothing to the case that isn't within the
18 common understanding of the jury and his testimony should be barred.

19
20 By: 
21 James E. David, WSBA #13754
22 Senior Deputy Prosecuting Attorney
23
24
25
26
27

1. Qualifications and Background

My name is Geoffrey R. Loftus. I am a Professor of Psychology at the University of Washington in Seattle. My area of expertise, in which I have been working for 35 years, is human perception and memory. Over the past ten years, I have qualified as an expert in perception and memory in approximately 180 criminal cases in eleven states, federal courts in nine cities (including Chicago), and U.S. Military court in Sigonella, Italy.

My experience is described in my CV which can be found at: <http://faculty.washington.edu/gloftus/CV/CV.html>

2. Issues about which I Would Testify in this Case

It is important to note that in a criminal case, I do not generally testify about or have an opinion as to who is right and who is wrong. Rather, I describe our scientific understanding of how perception and memory are known to work, in the hope that this information can assist the finder of fact in carrying out its job of deciding who is right and who is wrong.

In what follows, I will briefly list the scientific topics about which I would intend to testify. I briefly describe, as well, their relevance to this case.

A. General Remarks about Memory

Because this case involves issues of perception and memory, I would begin my testimony with a brief overview of our scientific bases for understanding these topics.

There is a generally accepted theory about how memory works, which was first explained in detail by the Psychologist, Ulric Neisser in 1967. This theory is rather complex, and has formed the foundation for an enormous amount of research activity during the intervening four decades. The basic tenets of the theory are as follows.

First, memory does not work like a video recorder. Instead, when a person witnesses some complex event, such as a crime, or an accident, or a wedding, information from the environment is stored in memory, and information acquired after the event has occurred. The result of this amalgamation of information is the person's memory for the event. Sometimes this memory is accurate, and other times it is inaccurate.

Memory researchers study how memory works using a variety of techniques. A common technique is to try to identify circumstances under which memory is inaccurate versus circumstances under which memory is accurate. These efforts have revealed four major sets of circumstances under which memory tends to be inaccurate. The first two sets of circumstances involve what is happening at the time the to-be-remembered event is originally experienced, while the second two sets of circumstances involve things that happen after the event has ended.

The first set of circumstances involves the state of the *environment* at the time the event is experienced. Examples of poor environmental conditions include poor lighting, obscured vision, and short viewing duration. To the degree that environmental conditions are poor, relatively little information about the event will be stored in memory to begin with. This will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted.

The second set of circumstances involves the state of the *observer* at the time the event is experienced. Examples of suboptimal observer states include high stress, perceived or directly included violence, viewing members of different races, and diverted attention. As with poor environmental factors, this will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted.

Loftus report

State v. Robin Schrieber

Page 2 of 4

The third set of circumstances involves what occurs during the *retention interval* that intervenes between the to-be-remembered event and the time the person tries to remember aspects of the event. Examples of memory-distorting problems include a lengthy retention interval, which leads to forgetting, and information (known as post-event information) learned by the person during the retention interval that can get incorporated into the person's memory for the original event. If such post-event is itself accurate, then the memory becomes more complete and also more accurate. However, if such post-event is itself inaccurate, then, paradoxically, the memory becomes more complete but at the same time, less accurate.

The fourth set of circumstances involves errors introduced at the time of *retrieval*, i.e., at the time the person is trying to remember what he or she experienced. Such problems include biased tests, such as a one involving leading questions. Such biases can lead to a biased response and can also potentially change and bias the memory itself.

B. Lighting Conditions

The relevance of lighting is that, on a bright sunny day, it is hard to see something in the shadows. This would also be relevant to a witness's ability to see a dimly-lit object. In particular, I would discuss what is known about light and dark adaptation and of the effects of light and dark adaptation on perception of objects in shadows and I would specify the consequences of a witness trying to observe a person in a track through tinted windows.

C. Attention

Attention may have played a role in the present case in the sense that the attention of the witnesses would likely have been on what was most relevant, namely the likelihood of the impending accident. The police officers would also have needed to attend to controlling their own vehicles.

The following scientific facts are relevant to the general topic of attention.

Basically, a person can only perceive and remember what he or she attends to. There are two general circumstances under which people *fail* to attend to something.

First, when a person doesn't know that some particular thing is going to be important in the future, there's no particular reason to attend to it. The scientific evidence on this point is quite clear, and real-life examples abound as well. For example, people typically can't describe which letters go with which numbers on a telephone dial. Although they've seen thousands of telephone dials, their failure to attend to the letter-digit correspondence renders them unable to remember this correspondence if asked.

Second—and this is most relevant to the present case—attention is *limited*; that is, a person can only attend to one thing at a time. An analogy is often made to a narrow-beam spotlight: All that is illuminated by the spotlight is what falls into the spotlight's beam. This means that if the beam is illuminating one thing in the environment, it can't be illuminating anything else. In terms of remembering complex events, if there are several things happening at once, a person attending to one aspect of the scene cannot attend to any other aspects of the scene.

D. Duration

Most of the relevant witnesses only had a very short time to perceive what they claimed to perceive.

In addition to discussing the consequences of limited duration on perception, I would testify about perceptual limitations issuing from the limited number of eye fixations that a person can make in a given time.

In particular, visual scanning takes the forms of "eye fixations"—periods of about a third of a second during which the eye is relatively stationary—separated by quick jumps of the eye from place to place. It is during these stationary fixation periods that the visual system takes in information about the world that forms part of the subsequent memory of what has been seen. During a given fixation, the eye can only take in information from a limited region of the visual field—about two degrees of visual angle (to provide a feeling for what's meant by this, two degrees of visual angle corresponds to about the width of a head at a distance of 10 feet). Thus during each second of duration, a witness could look at, at most, three separate places.

Loftus report

State v. Robin Schrieber

Page 3 of 4

E. Distance

There are a number of instances in this case where ability of witnesses to perceive details (e.g., the expression on Mr. Schrieber's face) at some particular distance is at issue. I have done research that will allow me to demonstrate to the jury the specific amount of visual information that is lost as a consequence of being a particular distance from the object of view.

F. Stress

It appeared for some of the witnesses—particularly the police officers—the incident (justifiably) was a cause of very high stress. Such stress could well have contributed to their inability to accurately perceive what was going on. The following scientific information about stress is therefore relevant.

The relation between stress and mental functioning in general is described by what is known as the Yerkes-Dodson law. According to this law, the quality of mental functioning is an inverted U-shaped function of the amount of stress the person is undergoing. With either very low or very high stress, mental functioning—including ability to perceive and memorize—is not very good. It is at an intermediate stress level, that mental functioning is optimal.

Note that this is a generic description of the relationship between stress and mental functioning. In any specific experiment to study stress, both the definition of stress and the definition of "mental functioning" would be quite concrete and precise.

Finally, I would testify about the common belief that under conditions of high stress, the details of an event are "stamped into" a person's memory. This experience seems superficially at odds with the assertion I have just made that high stress leads to poor memory. The resolution of this apparent discrepancy is as follows.

Under conditions of high stress, the *fact* that the stress-producing event itself occurred could well be stamped in; it's unlikely, for instance, that a person would forget that she was robbed. The reason for this is that stressful events are very *salient*, and people tend to rehearse salient events over and over in their minds. This causes the event to be stamped in.

However, this doesn't mean that the *details* of the event will be perceived and remembered correctly. Indeed, as I noted, under conditions of stress, details may very well be perceived incorrectly. This would mean, that the incorrectly perceived details could get rehearsed over and over along with the occurrence of the event itself, and memory for them would thus be very strong. This means that the person would be very confident in remembering the details even though they were incorrect. I will return later to the relation between confidence and accuracy.

G. Inferences

The memories on the part of many of the witnesses may have been constructed post-hoc on the bases of their inferences about what probably happened. For instance, an "angry expression" on Mr. Schrieber's face may have been inferred after the fact.

Inferences operate after some event is over, influencing how the eventual memory for the event is constructed. As an example, Haanigan and Reinitz (2001) recently reported an experiment in which observers viewed a slide sequence depicting some common activity, e.g., shopping in a supermarket. As part of the sequence they saw scenes depicting some relatively unusual situation (e.g., seeing oranges scattered over the supermarket floor). Later, the observers confidently asserted that they had seen a picture that reasonably depicted a possible cause of this situation (e.g., a slide of a woman pulling an orange from the bottom of the pile) when in fact they had never seen the slide. These and related results strongly suggest that, in these situations, viewers make inferences about what must have happened, and incorporate the results of such inferences into their memory of the event.

H. Post-event information

Inferences are one form of *post-event information*. In general, post-event information is information that is acquired by a witness after some event that provides a basis for the witness to reconstruct his or her memory for the details of what happened during the event. The potential influence of such memory reconstruction on the basis of post-event information is particularly important for explaining memories

Certification of Service by Mail

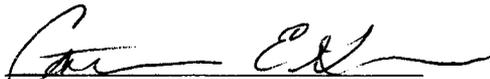
Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Supplemental Designation of Clerk's Papers and Brief of Appellant in *State v. Robin T. Schreiber*, Cause No. 35186-2-II, directed to:

Michael C. Kinnie
Attorney at Law
1200 Franklin
P.O. Box 5000
Vancouver, WA 98666-5000

Robin Schreiber, DOC# 898040
D 428-L
Monroe Correctional Complex
P.O. Box 777
Monroe, WA 98272

FILED
COURT OF APPEALS
DIVISION II
07 JUL 10 PM 12:55
STATE OF WASHINGTON
BY  DEPUTY

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



Catherine E. Glinski
Done in Port Orchard, WA
July 10, 2007