

No. 39448-1-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint Petition of

— NICHOLAS HACHENEY,

Petitioner.

**PERSONAL RESTRAINT PETITION
(REVISED)**

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A. STATUS OF PETITIONER

Nicholas Hacheney (hereinafter “Hacheney”) challenges his Kitsap County conviction for first-degree murder. Mr. Hacheney is currently incarcerated at the Reformatory in Monroe, Washington, serving a 320-month sentence.

This is Hacheney’s first collateral attack on this judgment. Mr. Hacheney filed an original petition as a “placeholder,” noting that he intended to later amend that document. After the State did not object, this Court authorized the filing of this replacement petition, which has been filed within 30 days of the completion of his direct appeal.

B. FACTS

1. Introduction

Mr. Hacheney may be a cad, but he is not a killer. However, the State, aided by an improper instruction, argued that the fact he was a cad, meant he *must* be a killer. RP 5017 (“Here’s where we get into the *strongest mode* of evidence, that is circumstantial evidence of consciousness of guilt...the affairs and the relationships...”) (emphasis added).

The original conclusion of investigators was that Dawn Hacheney died in an accidental fire. This opinion changed only after and *entirely as the result* of a witness, Sandy Glass, coming forward, demanding and

receiving immunity, and then stating that Hachenev confessed that he murdered his wife. This revelation took place nearly four years after Ms. Glass alleges the confession occurred. Thus, Ms. Glass' credibility was central to this case. Inexplicably, after promising such evidence in opening, counsel failed to cross-examine Ms. Glass about the "prophecy" she says she received that led her to devise a murderous plan, a plan she later projected onto Hachenev.

The case against Hachenev was also built on improper, suspect forensic opinions, including opinions that vouched for the credibility of other witnesses. To make matters worse, in two separate instances Hachenev could not cross-examine the witness who actually conducted the scientific test at issue, but instead was faced with the prospect of examining a witness with no personal knowledge of how the test was conducted, but who nonetheless vouched for the reliability of the outcome.

The investigation conducted since trial, unaided by discovery or access to investigators or experts (counsel represents Hachenev *pro bono*), has nevertheless called into question significant portions of the State's case. In addition, that investigation has shone new light on what this Court called the "closest" issue on direct appeal, the use of several video depositions at trial, calling into serious question the State's earlier claim that it made good faith efforts to obtain the presence of those witnesses at trial.

This is not a case where Mr. Hacheny almost got away with murder. It is, instead, an unfortunate case where Mr. Hacheny was wrongfully convicted of murder for the death of his wife in an accidental fire.

2. Procedural History

On December 26, 1997, Nicholas and Dawn Hacheny's house burned. A firefighter discovered Dawn, deceased, in her bed. Originally, the officials and Safeco Insurance, who examined the case, concluded that the fire and Mrs. Hacheny's death were accidental.

In 2001, Sandy Glass went to the police with her lawyer, sought and was granted complete immunity (RP 2353),¹ and then claimed that Mr. Hacheny had confessed the murder of his wife to her in 1998.

In September 2001, the State charged Hacheny with first degree premeditated murder. In February 2002, after Hacheny refused a plea offer that would have resulted in a 7-year sentence, the State amended its charge to aggravated first-degree murder. Hacheny was tried by a jury and convicted.

Following entry of the original judgment in this case, Mr. Hacheny appealed. After this Court affirmed, the Washington Supreme Court granted review and reversed Hacheny's conviction for aggravated murder based on the insufficiency of the State's proof that Dawn was murdered in

the course of arson. *State v. Hacheny*, 160 Wn.2d 503, 158 P.3d 1152 (2007). Thus, the Court remanded for “resentencing without consideration of the improper aggravating circumstance.” 160 Wn.2d at 524.

Hacheny was resentenced on June 20, 2008. Mr. Hacheny has no criminal history. Therefore, his “standard range” was 240-320 months. Hacheny was sentenced to the top of the range—320 months.

Following entry of the new judgment, Hacheny filed a notice of appeal. The appeal (No. 38015-3) resulted in reversal of a portion of Hacheny’s second sentence and remand for a third sentencing.

This amended PRP timely follows.

3. Facts

Dawn Hacheny’s deceased body was found after a fire destroyed part of the Hacheny home.

Nicholas Hacheny has consistently maintained his innocence. *See Declaration of Nicholas Hacheny.*

On January 26, 1998, Hacheny was interviewed by Scott Rappleye, a fire investigator for the Bremerton Fire Department and Detective Daniel Trudeau. Hacheny said that he and Dawn had opened Christmas presents in the bedroom, that they had strewn wrapping paper around the room, and that the bedroom space heater was the only source of heat in the house. He had been duck hunting when the fire occurred. The fact of the duck hunting

¹ “RP” refers to the verbatim report of proceedings. “CP” refers to the clerk’s papers. By separate

trip has never been contested—although the exact timing of the trip is a critical fact.

4. Sandy Glass

During the summer and fall of 1997, Hachenev was having an affair with a woman named Sandra Glass. During the spring of 2001, Glass mentioned to her then-boyfriend that while she and Hachenev had been alone in the basement of their church in 1998, Hachenev had admitted giving Dawn some Benadryl and lying awake until God told him, “(G)o take something that you want.” RP 2335. According to Ms. Glass, Hachenev held a plastic bag over Dawn's head until she was no longer breathing, set the fire, and left. *Id.* Glass stated at trial that her reason for coming forward with the alleged confession was the fact that her affair with Mr. Hachenev was becoming public. RP 2453.

5. Forensic Investigation

On December 29, 1997, Dr. Emmanuel Lacsina performed an autopsy. Dr. Lacsina determined the cause of death to be laryngospasm, possibly caused by a flash fire. The death was ruled accidental. RP 961.

John Rappleve, a fire investigator for the Bremerton Fire Department, also initially concluded the fire was accidental. He also noted that some of the propane canisters had “vented” during the fire, and that the area around the canisters had burned more heavily than other areas in the

motion, Hachenev will request that the direct appeal file be consolidated with this PRP.

room. RP 1260. Unfortunately, the propane canisters were discarded during the investigation preventing any scientific examination.

During the autopsy, Dr. Lacsina collected blood and lung samples that were later tested by Egle Weis, an employee of the state toxicology laboratory. Ms. Weis died unexpectedly before trial. Prior to trial, during an ER 702 hearing the state admitted seven exhibits in relationship to the testing done by Ms. Weis as the foundation of Dr. Logan's testimony regarding the reports.²

At trial, Dr. Logan testified to being Weis' supervisor in late 1997 and to the lab's general procedures for handling and testing blood and tissue samples. Over Hacheney's objections, the trial court admitted Exhibit 323, the report in which Weis described her test results. Hacheney will seek by separate order to include exhibits 1-6 and 323 in the record for this PRP. According to Dr. Logan, who was permitted to recite and vouch for her test results despite the fact that had no direct knowledge of the tests conducted or the results achieved, Weis' report indicated she found little carbon monoxide and no propane in the lungs, no carbon monoxide in the blood, and an elevated level of Benadryl.

Based in large part on the lab reports in which Weis had described

² See VRP October 1st 2002, Exhibit #1 –Request form from Kitsap County Coroner's Office. VRP 483 Exhibit #4 Printout of the gaschromatograph. VRP 507 Exhibit #3 Printout of gaschromatograph, mass spectrometer. VRP 508 Exhibit #6 Printout of the gaschromatograph. VRP 509 Exhibit #2 Result of printout from blood alcohol test. VRP 511 Exhibit #5 Printout of

the results of her tests, Drs. Lacsina and Selove, another pathologist, opined that Dawn had died from suffocation prior to the fire.

The facts relevant to the forensic testimony at trial are discussed in greater detail in the first four claims in this petition.

6. Closed Courtroom “Depositions” Used at Trial

On June 28, 2002, over Hachenev's objection, the trial court granted the State's request to take depositions from three witnesses who were planning to be in other countries at the time of trial. Two of those witnesses, Michael and Julia DeLashmutt, were moving to Scotland. The third, David Olson, was moving for at least six months to a rural area in Bolivia. Hachenev's father asked to attend the depositions, but the trial court denied his request.

At the time of trial, the State represented that all three witnesses refused to return for trial, despite the State's good faith efforts to secure their presence. The trial court accepted the State's representations, which were also heavily relied on by this Court in affirming Hachenev's conviction.

7. The Admission of “Bad Act” Evidence

Prior to trial, the trial court held that certain evidence was admissible under ER 404(b). At trial, the State offered Hachenev's alleged statement

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immunoassay test. VRP 512 Exhibit #7 Copy of toxicology report. VRP 513 (Same as Exhibit 323 admitted at trial)

(through video taped Deposition of Michael Delashmutt) made before the fire, that he could not wait to go to heaven because then he could have sex with whomever he wanted. The State also offered that shortly after the fire, Hachenev had begun sexual relationships with women named Latsbaugh, Anderson, and Matheson; and that at Dawn's funeral³ he had given Anderson a hug of questionable propriety. Hachenev objected. Later, the court gave the following limiting instruction:

Evidence has been introduced in this case on the subject of the Defendant's relationships with several women for the limited purposes of whether the Defendant acted with motive, intent or premeditation, or as *evidence of consciousness of guilt*. You must not consider this evidence for any other purpose.

CP 1355 (emphasis supplied).

a. Extra-Record Evidence Relied On in This Petition

Hachenev discusses his extra-record evidence in greater detail in each respective section below. However, he summarizes that evidence, which he groups into four appendices attached to this petition.

First, Hachenev has always maintained his innocence. He has written a declaration (Appendix A), which states that he is neither an arsonist, nor a murderer.

³ In pre-trial motions and during opening statements the state described this hug as “Mr. Hachenev made physical advances towards Annette Anderson at Dawn Hachenev’s funeral.” VRP 46 Anderson actually testified that the “hug” in question happened on the day of Dawn’s death at her Pastor’s house in front of a group of people and described it as “He gave me a big hug, and it was a different sort of hug, although, you know, it was a specific moment... sort of a no-holds barred, I’m giving you a full body hug thing.” RP 2888.

Second, Hacheney has discovered a wealth of information regarding the practices at the Washington State Patrol Toxicology Lab, which conducted tests heavily relied on by a number of the State's witnesses in this case, demonstrating what a three judge panel called a "culture of compromise." In short, the protocols were not followed and Dr. Logan, who vouched for the reliability of his staff, either knew about this malfeasance or, as he later claimed, was stretched too thin to properly supervise his staff. In any event, the true picture is much different than portrayed to Hacheney's judge and jury. These documents are contained in Appendix B.

Appendix C consists of documents obtained since trial through public disclosure requests which show two things: (1) a complete absence of any efforts by the State to insist that the three witnesses who were earlier deposed return for trial; and (2) assistance to those same witnesses by the State in claiming unavailability. In short, the new evidence calls into serious question the good faith that this Court found barely passed muster to justify "unavailability" on direct appeal.

Finally, this petition is based on extensive new information about Mr. Hacheney's whereabouts when the fire (that burned a portion of his house and caused the death of his wife) started. Those documents, which establish a different timeline than proposed by the State and which make it impossible for him to have started the fire, are contained in Appendix D.

C. ARGUMENT

1. Claims of Error

CLAIM NO. 1: MR. HACHENEY'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED BY THE ADMISSION OF TESTIMONIAL HEARSAY DESCRIBING THE RESULTS OF SEVERAL SCIENTIFIC EXAMINATIONS WHERE THE PERSONS WHO CONDUCTED THOSE TESTS WERE NOT SUBJECT TO CROSS-EXAMINATION.

Facts

During Hacheny's trial several witnesses testified to the results of scientific tests performed by other witnesses, who were not present at trial and not subject to cross-examination.

For example, Dr. Lacsina, who performed the autopsy in this case, testified to the results of a blood test conducted by Olympic Medical Laboratories that he indicated revealed a lack of carbon monoxide in the Dawn Hacheny's blood. RP 901. This finding was heavily relied on by both Dr. Lacsina and Dr. Selove to support their opinions. The defense objected, arguing both that the foundation had not been laid and that Hacheny could not cross-examine the results. RP 893-900. The defense objection was overruled.

Next, Dr. Barry Logan, the toxicologist at the Washington State Patrol Crime Laboratory, was permitted to testify concerning the protocol and the results of tests performed on lung tissue—tested for the presence or absence of propane. The actual tests were conducted by Egle Weis, an

employee of the crime lab who had died between the time of testing and trial. Dr. Logan testified that he was not present and did not witness Weis testing the samples and that no bench notes existed to show what procedures she followed, but nevertheless was permitted to opine that Ms. Weis followed the protocol (RP 1539, 1548), making the test results reliable.

Dr. Logan was asked: Based upon the answers she gave and the case file, do you have an opinion as to the validity, then, of the samples that were taken, and the testing that was conducted by Miss Weis. He answered:

A. Yes.

Q. What is that opinion?

A. Is that it was properly conducted in compliance with the protocols that were in place at that time.

RP 1547. *See also* RP 1582 (rendering opinion that propane was not detected by Ms. Weis).

Both scientific tests figured large in this case because they both concerned the presence or absence of propane in Dawn Hacheney's body, a key element in the State's suffocation theory. *See* RP 1383 (Dr. Selove testifies to his reliance on the toxicology report); RP 1412 (same); RP 5151-52, 5172 (State argues that the "undisputed" fact is that no propane was found in the deceased's lungs and no carbon monoxide in her blood—

of course, it was impossible for Hacheny to dispute this evidence without being able to cross-examine the person who conducted the test).

Argument

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” The Sixth Amendment’s Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The United States Supreme Court’s opinion in *Melendez-Diaz v. Massachusetts* means what it said, and said what it means: “[a] witness’s testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.” ___ U.S. ___, 129 S. Ct. 2527, 2531 (2009). For that reason, the prosecution violates the Confrontation Clause when it introduces forensic laboratory reports into evidence without affording the accused an opportunity to “‘be confronted with’ the analysts at trial.” *Id.* at 2532 (quoting *Crawford*, 541 U.S. at 54).

In *Crawford, supra*, the Court held that the prosecution may not introduce “testimonial” hearsay against a criminal defendant unless the

defendant has an opportunity to cross-examine the declarant, or unless the declarant is unavailable and the defendant has (or had) an opportunity for cross-examination. *Id.* at 54, 68. Five years later, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court clarified that forensic laboratory reports are testimonial evidence. *Id.* at 2532. Accordingly, the Supreme Court held that the prosecution violates the Confrontation Clause when it introduces a nontestifying analyst's forensic laboratory report through the testimony of a police officer.

The use of the definite article (confront *the* witnesses) in this constitutional provision is not adventitious. Instead, it dictates that if the State decides to introduce testimonial evidence, it must afford the defendant the opportunity be confronted with the specific creator of that evidence – that is, the person who actually made the statement or authored the document at issue. *Crawford*, 541 U.S. at 68. Accordingly, the United States Supreme Court has repeatedly held that the government violates the Confrontation Clause if it introduces a witness's testimonial statements through the in-court testimony of a different person, such as a police officer. *See id.*; *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz*, 129 S. Ct. at 2532; *id.* at 2546 (Kennedy, J., dissenting) (“The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second . . .”).

Nothing about the status of an in-court witness as a forensic supervisor or similar type of person alters this analysis. It is true that a supervisor may be a “competent witness” to answer general questions regarding someone else’s forensic declarations, such as “systemic problems with the laboratory processes” that the person used. But the Confrontation Clause guarantees more than that. As the Court explained in *Melendez-Diaz*, the Clause guarantees an opportunity to test the “honesty, proficiency, and methodology” of the actual author of a forensic report that the prosecution seeks to introduce into evidence. 129 S. Ct. at 2538. Indeed, an analyst “who provides false results may, under oath in open court, reconsider his false testimony. And, of course, the prospect of confrontation will deter fraudulent analysis” and “weed out . . . incompetent [analysts] as well.” *Id.* at 2537 (citations omitted).

The holding of *Melendez-Diaz*, in fact, effectively resolves the claim presented here. There, this Court explained that “[a] witness’s testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.” 129 S. Ct. at 2531 (emphasis added); *see also id.* at 2532 (“petitioner was entitled to ‘be confronted with’ the analysts at trial”) (emphasis added); *id.* at 2537 n.6 (“The analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation”) (emphasis added). The inescapable implication of

this holding – as even the dissent acknowledged – is that the analyst who wrote “those statements that are actually introduced into evidence” must testify at trial. 129 S. Ct. at 2545 (Kennedy, J., dissenting). Surrogate forensic testimony does not satisfy the Confrontation Clause.

Crawford does not simply require an opportunity for cross-examination of someone who can discuss, or even vouch for, the reliability of the testimonial evidence introduced. It requires the prosecution to make the declarant of testimonial evidence available for cross-examination, so the defendant can probe the reliability of the declarant’s statements directly. *Crawford*, 541 U.S. at 61. Hence, as a leading treatise explains, “*Crawford*’s language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial.” D.H. KAYE ET AL., *THE NEW WIGMORE: A TREATISE ON EVIDENCE-EXPERT EVIDENCE* § 3.10.3, at 57 (Supp. 2009).

To use [testimonial] information in evaluating the expert’s testimony, the jury must make a preliminary judgment about whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe that the expert’s reliance is justified; conversely, if the jury doubts the accuracy or validity of the basis evidence, that presumably increases skepticism about the expert’s conclusions.

THE NEW WIGMORE, supra, § 3.10.8, at 53.

Thus, as courts and commentators have recognized, it is simply “nonsense” to claim that a forensic report introduced to provide a basis for

some other analyst's in-court testimony is not introduced for the truth of the matter asserted. *Id.* at 54; see also *People v. Goldstein*, 6 N.Y.3d 119, 128 (N.Y. 2005) (“The distinction between a statement offered for its truth and a statement offered to shed light on an expert’s opinion is not meaningful in this context.”); Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 828, 855-56 (2008) (“[I]t is not logically possible for a jury to use the hearsay statements to assess the weight of the expert’s opinion other than by considering their truth”).

In the wake of *Melendez-Diaz*, two state supreme courts and one federal court of appeals have held that the Confrontation Clause prohibits what might be called “surrogate” forensic testimony – that is, introducing one forensic analyst’s testimonial statement through the in-court testimony of another. In *Commonwealth v. Avila*, 912 N.E.2d 1014 (Mass. 2009), the defendant argued that the prosecution violated the Confrontation Clause by permitting one forensic analyst “to recite [another’s] findings and conclusions on direct examination.” *Id.* at 1027. Drawing on its earlier decision in *Commonwealth v. Nardi*, 893 N.E.2d 1221 (Mass. 2008), which had held that a testifying analyst in such a scenario is “plainly . . . asserting the truth of” the nontestifying analyst’s findings in a manner that triggers the defendant’s constitutional right to confrontation, *id.* at 1232-33, the court held that *Melendez-Diaz* and *Crawford* require a testifying “expert

witness's testimony [to be] confined to his or her own opinions.” *Avila*, 912 N.E.2d at 1029. When a forensic examiner, “as an expert witness . . . recite[s] or otherwise testif[ies on direct examination] about the underlying factual findings of [an] unavailable [forensic analyst] as contained in [his forensic] report,” the prosecution transgresses the Confrontation Clause. *Id.* at 1029.

Similarly, in *State v. Locklear*, 681 S.E.2d 293, 304-305 (N.C. 2009), the prosecution introduced two forensic analysts' reports through the in-court testimony of a third analyst. Reciting *Crawford's* basic rule that “[t]he Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant,” the North Carolina Supreme Court held that introducing one forensic analyst's report through the live testimony of a different analyst “violate[s] a defendant's constitutional right to confront the witnesses against him.” *Id.* at 304-05 (emphasis added); *see also State v. Galindo*, 683 S.E.2d 785 (N.C. Ct. App. 2009) (finding confrontation violation where supervisor testified concerning someone else's forensic analysis).

The Seventh Circuit likewise has held that although a surrogate forensic analyst may testify based on raw data someone else generated, the “conclusions” of the nontestifying analyst who performed

the testing are testimonial statements that must be “kept out of evidence.” *United States v. Moon*, 512 F.3d 359, 362 (7th Cir.), *cert. denied*, 129 S. Ct. 40 (2008). Reaffirming that ruling in a case after *Melendez-Diaz*, the Seventh Circuit held that a forensic analyst’s testimony based on forensic tests that another analyst performed did not violate the Confrontation Clause because “[the second analyst’s] report was not admitted into evidence.” *United States v. Turner*, ___ F.3d ___, 2010 WL 92489, at *5 (7th Cir. Jan. 12, 2010). The Confrontation Clause would have been violated if the testifying analyst had “not [been] involved in the testing process” at issue and the prosecution had introduced the second analyst’s certificate of analysis. *Id.* at *4-*5.

Intermediate courts in three states – Texas, Michigan, and California – have likewise held that surrogate forensic testimony violates the Confrontation Clause. *See People v. Payne*, 774 N.W.2d 714 (Mich. Ct. App. 2009); *Wood v. State*, ___ S.W.3d ___, 2009 WL 3230848 (Tex. Ct. App. Oct. 7, 2009); *Hamilton v. State*, ___ S.W.3d ___, 2009 WL 2762487 (Tex. Ct. App. Aug. 31, 2009); *Cuadros-Fernandez*, ___ S.W.3d ___, 2009 WL 2647890 (Tex. Ct. App. Aug. 28, 2009); *People v. Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009); *People v. Lopez*, 98 Cal. Rptr. 3d 825 (Cal. Ct. App. 2009), *rev. granted* (Cal. Dec. 2, 2009).

The claim presented also directly implicates the truth-seeking function of trial. As the Court noted in *Melendez-Diaz*, forensic reports, just like other *ex parte* testimony created by law enforcement agents, presents “risks of manipulation.” 129 S. Ct. at 2536. Indeed, investigative boards, journalists, and interest groups have documented numerous recent instances of fraud and dishonesty in our nation’s forensic laboratories. *Id.* at 2536-38.8 The Supreme Court also has recognized that “a forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution.” *Melendez-Diaz*, 129 S. Ct. at 2536. Even an entirely honest and objective forensic analyst may suffer from a “lack of proper training or deficiency in judgment,” *id.* at 2537, or may place undue analytical weight on a suspect methodology. *Id.* at 2538.

Surrogate witnesses fail to address – and may actually aggravate – the problems posed by an analyst’s potential fraud, incompetence, or flawed methodology. A recent case from California vividly illustrates the point.

In *People v. Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009), rev. granted (Cal. Dec. 2, 2009) the prosecution introduced an autopsy report to prove that a certain amount of time had elapsed before the victim’s death, a hotly contested issue at trial. The medical examiner who had authored the

report, however, had since been fired. He had also been forced to resign “under a cloud” from another job, and was blacklisted by law enforcement in two more counties for falsifying his credentials. *Id.* at 704. Finally, the examiner had been known to base his conclusions on police reports instead of forensic methods. *See People v. Beeler*, 891 P.2d 153, 168 (Cal. 1995); Scott Smith, *S.J. Pathologist Under Fire Over Questionable Past*, THE RECORD, Jan. 7, 2007, available at http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070107/A_NEWS/701070311#STS=g329z7h5.134t. In light of this problematic track record, the prosecution put the medical examiner’s supervisor on the stand instead of the examiner. As the supervisor explained during the preliminary hearing, “[t]he only reason they won’t use [the examiner himself] is because the law requires the District Attorney to provide this background information to each defense attorney for each case, and [the prosecutors] feel it becomes too awkward to make them easily try their cases.” *Dungo*, 98 Cal. Rptr. 3d at 708 (alterations in original). The California Court of Appeal held that this surrogate testimony violated Crawford, observing that the “prosecution’s intent” had been to “prevent[] the defense from exploring the possibility that the [medical examiner] lacked proper training or had poor judgment or from testing [his] ‘honesty, proficiency, and methodology.’” *Id.* at 714 (quoting *Melendez-Diaz*, 129 S. Ct. at 2538).

Allowing supervisors to testify regarding forensic tests conducted by third party analysts would, in effect, strip defendants of the opportunity to probe the analyst's "honesty, proficiency, and methodology;" thus making it impossible to "weed out" fraudulent analysts as well as incompetent ones. *Id.* Likewise, allowing experienced supervisors to testify in place of analysts may give test results a veneer of credibility they do not deserve in some cases. This problem is compounded by the fact that supervisors may be particularly solicitous of the work done by employees in their charge or reluctant to share doubts about that work lest doing so reflect poorly on the supervisor's own skill and standing as a manager.

There are compelling, additional, "real world" reasons why the right to confront a forensic scientist is integral to the truth finding function. Over the past 35 years, a belief has taken hold in the criminal justice system that critical elements of any given case can be conclusively and irrefutably resolved through the use of forensic evidence. This belief stems from the assumption that state forensic examiners are highly-trained scientists, who conduct widely-recognized tests, and can then provide an objective and unimpeachable report about their results for use in criminal trials. The supposedly objective and "neutral" nature of these reports render the need for direct testimony and cross-examination superfluous.

This is unfortunately not true—in general or in this case, as the following section provides.

However, even if all forensic examiners operated under ideal “scientific” circumstances—solid techniques performed by qualified professionals, conducted in an accredited laboratory with meaningful supervision and controls—their reports would still be subject to the same dangers that prompted the Framers to adopt the Confrontation Clause in the first place. This is because, at bottom, the evidentiary worth of forensic evidence cannot be boiled down to a simple mathematical calculus. Instead, the probative value of forensic evidence always depends on a variety of factors, including the training and skill of the forensic examiner, the validity and reliability of the technique, the precision of the recording methods, the existence of supervisory controls, and the absence of context and confirmation bias undermining the accuracy and objectivity of the forensic examiner in reporting the results.

As the *Melendez-Diaz* decision points out, the trials of the wrongly convicted reveal a widespread pattern of forensic errors. Although some of these errors involve forensic practices that have given way to new testing methods, there is no reason to believe these errors are purely or even largely a function of technology. As the Framers recognized more than 200 years ago when they included the Confrontation Clause in the Bill of

Rights, simple mistakes and even more culpable ones are likely to continue regardless of how much technological progress occurs. Technological advances cannot eliminate the forensic errors that have plagued the exoneration cases, and these errors highlight the need for the sort of vigorous confrontation right the Court has described in its *Crawford* line of cases.

Confrontation is the best mechanism yet devised for safeguarding against precisely the sorts of witness mistakes, overreaching, bias and outright fabrication exposed by the exonerations and their aftermath. Indeed, these are precisely the sorts of errors most likely to occur when, as often occurred during the *Ohio v. Roberts* era, the state's testimonial evidence is shielded from the opportunity for adversarial scrutiny. *See e.g., Pointer v. Texas*, 380 U.S. 400, 404 (1965) (importance of confrontation in exposing falsehood); *Delaware v. Van Arsdall*, 475 U.S. 673, 682-83 (1986) (importance of confrontation in exposing bias); *see generally Crawford v. Washington*, 541 U.S. 36, 61-62 (2004) (describing confrontation as “procedural” guarantee that reflects Framers' substantive judgment about “how reliability can best be determined.”).

The *Melendez-Diaz* decision articulates the very problem found in the Hachenev case. Ms. Weis was asked to conduct certain tests on blood and lung tissue during the course of an investigation. The accuracy of her

testing required certain protocols to be followed and allowed for at least some level of subjective analysis. Furthermore, it was established at trial that there are a wide range of protocols that could have been followed and the Crime Lab had no written protocol at the time of the testing. Dr. Logan further testified that he had no knowledge of what Weis specifically did and no bench notes existed. The variance in how the material was handled would have a dramatic impact on the results of the test. Like the *Melendez-Diaz* case, Weis used chromatography mass spectrometry analysis. The Supreme Court specifically stated that such testing is subject to judgment by the person conducting the test.

“At least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination. See 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 23.03[c], pp. 532-533, ch. 23A, p. 607 (4th ed.2007) (identifying four “critical errors” that analysts may commit in interpreting the results of the commonly used gas chromatography/mass spectrometry analysis); Shellow, *The Application of Daubert to the Identification of Drugs*, 2 *Shepard's Expert & Scientific Evidence Quarterly* 593, 600 (1995) (noting that while spectrometers may be equipped with computerized matching systems, “forensic analysts in crime laboratories typically do not utilize this feature of the instrument, but rely exclusively on their subjective judgment”)

Id. at 2537-38.

Hachenev was unable to confront Weis on chain of custody, evidence handling, her practices, or the subjective analysis she made in her conclusions. Instead Mr. Hachenev was faced with a witness in Dr. Logan

who attested to the accuracy of the test results without any direct knowledge as to how they were performed or what went into Ms. Weis' conclusions.

Just after *Melendez Diaz* was announced the Supreme Court issued a GVR (grant, vacate and remand) order in the case of *Crager v. Ohio* 129 S. Ct. 2856, 174 L.Ed.2d 599 (2009). This case is particularly on point with the Hachenev case. In *Crager*, the analyst who did the testing and prepared the report, Jennifer Duval, was on maternity leave and the State moved to allow her colleague, Steven Wiechman, to testify as to the results of her tests. *State v. Crager* 116 Ohio St. 3d 369, 2007-Ohio 6840. The defense objected "Mr. Wiechman did not conduct the testing, he did not remove any samples to be tested, he did not do the actual calculations. *** I don't see how he can testify to what someone else did." *Id.* The trial court allowed the evidence and testimony over objection based upon the business record exception. (See virtually the same objection in Hachenev trial with similar results. VRP 1151-1555)

Mr. Wiechman was then allowed to testify as to his qualifications and the safeguards and procedures in place that ensure accuracy at the lab much like the testimony given by Dr. Logan in the present case. Mr. Wiechman, like Dr. Logan, testified as to the process that is supposedly done in every case regarding handling of evidence and testing procedures.

Like Dr. Logan, Mr. Wiechman had not conducted any of the actual testing. However, unlike Dr. Logan in the present case, Mr. Wiechman did have access to Duvall's notes, the DNA profiles she generated and her conclusions. Mr. Wiechman also participated in the technical review of the findings of Ms. Duvall and had looked at the same data that Duvall had looked at and reached the same conclusions prior to knowing that the case would be tried or that he would be testifying.

The Ohio Supreme Court agreed with the trial court that the reports fell within the business records exception to the hearsay rule. *Id.* They further opined that the expert testimony and reports were not testimonial under *Crawford v. Washington* and did not violate Crager's 6th Amendment right to confront witnesses against him, utilizing essentially the same reasoning of this Court in its prior ruling in the Hacheny direct appeal.

On June 29th 2009 the U.S. Supreme Court granted Crager's Petition, vacated his judgment based upon its ruling's in *Melendez-Diaz* and remanded the Case to the Ohio Supreme Court for further consideration. On September 17, 2009, the Ohio Supreme Court ruled *sua sponte* to vacate the judgment of the trial court and remanded the cause for a new trial consistent with *Melendez-Diaz v. Massachusetts*. Slip Opinion No. 2009-Ohio-4760.

In light of the U.S. Supreme Court's ruling in *Melendez-Diaz*, it is now clear that Mr. Hacheney was deprived of his right to confront witnesses against him by the admission of numerous lab reports and testimony from Dr. Logan, Dr. Lacsina, and Dr. Selove based upon those reports. The error is further compounded by the revelations coming out of the Washington State Toxicology Lab over the past several years. (Discussed below)

The evidence introduced through the lab reports was critical to the State's case. It allowed the state to argue that the tests in question conclusively eliminated the presence of propane and carbon monoxide in Dawn's lungs and blood and that this therefore meant that she had to be dead before the fire started.

What is the undisputed forensic pathology? In essence, that Ms. Hacheney was either dead or not breathing before the fire, that is undisputed. She has to be dead or not breathing before the fire because there's no carbon monoxide in her blood. There's no soot in her lungs or throat. There's no cyanide in her blood, and cyanide would be present because if she were alive and breathing the plastics in the room, the carpeting, the furniture, any plastics that are in the room emit cyanide when they are burned, and that would be breathed in and be in her blood.

VRP 5172.

As we now know, the accuracy of the tests in question is highly dependant upon the process used. Specifically, whether the material in question was properly placed in the correct container and if the gas was

drawn out of the container in the appropriate manner. The proper set up and calibration of the gas chromatograph is also a critical factor. None of those facts are known to anyone who testified in this case and there is no record of how the tests were conducted. We know from Dr. Logan's testimony that testing for propane was not a common practice and that the lab had no written protocol on it at the time Ms. Wies tested it. We also know from Dr. Logan's testimony that many of the optimum procedures were not done in the present case such as taking the entire lung instead of a very small sample, taking blood from an auxiliary source as opposed to taking the blood from the heart and placing the sample in a metal sealed container and drawing the gas through a syringe. Dr. Logan also testified that if the container lid were removed that gas would escape. Numerous question are left unanswered about the process used and the only person who could provide the answers is the people who did the actual testing. The inability to confront the most critical pieces of scientific evidence against Mr. Hachenev was far from harmless.

Because he was harmed by the violation of the Confrontation Clause and the right to meet the witnesses against him "face to face," this Court should reverse Mr. Hachenev's conviction.

CLAIM NO. 2: NEWLY DISCOVERED EVIDENCE REGARDING THE PERFORMANCE STANDARDS OF THE WASHINGTON STATE PATROL CRIME LAB JUSTIFIES A NEW TRIAL.

CLAIM NO. 3: THE STATE FAILED TO DISCLOSE MATERIAL INFORMATION REGARDING THE PERFORMANCE STANDARDS OF THE WASHINGTON STATE PATROL CRIME LAB IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

CLAIM NO. 4: MR. HACHENEY WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO COMPETENTLY INVESTIGATE THE PERFORMANCE STANDARDS OF THE WASHINGTON STATE PATROL CRIME LAB.

Facts

On direct appeal, this Court concluded that the report prepared by Egle Weis was admissible because the person conducting the test was a “professional” acting under a “business duty.” Indeed, Dr. Logan’s opinion was not based on how Ms. Weis performed the test in question, but instead on the “normal practice” of both Ms. Weis and the entire lab. The trial court admitted the evidence concluding she “acted reliably and trustworthily.”

Prior to trial, the State did not disclose to the defense any information to the contrary. Likewise, the defense apparently did not undertake an investigation and discover otherwise.

In the years since trial, a wealth of information has been discovered by post-conviction counsel bringing into question both Dr. Logan’s oversight and raising significant doubts about whether all the employees of the crime lab acted “reliably and trustworthily.” *See* Appendix B. This

new information sheds new light on whether the internal procedures of the Washington State Patrol Toxicology Lab in 1998 provided sufficient guarantees of trustworthiness and whether it was safe to “assume” that all employees of the crime lab acted reliably and trustworthily. Indeed, we now know that in a disturbing number of cases, they did not.

In July 2004, the *Seattle Post Intelligencer* published a series of articles outlining several problems with the crime lab. *See* Appendix B. Most importantly for purposes of this case, the reports revealed significant problems with the oversight of WSP Crime Lab employees.

In March 2007, the first of two anonymous tips from a whistleblower led to an investigation of the WSP Toxicology Lab. Dr. Logan asked lab scientist Ann Marie Gordon to lead the investigation into the accusation that lab employees were falsifying reports, that evidence was being destroyed, and that protocol was not being followed. In April 2007, Ms. Gordon reported that she had completed her investigation, revealing no fraud.

In July 2007, a second tip was received asking to investigate Ms. Gordon’s performance more closely (suggesting that if her schedule was compared against some of her signed certificates that it would show fraud). When Dr. Logan met with Ms. Gordon to inform her that another investigation would be commenced, Ms. Gordon admitted that she had acted fraudulently, signing certificates for work she had not performed,

including stating that she had calibrated machines when she had not done the work (*i.e.*, one of the aspects of Ms. Weis' work that Logan assured Hacheney's jurors had been correctly performed because it always was). Ms. Gordon resigned on July 20, 2007.

As a result, several requests were made to conduct a full investigation of the State Patrol crime lab. *See* Appendix B. The Washington Foundation for Criminal Justice stated: "It represents a departure from integrity so profound that you can't believe anything about the lab." *See* Appendix B.

In January, 2008, a panel of judges in King County ruled that "the work product of the WSTL (Washington State Toxicology Lab) has been so compromised by ethical lapses, systemic inaccuracy, negligence and violations of scientific principals that the WSTL simulator solution work product would not be helpful to the trier of fact." *State v. Ahmach*, Appendix B, *Ruling* at 25.

Included in the judges' ruling were a number of findings highly relevant to the case at bar:

- a. Lab Manager Gordon had been taught by her predecessor to falsify test results conducted by other scientists;
- b. Dr. Logan was aware of this practice as early as 2000 (two years before Hacheney's trial);
- c. Although Dr. Logan and Ms. Gordon discussed the impropriety of this practice, in 2003, Ms. Gordon adopted the

practice herself;

d. At least two other employees adopted the practice;

e. The tests in question were run through the gas chromatograph;

f. Worksheets from machine testing were often drafted weeks later by personnel not present when the tests were conducted. These worksheets were inaccurate in some cases;

g. Declarations for certification of the solutions were prepared by support personnel and then signed by the analysts—sometimes weeks later. There were at least 150 instances of non-software related errors discovered.

h. In one instance, a gas chromatograph machine was malfunctioning, resulting in abnormal readings. This machine remained online for some time despite the fact that individual toxicologists knew it was not functioning properly;

i. Results from a 2004 audit revealed the following conclusions:

i. The WSLT was noncompliant with policies and procedures in eight major categories;

ii. The simulator solutions logbooks were not properly kept;

iii. The required self-audits were not performed;

iv. Lab Manager Gordon indicated she did not have time to follow WSP policies and would not do so;

v. WSP policies and required procedures appear to be of secondary concern to lab personnel;

j. Results from a 2007 audit revealed the following conclusion: “The department is unnecessarily exposed to litigation due to insufficient documentation and disregard for evidence handling policies and procedures.”

These and other factors led the panel of judges to conclude the WSTL had developed a culture of compromise. Calling the problems with the lab

“pervasive,” the judges summarized their concerns to include a failure to “pursue an ethical standard” expected of an agency that serves as an integral part of the criminal justice system; the failure to create and abide by procedures to catch and correct human error; and the failure to maintain scientific standards reasonably expected of an agency involving critically probative evidence.

The application of the information underlying these conclusions to Mr. Hacheney’s case is obvious.

The panel then went on to discuss Dr. Logan’s role, responsibility, and knowledge of the fraud. “While it is not clear from the testimony of the various parties just when Dr. Logan knew of the fraud, he should have known after the first tip. As previously stated, it is most likely that everyone in the WSTL was fully aware of the fraud.” *Id.* at 23. “This litany of problems is indicative of a pervasive culture which has been allowed to exist in the WSTL. In this culture, the WSTL compromises the accuracy of the work product. Accuracy becomes secondary to the accomplishment of the work.” *Id.* at 25.

In February 2008, Dr. Logan resigned. An investigation conducted by the Forensic Investigations Council concluded that Dr. Logan had too many responsibilities. “However, everyone who supervises a large number of employees...realizes that sometimes employees do not follow the rules, do not follow the directives and do not follow the law.” *See* Appendix B

Dr. Logan admitted no such difficulty or problems during his testimony in this case.

However, in response to the King County judges' ruling he complained that the workload of his department was two to five times that of other labs, that complacency about failing to follow protocol had set in; and that the protocols themselves were open to interpretation. Dr. Logan suggested the opposite to Hacheney's jury. Undersigned counsel has contacted Dr. Logan and discussed some of these discrepancies. *See* Declaration of Dr. Logan Appendix B.

In light of the fact that two additional people who initially handled the evidence, (Ted Zink, the Kitsap County Coroner and Glen Case, a lab employee) were also not available for cross-examination, the findings of the Risk management Division in their "Report to the Chief" are highly illustrative of the problems in this case:

- a. The evidence storage area was accessible to anyone;
- b. The evidence vault door was often propped open;
- c. There was no record of who entered the storage area;
- d. Auditors observed the removal of items without appropriate accompanying notations;
- e. Accountability to the chain of custody was noticeably absent;
- f. Minimal chain of custody directives existed;
- g. An environment of non-compliance with protocol developed;

- h. Personnel were not held accountable for failing to follow directives;
- i. Dr. Logan failed to implement changes suggested in 2005.

In response to a public disclosure request regarding one of the absent witnesses who handled the evidence in this case, Glenn Case, it was learned that he left the lab under questionable circumstances shortly before Hacheney's trial. However, none of this information was revealed by Dr. Logan or the State to Hacheney, the trial court, or Hacheney's jury.

This previously suppressed and newly discovered evidence must be measured by the assurances of quality control repeatedly pronounced during Hacheney's trial. Here is a quick summary of the WSTL's handling of the lung tissue:

- a. Dr. Lacsina had no memory of how he collected or stored the lung tissue. He was not sure to whom he gave the tissue—"it might have been Ted Zink." RP 903-04;
- b. Ted Zink, the County Coroner was not called to testify;
- c. Zink supposedly delivered the sample to Glen Case;
- d. Case was not called to testify;
- e. There was no documentation of Zink's work;
- f. The samples were then examined and tested by Egle Weis;
- g. Ms. Weis, who died before trial, obviously did not testify;
- h. Dr. Logan, who admitted that he did not have Ms. Weis' bench notes and did not personally observe any of her examination of the item testified to his opinion that she followed the protocols and to the reliability of her test

results (RP 1548);

The rationale supporting the admission of Dr. Logan's testimony was based on a set of assumptions proffered by the State and adopted by the trial court and later, this Court, which have now been proven false. At the time of the hearing, Dr. Logan professed that all of his employees followed protocol. We now know, and it appears Dr. Logan knew then, that the WSTL had a pervasive practice of cutting corners. Given this new information, it is impossible to conclude that "Ms. Weis performed the applications in the acceptable way, following accepted and appropriate protocol." CP 190.

Likewise, Dr. Logan's assurances of oversight have been undermined—by his own admission. As early as 2000, Dr. Logan was aware of a pattern of noncompliance and fraud. He nevertheless assured Hachenev's jury of the opposite proposition. Dr. Logan simply could not reasonably personally vouch for the test results where he had no personal knowledge of how the test was conducted.

Petitioner has framed this claim in three alternative ways: newly discovered evidence, a *Brady* violation, and Sixth Amendment ineffectiveness for failing to investigate. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *Silva v. Brown*, 416 F.3d 980, 985-86 (9th Cir. 2005); *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir.1999). In the end, no matter how the claim is framed, one thing is clear: Hachenev's jury was not given

anything close to accurate information about Dr. Logan's ability to vouch for the reliability of the test results offered in this case.

CLAIM NO. 5: MR. HACHENEY'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED WHEN VIDEO DEPOSITIONS WERE ADMITTED AT TRIAL. THIS CLAIM IS BASED ON NEWLY DISCOVERED EVIDENCE THAT THE STATE DID NOT MAKE GOOD FAITH EFFORTS TO OBTAIN THE PRESENCE OF THE WITNESSES AT TRIAL.

On direct appeal, this Court held:

The closest question in this case is whether the trial court, before permitting the use of Olson's and the DeLashmutts' depositions at trial, properly found that the State made good faith efforts, through 'process or other reasonable means,' to obtain their presence at trial. Hachenev contends that when the trial court admitted the three witness' pre-trial depositions in lieu of their live testimony, it violated his Sixth Amendment right to confront the witnesses against him.

This Court continued:

The State served all three witnesses with enforceable trial subpoenas before they left Washington. As far as the record shows, the State never hinted to them that they did not have to obey, or that they would not be punished if they failed to obey. Reasoning that the witnesses' depositions said or implied, 'We're leaving and not coming back,' [RP 3833] and that the prosecutor had 'revealed {that} all three witnesses refused to come and refused to honor the subpoena,' [*id.*] the trial court seems to have inferred that the witnesses would not have returned for trial even if the State had offered to reimburse them for their reasonable travel expenses. That inference was reasonably available from the record, which as a consequence is sufficient to support findings that the State could not procure the witnesses' attendance 'by process or other reasonable means and that the State was acting in good faith.

Although we resolve this question in favor of the State, we consider it close because the State, quite inexplicably, failed to offer to pay the travel expenses that the DeLashmutts and Olson would reasonably and necessarily incur to return for trial. *We might reach a different result if the record showed that the State had suggested or*

even hinted to a witness that the witness could ignore his or her subpoena once he or she had been deposed, for such a showing might have precluded the trial court's finding that the State had made a good faith effort to obtain the witness's attendance at trial. Because the record is devoid of such facts, however, we conclude that the trial court did not abuse its discretion.

121 Wn. App. 1061, 2005 WL 1847160 (emphasis added).

Evidence has now been developed that the State did much more than “hint” to the witnesses that they were free to ignore their subpoenas.

Through a public disclosure request, Petitioner has discovered the following:

1. David Olson wrote a letter on June 5, 2002, asking to have his testimony taped instead of appearing at trial. *The State did not disclose its response to that letter.*
2. That same day, Julia DeLashmutt sent an email to the Prosecutor’s Office stating that she and her husband (Michael) would be in Scotland in mid-October and asking what was needed before they left. *Once again, the State did not provide information regarding its response.*
3. On June 12, 2002, the State moved for videotape depositions, citing only the financial hardship to the witnesses, if required to travel back to the United States. *See CP 158.*
4. On June 28, 2002, at a hearing, the State once again argued that it would be “burdensome” for the witness to be forced to return for trial.
5. The video depositions were taken in early August 2002.
6. On September 9, 2002, Amanda Jarrett of the Kitsap County Prosecutor’s Office sent an email to DPA Clair Bradley indicating she was in the process of writing a letter instructing the DeLashmutts to contact her “regarding getting a witness unavailability letter faxed to us on the day of trial.” *The State has not provided the actual letter sent to the witnesses.*

7. On September 23, 2002, Ms. Jarrett sent another email to DPA Bradley with the DeLashmutts' contact information. The email also references that she sent a letter to them "re: getting something from her and Michael on 10/16 saying they are located in Scotland." She also indicates that she spoke to Julia's mother about the matter. *Once again, the State did not provide the email sent to the DeLashmutts claiming that it was deleted.*
8. On September 25, 2002, Ms. Jarrett sent an email to David Olson requesting that he fax her an "unavailability letter" on the first day of trial. She then went on to suggest language, specifically, "*I am therefore unable to return to Kitsap County to testify in the trial....*" The email instructs Olson to fax the letter to their office.
9. On September 27, 2002, Mr. Olson sent an email to Ms. Jarrett indicating he had received her email.
10. On October 16, 2002, Olson faxed a letter to the Prosecutor's Office that included Ms. Jarrett's proposed language nearly verbatim.
11. That same day, a faxed letter was also received from the DeLashmutts, which also contained identical language proposed by Ms. Jarrett.
12. Nowhere in the correspondence released by the Prosecutor's Office does any one of the three witnesses indicate that they refuse to return for trial.
13. Nowhere in the correspondence released by the Prosecutor's Office does the State indicate to any witness that she or he has an obligation to obey their subpoena nor mention the penalty for failing to honor that legal obligation.
14. On February 26, 2009, John Guinn, an attorney assisting undersigned counsel in this case, spoke with David Olson. When asked by Guinn what the prosecutors told him about his obligations after he was deposed, Olson stated, "as far as I knew, I was done." When asked to memorialize this conversation, Olson read a proposed declaration, agreed that

it was accurate, but refused to sign—stating the he “did not want to get involved in the case.” *See First Declaration of Guinn.*

15. Mr. Delashmutt has now contacted this office and relayed the fact that not only were both he and his wife willing to return for trial but would have welcomed a trip home at state expense. Mr. Delashmutt has further stated that they never indicated to the State that they refused to return for trial.
16. While Mr. Delashmutt acknowledged the above information in email exchanges, he also states that he refuses to sign even a truthful declaration.

See generally Appendix C.

As this Court noted on direct appeal, the Sixth Amendment provides that the accused shall enjoy the right to confront the witnesses against him. It bars the use of a witness' deposition unless the witness was previously cross-examined and is unavailable at the time of trial despite the State's good faith efforts to obtain his or her presence “by process or other reasonable means.” ER 804(a)(5); *Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Mancusi v. Stubbs*, 408 U.S. 204, 210-213, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *Barber v. Page*, 390 U.S. 719, 723-25, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

According to *State v. Aaron*, 49 Wn.App. 735, 740, 745 P.2d 1316 (1987), whether the State has made a sufficient effort to satisfy the good faith requirement of ER 804 is a determination that necessarily depends on

the specific circumstances of the case and rests largely within the discretion of the trial court. In *State v. Aaron*, the defendant was charged with burglary. He failed to appear in court as scheduled, but was arrested and arraigned ten days later. At his arraignment, the State moved to depose the key eyewitness, who wanted to leave for England the next day. The court granted the motion and the deposition took place that same afternoon, over defense counsel's objection. When the witness failed to appear at trial, the State moved to admit the deposition, and the trial court granted the motion. Emphasizing that the State had made 'no effort' to procure the witness' return for trial, Division One reversed. 49 Wn.App. 735.

In *State v. Hobson*, 61 Wn.App. 330, 810 P.2d 70, *review denied*, 117 Wn.2d 1029 (1991), on the other hand, the defendant was charged with second degree theft. His trial was set for September 15, reset for October 3, then reset again for October 21. On October 19, the State moved to continue the October 21st trial date because a witness whom it had previously subpoenaed for trial planned to be gone on a pre-paid hunting trip. The trial court denied the motion. The State then moved to depose the witness, the trial court granted that motion, and the witness was deposed. Later, at trial, the witness failed to appear. The State then moved to admit the deposition, representing that even though the witness had remained under subpoena, 'he had indicated that he would not forgo his trip to testify at Hobson's trial.' 61 Wn.App. at 333. The trial court granted the motion,

and Division One affirmed. *See also Crawford, supra* (requiring witness to be demonstrably unavailable).

One of the core elements of the Confrontation Clause is that it requires the witness to relate the fact *in open court* while under oath before the “watchful eyes of the jury.” *State v. Rohrich*, 132 Wn.2d 472, 939 P.2d 697 (1997). For centuries this process, dispensed with for these three witnesses, has been held to maximize the accuracy of the truth finding process.

This Court originally concluded “The facts and circumstances here resemble *Hobson* more than *Aaron*.”

The reverse is now true.

This new evidence certainly casts the trial court’s ruling, not to mention the State’s credibility in a different light. In the present case, not only did the State fail to make efforts to secure the three witnesses at trial, they gave the witnesses a roadmap to avoid their obligation. Nowhere in any of the documents and correspondence retained by the State and obtained by the defense does any one of the three witnesses indicate they are refusing to appear at trial. Instead, the documents provided support the conclusion that the State suggested to the witnesses that all they needed to do was to repeat language suggested by the State in order to be free of their obligation.

To make matters worse, the documents and correspondence obtained

by Petitioner are inconsistent with what the State told the trial court. For example, the prosecutor told the trial court that Olson “would not be honoring the subpoena” and that he would “be difficult to reach in any sort of routine or regular basis.” RP 3809-10. The State made these remarks despite actively exchanging emails with Olson—a fact conveniently omitted.

Further, Petitioner obtained all of this information without the aid of discovery devices. At an evidentiary hearing, Petitioner will be able to avail himself of those devices. RAP 16.11. Thus, if the State contests this new evidence, then an evidentiary hearing should be held.

If, on the other hand, the State does not offer its own, competent contesting evidence, then this Court should reverse and remand for a new trial.

CLAIM NO. 6: BECAUSE THE STATE DID NOT MAKE THE NECESSARY EFFORTS TO OBTAIN THE PRESENCE OF THE “DEPONENTS” AT TRIAL, THE DEPOSITIONS CONSTITUTED PART OF THE TRIAL. THEREFORE, CLOSING THE COURTROOM VIOLATED HACHENEY’S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO AN OPEN AND PUBLIC TRIAL.

On direct appeal, Hachenev argued that the trial court violated his constitutional right to a public trial by not allowing his father to attend the depositions. Both the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington Constitution give an accused the right to a public trial. If that right is violated, the remedy is to reverse and remand for a new trial. Washington courts have scrupulously protected

the accused's and the public's right to open public criminal proceedings. *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006) (state constitution requires open and public trials); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full hearing violated defendant's public trial rights); *In re Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed prior to closing a courtroom or sealing documents); *State v. Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001), *review denied*, 146 Wn.2d 1006 (2002). *See also In re Oliver*, 333 U.S. 257, 266, 68 S.Ct. 499, 504, 92 L.Ed. 682 (1948) (federal constitutional right to a public trial applicable to the states through 14th Amendment).

On direct appeal, this Court concluded that the Constitutional rights were not violated because the public was excluded from a deposition, not a portion of the trial. However, the new evidence presented in the section above supports the conclusion that the State never intended to attempt to bring the witnesses back for trial. Instead, the deposition was part of the

trial. Thus, the State misled both the trial court and this Court to conclude that the closed court hearing was merely a discovery deposition and not part of the trial.

Further, the fact that the deposition was played during trial does not cure the error. One of the critical underpinnings of the right to a public and open trial is that it serves to discourage perjury. *See Waller v. Georgia*, 467 U.S. 39, 46 104 S.Ct. 2210, 2215-16, 81 L.Ed.2d 31 (1984). *See also, United States v. Brazel*, 102 F.3d 1120, 1155 (11th Cir. 1997) (public trials ensure participants act responsibly, encourage witnesses to come forward, and discourage perjury). That protection is virtually non-existent where the witnesses testified in a private setting and then were out of the country at the time the depositions were played at trial.

“Prejudice is necessarily presumed where a violation of the public trial right occurs.” *Easterling*, 157 Wn.2d at 181, 137 P.3d 825. “The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.” *Id.* *See also State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), in which the Supreme Court rejected an argument by the state that closed jury interviews did not violate the right to public trial because they took place prior to the commencement of the trial.

The remedy is reversal and a new trial. *Easterling*, 157 Wn.2d at 174.

Once again, new facts cast this claim in a different light and merit a different outcome.

CLAIM NO. 7: MR. HACHENEY WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE WHERE COUNSEL FAILED TO INVESTIGATE AND PRESENT AN ACCURATE TIMELINE WHICH WOULD HAVE BEEN COMPELLING PROOF THAT IT WAS IMPOSSIBLE FOR MR. HACHENEY TO HAVE STARTED THE FIRE.

Mr. Hacheny could not have started the fire that caused his wife's death if he was either hunting or on his way to hunt. Thus, constructing an accurate timeline was critical to his defense.

Certainly, the State understood the importance of the timeline. The State alleged that Hacheny left home at 6:45 a.m. and arrived in the hunting blinds at 7:50 a.m. RP 5028. The State also presented evidence through a police officer that he made the drive from Hacheny's house to the hunting site in 51 minutes. Finally, the State argued that Hacheny and the two other hunters left the duck hunting site at 8:25, giving them approximately 30 minutes of hunting time, arriving at the restaurant where they ate breakfast and Hacheny paid the bill at 9:27 a.m. (as evidenced by a credit card receipt). According to the State's argument, this timeline allows for Mr. Hacheny to have set the fire, met his companions and arrived at the hunting site prior to the break of daylight, spent time hunting, eat breakfast, and finally for Hacheny to return to his now-burned house.

In fact, the timeline is speculative and, more importantly, could have been easily contradicted by competent evidence. *See Appendix D.*

While the defense theory also depended on the timeline, the defense case merely amounted to a weak criticism of the State's evidence in closing. RP 5102-04. The reason for the defense failure is simple. The defense failed to conduct the necessary investigation despite the repeated urgings of Mr. Hachenev and his father.

Petitioner has now conducted the investigation that trial counsel failed to conduct. That evidence, which is admittedly difficult to explain and/or fully appreciate without the aid of a hearing, provides additional convincing evidence of Hachenev's innocence. If this evidence had been discovered and presented there is a reasonable likelihood that jurors would have reached a different outcome. As will be shown, a simple internet search by defense counsel would have revealed objective evidence that completely contradicts the timeline presented by the state.

It is important to begin by identifying the facts that are uncontested and beyond dispute. Those facts are critical to establishing the most accurate timeline possible. There are several: arrival in the hunting blinds at least 20-30 minutes before daylight, the time that Hachenev paid for breakfast, and the time of the first 911 call reporting the fire. Hachenev uses those uncontested facts as "markers" to aid in the most accurate determination of the time of the events that took place on the day of Dawn's death.

Arrival in the Hunting Blinds:

Establishing the time that Hacheney and the two other hunters arrived in the “hunting blinds” allows us to establish the time that Hacheney left his house. Obviously, according to the State’s theory, Hacheney started the fire as he left.

Phil Martini, one of Mr. Hacheney’s hunting partners that morning and a witness for the State gave two very critical pieces of evidence. He gave a specific description of the lighting conditions at the time the group arrived in the duck blinds. “Just the beginnings of the cracks of dawn coming over the edge of the horizon.” He also testified that the group had been at the hunting site for 20-30 minutes when he saw two birds, but that it was not fully daylight yet. RP 541-42.

Thus, it is important to establish at what time a person can see just the beginnings of the cracks of dawn coming over the edge of the horizon.

Lighting Conditions

Before and after his son’s conviction in 2003, Mr. Hacheney’s father, Dan Hacheney made numerous efforts to show trial and appellate counsel evidence that was readily available and conclusively demonstrates the impossibility of the timeline presented by the state. Although Mr. Hacheney presented numerous different pieces of evidence including maps, video tapes and pictures, the most objective and conclusive evidence was easily obtained through a simple search on the internet.

Prior to 2002 when this trial was taking place, the City of Port Townsend installed cameras on the top of the county courthouse that were aimed towards the bay so that commuters could check on the ferry traffic and arrivals. The cameras are pointed directly at the very same body of water that the hunters were on the morning in question and is less than 10 miles from the duck blinds.

Counsel has now included with this PRP images downloaded from the Port Townsend webcam ([http://www.cityofpt.us/ Webcam/ OutSideCam.asp](http://www.cityofpt.us/Webcam/OutSideCam.asp)) on December 24th, 25th and 26th of this last year. Each image is clearly time and date stamped. The full photographic evidence is provided on an accompanying CD, part of Appendix D.

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December 25th 2009



December 26th 2009



These images show the precise conditions that Phil Martini described on stand as to when the hunting party arrived in the duck blind. “It was still dark, but you could see the beginnings of dawn.” VRP 513 “It is my understanding I had to be in place before- long before daylight. When I say daylight, I mean just the beginnings of the cracks of dawn coming over the edge of the horizon. I don’t mean full sunrise.” VRP 541-42.

The images presented here plainly show that from 6:45- 7:00 am it is still dark but you can see the cracks of dawn on the horizon. There is absolutely no possible way for the hunters to have arrived at the hunting blinds when it was dark and a few minutes later see the cracks of dawn cover over the horizon any later than 7:00 am. This would have been critical evidence to present to the jury as Martini’s description was very specific and this event only takes place at one time of the morning.

The other key piece of evidence provided by Phil Martini was the fact that the hunters had been in the hunting blinds for 20-30 minutes and it was still not “fully daylight.”

This testimony is critical because the state presented the theory that the hunters arrived at the hunting blinds at 7:50 am. The webcam evidence presented here as well as numerous other pictures and video taken by Mr. Hacheneys father clearly show that it would be impossible to arrive at the duck blinds at 7:50 am, wait 20-30 minutes and have it still be “not fully daylight.”

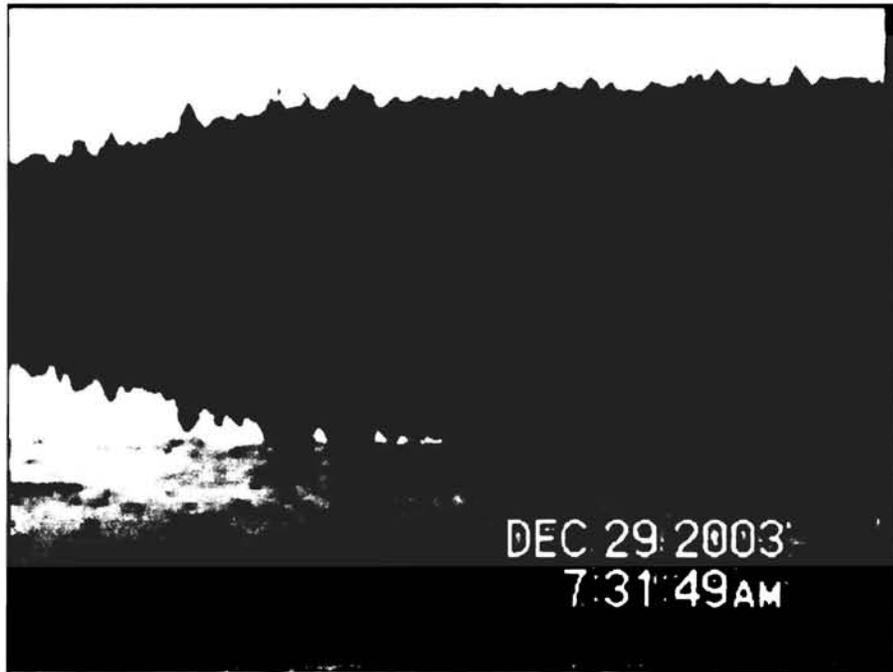
It is indisputable that “sunrise” was 7:58 a.m. that morning. However, it is also indisputable that “civil twilight” was at 7:22 a.m. See US Naval Observatory Astronomical Applications Department (http://aa.usno.navy.mil/cgi-bin/aa_pap.pl). Before sunrise and again after sunset there are intervals of time, twilight, during which there is natural light provided by the upper atmosphere, which does receive direct sunlight and reflects part of it toward the Earth's surface.

On December 26th there were three different astronomical events taking place: The first signs of daylight breaking over the horizon which took place between 6:45 and 7:00 am. Civil twilight, where you can distinguish objects, which took place at 7:22 am and sunrise where the sun actually breaks the horizon, which took place at 7:58 am.

Unfortunately, the state was able to present the misleading premise that the hunters arrived at the hunting blinds at 7:50 am and it was not yet light at that time. Quite inexplicably, defense counsel did little to contest this fabrication when they easily could have.

If it was “fully daylight” by 7:30 a.m. (not 7:58—as posited by the State), and Mr. Martini testified that he had been in the duck blind for 20-30 minutes and then he saw the birds before full daylight, the party had to arrive in the hunting blinds some time prior to 7:00 am. This is nearly an hour earlier than the (largely unanswered and misleading) timeline presented by the State. “We can conclude that they're in the blinds and

ready to hunt at approximately 7:50 a.m.” VRP 5028 Had they been presented with this evidence, the jury could have easily seen the impossibility of the state’s timeline. A simple picture showing the hunting site at 7:30 am would have completely discredited the state’s theory.



See generally Appendix D

It is arguable that there is no more critical piece of exculpatory evidence to the defense than when the party arrived in the duck blinds. As the closing arguments took place on December 23rd and the jury deliberated on December 26th, the pictures showing the lighting conditions would have been extremely helpful to the jury and would have been fatal to the state's timeline. Furthermore, the images were readily available through a simple internet search. Both Mr. Hachenev and his father were imploring defense counsel to research this issue but sadly to no avail.

Next, we work backwards in time to determine when Mr. Hachenev left his home.

Evidence was readily available, but sadly uninvestigated and not presented, to dispute the police officer's testimony of 51 minutes. Google maps shows the distance between the Hachenev house and Indian Island as 41 miles with a driving time of 1 hour and 14 minutes. This does not include the time to walk to the duck blinds which adds an additional 5-10 minutes.

In fact, when Daniel Hachenev traveled the route with Gregg Olsen after trial, they drove the route and then walked to the duck blinds. The distance traveled was 42 miles. It took 1 hour and 25 minutes. Later, John Guinn, an attorney assisting on this case, traveled the route (quickly) with a videographer and recorded a total time of 1 hour and 14 minutes from

house to duck blinds. Taking the shortest time and calculating from 7:10 a.m., **Hachenev left home at 5:56 a.m.—at the latest.**

This information could have been extremely powerful if presented along with the testimony of defense expert, Jim White of Western Fire Center. After conducting extensive fire modeling, Mr. White concluded that the burn patterns in the house were consistent with a flash fire. RP 4594. He further opined that the fire lasted about 20 minutes. RP 4599. Finally, Mr. White opined that “given the physics of this universe,” ATF Agent Wetzel’s smoldering fire theory could be conclusively ruled out. RP 4562-63.⁴

The fire was first reported in a “911 call” at 7:13 a.m.. It was extinguished at approximately 7:25 a.m..

Using White’s testimony, the fire started around 7:00 a.m.

Thus, it was impossible for Hachenev to have started the fire.

He had been gone from the house for over an hour.

However, the timeline evidence fully supports Hachenev’s innocence even using the testimony—presented by the State—of fire investigator Scott Roberts. After fully establishing Mr. Roberts credentials earned during 22 years of work involving nearly 2000 fires (RP 3421-23), Roberts testified that, although he could not give an exact duration time for

⁴ It is important to note that it is impossible to say that the jury verdict represents a rejection, in whole or in part, of White’s testimony. For purposes of this ineffectiveness claim, Hachenev need only show a “reasonable probability” of a different outcome.

the fire, his opinion was that it burned an hour or less. RP 3573, 3592-93.

Utilizing Roberts' "up to one hour" opinion, the fire began around 6:25 a.m.. At that time, Hachenev had been gone for at least 30 minutes.

This evidence, even standing alone, could have easily created a reasonable doubt in the minds of Hachenev's jurors. Further, there was no tactical downside to it. Thus, counsel had a duty both to investigate and present this evidence.

Mr. Hachenev was further prejudiced by the misleading timeline and counsels' failure to dispute it by the fact that the state presented statements given to Safeco Insurance shortly after the fire where Mr. Hachenev told them the party had arrived at the hunting site around 6:45 am. The state then presented their misleading timeline during closing argument and told the jury, "He's flat-out telling Safeco a whole line of lies about his time line there, and it's inconsistent with reality." VRP 5028

Effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and art. 1, § 22 of the Washington constitution. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). To establish that trial counsel's representation was constitutionally inadequate, Hachenev must first establish that counsel's performance was deficient, and then demonstrate that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687, 104 S. Ct. at

2064. The measure of attorney performance is reasonableness under prevailing professional norms. *Id.* at 688, 104 S. Ct. at 2065. “Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* at 691, 104 S. Ct. at 2066.

Over the last decade, counsel’s duty to thoroughly investigate before making tactical decisions has been clearly defined. *See e.g., Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). These three cases further elucidated the rule that counsel must conduct a competent investigation before making tactical choices, established in *Strickland v. Washington*, 466 U.S. 688 (2000).

The touchstone of the prejudice inquiry is the fairness of the trial and the reliability of the jury’s verdict in light of any errors made by counsel. *Id.* at 696, 104 S. Ct. at 2069. The petitioner must show deficient performance which is “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687, 104 S. Ct. at 2064. If there is a reasonable probability that, but for counsel’s act or omission, the outcome of the proceeding would have been different, the defendant was prejudiced. *Id.* at 694, 104 S. Ct. at 2064. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*; *Thomas*, 109 Wn.2d 222, 226, 742, P.2d 816 (1987). The Supreme Court clarified that a

“reasonable probability” of a different result is shown when the new information “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the jury verdict.” *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995) (footnote omitted).⁵ The Supreme Court in *Kyles* emphasized that materiality, or, here, prejudice, is not a sufficiency of the evidence test. *Kyles*, 115 S. Ct. at 1566.

The "reasonable probability" standard has been uniformly described by courts around the country as "not stringent," requiring a showing by less than a preponderance of the evidence that the outcome of the proceeding would have been different had the claimant's rights not been violated. *See, e.g., Skaggs v. Parker*, 235 F.3d 261, 270-271 (6th Cir. 2000) ("[A] petitioner [claiming error under this standard] need not prove by a preponderance of the evidence that the result would have been different, but merely that there is a reasonable probability that the result would have been different."); *Hull v. Kyler*, 190 F.3d 88, 110 (3rd Cir. 1999) (the reasonable probability standard "is not a stringent one," and is "less demanding than

⁵ *Kyles* argued the State had suppressed exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Court's analysis of *Brady* "materiality" guides the prejudice analysis of ineffective assistance of counsel claims as the two standards are historically linked. The Supreme Court in *Strickland* relied upon the materiality prong of *Brady* in defining prejudice in a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068 ("the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information to disclose to the defense by the prosecution"). *See also United States v. Bagley*, 473 U.S. at 682, 105 S. Ct. at 3383. The Court in *Kyles* again acknowledged this connection between the two standards. *Kyles*, 115 S. Ct. at 1565-66 (relying on both *Brady* and *Strickland* and their respective progeny in defining materiality).

the preponderance standard") (citation omitted); *Paters v. United States*, 159 F.3d 1043, 1049 (7th Cir. 1998) (Rovner, J., concurring) (the reasonable probability standard "clearly is less demanding than a preponderance of the evidence standard"); *Belyeu v. Scott*, 67 F.3d 535, 540 (5th Cir. 1995) (under the reasonable probability standard, "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the [error] cannot be shown by a preponderance of the evidence to have determined the outcome").

Like the other claims that depend on extra-record evidence both elements of Hachenev's *Strickland* claim—deficient performance and prejudice—must be measured at an evidentiary hearing.

However, if Hachenev can prove at a hearing what he alleges in this Petition, he is entitled to a new trial.

CLAIM NO. 8: MR. HACHENEV WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO DR. SELOVE'S TESTIMONY THAT DAWN HACHENEV DIED AS A RESULT OF BEING SUFFOCATED WITH A PLASTIC BAG, WHERE THAT CONCLUSION EXPLICITLY INCLUDED AN OPINION THAT MS. GLASS WAS CREDIBLE, AND WHERE IT EMBRACED THE ULTIMATE ISSUE.

CLAIM NO. 9: MR. HACHENEV WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL FAILED TO ASSIGN ERROR TO DR. SELOVE'S COMMENT ON DIRECT APPEAL.

Dr. Daniel Selove is a pathologist who testified to his opinion about the cause of Dawn Hachenev's death. Although he admitted the science supported two possibilities (undetermined and homicide), he offered a

definitive conclusion: “the cause of death is asphyxia by suffocation.” RP 1416. More precisely, he concluded that the cause of death was “suffocation by plastic bag.” RP 1417; 1500.

In offering this opinion, Dr. Selove repeatedly vouched for the credibility of Ms. Glass. *See* RP 1415-15 (Noting that he expressly relied on statements by Glass, “(a)nd because of reliance on those statements, I can exclude strangulation.”). In summarizing the facts supporting his opinion, Dr. Selove prominently mentioned that “in fact, plastic bag suffocation occurred.” RP 1500.

Although the defense cross-examined Dr. Selove and established that if Ms. Glass was not truthful, then his opinion would change (RP 1467), the defense failed to object to Dr. Selove’s repeated incorporating an opinion regarding the truthfulness of Glass’ accusation in his “medical” opinion. Further, in rebuttal, the State blunted the defense cross-examination by once again asking Dr. Selove to comment on the credibility of other witnesses:

Q. So, some of the facts that Mr. Talney asked you about, would those cause you to change your opinion at all as to the cause of death?

A. No, none that I have heard today would cause me to change my interpretation of...the autopsy and investigative reports.

RP 1500.

Despite a solid line of cases condemning testimony that constitutes a

comment on the credibility of another witness, Hacheney's appellate counsel failed to raise the issue on direct appeal.

Hacheney now raises this claim in two, alternate postures: ineffective assistance of trial counsel for failing to object and ineffective assistance of appellate counsel for failing to raise the issue on direct appeal. In each case, Hacheney must show a reasonable probability of a different outcome. What that means, practically speaking, is that he must undermine confidence in the trial outcome *or* he must show a reasonable likelihood of a different decision on appeal. The latter test is significant because, if the issue had been raised on direct appeal, the State would have had to demonstrate the harmlessness of the error beyond a reasonable doubt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (A constitutional error is harmless only if the reviewing court is "convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.").

The case law is clear that testimony containing opinions on a defendant's guilt are unconstitutional. "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." Such an opinion violates the defendant's right to a trial by an impartial jury and his right to have the jury make independent evaluation of the facts." *State v. Wilber*, 55 Wn.App. 294, 297, 777 P.2d 36

(1989) (quoting *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)).

The case law also clearly shows that witness opinion as to another witness' credibility is improper. “[N]o witness may give an opinion on another witness' credibility.” *State v. Carlson*, 80 Wn.App. 116, 123, 906 P.2d 999 (1995). Comments on the credibility of a key witness may also be improper because issues of credibility are reserved for the trier of fact. *City of Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993). This infringement on the province of the fact-finder is also an error of constitutional magnitude. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

A “manifest error,” an error that can be raised on direct appeal without a contemporaneous objection at trial, requires a nearly explicit statement by the witness that the witness believed the accusing victim. See *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007).

Hachenev satisfies that standard. Dr. Selove testified that Hachenev was guilty of murder. His words could not be clearer—“**in fact**, plastic bag suffocation occurred.” RP 1500. It would be hard to imagine testimony that more fully embraced an opinion on guilt.

Further, while Dr. Selove admitted that his opinion would change if Ms. Glass was not credible, he consistently vouched for her credibility, a necessary component to his conclusion.

Frankly, Dr. Selove's testimony, like several of the State's

professional witnesses, went beyond the limits of science. Rather than using his expertise to enlighten the jury and then entrusting them to make credibility determinations, he stepped far across the lines of science into advocacy.

CLAIM NO. 10: MR. HACHENEY WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CROSS-EXAMINE MS. GLASS REGARDING HER PLAN TO KILL HER HUSBAND WHERE THE EVIDENCE WAS ADMISSIBLE AND WHERE DEFENSE COUNSEL PROMISED TO PRODUCE IT FOR THE JURY IN OPENING STATEMENT.

Sandy Glass was the singular key witness in this case. Not only did she testify that Hacheny confessed the murder of his wife to her—a highly contested point—her statement to that effect resulted in a number of the State’s forensic experts changing their opinions, not because of some new scientific test, but based merely on her statements. *Compare* RP 1467 (Dr. Selove’s opinion regarding cause of death relies “completely and solely on the statements of Sandy Glass”); RP 1493 (“on the basis of the autopsy and the toxicology alone, I would say that the cause of death and manner are undetermined.”).

As her testimony revealed, Ms. Glass also had some unusual beliefs about “prophesies” from God.

In short, Ms. Glass’ testimony was critical, but her reliability was certainly not unquestionable.

One prophesy “received” by Ms. Glass was that her husband was

soon to die. RP 69 (“...her husband, Jimmy, was going to die, and that prophesy didn’t just disappear, it continued, and she believed it.”). This prophecy and Ms. Glass’ reaction to it was central to the defense attack on her credibility. Very early in the defense opening, counsel told jurors about Ms. Glass’ “prophesies” and her response—suggesting that Ms. Glass had a difficult time separating reality from her beliefs. *See* RP 67-70.

Defense counsel then told Hacheney’s jurors:

The evidence will show, and it will come from Sandy’s mouth, that she went so far as planning the death of her husband. It was going to be a car accident.

RP 69.

Ultimately, the Court reserved ruling on the admissibility of this testimony. RP 102-07. Later in the trial, the defense sought to admit the evidence, noting:

It was more than just a thought. She actually had a specific plan in which to kill her husband.

RP 2157; CP 104.

Then, quite inexplicably, defense counsel stated that he no longer sought to admit the evidence that co-counsel had explicitly promised Hacheney’s jurors would “come from Sandy’s mouth.” RP 2158. Given this agreement, the Court excluded the evidence. RP 2173. In short, one defense attorney abandoned what Hacheney’s other attorney promised his jurors to produce and inferentially suggested was the most vital piece of the

defense attack on Ms. Glass' credibility.

As discussed earlier in this Petition, the right to counsel includes the right to reasonable effective representation by counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). In order to prevail on an ineffective assistance of counsel claim, the respondent must meet the two part test set forth in *Strickland*: deficient performance and prejudice.

“(L)ittle is more damaging than to fail to produce important evidence that had been promised in an opening” because the “jurors would believe, in the absence of some other explanation, that the witnesses were unwilling, viz., unable, to live up to their billing.” *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir.1988). Of course, the ultimate question of ineffective assistance as a result of a broken opening statement promise to produce particular testimony from a particular witness depends on the facts and circumstances of the case.

In *Anderson*, defense counsel in opening asserted that he would call a psychologist and a psychiatrist to testify that the “defendant was ‘walking unconsciously toward a psychological no exit....Without feeling, without any appreciation of what was happening...like a robot programmed on destruction.’” *Anderson*, 858 F.2d at 17. He failed to deliver any of the promised expert medical testimony. The court characterized the promise as

“dramatic” and the indicated testimony as strikingly significant. *Id.* at 18.

In *Ouber v. Guarino*, 293 F.3d 19, 28 (1st Cir.2002), trial counsel “promised, over and over, that the petitioner would testify and exhorted the jurors to draw their ultimate conclusions based on her credibility.” The petitioner's testimony would have sharply conflicted with the testimony of a main trial witness. Despite the repeated promises, however, the petitioner was not called to testify. The *Ouber* court concluded that trial counsel had “structured the entire defense around the prospect of the petitioner's testimony that was never delivered.” *Id.*

It is true that Ms. Glass was called as a witness in this case. But, that is not the point. Instead, the defense theory in opening was that Ms. Glass was seriously psychologically confused, strongly suggesting that her claims about Hachenev's confession were simply a projection onto him of her own thoughts. Psychological projection (or “projection bias”) is when a person's personal attributes, thoughts, and/or emotions are ascribed onto another person or people. In classical psychology, “projection” is always seen as a defense mechanism which occurs when a person's own unacceptable or threatening feelings are repressed and then attributed to someone else.

This theory was certainly much more plausible than the State's claim that Hachenev's sexual indiscretions demonstrated his guilty knowledge. Indeed, Ms. Glass' testimony provided additional support for this theory when she was asked about the source of the “voice” she heard that

prophesized her husband's death.

Q: Is it your own voice?

A: Not that I am aware of.

Q: Isn't it possible, ma'am, that these were your own private thoughts?

A: It is certainly possible.

RP 2389.⁶

However, there were two critical elements to this theory—both promised in opening statements. Without the second element—the fact that Glass devised a homicidal plan—the projection theory utterly failed. *See* RP 5000 (State uses Glass' prophesy testimony against Hacheney).

Ms. Glass' plan to kill her husband was admissible under a variety of theories. For example, it was admissible as part of one of the perceived benefits that Glass received from the State when she received complete immunity. Indeed, the only portion of her statement that even remotely suggests of criminal activity is her thoughts and actions relating to her plan to kill her husband.

Like a number of the other claims raised in this petition, this claim, which is clearly not frivolous, can only be decided at an evidentiary hearing. However, at such a hearing Petitioner expects he will be able to satisfy both *Strickland* prongs. The defense failed to deliver what it

⁶ Unfortunately, defense counsel also missed this perfect opportunity presented by the witness by moving on to questions about where and when Glass heard this voice in her head.

promised to Hachenev's jurors and what was the linchpin to evaluating Glass' credibility. This self-inflicted blow to the defense case undermines confidence in the outcome of the case—especially where Hachenev's guilt or innocence turned so completely on this single witness.

CLAIM No. 11: THE INSTRUCTION WHICH TOLD JURORS THEY COULD CONSIDER HACHENEV'S "RELATIONSHIPS WITH WOMEN" AS "CONSCIOUSNESS OF GUILT" CONSTITUTED A COMMENT ON THE EVIDENCE IN VIOLATION OF ARTICLE IV, SECTION 16 OF THE WASHINGTON CONSTITUTION.

CLAIM No. 11: THE "CONSCIOUSNESS OF GUILT" LIMITING INSTRUCTION VIOLATED DUE PROCESS BECAUSE MR. HACHENEV'S SEX LIFE HAD NO PROBATIVE VALUE TO THAT ISSUE, THE INSTRUCTION WAS NOT CLEARLY PHRASED AS A PERMISSIVE INFERENCE, AND WHERE NO CAUTIONARY LANGUAGE WAS INCLUDED IN THE INSTRUCTION.

CLAIM No. 12: MR. HACHENEV'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED WHEN THE TRIAL COURT, AFTER DECIDING TO GIVE AN INSTRUCTION ON "CONSCIOUSNESS OF GUILT," DID NOT FURTHER GIVE AN INSTRUCTION ON "MULTIPLE HYPOTHESIS," DID NOT REQUIRE THE STATE TO PROVE THE INFERENCE BEYOND A REASONABLE DOUBT, FAILED TO GIVE A CORRESPONDING "CONSCIOUSNESS OF INNOCENCE" INSTRUCTION, OR FAILED TO DO ALL OF THE ABOVE.

CLAIM No. 13: MR. HACHENEV'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN COUNSEL FAILED TO REQUEST THAT THE "CONSCIOUSNESS OF GUILT" INSTRUCTION INCLUDE LANGUAGE STATING THAT THE INFERENCE WAS NOT MANDATORY, AND THAT WHERE THE EVIDENCE WAS SUSCEPTIBLE OF TWO EQUALLY VALID CONSTRUCTIONS THE JURY MUST DRAW THE INFERENCE CONSISTENT WITH INNOCENCE.

CLAIM No. 14: MR. HACHENEV'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN COUNSEL FAILED TO REQUEST A CORRESPONDING "CONSCIOUSNESS OF INNOCENCE" INSTRUCTION.

After his wife's death, Mr. Hachenev had romantic relationships with several women, one of whom he eventually married.

The trial court instructed Hachenev's jury they could consider Hachenev's relationships with other women as "consciousness of guilt."

The instruction read:

Evidence has been introduced in this case on the subject of the defendant's relationship with several women solely for the question of whether the defendant acted with motive, intent, premeditation, or consciousness of guilt. You must not consider this evidence for any other purpose.

RP 4978. The instruction was created in part based on a limiting instruction offered by the defense. However, the defense objected to the "consciousness of guilt" language. Thus, the final instruction was crafted by the trial court. The defense failed to propose any additional limiting language.

This instruction is highly problematic. It constitutes a comment on the evidence. It allows the jury to draw an impermissible and unwarranted inference. It fails to contain necessary limiting language. This is precisely why the State used the instruction to their great (unfair) advantage. RP 5017. The State argued:

Here's where we get into the strongest mode of evidence, that is circumstantial evidence of consciousness of guilt, and the instructions do allow you to use the affairs and the relationships to look at this issue of consciousness of guilt.

Id.

In stark contrast to the instruction that Hachenedy's jurors received, Washington law does not support a consciousness of guilt instruction even in what is usually thought of as the preeminent proof of consciousness of guilt—flight. See WPIC 6.21, comment (“It is the view of the committee that an instruction on flight singles out and emphasizes particular evidence and for that reason should not be given.”); *State v. Reed*, 25 Wn. App. 46, 604 P.2d 1330 (1979) (Even though a defendant's flight to avoid prosecution may be admissible evidence to prove guilt, it should not be the subject of a jury instruction).

This is consistent with the common law rule that presumptions and inferences are generally not favored in the criminal law. See *State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006). For this reason, Washington cases strongly suggest that jury instructions should be written in terms of what the jury “may infer,” rather than in terms of a presumption, even when the statute uses presumption language. See, e.g., *State v. Johnson*, 100 Wn.2d 607, 674 P.2d 145 (1983), *overruled on other grounds in State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985).

A permissive inference suggests a possible conclusion that the jury can reach if it finds that a predicate fact has been proved. Sometimes an inference is so apparent that it does not need to be, and should not be, stated for the jury. There are an unlimited number of inferences that jurors may make, yet these are not singled out for special jury instructions. Where a

Court singles out one or more permissive inferences in an instruction, it is likely that the instruction could be construed by jurors as a judicial comment on the evidence. Article IV, section 16 of the Washington Constitution strictly prohibits such comments. The harm, frankly, is even more pronounced where the inference is speculative, as it was in this case.

Permissive inferences are constitutional only if fact B flows “more likely than not” from fact A. While the evidence is arguably relevant on the issue of motive, it is absurd to argue that the evidence proves or tends to prove “consciousness of guilt.” The fact that Mr. Hacheney had several sexual partners after his wife’s death is simply not the equivalent of post-crime flight, destruction of evidence, the creation of false exculpatory evidence, or threats made to silence a witness. *See e.g., State v. Van Alcorn*, 665 P.2d 97, 100 (Ariz. Ct. App. 1983) (noting that courts have approved consciousness-of-guilt instructions in cases involving flight, use of false names, disguises and other concealment, hiding evidence, and attempting to influence witnesses); *Commonwealth v. Martinez*, 769 N.E.2d 273, 280 (Mass. 2002) (upholding consciousness-of-guilt instruction based on evidence that the defendant “fled, hid, made intentionally false statements, used a false name, destroyed evidence, or intimidated a witness”).

However, the “limiting instruction” permitted Hacheney’s jurors to consider this evidence as proof of *guilt*. Indeed, in cases in which the

inference is the sole and sufficient proof of only an element, a higher standard of reasonable doubt may well be triggered. *See State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997); *State v. Hanna*, 123 Wn.2d 704, 710–11, 871 P.2d 135 (1994); *State v. Sandoval*, 123 Wn.App. 1, 5, 94 P.3d 323 (2004) (referring to opinions that have discussed a higher standard of reasonable doubt, but noting that the state Supreme Court has not yet applied it). That higher presumption should likewise be triggered where the Court is instructing jurors that they can draw an inference of guilt from the evidence. *See Herring v. State*, 501 So. 2d 19, 20 (Fla. 3d Dist. App. 1986) (defendant's behavior is circumstantial evidence probative of his consciousness of his guilt, and ultimately guilt itself, only when it can be said that the behavior is susceptible of no *prima facie* explanation except consciousness of guilt).

Telling jurors that they can infer guilt from certain acts is much different from telling jurors that they can draw an inference of motive. Motive is never sufficient to prove guilt. Consciousness of guilt has only one implication.

Mis-instructing jurors on permissive inferences can raise other problems as well. When a trial court gives such an instruction, either on request or on its own motion, the court must be careful to instruct the jury correctly as to the limited purpose for which the evidence is admitted. *United States v. Back*, 588 F.2d 1283, 1287 (9th Cir. 1979). An improper

limiting instruction may even enhance prejudice to a point where unfair prejudice outweighs probative value. *Id.* at 1287.

Hachenev raises a constitutional challenge to this instruction. Thus, this court must determine “whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.” *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)). In such cases, the question is “whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,...not merely whether ‘the instruction is undesirable, erroneous, or even ‘universally condemned.’” *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736-37 (1977) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400 (1973)).

Moreover, in deciding whether an instructional error violates fundamental fairness, *i.e.*, whether it rises to the level of constitutional error the court must consider the instructional error “in the context of the instructions as a whole and the trial record.” *Estelle*, 502 U.S. at 72, 112 U.S. at 482. “When the claim is an instructional error ‘[w]hether a constitutional violation has occurred will depend upon the evidence in the case and the overall instructions given to the jury.” *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th Cir. 1997) (quoting *Ducker v. Godiner*, 67 F.3d 734, 745 (9th Cir. 1995)). *See also Meeks v. Moore*, 216 F.3d 951, 969 (11th

Cir. 2000) (“In determining whether a state jury charge was deficient, federal habeas courts are required to examine the instruction in light of all the instructions and indeed all of the trial, to determine if any prejudice occurred from the instruction given.”). Among other things, the court may consider counsels’ closing arguments in determining whether the instructional error rose to the level of a constitutional violation. *See McLaughlin v. State Farm Mut. Auto. Ins. Co.*, 30 F.3d 861, 868 (7th Cir. 1994) (considering counsels' arguments in determining sufficiency of jury instruction).

If this Court considers the instruction together with the State’s capitalizing on the instruction during closing, the Due Process violation becomes both obvious and overwhelming.

Given the Court’s decision to give the “consciousness of guilt” instruction, defense counsel had every incentive to restrict or limit it. For example, the defense should have proposed additional language:

If two inferences can be drawn from defendant's conduct, one consistent with innocent purpose and one consistent with consciousness of guilt, you must draw the inference consistent with innocent purpose. Such evidence of consciousness of guilt may be used to strengthen other evidence of guilt. However, evidence of consciousness of guilt is not sufficient, in and of itself, to convict the defendant of any crime charged in the indictment, nor does it in any way shift the burden of proving the defendant's guilt beyond a reasonable doubt from the prosecution.

Moreover, defense counsel could have sought a corresponding instruction:

There has been evidence presented that Mr. Hachenev voluntarily

spoke to investigators about the fire and his wife's death. You may consider whether Mr. Hacheny's cooperation with the investigation indicates consciousness of innocence on his part.

See Commonwealth v. Porter, 429 N.E.2d 14, 19 n.10 (1981).

Indeed, other actions and statements by Hacheny after his wife's death provide stronger support for a "consciousness of innocence" instruction than Mr. Hacheny's sexual history. For example, Hacheny indicated that he felt responsible for his wife's death because he had not installed fire detectors in the house.

In sum, the "limiting" instruction produced the opposite effect. Allowing jurors to use this evidence as proof of guilt constituted a comment on the evidence; singled out an improper purpose and gave jurors and the State the "green light" to use the evidence for this purpose; and violated due process. Given the trial court's erroneous decision to give the instruction, the defense was ineffective for failing to propose an instruction that would have either properly guided jury deliberations or an instruction that would have permitted the opposite inference.

No matter how this claim is framed, Hacheny was unfairly prejudiced.

CLAIM NO. 15: CUMULATIVE ERROR

Where the cumulative effect of multiple errors so infected the proceedings with unfairness a resulting conviction or death sentence is invalid. *See Kyles v. Whitley*, 514 U.S. 419, 434-35, 115 S. Ct. 1555, 131

L. Ed.2d 490 (1995). As the Ninth Circuit pointed out in *Thomas v. Hubbard*, 273 F.3d 1164 (9th Cir.2001), “[i]n analyzing prejudice in a case in which it is questionable whether any single trial error examined in isolation is sufficiently prejudicial to warrant reversal, this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review.” *Id.* at 1178 (internal quotations omitted) (citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996)); *see also Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir.1984) (“Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.”).

It is also overwhelmingly clear that a Sixth Amendment claim of ineffectiveness *must* be analyzed cumulatively. *Williams v. Taylor*, 529 U.S. 362 (2000). A defendant may prove that he has suffered ineffective assistance of counsel based on the cumulative effect of errors. *See Wade v. Calderon*, 29 F.3d 1312, 1319 (9th Cir. 1994), *cert. denied*, 513 U.S. 1120 (1995). “In analyzing prejudice in a case in which it is questionable whether any single trial error examined in isolation is sufficiently prejudicial to warrant reversal, this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review.” *Thomas v.*

Hubbard, 273 F.3d 1164, 1178 (9th Cir. 2001) (internal quotations omitted), citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); see also *Whelchel v. Washington*, 232 F.3d 1197, 1212 (9th Cir. 2000) (noting that cumulative error applies on habeas review); *Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir. 1984) (“Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.”).

There are two primary types of errors in this case that must be measured cumulatively. First, the several claims of ineffectiveness resulted in a much weaker case presented on Hacheney’s behalf than reasonably competent counsel would have presented. Counsel’s errors simultaneously made it easier for the State to convict Mr. Hacheney.

In addition, the failure of many of the State’s forensic experts to confine their testimony to the limits of science was highly prejudicial. The State’s forensic experts vouched, both explicitly and implicitly, for the reliability of the work of other scientists where they had no personal knowledge of that work and, at least in the case of Dr. Logan, without mentioning the problems that he knew existed. In addition, Dr. Selove self-appointed himself judge and jury and told jurors that his expertise as a pathologist led him to one, sure conclusion: Hacheney suffocated his wife. Not only was Dr. Selove wrong, he opinion far exceeded the usefulness of

the medical expertise he legitimately could offer.

2. Requisite Showing Necessary for an Evidentiary Hearing

Because most of Hachenev's claims are based on extra-record evidence, he begins by describing the low threshold showing required in order to merit an evidentiary hearing—a threshold showing that he has clearly satisfied.

After a PRP is filed and briefed, the “Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits.”

RAP 16.11.⁷ The rule further provides:

If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing.

Id. Thus, the Chief Judge has the option of sending the entire PRP to the trial court for both an evidentiary hearing or referring those issues based on contested extra-record facts to the trial court for the conduct of an evidentiary hearing and entry of factual findings. In the latter case, this Court then applies those factual findings to the applicable law.

⁷ Although not defined in the rule, frivolousness is generally defined as “wholly without merit.” This petition is clearly far from frivolous.

As a threshold matter, the petitioner must state the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. RAP 16.7(a)(2)(i). Bald assertions and conclusory allegations will not support the holding of a hearing. *See In re Williams*, 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988). Thus, a mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient.

Rather, with regard to the required factual statement, the petitioner must state *with particularity* facts which, if proven, would entitle him to relief. Where Petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. Where facts are outside of the trial record and especially where the facts are disputed and/or involve credibility determinations, the need for an evidentiary hearing is at its zenith. *See Frazer v. United States*, 18 F.3d 778, 784 (9th Cir.1994) (“Because all of these factual allegations were outside the record, this claim on its face should have signaled the need for an evidentiary hearing.”). Borrowing from the analogous habeas standard (a comparatively higher standard), in showing a colorable claim, a petitioner is “required to allege specific facts which, if true, would entitle him to relief.” *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir.1998) (internal quotation marks and citation omitted).

Once the petitioner makes this threshold showing, the court will then examine the State's response to the petition. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.

In short, the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. An evidentiary hearing plays a central role in sorting through and ensuring the reliability of the facts upon which legal judgments are made.

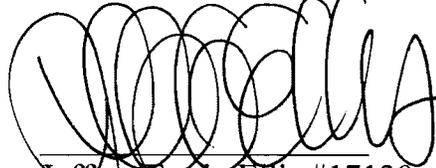
Once briefing is complete, this Court should decide whether any of Mr. Hacheney's "record based" claims merit reversal. If any such claim merits a new trial, then an evidentiary hearing is not necessary. Next, if the State fails to dispute the facts of any extra-record claim, then the Court should decide whether that claim justifies relief. Finally, the Court should remand any disputed claims for a hearing.

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above and after the completion of an evidentiary hearing, this Court should reverse Mr. Hachenev's murder conviction and remand for a new trial.

DATED this 24th day of May, 2010.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read 'Jeffrey Erwin Ellis', written over a horizontal line.

Jeffrey Erwin Ellis #17139
Attorney for Mr. Hachenev

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& Witchley, PLLC
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APPENDIX A

DECLARATION OF
NICHOLAS DANIEL HACHENEY

I, Nicholas Daniel Hacheneay, declare the following:

On December 26th 1997, I woke up at approximately 5:00 am and got ready for a hunting trip with Phil Martini and Lindsey Smith (now Latsbaugh.) I gathered up my hunting gear and I took our dog, Hope outside and let her run and then put her in the kennel in my Jeep. I then loaded the gear in the Jeep and left. The last time I saw my wife, Dawn Hacheneay, she was alive and sleeping in bed. She woke up momentarily when the alarm clock went off, I gave her a kiss goodbye, she said goodbye and then went back asleep. I did not murder my wife and I did not light our house on fire.

To the best of my recollection I left the house sometime around 5:30-5:45 am. After leaving the house I went to the nearby Texaco station and bought a cup of coffee. My wife did not drink coffee and we did not have a coffeepot in the house. Upon arriving at the Hood Canal Bridge, I got out of the Jeep and walked over to Phil Martini's truck. We talked for a few minutes and I explained the route we would be going. We discussed all riding together in my Jeep but Phil had his young dog along and so he followed in his truck. Lindsey got in the Jeep and we drove to Indian Island. When we arrived at the parking lot we got out and let the dogs run a little bit. It was still dark when we were in the parking lot. As

Phil was a relatively new hunter, we talked about what we needed to do once we got out to the blinds. Phil changed the choke on his shotgun. We then walked down to the hunting blinds. I put Phil and his dog in one blind and I went to the other blind with my dog. Lindsey came with me. It was just starting to get light enough to see when we got to the blinds but it was still well before shooting light. We hunted for awhile (probably an hour or so.) It was one of those days when very few birds were flying and eventually Lindsey and I walked back over to Phil's blind and we all discussed going to breakfast at the Chimacum Café. We all agreed to go to breakfast.

We then walked back to the vehicles and drove to Chimacum. When we got there it was closed so we decided to try Mitzel's restaurant in Poulsbo. When we got to Mitzel's I told Phil and Lindsey that I couldn't stay long because I had promised to open presents with Dawn that morning. I don't remember what I ordered but it probably was something like a Danish and coffee because both Lindsey and Phil ordered full breakfasts and the bill for all three of us with tax and tip only came to \$21.67. After awhile I said I needed to get going and paid the bill and left.

Upon arriving at my house, there were fire engines parked in front. An officer came to my door as I got out of the Jeep and I told him this was my house. He took me to a woman (Jane Jermy) who sat me on the back of the fire truck and told me that they had found a body in the house. She asked me who was in the house and I said my wife Dawn was. When I realized that Dawn was dead, I

collapsed onto the street and began crying. Ms. Jermy helped me back onto the truck and asked if there was anyone she could call for me. I asked her to call my Pastor.

In the days that followed my wife's death, I had numerous conversations where I stated that I felt that her death was my fault. One of the issues that came up was the fact that the house did not have smoke detectors. We had been remodeling the house and I had not installed the smoke detectors. I felt that the fact that the house was in disarray and we didn't have smoke detectors contributed to the fire.

At the time we were part of a fundamental charismatic church that believed that when bad things happened, it was God's punishment. The church was in the middle of a major power struggle between the senior pastor and the apostle."

Approximately 4 months prior to Dawn's death, I had an affair with a woman named Sandy Glass. I had confessed that affair to Dawn and we were working on dealing with it. I had not told anyone else about the affair. As I was a pastor in the church, we were trying to extract ourselves from the church without having it turning into a huge scandal. The church regularly ex-communicated people in a very public and painful way and we did not want to go through that.

In the weeks following Dawn's death I told Sandy Glass that I felt that it was my fault that Dawn died, that if I hadn't had an affair and had taken care of the house and my wife that she would still be alive. Sandy Glass said that she had

received "prophecies" from God that Dawn was a lamb and that it was all part of God's plan and that we were now free to "take the land." She told me that the angel Gabriel was living at her house and that all of what was taking place was ordained by God. I told her that I didn't believe that. (Much of what Sandy Glass testified to at trial, regarding these conversations, took place after Dawn's death but it was portrayed as having taken place before.) Sometime after that, Sandy Glass came to me and told me that her husband was going to die soon and that God had shown her how it was going to happen. I told her that I didn't believe that God worked that way and that it was all just fantasy. I had little or no contact with her after that. I certainly did not tell her that I committed murder or that I had anything to do with the fire.

I soon quit my pastor job and left the church. In the months that followed my wife's death, I made a complete mess of my life. I got drunk almost daily and slept with anyone that was willing. It was an extremely painful and confusing chapter of my life and I have a lot of regrets for my actions during that time. Much of that time I spent looking for answers and trying to find some meaning to all that had happened. I was deeply ashamed of the choices that I made and I kept it all secret.

I eventually extracted myself from that cycle and got my life back on track. I had no contact with Sandy Glass until the summer of 2001 when it was brought to my attention that she was going to make the news of our affair public. I contacted her by phone and asked her why she was choosing to come forward with

the affair now. She kept saying "it's the truth." I told her that it was going to hurt a lot of people and it seemed like it was more about hatred than the truth. She the stated that she was having the investigation into Dawn's death re-opened. I asked her what she was talking about and she said that she knew that Dawn had not died in the fire. I then asked her if this was something that God had revealed to her. She said that God was truth. I hung up the phone. Later that night I received a phone call in the middle of the night from a man (later identified as Sandy Glass' boyfriend) who had a bunch of threats.

The next day I contacted an attorney friend of mine and asked for his advice. He said to ignore it and to avoid any contact with those people. The news of the affairs eventually did come out and I dealt with all of the fall out from that. I did not hear anything else until Sept 12th 2001 when I was arrested and charged with murder. I have protested my innocence from day one until today. I was offered a plea bargain for 7 years and I refused it even though I was being threatened with the death penalty.

I am not guilty of murdering my wife and I did not set fire to our house.

I declare under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.



Nicholas Daniel Hacheney



Dated June 16, 2009

APPENDIX B

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Friday, July 23, 2004

Oversight of crime-lab staff has often been lax

By RUTH TEICHROEB
 SEATTLE POST-INTELLIGENCER REPORTER

A crime lab chemist snorts heroin on the job for months, stealing the drug from evidence he was testing.

A senior DNA analyst lies to a defense attorney, fearing his testing error would be used to undermine a case against a suspected rapist.

A forensic scientist is accused of sloppy drug analysis, after a national watchdog group complains about his misleading court testimony.

In all of these cases, internal checks and balances failed. The system for double-checking work broke down in one case. In another, officials overlooked warning signs until faced with a crisis. And the work of discredited senior staffers was almost never audited, an investigation by the Seattle Post-Intelligencer found.

A close look at the Washington State Patrol crime labs reveals a stressed system in which officials have been slow to deal with misconduct by long-time employees -- dating back to one of the first scientists hired more than 30 years ago.

Crime lab officials say these are isolated incidents that don't reflect the high-quality work done by their 120 employees on thousands of cases a year, despite caseload and budget pressures.

"It's a constant process of learning from our mistakes and trying to do better," said Barry Logan, director of the State Patrol's Forensic

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- Crime labs too beholden to prosecutors, critics say
- Previously: "Shadow of Doubt" special report

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Washington State Patrol crime labs' Director Barry Logan says most of his forensic scientists do top-notch work on thousands of

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A single inept or dishonest forensic scientist, though, can undermine the integrity of the legal process, given the pivotal role the crime labs play in determining a suspect's guilt or innocence.

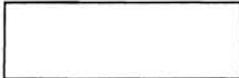
"It's only as good as the weakest link," said Steven Benjamin, co-chairman of the forensic evidence committee for the National Association of Criminal Defense Lawyers. "When a laboratory has an inept or dishonest examiner and an inadequate response, then that whole lab becomes the weakest link."

A review of two dozen crime lab disciplinary records also raise questions about the professionalism of some scientists on the state payroll. In the past five years, a lab supervisor was caught viewing pornography on his office computer, a lab manager was fired for sexually harassing female co-workers and a DNA analyst was found sleeping on the job.

Crime labs are subject to minimal federal or state oversight. Even the last industry-led, voluntary accreditation review of Washington's system, however, found problems in all seven labs in 1999.

The lack of government scrutiny has become a national issue in the wake of high-profile scandals plaguing crime labs from Houston, where shoddy DNA work led to a wrongful conviction, to a string of problems at the FBI's pre-eminent facility in Quantico, Va.

OUR AFFILIATES



Two months ago, Oregon attorney Brandon Mayfield was jailed for two weeks as a material witness after FBI fingerprint experts mistakenly linked him to the March 11 Madrid bombings that killed 191 people.

Over the objections of Spanish investigators, three veteran FBI fingerprint examiners declared they had a "100 percent" match with Mayfield -- a claim soon proved to be false.

The case not only prompted questions about the reliability of fingerprint evidence; it left people wondering whether experienced forensic scientists had let biases cloud their judgment.

And it lent credence to the complaint that too many crime lab staff see themselves as cops in white lab coats rather than objective scientists.

'I tried to conceal it'

A simple error on a DNA test would lead to the undoing of 16-year forensic scientist John Brown.

Embarrassed by his mistake, Brown made a decision that would shatter his credibility and impugn the integrity of

BACKGROUND

Internal State Patrol memo detailing allegations against John



HEADLINE

Gregoire fee job

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State Patrol Gregoire, Rc

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the entire system.

Brown, and their implications for the crime lab. (950K PDF)

campus milit

It began when Seattle police submitted vaginal swabs in an unsolved rape case to the state crime lab. Brown came up with a DNA profile of a possible male suspect but didn't find a match the first time he searched the convicted-felon DNA databank in November 1997.

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Seattle crim downward tr

During an internal review, his boss, Don McLaren, noticed that Brown had missed one of the markers in the DNA test. Brown reran the correct profile and produced a match with Craig Barfield, then 35, who had served time for burglary convictions.

Shipyar vo monorail

Man convict girlfriend, m

Kelso's bawc

Brown issued a final report linking Barfield to the DNA profile, but made no mention of his first test.

Other Voices phones in th

"A mistake like this is like leaving fresh salmon on the counter and ... leaving your cat in the kitchen," Brown, 54, said recently, speaking publicly for the first time.

Judge hears case

Makahs defe catch

"I saw it as much more harm that the defense would get hold of the data saying there's no match in the database, and they'd prance around and say it proves the innocence of their client."



Suspect cau pleads guilty

3 sought in c deadly shoot

USS Abrahah home

He also destroyed his erroneous draft report, a common practice at that time, according to Brown and McLaren, but one that contradicted the legal system's basic tenet of full disclosure.

Brown

Bills would le considered in admissions

Other man a police car is

A few months later, in April 1998, Barfield's public defender, Stephanie Adraktas, grilled a nervous Brown about discrepancies in his lab notes during a pre-trial interview.

King County

By then, Brown said he knew Barfield had been accused of a previous rape, and wanted to help bolster the case. "I didn't want this mistake to come up," he told the P-I. "So I tried to conceal it."

One of the founders of the lab's DNA section almost a decade earlier, Brown had testified in 40 DNA cases. He'd tested evidence in 300 DNA cases, according to his resume.

He said defense attorneys had begun personally attacking forensic scientists because they could no longer challenge irrefutable DNA evidence in court. They wanted to "destroy him."

"The legal stuff was a battlefield," he said.

During the interview with Adraktas, Brown was at first evasive, then lied about the existence of the draft report. As the hours ground on, Adraktas

extracted the truth. "Every defense attorney wants to go out hunting and to capture a forensic scientist and I was the big buck with a full rack," Brown would later tell State Patrol investigators.

Brown's attitude stunned Adraktas. "I do find it disturbing and sad that someone whose job was to be objective and evaluate evidence fairly would do this," she said. "It wasn't his role to decide if the charged person was guilty. That was up to a jury."

To do damage control, King County Deputy Prosecutor Steven Fogg immediately sent the crucial DNA evidence to a private California lab, which confirmed the match with Barfield.

At Barfield's trial two years later, Brown, who had just been promoted to supervisor of the lab system's DNA program, admitted that he'd lied about his first test.

The State Patrol put Brown on administrative leave and launched an internal investigation. Administrators concluded Brown's credibility was tarnished, and his "untruthfulness" could be used to discredit his prior work -- and the entire system.

On the verge of being fired, Brown resigned in September 2000.

The lab, in response, began limiting defense attorneys to two-hour time blocks during pre-trial interviews to ease psychological pressures on forensic scientists.

"I'm not going to defend what John Brown did," said Logan, the crime labs chief. "He got into a difficult situation and made it worse by how he handled it."

Lab officials didn't audit Brown's other cases for problems after his resignation because his previous track record was "excellent," Logan said. They did write a policy requiring staff to keep all draft reports.

"I believe we have an excellent record in disclosing as much as we believe will be relevant," Logan said.

After Barfield was convicted of rape and burglary, however, the court fined the state \$5,000 for failing to disclose memos revealing Brown had been suspended during the trial.

"A fine was just an inadequate response to that," Adraktas said. "If that's all an agency will suffer as a result of withholding information in a serious case, what will prevent them from doing it again?"

The crime labs' habit of destroying erroneous draft reports was "chilling" and raises the possibility of wrongful convictions, she said.

Andraktas also questions why the agency waited two years to investigate Brown's conduct, even promoting him. She said she submitted a transcript of Brown's false statements to the State Patrol's legal counsel soon after the interview.

Logan said he didn't know about Brown's dishonesty until the trial, and isn't sure if anyone else did. Officials did know he'd destroyed the draft report, which wasn't against policy at the time. Logan said they took action as soon as Brown testified to lying.

Today, Brown in part blames what happened on the stress of dealing with defense attorneys -- something police agencies discount, because employees are expected to "handle this stuff."

"We were facing on a monthly basis people who were trying to destroy our reputations," Brown said. "There was no acceptance of that."

Scientist falsified his report

From the earliest days of the state system, crime lab officials have floundered at reining in problem employees.

One glaring example is Donald K. Phillips, a forensic scientist hired in 1971 after a brief stint in the Seattle Police Department lab.

BACKGROUND

Internal State Patrol memo detailing the allegations against Donald K. Phillips. (2.3MB PDF)
Summary of findings from a review of those allegations. (686K PDF)

Phillips' skills were soon called into question, but those concerns had little effect on what would be a 15-year career with the State Patrol.

"They let him through probation even though they knew he was a problem," recalled Kay Sweeney, a former crime lab quality assurance manager for the State Patrol. "Once you passed probation, it's very hard to be terminated."

In August 1973, Phillips failed an 11-month trial run as a supervisor. His job evaluation, while praising his loyalty, cited poor communication with fellow employees and "an inability to properly perceive the necessary approach" to casework. It recommended he not be put in charge of cases.

Over the next two years, Phillips was promoted twice. By 1977, he was regularly collecting evidence at major crime scenes. Four years later, he was supervising homicide and rape crime-scene investigations.

It became clear in the mid-'80s that Phillips had misrepresented his credentials. On the witness stand, he'd testified more than once to having a chemistry major. In reality, he had majored in agricultural science at Ohio State University.

"I just didn't tell them what kind of chemistry," Phillips said in a recent interview.

In April 1985, lab officials fired Phillips for misconduct after he frightened a hotel maid by showing her gruesome crime scene photos in his room while out of town for a trial. The maid told police she feared he might be the Green River Killer.

Phillips said he was really fired for filing too much overtime. Eight months later, he won an appeal and was reinstated. Lab officials at first restricted him to drug cases.

Phillips said he was surprised when his boss, Sweeney, sent him to collect evidence at a Kitsap County crime scene on Sept. 29, 1986. After reminding Phillips about proper procedures, Sweeney gave him the green light to search a garage where police believed 16-year-old Tracy Parker had been bludgeoned to death two weeks earlier. It would become a capital case, ultimately putting the killer -- Brian Keith Lord -- behind bars for life.

Police soon reported that Phillips had sprayed a claw hammer with too much of a chemical used to detect blood, preventing further testing.

Phillips denies doing anything wrong. "To this day, I believe there was enough blood to get a typing."

The real problem wasn't Phillips' mistake but his attempt to cover it up by denying he'd sprayed the hammer -- to the point of stating that in his lab report, according to Sweeney and State Patrol documents.

"He chose to falsify what he'd done. If he was going to do that to me, his supervisor, I couldn't trust him," Sweeney said.

When the State Patrol launched an internal investigation, Phillips resigned in December 1986.

"I still dream about it -- I loved the lab," said Phillips, 65, who moved to Oklahoma and started a business -- his own perennial greenhouse. "I thought I'd be there forever."

Despite Phillips' turbulent history, lab officials did not audit any of the thousands of cases he'd handled, or review his testimony in more than 50 cases.

Flaws on proficiency tests

Lab officials often point to proficiency tests as proof of forensic scientists' competence.

Crime lab workers must pass one test annually in each specialty to satisfy

"It's such a hokey test," said Dan Krane, a biology professor at Wright State University in Ohio who runs a forensic consulting firm. "They all do it at the same time and use pristine samples which aren't anything like casework."

What Phillips said happened in the early 1980s was even worse.

"Everybody would put their heads together and get the right answers," he recalled. "We wanted to be right."

Drug analyst under surveillance

The chemist's odd behavior raised co-workers' suspicions as far back as 1998. Yet two years would pass before the State Patrol intervened.



Hoover

After starting work at the Marysville lab in April 1997, James Boaz noticed that his colleague, Michael Hoover, handled an inordinate number of heroin cases. Sometimes Hoover even took over Boaz's cases without permission.

Boaz began locking up his files in his drawer when he wasn't at his desk. He also heard "loud snorting" coming from Hoover's desk, Boaz would later tell State Patrol investigators.

BACKGROUND

State Patrol investigative report on Michael Hoover. (2.6MB PDF)

Chemist David Northrop said he first noticed problems in 1999 when Hoover posted a note soliciting heroin cases from the intake clerks. Northrop complained to his boss, Erik Neilson. By summer 2000, Boaz and Northrop reported that Hoover was secretive when handling heroin cases and assigned himself too many. They suspected he was making up results.

When Neilson confronted Hoover in September 2000, the 11-year employee claimed he was stashing heroin for police to use in training drug-sniffing dogs. Neilson warned him to stop.

Two months later, Boaz and Northrop reiterated their suspicions and Neilson contacted the State Patrol to report that Hoover might be stealing heroin from evidence.

The State Patrol immediately launched an internal investigation, installed a hidden video camera above Hoover's desk and later



It was Marysville lab manager Erik Neilson, above, who told the State Patrol that Hoover might be

questioned him.

stealing heroin from evidence.

Hoover confessed, saying he sniffed heroin in the lab to ease chronic back pain.

"I don't want anything bad to reflect on the State Patrol," Hoover told investigators on Dec. 22, 2000. "I found that if I sniff a little bit of ... heroin once in a while, it makes the pain go away where I can sleep at night."

Snohomish County prosecutors charged him with one count of tampering with evidence and one count of official misconduct, both misdemeanors. Felony charges weren't filed because no heroin was found in Hoover's possession.

Hoover resigned, pleaded guilty to the charges and received an 11-month jail sentence in November 2001. The scandal led to the dismissal of hundreds of pending drug cases in Snohomish, Island, Skagit, Whatcom, Jefferson and Clallam counties. The state Court of Appeals also overturned convictions in two drug cases because Hoover had tested the evidence.

"He stands by his test results," said Hoover's former attorney, Stephen Garvey. "I suspect juries would have still convicted."

The State Patrol did its best to minimize the damage, emphasizing that "the system worked" because lab employees turned Hoover in.

Asked about the delay in investigating Hoover's suspicious behavior, Logan said he and others have thought long and hard about what might have led to earlier detection and are now more likely to see the red flags: "They were seeing these things and they never wanted to put two and two together about someone who was a colleague and a friend."

Official concedes safeguards lax

The State Patrol lab relies on peer review as its primary safeguard for catching mistakes. Lab notes and reports for every case must be reviewed by at least one other forensic scientist before being released.

While effective to a point, peer review has its limits.

Interpersonal conflicts get played out during reviews. Overloaded scientists do only cursory looks. Errors are missed due to inexperience.

A troubling breakdown in that system came to light during an internal audit of the work of Spokane forensic scientist Arnold Melnikoff.

Lab officials decided to review his work after Melnikoff was accused of helping wrongfully convict a Montana man of rape based on erroneous

hair-analysis work he did for that state's lab in the 1980s.

The April 2003 audit examined 100 of Melnikoff's felony drug cases dating back four years and found troubling flaws in 30, ranging from insufficient data to identify substances to mistakes in documentation. The report described Melnikoff's drug-analysis work as "sloppy" and "built around speed and short-cuts."



Melnikoff

Melnikoff, who had been on paid leave since November 2002, contested every finding in the audit. In a written rebuttal, he wrote that he'd never failed a proficiency test or had a negative performance review in his 14-year employment.

And he pointed out that every drug case he'd analyzed had passed peer review: "If there was a 'problem,' it was a statewide laboratory problem," Melnikoff wrote.

The State Patrol fired Melnikoff in March, saying his 1990 testimony in a Montana rape trial had undermined his credibility. Melnikoff is appealing his firing.

Logan conceded that Melnikoff's case revealed employees had become lax about peer review, especially when dealing with a difficult co-worker. "The people doing peer review were only taking him on on the major errors," said Logan, who now requires supervisors to do spot checks as well.

What's really needed is more rigorous science, said Edward Blake, a California forensic scientist whose work has helped free dozens of wrongly convicted prisoners.

"This is an operation like 'I'm OK, you're OK,' " Blake said.

Lab workers violate conduct code

Moral integrity and honesty are key qualities for crime lab employees whose work will help convict or exonerate suspects.

Job applicants take lie-detector tests that include questions about illegal drug use. One-third of applicants are disqualified because they've smoked marijuana in the previous three years.

Once hired, crime lab scientists are supposed to follow the State Patrol's code of conduct. But over the last five years, 25 of them have been disciplined for violating those rules. Complaints included everything from arguing with co-workers or leaving a loaded rifle propped against a workbench to lying about travel and releasing confidential documents to a family member.

One-third of the scientists received a written reprimand. Others were suspended briefly or counseled. Seven were fired, although one of them won back his job.

Timothy Nishimura, then manager of the Marysville lab, was fired in September 2000 for misconduct, including sexual harassment of female employees dating back to 1991, according to State Patrol documents.

Nishimura appealed his firing, and was reinstated with back pay in March 2002. He was demoted to a document-examiner job in the Seattle lab. He refused comment for this story.

In another case, Kevin Fortney, supervisor in the Spokane lab, was investigated in December 2000 for cruising Internet porn sites at work. Fortney admitted his behavior and was suspended for two days. He has since been promoted to manager of that lab. Fortney didn't respond to requests for comment.

Crime labs seem hard-pressed to find scientists who are not only well-educated but can analyze complex cases, said Blake, the California expert. "Just because they can extract DNA doesn't mean they can think through problems," he said.

The most common problem isn't testing errors but incorrect interpretation of the data, said Ray Grimsbo, a Portland forensic scientist who runs a private lab.

"It's what they do with the results that gets them into trouble," said Grimsbo, attributing that to lack of experience or arrogance.

Pushing evidence too far is what some critics say happened when former Seattle crime lab manager Mike Grubb testified in a Vancouver, Wash., murder case.

Grubb told the court an earprint found at the scene in 1994 likely belonged to the accused, David Kunze. An expert from the Netherlands went further, testifying that the earprint was definitely left by Kunze's left ear.

The earprint evidence convinced a jury, who convicted Kunze in July 1997 of aggravated murder in the beating death of his ex-wife's fiancé. Kunze was sentenced to life in prison.

Two years later, the Court of Appeals overturned Kunze's conviction, criticizing the earprint testimony as "not generally accepted as reliable in the relevant scientific community."

"It was junk science," said John Henry Browne, Kunze's attorney. Kunze was set free in 2001 after a second trial ended in a mistrial.

It wasn't the first time an appeals court had taken issue with Grubb's conclusions. His testimony in a 1994 rape-murder trial, in which he claimed he could determine the age of semen found in the body of the teenage victim, was criticized as scientifically unsound.

Grubb stands behind his conclusions in both cases, saying he based his findings on years of experience and forensic studies.

"My testimony was well within the bounds of reasonableness," said Grubb, who left the lab in 1998 to run the San Diego Police Department crime lab.

Experts say reforms needed

Some critics believe a host of reforms are needed, including weeding out incompetent or dishonest crime lab employees, and requiring more rigorous outside reviews.

Washington's crime labs are inspected once every five years to retain voluntary accreditation. During the last review, in September 1999, all of the labs initially fell short of meeting key standards, records show.

Inspectors cited problems ranging from proficiency tests that weren't up to date to an unlocked evidence freezer. Those problems were soon corrected.

Said Logan: "They didn't come up with anything that they felt was a problem with the quality of the work."

Failing to meet voluntary standards, however, is a red flag because accreditation is done by former crime lab insiders who set the bar low, experts say.

"It's an old boys' network," said William C. Thompson, a criminology and law professor at the University of California-Irvine. "It's the absolute bare bones that's needed to run a lab. It isn't the best scientific work that can be done."

"The labs have manufactured credentials for themselves," said Blake, who won't accredit his California lab. "If you have people who are willing to manufacture credentials, what else are they making up?"

Unlike most critics, Frederick Whitehurst has been on the other side.

Whitehurst, an attorney and former FBI explosives expert, went public in 1995 about flaws in that lab.

He now heads the non-profit Forensic Justice Project.

While he favors requiring the nation's crime labs to undergo independent

audits, he also remembers what it was like to have a two-year backlog of cases on his desk.

He hasn't forgotten the frustration of trying to do his best in the face of unrelenting demand.

"They can't go back and check. There's no time, there's no money," he said. "... And they will fall to the pressures."

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State Patrol fires crime lab scientist

His testimony in Montana cited; internal audit is downplayed

Wednesday, March 24, 2004

By RUTH TEICHROEB
SEATTLE POST-INTELLIGENCER REPORTER

Washington State Patrol officials fired beleaguered crime lab forensic scientist Arnold Melnikoff yesterday, saying his flawed hair-analysis testimony in a Montana rape trial while on the agency's payroll violated professional standards.

Citing a need to restore "public trust and confidence," the State Patrol said Melnikoff's "incompetent and inaccurate" testimony in that 1990 case meant he could no longer do his job.

Special Report

Shadow of Doubt: They sit in prison -- but crime lab tests are flawed

But State Patrol and crime-lab officials downplayed a scathing internal audit that raised questions about 30 out of 100 drug-analysis cases handled by Melnikoff at the Spokane crime lab between 1999 and 2002.

The audit's conclusion that he did "sloppy work" that seemed to be "built around speed and shortcuts" was not a firing offense.

"The mistakes were not egregious to the point of misidentifying the substance," said Barry Logan, director of the Forensic Laboratory Services Bureau.

Evidence is no longer available to retest in 10 of the cases marked for re-examination by the audit, a Seattle Post-Intelligencer investigation found earlier this month. The investigation also revealed that state officials had not notified anyone of the findings of the April 2003 audit.

Twenty-two defendants were convicted in 17 of the 30 cases. Five are still in prison -- all convicted of manufacturing methamphetamine. Several attorneys are considering appeals, but crime-lab officials are confident there are no grounds for any new trials.

Under pressure from defense attorneys and prosecutors, Logan agreed last week to notify prosecutors in seven Eastern Washington counties that drug evidence handled by Melnikoff had been called into question by the audit. Yesterday, Logan said the notification would be expanded to prosecutors in 17 counties on that side of the state -- including every county in which one of the 100 cases reviewed by the audit originated.

"If we are faced with this situation in the future, we will handle it very differently," Logan said.

Melnikoff's attorney, Rocco Treppiedi called the firing "shameful" yesterday, saying he will appeal it.

"It's a politically expedient decision," Treppiedi said. "It's clearly based on the State Patrol and the lab

system bowing to the pressure of the Innocence Project."

The investigation was first launched after Peter Neufeld, an attorney with the New York-based Innocence Project, wrote to Attorney General Christine Gregoire in September 2002, urging her to investigate Melnikoff because of complaints about his work for the Montana crime lab between 1970 and 1989.

Neufeld blamed Melnikoff's "erroneous" hair-analysis testimony for helping convict Jimmy Ray Bromgard of rape. DNA testing exonerated Bromgard in 2002. Melnikoff's hair-analysis testimony has also been criticized for helping wrongly convict two other Montana men of rape, including Paul Kordonowy.

Shortly after being hired in 1989 by the State Patrol, Melnikoff testified at Kordonowy's trial and he was convicted. Last May, however, DNA tests were used to overturn Kordonowy's conviction, although he is still in prison on another conviction.

Treppiedi said Neufeld and the State Patrol unfairly "targeted" Melnikoff, 59, who had testified to the best of his ability in 1990. Treppiedi also disputed that Melnikoff's hair-analysis errors had undermined his ability to testify, saying the State Patrol has allowed him to testify in five drug-related trials since he was put on paid leave in November 2002.

And he accused the State Patrol of violating union procedures in the way they handled the investigation.

But Neufeld, of the Innocence Project, said crime lab officials did the right thing.

"I'm glad for the state of Washington that this man will no longer be doing testing where people's liberty is at stake," Neufeld said yesterday.

Defense attorneys and legal experts said the crime lab had no choice but to fire Melnikoff.

"His credibility is shot," said Anne Daly, president of the 800-member Washington Defenders Association, which represents the state's public defenders. "He did things while in their employment that could potentially jeopardize the liberty of many people."

Daly called on the crime lab to notify prosecutors about every case Melnikoff handled since 1989 -- easily thousands of cases.

"I think they need to look at every single case he touched," she said. "Turn it over and let someone else make the decision."

Melnikoff handled 1,315 drug analysis cases between 1998 and 2002, according to State Patrol records. Records show he was not allowed to handle hair-analysis cases after 1991, when he made mistakes while preparing to teach an in-house training program.

Others also said challenged Logan's reassurances that Melnikoff's final conclusions were accurate, especially since some of the evidence could not be retested.

"Who's to say a jury wouldn't have found his mistakes relevant and made a different decision," said Roger Hunko, president of the 750-member Washington Association of Criminal Defense Lawyers.

The 30 percent "error rate" in Melnikoff's cases, even if confined to procedural mistakes, should alarm any scientist, said John Strait, a law professor at Seattle University who teaches a forensics course.

"That wouldn't pass a first-year college chemistry class," Strait said.

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SEATTLE POST-INTELLIGENCER

http://seattlepi.nwsourc.com/local/183059_crimeLaberrors22.html

Produce crime lab error rates, some urge

But defense attorneys would misuse data, scientists counter

Thursday, July 22, 2004

By RUTH TEICHROEB

SEATTLE POST-INTELLIGENCER REPORTER

The high stakes of DNA testing have prompted debate about whether the nation's crime labs should have to produce error rates. Defense experts and academics say such a statistic would provide a valid way to gauge the reliability of a lab's work. Forensic scientists in state-run and private crime labs say error rates would be meaningless.

A generic error rate for a lab doesn't tell you whether a specific DNA test is correct, said Gary Shutler, who oversees DNA testing for the Washington crime lab system.

Defense attorneys would use labwide error rates to try to undermine every DNA result, Shutler said. Even defining what type of contamination or errors should be included in an error rate would be difficult.

But some experts argue that error rates should be a factor in weighing DNA evidence in court -- something prosecutors, police and crime lab officials have a "vested interest" in avoiding.

"An error rate is an albatross around their neck," said Dan Krane, a biology professor at Ohio's Wright State University and president of a forensic consulting company. "It limits the strength of their testimony in court."

One of the best ways to determine error rates would be to use blind proficiency tests -- exams disguised as regular casework.

Right now, forensic scientists at the Washington State Patrol labs, and most other state-run crime labs, know when they are taking a proficiency test. DNA analysts must pass two of those tests each year.

Krane said open proficiency tests typically use pristine samples that bear little resemblance to complex casework.

Blind proficiency testing is recommended, but not required, by the American Society of Crime Laboratory Directors' Laboratory Accreditation Board, an organization that offers voluntary accreditation. That group advocates the blind method not as a way to determine error rates but as a more precise test of a worker's accuracy.

A decade ago, mandatory blind testing was proposed as part of the federal DNA Identification Act.

A Justice Department panel designed blind tests, tried them out and estimated it would cost \$500,000 to \$1 million annually for one test per lab, according to panel member William C. Thompson, a criminology and law professor at the University of California-Irvine.

The panel wound up recommending against blind testing.

"Legislators didn't want to do anything to offend law enforcement groups," Thompson said. "Law enforcement sees this as a bleeding-heart liberal attempt to give ammunition to defense lawyers."

Blind proficiency tests would be too costly to design and administer, said Barry Logan, director of the Washington crime lab system.

"We trust people doing casework to do the work professionally," Logan said.

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- Rare look inside state crime labs reveals recurring problems
- DNA testing mistakes at the State Patrol crime labs
- How DNA is tested in crime labs (PDF; 165K)
- "Shadow of Doubt" special report

SEATTLE POST-INTELLIGENCER

http://seattlepi.nwsource.com/local/183227_labsolutions23.html

Crime labs too beholden to prosecutors, critics say

Friday, July 23, 2004

By RUTH TEICHROEB
SEATTLE POST-INTELLIGENCER REPORTER

Flawed forensic work not only leads to wrongful convictions, it leaves criminals on the street.

That's a good reason to care about reforming state-run crime labs, legal experts say.

"What you have in this country is an epidemic of crime lab scandals," said Barry Scheck, president-elect of the National Association of Criminal Defense Lawyers.

Scheck is co-founder of the New-York based Innocence Project, a group that has helped exonerate 145 wrongfully convicted prisoners.

"Forensic science has to be an independent third force in the justice system," he said, "not beholden to prosecutors and police."

Proposed solutions center on more government scrutiny and better-funded labs. At the top of the list is a federal law requiring crime labs to comply with the same kind of rules medical labs have had to follow since 1967.

Clinical lab workers have to take frequent "blind" proficiency tests that are mixed into their regular work -- unlike crime lab staff who know when they're being tested.

Blind testing would uncover a lot more errors at state crime labs, said Janine Arvizu, an expert from Albuquerque, who has audited federal and private labs. "The forensic industry just won't bite that bullet," she said. "There's this attitude that, 'We work for the good guys -- just trust us.' "

Even the national voluntary accreditation group recommends, but does not require, blind testing.

"If you know it's a proficiency test, the person may do better work than usual and double-check it more," said Ralph Keaton, executive director of American Society of Crime Laboratory Directors.

Washington crime lab officials say blind testing is too costly and difficult to administer. The system would have to design its own tests and collude with police to pass them off as real since forensic scientists consult with officers, said Barry Logan, director of the Washington State Patrol's Forensic Laboratory Services Bureau.

Critics also want a federal law to require regular inspections by independent outside experts and licensing of forensic scientists.

"We really want to get the bad guys who did it," said John Strait, a Seattle University law professor who teaches forensics. "We want reliability in the system."

Ties to State Patrol defended

More controversial is the proposal that crime labs should operate independently, as Britain's do, rather than be run by police agencies.

That doesn't sit well with Logan, who said the lab's work isn't compromised by its ties to the State Patrol. Only 7 percent of the crime labs' cases are referred by the State Patrol, most of those drug-related. And the State Patrol's clout with legislators on budget matters is a big advantage, he said.

Federal legislation would duplicate standards already established by voluntary accreditation, according to Logan.

Better pay, higher standards

The real problem is inadequate funding for staff and equipment, said Logan and veteran prosecutors.

"There aren't enough people to do the work," said Mark Roe, Snohomish County's chief criminal deputy prosecutor.

Logan is asking legislators to approve funding for 20 new forensic positions next year when updated labs open in Vancouver and Spokane. That will help clear current backlogs of up to a year.

Thanks to the hit TV show "CSI," crime labs are attracting plenty of forensic wannabes. Recruiting experienced forensic scientists is harder because Washington's pay scale is 20 percent below that of other Western states, Logan said. Entry-level wages begin at \$31,740 a

related features

- Oversight of crime-lab staff has often been lax
- "Shadow of Doubt" special feature

year and reach \$63,000 for veterans. Efforts to secure pay raises have failed during the last two years.

To encourage more applicants, lab officials have worked with Eastern Washington University in Cheney to set up a forensic chemistry program, and will soon have a forensic biology program as well. A bachelor of science degree is now required for most lab jobs.

Fingerprint examiners need only a minimum of four years of related experience. By 2005, a university degree will be the recommended national minimum.

The last voluntary accreditation of the State Patrol lab system, done in September 1999, found that six of its seven fingerprint examiners didn't have university degrees. The fingerprint supervisor had an associate degree in secretarial science.

Independent oversight

The public will be more willing to pay for improvements if crime labs are held accountable, critics say.

State legislators should set up independent agencies that investigate allegations of misconduct at crime labs, according to the national defense attorneys group.

That should include a full review of past cases handled by a discredited scientist.

"Problems are exposed and then it's back to business as usual," said William C. Thompson, a criminology and law professor at the University of California-Irvine. "We need some sort of independent body with the power to hold hearings."

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Kevin J. Curtis
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State Forensics Council Asked to Investigate Crime Lab

Leaders of a statewide legal organization today asked the state's Forensic Investigations Council to investigate alleged negligence or misconduct by the Washington State Patrol's crime laboratory system. The request comes in the wake of several incidents that point to systematic problems in the operations of the state's forensics lab.

"We want to ensure that innocent people are not imprisoned, and that people who have committed crimes are brought to justice. Accurate forensic work is essential to the fair administration of the law," said Bill Bowman, president-elect of the Washington State Association of Criminal Defense Lawyers (WACDL).

In a letter to the Forensics Investigations Council, Bowman and current WACDL president Kevin Curtis urged it to examine problems stemming from several serious allegations about crime laboratory operations that have come to light:

- that toxicology lab manager Ann Marie Gordon gave assurances that she had tested quality assurance solutions used for breath testing when in fact she had not conducted such testing;
- that recordkeeping and data analysis was severely deficient during Gordon's tenure (Gordon resigned on July 20, 2007, after allegations of misconduct were made public); and
- that ballistics analyst Evan Thompson provided misleading and unfounded testimony in an unknown number of cases;

The Forensic Investigations Council is responsible for looking into allegations of serious negligence or misconduct in forensic work relating to crimes. WACDL leaders requested that the council investigate and issue a public report on the causes of the alleged problems; make recommendations for corrective actions, including changes in crime laboratory protocols; and evaluate the effectiveness and completeness of any internal investigations conducted by the State Patrol.

"The public became aware of deficiencies in the forensic lab only because a whistleblower came forward. An independent body needs to look into the situation, so that we can minimize the possibility of forensic investigation errors in the future," said Kevin Curtis.

The Washington Association of Criminal Defense Lawyers was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has over 1000 members – private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system.

1 were performed on the Datamaster or Datamaster CDM machines located throughout King
2 County and Washington.

3 These instruments operate under the principal of comparing the unknown (the breath of
4 the arrestee) to a known standard of alcohol to measure the amount of alcohol in the breath.

5 There are multiple checks performed by the instrument to ascertain the accuracy of the result.

6 One of the checks is the external standard, which measures the headspace alcohol vapor content
7 of an external simulator solution (field solution). This solution is a mixture of ethanol and water
8 in a known quantity prepared by the WSTL.

9 These instruments are periodically checked, calibrated and maintained by the Washington
10 State Patrol Breath Test Section (breath test section). For this purpose they also use solutions of
11 ethanol and water prepared to known standards by the WSTL (QAP solutions).

12 The procedure for preparation of QAP and field simulator solutions is set forth in
13 protocols created and/or promulgated by the State Toxicologist, Dr. Barry Logan. An analyst
14 mixes the solutions according to the protocol, and then each of 16 analysts test the solutions by
15 preparing vials of the mixture and submitting them to headspace gas chromatography along with
16 control vials and blank vials. The results are recorded for each analyst, and ultimately published
17 to the web for access by the public. The analysts then "certify" that they have performed the
18 tests, and that the results as published are correct. These certifications are intended to be used in
19 court in lieu of live testimony by the toxicologists.
20

21
22 This three judge panel has found many irregularities in the preparation, use and
23 documentation of these solutions and tests, as set forth below:
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25

False Certifications

- 1
2 1. Ann Marie Gordon (AMG) became lab manager at WSTL by appointment of Dr.
3 Logan.
- 4 2. AMG informed Dr. Logan that her predecessor as lab manager had engaged in a
5 practice of having other toxicologists prepare and test simulator solutions for him and
6 yet certify that he had prepared and tested the simulator solutions.
- 7 3. AMG told Dr. Logan that she did not approve of this procedure and was then also
8 informed by Dr. Logan that it was not acceptable for a toxicologist to engage in this
9 practice.
- 10 4. Nonetheless, AMG did engage in this practice beginning in 2003. Ed Formoso was a
11 lab supervisor; he prepared and tested simulator solutions for AMG from 2003 to
12 2007. This involved 56 simulator solution tests.
- 13 5. Each test was accompanied by a CrRLJ 6.13 certification that AMG had performed
14 the test and that the test was accurate and correct.
- 15 6. Melissa Pemberton was the quality control manager at the WSTL during a part of this
16 time, and knew that AMG was not performing tests but was certifying them.
- 17 7. This deception was uncovered after two anonymous tips received by the Chief of the
18 Washington State Patrol.
- 19 8. The first was received on March 15, 2007. Dr. Logan was directed by Assistant Chief
20 Beckley to investigate this complaint.
- 21 9. Dr. Logan directed AMG and Formoso to investigate the complaint.
- 22 10. AMG and Formoso discussed the procedure and agreed that Formoso would no
23 longer perform tests on behalf of AMG.
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11. AMG informed Dr. Logan that she did not perform the tests of the solutions but that she signed the forms indicating that she did.

12. AMG and Formoso prepared a report stating that there was no problem with the certifications and that no solution had left the lab with an incorrect solution in 20 years.

13. Dr. Logan, AMG and Formoso knew, or should have known, that this report was incorrect and misleading, but took no steps to correct it or provide for another investigation.

14. Melissa Pemberton had run vials prepared for AMG by Formoso through the gas chromatograph along with her own samples, knowing that these were to be attributed to AMG, and that AMG would sign certificates alleging that she did the tests.

15. Dr. Logan was aware of this, by August of 2007.

16. DR. Logan and Pemberton both testified under oath that no one other than Formoso ever ran tests for AMG.

Defective and Erroneous Certification Procedures

17. The software used to perform calculations for simulator solution worksheets was defective from its inception in that it omitted the fourth data entry from the fourth toxicologist who performed the tests.

18. Beginning in August 2005 a change in the software resulted in a failure to include data from 4 of the 16 toxicologists performing tests in calculations to establish accuracy.

19. Lab protocols require the inclusion of all analysts' data in these calculations.

1 20. No one checked the software program to ascertain accuracy and compliance with
2 protocols. There was no procedure or protocol propounded to check or verify
3 software used by the WSTL.

4 21. Analysts were not trained or directed to check the calculations performed by the
5 software.

6 22. Analysts regularly signed declarations which stated the mean concentration of alcohol
7 in the solutions. These declarations were prepared by support staff, and were not
8 checked for accuracy by the analysts before signing. In at least six instances these
9 declarations were in error. At least one analyst signed them a second time still
10 reflecting the errors.

11
12 **Software Failure, Human Error, Equipment Malfunction and Violation of Protocols**

13 23. The software used for calculations to determine the acceptability of simulator
14 solutions was developed by computer programmer(s) within the Washington State
15 patrol and was not subject to rigorous testing and/or checking such that substantial
16 errors resulted and significant data was deleted from calculations.

17 24. No procedure or protocol within the WSTL required this software to be validated for
18 accuracy or fitness for purpose, and no Lab personnel conducted such testing at
19 anytime, nor verified that the data produced was correct.

20 25. Errors based on software miscalculations existed within almost all field simulator
21 solution certifications issued between August 2005 and August 2007. At least one
22 QAP solution was similarly affected.

23 26. When analysts conducted gas chromatograph tests, the machine printed results
24 automatically. These were maintained in the test files. Thereafter (sometimes weeks
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1 after), worksheets were prepared by support personnel detailing the testing results for
2 each toxicologist. Thereafter analysts signed the worksheets to acknowledge their
3 correctness. These worksheets were not checked against the original chromatographs
4 to determine if they were accurate before signing, and incorrect data was in fact
5 inserted into some worksheets. These worksheets were posted to the web and relied
6 upon in determining the accuracy and precision of the breath testing machines in the
7 field.

8 27. Declarations by toxicologists for certification of the solutions are prepared by support
9 personnel and then given to analysts to sign, sometimes weeks after the actual testing.
10 These were not checked against chromatographs or worksheets to insure accuracy.
11 There were at least 150 instances of similar non-software related errors committed by
12 analysts and revealed in the record. These include:

- 13 a. Entering incorrect data into certification spreadsheets for use in calculations to
14 determine mean solution values and compliance with protocols.
15 b. Entering incorrect test values for controls.
16 c. Entering data for the wrong solutions into certification spreadsheets.
17 d. Signing declarations indicating testing of the solution prior to the solution even being
18 prepared.
19 e. Signing declarations indicating that a solution had been tested before the testing had
20 taken place.
21 f. Incorrect dates for testing and/or signing of declarations.
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23 28. The WSTI was equipped with several gas chromatograph machines for use by the
24 analysts. A machine that malfunctioned was not repaired or maintained adequately
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and this resulted in different operational and measurement characteristics and abnormal variations in readings. The machine remained on line for some time even though individual toxicologists knew that it was not functioning properly. Once repaired this abnormality disappeared.

Improper Evidentiary Procedures

29. In 2004 the Washington State Patrol conducted an internal audit of the WSTL. The report included the following conclusions:

- a. The WSTL was noncompliant with policies and procedures in 8 major categories.
- b. The simulator solution logbooks were not properly kept.
- c. The required self audits were not performed.
- d. AMG indicated that she did not have time to follow WSP policies and would not do so.
- e. "WSP policies and required procedures appear to be of secondary concern to Lab personnel....Accurate recordkeeping and quarterly auditing as required by patrol Policies and CALEA standards is severely deficient."

30. In 2007 another internal audit was conducted by the Washington State Patrol. The report included the following conclusions:

- a. "The department is unnecessarily exposed to litigation due to insufficient documentation and disregard for evidence handling policies and procedures."
- b. "Mandatory audits are not being completed.... Non-standard evidence handling procedures and insufficient documentation to ensure the same...and failure to perform required audits jeopardizes operational performance as well as CALEA accreditation."

Inadequate and Erroneous Protocols and Training

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31. The accuracy of breath alcohol measurements is determined by the use of simulator solutions. These must be accurately prepared and certified as such to gain the trust and confidence of the courts and public.
32. Accuracy of these solutions is assured by the adherence to proper protocols for their preparation and use.
33. Contrary to protocol requirements, toxicologists were trained to discard data generated by the tests if any single data entry lay outside the range for the mean value of the solution as dictated by the protocol. This tended to create a testing system that would not fail a solution as every value outside the range was discarded and only those that were within the accepted range were included in the calculations of accuracy.
34. Discarding of data is appropriate in some circumstances where identifiable reasons exist or where there is appropriate statistical justification (outliers). However, a decision to discard data must be governed by appropriate protocols and must be properly documented so that these decisions can be reviewed. Such a protocol was not promulgated until this legal proceeding was well underway, and documentation was not required or provided.
35. Several toxicologists discarded data without identifiable or statistical reasons for doing so. Inadequate or no documentation was provided, so that in those situations this Court cannot determine why data was discarded.

- 1 36. At least one toxicologist was not taught that testing of simulator solutions followed
2 different procedures than testing of other materials, and conducted multiple tests,
3 discarding the results of at least one test.
- 4 37. Protocols for solution preparation and machine testing were contradictory or
5 inconsistent, resulting in field solutions being used for QAP testing in some cases.

6 **Impact on Tests Conducted In the Field**

- 7 38. Field solution #2018 was never properly certified due to errors committed by the
8 analyst. This solution was used as the external standard in 2,018 tests.
- 9 39. Field solution #2019 was never properly certified due to similar errors committed by
10 the same analyst. These two batch errors were likely caused when the analyst
11 switched data. This solution was used as the basis for QAP's performed on at least 39
12 breath test machines. There were approximately 7,928 tests conducted on the affected
13 machines.
- 14 40. QAP batch solution #06028 was certified after data was discarded improperly. QAP
15 procedures were performed on 32 Datamaster machines using this solution. This had
16 an impact on 3,445 tests.
- 17 41. Field solution #05008 was used as a QAP solution to test and calibrate the
18 Datamaster. Though, perhaps, not a violation of protocol since the protocols were in
19 conflict, Dr. Logan conceded that field solutions were never intended to be used for
20 the QAP process. This solution was improperly certified by AMG. If the data from
21 her tests were removed, the solution has a mean alcohol concentration of .1022,
22 outside the acceptable range for QAP solutions. The tests conducted using machines
23 tested and calibrated with this solution number 1,679.
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- 1 42. Field solution batch #06003 was used as a QAP solution. This solution had a mean
2 alcohol concentration of .1024, outside the range deemed acceptable for QAP
3 solutions. Two machines were tested using this solution, affecting 392 individual
4 tests.
- 5 43. Field solution #06048 was qualified using software which provided incorrect results.
6 When correct figures are computed, it was determined that the solution would not
7 have qualified as a QAP solution. At least one Datamaster QAP was performed with
8 this solution, affecting 21 individual tests.
- 9 44. This same solution was also used as a field solution, but when proper calculations are
10 made, it is apparent that it would have affected all tests conducted using this machine.
11 However, the number of tests affected has not been determined.
- 12 45. QAP solution #06037 was certified using software that incorrectly calculated the
13 equivalent vapor concentration. The machines calibrated using this solution affected
14 2,691 individual breath tests.
- 15 46. Field solution #06043 was tested by one analyst using a defective gas chromatograph.
16 The test should have been repeated to determine accuracy. The number of individual
17 test impacted by this has not been ascertained.
- 18 47. Not all (or possibly any) of the defective solutions noted above would have resulted
19 in substantial changes in every test result. Some test results would be of greater
20 importance than others if they are at or near the absolute standards for violations
21 created by statute, i.e. .02, .04, .08, and .15. However, every test conducted with an
22 improperly certified or defective solution is affected in some way.
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25 **NonDisclosure of Machine Bias**

1 48. All measuring machines have some bias, and Datamaster breath test machines have
2 bias which is identified in the QAP process.

3 49. This bias is not determinable without testing; sometimes creating readings lower than
4 actual and sometimes higher.

5 50. The bias of any particular machine can be determined from the information created
6 during the QAP process by applying mathematical formulas and calculations. This
7 information is not readily available to the public, though it is published on the web.
8 Due to the complexity of the calculations and formula involved, few in the legal
9 community are aware of this bias. The Breath Test Section of the Washington State
10 Patrol does, however, provide this information to attorneys and defendants when
11 requested.

12 51. The machine bias information could be easily made available to the defendants,
13 attorneys and public by the State Toxicologist.
14

15 Analysis

16 BAC Admissibility Post Jensen

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18 The Washington legislature conveyed its "frustration with the inadequacy of previous
19 attempts to curtail the incidence of (Driving Under the Influence) DUI" with the adoption of
20 SHB 3055¹ in 2004. City of Puyallup v. Jensen, 158 Wn.2d 384, 388 (2006). Central to SHB
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23 ¹ In part, the legislature indicated its intent in the adoption of SHB 3055 as follows:
24 "The legislature finds that previous attempts to curtail the incidence of driving while intoxicated have been
25 inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers continue at
unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To
that end the legislature seeks to ensure swift and certain consequences for those who drink and drive.
To accomplish this goal, the legislature adopts standards governing the admissibility of tests of a person's blood
or breath. These standards will provide a degree of uniformity that is currently lacking, and will reduce the delays

1 3055 were amendments to RCW 46.61.506, by which the legislature sought to curtail pretrial
 2 motions seeking the suppression of breath tests in DUI cases. As amended, RCW 46.61.506
 3 required that trial courts assume the 'truth of the prosecution's... evidence and all reasonable
 4 inferences from it in a light most favorable to the prosecution." RCW 46.61.506(4)(b). While
 5 the amendments would still allow defendants to challenge the reliability or accuracy of breath
 6 tests, those challenges would "not preclude the admissibility of the test once the prosecution ...
 7 has made a prima facie showing" of each of eight basic admissibility requirements set forth in
 8 the statute. RCW 46.61.506(4)(a). Ultimately then, SHB 3055 constituted a legislative attempt
 9 to eliminate the trial court's role as the gatekeeper² for a critical piece of evidence in DUI
 10 prosecutions.

11 Thus, when the Washington Supreme Court considered this issue in *Jensen*, supra, the
 12 court could have found that the legislation violated the inherent right of the judicial branch to
 13 control its own court procedures, i.e., a violation of the Separation of Powers doctrine. Instead,
 14 the Court determined that it could harmonize RCW 46.61.506, as amended, with the rules of
 15 evidence and give effect to both. *Jensen*, 158 Wn.2d at 399. The court held that, once the
 16 prosecution had met its prima facie burden under RCW 46.61.506(4), the breath test thereafter
 17 became "admissible," meaning that the court could still serve in its role as the gatekeeper under
 18 the applicable rules of evidence. *Id.* By analogy, the *Jensen* court referenced DNA testing:

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 21 caused by challenges to various breath test instrument components and maintenance procedures. Such challenges,
 22 while allowed, will no longer go to admissibility of test results. Instead, such challenges are to be considered by the
 23 finder of fact in deciding what weight to place upon an admitted blood or breath test result."
 24 Laws of 2004, ch. 68.

25 ² A trial court is said to be the "gatekeeper" for the admissibility of evidence under both the *Frye* test (*Frye v. United*
States, 293 F. 1013 (D.C. Cir. 1923)) and under the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals*,
Inc., 509 U.S. 579 (1993); *State v. Copeland*, 170 Wn.2d 244, 259-260 (1996). "In *Daubert*, the Supreme Court held
 that a trial judge should act as a "gatekeeper" to ensure that all scientific evidence admitted is both relevant and
 reliable." *Reese v. Stroh*, 74 Wn. App. 550, 559 (1994). The court also acts as the gatekeeper when it rules on
 motions to suppress scientific evidence under ER 403 or ER 702.

1 In the DNA analogy, DNA admissibility has been accepted under Frye³; however,
 2 challenges to the weight of the DNA evidence, including laboratory error, the size,
 3 quality, and randomness of Federal Bureau of Investigation (FBI) databases, and the
 4 methodology and practices of the FBI in declaring a DNA match, are subject to ER 702
 5 admissibility as determined by the trial court.

6
 7 Jensen, 158 Wn.2d at 397. Continuing this analogy to the cases herein, the trial court's
 8 determination that the prosecution had, *prima facie*, met the requirements of RCW 46.61.506(4),
 9 would be comparable to acceptance under Frye, meaning that the court would then move on to
 10 consideration of any rules of evidence that might be applicable.

11 12 ER 702 and Laboratory Evidence

13 A breath test reading is not admissible absent expert testimony, either in person or by
 14 affidavit as allowed by CrRLJ 6.13(c)⁴. Pursuant to ER 702, however, an expert may only testify
 15 "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand
 16 the evidence or to determine a fact in issue." In a criminal prosecution, a post Frye analysis of
 17 the admissibility of expert testimony under ER 702 is a consequential activity with independent
 18 force and effect. "In this state ER 702 has a significant role to play in admissibility of scientific
 19 evidence aside from Frye." State v. Copeland, 130 Wn.2d 244, 259-260 (1996).

20
 21 ³ Frye requires that the court determine whether (1) the scientific theory has general acceptance in the scientific
 22 community, (2) the techniques and experiments that currently exist can produce reliable results and are
 generally accepted by the scientific community, and (3) the laboratory performed the accepted scientific techniques
 in the particular case. Frye v. United States, *Supra*.

23 ⁴ A breath test technician must testify that the BAC Verifier Datamaster or Datamaster CDM was tested, certified
 and working properly on the date of the test, and a state toxicologist must testify that the simulator solution was
 24 properly prepared and tested. Both would also have to testify that each activity was performed in conformance with
 the rules established by the Washington State Toxicologist. RCW 46.61.506(3); CrRLJ 6.13(c).
 25 The Defendants here have sought suppression of their breath tests based upon the failure of the WSTL to properly
 prepare, test and certify simulator solutions. The Defendants have not raised any issues relating to the Washington
 State Patrol Breath Test Section or Breath Test Technicians.

1 Under Jensen, therefore, after the prosecution has met its prima facie burden for the
2 admission of a BAC reading, a trial court must engage in a meaningful review of the
3 admissibility of the BAC evidence involving, under ER 702, a two part test. State v. Cauthron,
4 120 Wn.2d 879, 890 (1993). As in Copland, supra, the Cauthron court was concerned with the
5 admissibility of DNA evidence:

6
7 The 2-part test to be applied under ER 702 is whether: (1) the witness qualifies as
8 an expert and (2) the expert testimony would be helpful to the trier of fact. Part 2 of this
9 standard should be applied by the trial court to determine if the particularities of the DNA
10 typing in a given case warrant closer scrutiny. If there is a precise problem identified by
11 the defense which would render the test unreliable, then the testimony might not meet the
12 requirements of ER 702 because it would not be helpful to the trier of fact.

13
14 Cauthron, 120 Wn.2d at 890. In each of the following cases, the Supreme Court engaged in both
15 a Frye analysis and an ER 702 review of challenged forensic laboratory conclusions. In each case
16 discussed, the court began with the proposition that the "determination of whether expert
17 testimony is admissible is within the discretion of the trial court. Unless there has been an abuse
18 of discretion, this court will not disturb the trial court's decision." Cauthron, 120 Wn.2d at 890.
19 In each case the trial court admitted the scientific evidence and none of the ER 702 challenges to
20 the trial court decisions were overruled, both for the factual reasons noted for each below, and
21 because in each case the court was upholding a discretionary ruling of the trial court.

- 22
23 • In State v. Cauthron, supra, the court noted that the defense had only presented
24 "potential problems" with the DNA evidence. Moreover, the court noted that "the
25 defense presented its own experts to rebut the State's conclusions. Dr. Ford and

1 Dr. Libby both testified that they found the autorads in this case inconclusive, and
2 discussed their reasons at length. In addition, they each pointed out the possible
3 pitfalls of DNA testing, such as degradation, staining, cross contamination, etc.,
4 and the lack of controls employed in the testing procedure. The jury was
5 presented with a balanced picture of the DNA evidence³. Cauthron, 120 Wn.2d
6 at 899.

- 7
- 8 • In State v. Kalakosky, 121 Wn.2d 525 (1993), the court quickly dealt with the two
9 errors cited by the defense. (1) "The defense asserts that semen samples taken
10 from the C.F. crime scene were spilled in 'close working proximity to samples of
11 defendant's blood'. The record does not support this". Kalakosky, 121 Wn.2d at
12 540. (2) "The defense also alleges that there was evidence of a mislabeled
13 autoradiograph which compromised the reliability of the DNA testing. This also is
14 unsupported by the record." *Id.*

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- 16 • In Copeland supra, the court considered the admissibility of lab results which had
17 been challenged for a lack of external testing of lab procedures and for allegedly
18 simplistic proficiency testing procedures. In dismissing these challenges, the
19 court noted that "while a completely independent audit may be ideal, there was no
20 evidence that the FBI procedures compromised the test results in this case."
21 Copeland, 130 Wn.2d at 271. The court concluded that the "issues of laboratory
22 error and lack of proficiency testing can be and were the subject of cross-

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24 ³ The Cauthron court ultimately reversed the trial court, not for lab error, but because a critical underlying
25 assumption for the admissibility of DNA testing was absent. "Testimony of a match in DNA samples, without the
statistical background or probability estimates, is neither based on a generally accepted scientific theory nor helpful
to the trier of fact." Cauthron, 120 Wn.2d at 907.

1 examination and defense expert testimony at Copeland's trial. Id.; See also, State
2 v. Cannon, 130 Wn.2d 313 (1996).

3
4 Thus, in each of the above cases dealing with potential lab errors and poor lab
5 procedures, the errors and poor procedures were relatively insignificant. Moreover, the Supreme
6 Court stressed the importance of a trial court's role in evaluating lab evidence under the
7 mandates of ER 702.

8 In Kalakosky, while the court noted that alleged infirmities in the performance of a test
9 will usually go to the weight of the evidence, not its admissibility, it also stated that:

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11 If the testimony before the trial court shows that a given testing procedure was so
12 flawed as to be unreliable then the results might be excluded because they are not
13 "helpful to the trier of fact". The issue of human error in the forensic laboratory is
14 analyzed under ER 702 and is not a part of the Frye test....

15
16 Kalakosky, 121 Wn.2d at 541. See also, Cannon, 130 Wn.2d at 325; and Copeland, 130 Wn.2d
17 at 270. That this is still the standard in DUI cases post JENKIN is reflected in Justice Madsen's
18 concurrence in City of Seattle v. Ludvigsen, 2007 Wash. LEXIS 953 (2007):

19
20 When deviations from additional testing procedures or machine maintenance protocols
21 are so serious as to render test results unreliable, a court has discretion to exclude them in
22 accordance with the rules of evidence.

23 Ludvigsen, at page 35.

24 The State argues a violation of protocols by the WSTL could not provide any basis for
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1 suppression of breath tests, citing State v. Mee Hui Kim, 134 Wn. App. 27 (2006). Kim,
2 however, does not stand for the proposition that a breath or blood test may never be suppressed
3 for a violation of WSTL protocols under ER 702. The defendant in Kim did not contend that the
4 WSTL failed to comply with a protocol; rather the defendant in Kim argued that the State had
5 failed to show compliance with a protocol:

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7 Specifically, Kim points to the State's failure to show that preparation of the volatile
8 standards in the "Alcohol Standard Logbook" met the requirements in the Head Space
9 GC Protocol.

10
11 Kim, 134 Wn. App. at 35-36. Ann Marie Gordon, testifying at the Kim motion hearing, stated
12 that the protocol had been complied with and that the logbook was available at the lab for
13 defense review. Upon these facts the trial court held that the State had shown compliance with
14 the WAC and that the defense could (when, after the motion hearing they had been able to
15 review the logbook) renew their motion to suppress. Kim, 134 Wn. App. at 36-37. Thus, trial
16 courts are still able to weigh the failure of the WSTL to follow its own protocols in a motion to
17 suppress under ER 702.

18
19 In each of the Defendants' cases herein, the defense cannot point to specific errors
20 directly compromising the breath test results at critical BAC levels. For this reason the State
21 argues that this court should decline to suppress the results of the breath tests and should instead
22 admit the evidence at trial and allow the trier of fact to weigh each of the issues raised. While
23 the State's position is generally preferable when disputes arise relating to the quality of scientific
24 evidence, it is not always the last word on the subject. Indeed, if the court were always to admit
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1 questionable evidence at trial, ER 702 would serve little purpose. Here we find, for the reasons
2 documented in this court's findings of fact and more fully explained below, that the decision to
3 suppress or admit tips considerably in favor of suppression.

4 Under the current statutory scheme, a charge of DUI is most commonly proven by two
5 different means: proving that an individual drove a motor vehicle while under the influence of or
6 affected by intoxicating liquor, or by proof that the person had, within two hours after driving, an
7 alcohol concentration of 0.08 or higher as shown by analysis of the person's breath⁶. RCW
8 46.61.502 (1). Proof of DUI via analysis of the persons breath is considered a per se violation,
9 i.e., the state is not required to show that the defendant was affected by the alcohol, merely that
10 the level of alcohol in the defendants breath was at or above 0.08. Thus, a crime which carries a
11 potential sentence of one year in jail; carries a mandatory minimum of some amount of jail time,
12 and which will result in the mandatory loss of the privilege to drive a motor vehicle, may be
13 proved by evidence from an instrument alone.

14 The 0.08 BAC level is not the only critical level for breath alcohol which has been set by
15 the legislature. The first critical level is 0.02, the level at which a person under the age of 21
16 may be convicted of Driving or Being in Physical Control of a Motor Vehicle After Consuming
17 Alcohol. RCW 46.61.503. The next critical breath alcohol level is 0.04, the level at which a
18 commercial driver will lose his or her commercial drivers license (CDL) for one year. RCW
19 46.25.090; RCW 46.25.120. Finally, in a DUI prosecution, in addition to the 0.08 breath alcohol
20 level, the 0.15 level is also critical. A breath alcohol level of 0.15 or above carries greater
21 mandatory minimum sentencing requirements. RCW 46.61.5055. Moreover, for breath tests
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25 ⁶ The state may also prove the charge of DUI by proof that the defendant was under the combined influence of
liquor and any drug or by proof that the defendant's blood alcohol concentration was 0.08 or higher. RCW
46.61.502 (1).

1 registering above 0.02, 0.04 and 0.08, an individual may lose his or her privilege to drive without
2 the benefit of a prior hearing⁷. RCW 46.20.3101; RCW 46.25.120.

3 Thus, even errors in the range of 1 or 2% can have a profound effect on a breath test
4 reading. Nonetheless, each expert witness who offered testimony⁸ stated that there was not a
5 process or a machine that would not insert some amount of inherent error in any result. That is
6 also the case with the Datamaster and Datamaster CDM. In the process of breath test instrument
7 calibration, the protocols indicate that breath test instrument is still functioning properly if it is
8 accurate to within +/- 5%, and if the precision of the readings stand at +/- 3%⁹. Rod Gullberg
9 testified that the lack of accuracy in a breath test machine is referred to as "bias." A breath test
10 machine normally has a bias of 1-2%, with the smaller fraction of the machines registering a bias
11 of 5% or less¹⁰. The breath test program is not, however, set up to account for any of the
12 potential bias inherent in a breath test machine¹¹. Thus, a process that already allows potential
13 bias in each reading only underscores the importance of ensuring that the WSTL eliminates all
14 other possible sources of error.

15
16 Throughout Washington State, over 40,000 breath tests are administered annually. In
17 light of the importance of each one of these tests for the state and for individual defendants, it is
18 vital that each aspect of the breath test program operate effectively. As stated in the findings, the
19 WSTL prepares and tests both field simulator solutions and quality assurance procedure
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22 ⁷ In the case of a 0.04 reading, a CDL is lost. In each situation the defendant may request a hearing prior to
revocation.

23 ⁸ The court heard testimony from the following expert witnesses: Rod Gullberg, Dr. Barry Logan, Dr. Ashley Emery
and Dr. Nayak Pollisar.

24 ⁹ The WAC defines accuracy and precision as follows: "accuracy" means the proximity of a measured value to a
reference value; "precision" means the ability of a technique to perform a measurement in a reproducible manner.
WAC 449-16-030 (1) & (10).

25 ¹⁰ The bias allowed in the protocols, however, does not include improper procedures or mistakes.

¹¹ For instance, readings are not adjusted at any of the critical levels to account for actual or for potential bias, nor
are defendants informed of the potential bias before or during trial.

1 simulator solutions. These solutions serve as a critical check on breath test instruments to ensure
2 that each will provide accurate and precise breath alcohol readings. The CrRIJ 6.13 certificates,
3 or a toxicologist's in-court testimony, allow a breath test technician to "close the loop" and
4 testify that the breath test reading was correct.

5 6 **A Culture of Compromise**

7 The Cauborn, Kajaknsky and Connell cases, discussed above, generally dealt with
8 questions of lab mistakes and process errors. While many of our findings concern lab mistakes
9 and process errors, the remaining findings indicate that the problems in the WSTL are much
10 more pervasive.

11 Generally, our concerns regarding the WSTL fall into three general categories:

- 12
13 1. The failure to pursue the ethical standard which should reasonably be expected of an
14 agency that operates as an integral part of the criminal justice system;
- 15 2. The failure to establish procedures to catch and correct human, and software and machine
16 errors within the lab; and
- 17 3. The failure to pursue the rigorous scientific standards which should be reasonably
18 expected of an agency that contributes a key component of critical evidence that may,
19 almost standing alone, result in a criminal conviction.

20 21 **Ethical Compromises**

22 Ann Marie Gordon falsely signed CrRIJ 6.13 certifications under penalty of perjury
23 indicating that she prepared and tested field simulator solutions and that the solutions were found
24 to conform to the standards established by the State Toxicologist. This and other ethical
25 compromises documented in the findings adopted in this order may at the same time be viewed

1 as both petty and alarming. The ethical compromises were petty because they were frustratingly
2 unnecessary, and alarming because the WSTL exists primarily to provide accurate information to
3 state trial courts¹². It is, therefore, reasonable to expect that those employed in an office with
4 such a direct link to courts, whose primary duty is the discovery of the truth, would fully
5 understand the importance of truth in all of their activities. The State has argued that there isn't
6 any evidence that Ann Marie Gordon ever actually testified in court that she had prepared and
7 tested a simulator solution. Yet, CrRLJ 6.13 exists to allow the admission of simulator solutions
8 (via affidavits) in the absence of direct court testimony by the toxicologist who prepared the
9 solution. We do not know whether any false Ann Marie Gordon CrRLJ 6.13 certificates were
10 ever used in court in lieu of live testimony, but considering the number of DUI trials, it is more
11 than likely that some were.

12 There are several other factors that highlight the disturbing nature of this practice. This
13 was a procedure which:

- 14 • Ann Marie Gordon herself had specifically recognized was inappropriate;
- 15 • violated the protocols of the WSTL;
- 16 • required that she not only state that she performed an activity which she did not perform
17 but also that she sign an affidavit to that effect under penalty of perjury;

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22 ¹² The WSTL was created to provide forensic information to prosecuting attorneys as well as coroners and medical examiners.
23 Prosecuting attorneys will, of course, request information from the WSTL in the hope that it will assist in the prosecution of
24 anyone who may be guilty of committing a crime. In the case of breath alcohol testing, the link to trial courts is strong because
25 the WSTL runs essentially independent of specific requests from individual prosecuting attorneys.
The WSTL was specifically established by RCW 68.50.107:

"There shall be established in conjunction with the chief of the Washington state patrol and under the authority of the
state forensic investigations council a state toxicological laboratory under the direction of the state toxicologist whose
duty it will be to perform all necessary toxicologic procedures requested by all coroners, medical examiners, and
prosecuting attorneys."

- 1 • required the active participation of at least one other member of the WSTL (Edward
- 2 Formoso) in the fraud (but we have also found that this pernicious fraud ultimately
- 3 required the participation of toxicologist Melissa Pemberton and perhaps others)¹³; and
- 4 • set the ethical tone for the entire toxicology lab¹⁴.

5 While such fraud can never be justified by necessity, it is, nonetheless, baffling to consider the
6 risk the toxicology lab was willing to take for little, if any, gain. If Ann Marie Gordon never
7 testified in court that she prepared and tested a simulator solution, and if this means that she,
8 perhaps, never intended to so testify, why was she so ready to commit perjury by signing false
9 certifications?

10 The State Toxicologist, Dr. Barry Logan, is ultimately responsible for the WSTL, and he
11 bears a good deal of the responsibility for its shortcomings. He hired and supervised Ann
12 Marie Gordon. Ms. Gordon testified that she continued to "test" solutions and sign the CrRLJ
13 6.13 certificates because she believed Dr. Logan wanted her to. Dr. Logan testified that he had
14 been told in 2000 by Ms. Gordon that her predecessor in the WSTL had fraudulently signed
15 CrRLJ 6.13 certificates when he was manager of the WSTL. Yet, not only did Dr. Logan fail to
16 detect that this same fraudulent procedure was occurring from 2003 to 2007, but he also
17 professed not to know that toxicologists even signed CrRLJ 6.13 certificates. Because of this
18 ignorance, he testified that he did not understand the meaning of the first tip that came into the
19 State Patrol. The tip indicated that "Simulator solutions are being falsified as far as the
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21 ¹³ Although we cannot know with certainty whether this fraud was known to the other members of the WSTL, we
22 believe that it is unlikely that anyone working in such a small office could have failed to see that one of their
23 members was failing to test a solution and that, nonetheless, her name would appear on the paperwork they all had
24 to sign indicating that they had each completed their testing.

25 ¹⁴ This conclusion is not meant to indicate that all members of the toxicology lab engaged in unethical practices. It
is rather, a comment on the culture of the office itself. If the top of the chain of command engages in questionable
practices, it should not surprise anyone to find that this poor behavior has infected the culture of the entire office.
Again however, we caution anyone from making any specific conclusions about employees of the WSTL. Good
people are quite capable of resisting poor behavior, even if a poor example is set at the top; and during the course of
this motion we heard the testimony of many competent, dedicated and ethical people from the WSTL.

1 certification." Thereafter, in a situation screaming with irony, Dr. Logan assigned the
2 perpetrator of the fraud, Ann Marie Gordon, the task of investigating the tip. To complete the
3 circle, Ms. Gordon enlisted the assistance of lab supervisor Ed Formoso, her co-conspirator in
4 the fraud, as her co-investigator. While they both ended their fraudulent practice at the time the
5 first tip was received, their investigation also concluded that no fraud was occurring.

6 While it is not clear from the testimony of the various parties, just when Dr. Logan knew
7 of the fraud, he should have known after the first tip. As previously stated, it is most likely that
8 everyone in the WSTL was fully aware of the fraud, and if 16 toxicologists knew, why didn't
9 Dr. Logan? When informed that the certifications were being falsified, why didn't he consider
10 the possibility that his current lab manager was engaging in the same activity that had occurred
11 a few years before? Why was Ann Marie Gordon assigned the task of investigating the tip?
12 While these questions may never be answered, they cast a long shadow over Dr. Logan's ability
13 to serve as the State Toxicologist.

14 **Systemic Inaccuracy, Negligence and Violation of Scientific Principles**

15 Dr. Nayak Polissar, an expert called by the State, testified that only superior methods will
16 ensure accuracy, and that the accuracy and precision necessary for a particular laboratory task is
17 dependent upon the particular use intended for the final product. As stated by the National
18 Institute of Standards and Technology (NIST), "accuracy... is judged with respect to the use to
19 be made of the data." NIST Special Publication 260-100.2 (1993).

20 Data Transfer

21
22 When each of the 16 toxicologists tested simulator solutions, the data from their tests was
23 recorded on documents known as chromatograms. The data was thereafter transferred to
24 worksheets, a problematic step, unless the WSTL required a review to ensure that the data was
25

1 correctly transferred. The WSTL did not require that the data transfer be checked, and
2 toxicologists signed certifications which were unverified and later found incorrect. Many errors
3 in diverse areas were subsequently discovered.

4 5 Computer Software

6 The computer software used to enter and calculate simulator solution lab results on the
7 worksheets was not created by an individual with the requisite knowledge and skill necessary to
8 ensure that the data was correctly analyzed and recorded. Moreover, no one checked the
9 software to determine if it was operating properly. Nor was this a mistake that one can charge
10 to an individual employee. The WSTL itself never considered that it was necessary to check
11 the software to ensure that it was fit for its purpose. The software contained errors which were
12 not revealed until the WSTL came under close scrutiny because of the Ann Marie Gorton
13 investigation.
14

15 16 Malfunctioning Gas Chromatograph

17 The WSTL suffered through a time period during which a gas chromatograph machine
18 was malfunctioning. During this period of time, the gas chromatograph could, under certain
19 circumstances, provide incorrect readings. The WSTL chose to ignore rather than address this
20 issue for a considerable period of time.
21

22 Thousands of Tests Affected

23 Literally thousands of breath tests performed in recent years were affected through a
24 multiplicity of errors in the toxicology lab. A very brief recitation of the errors include: the
25

1 improper rejection of data; erroneously switched data; the use of field simulator solutions to
2 conduct quality assurance procedures; the use of software that improperly computed data and
3 that improperly ignored the data of the last four of the toxicologists providing data for field
4 simulator solutions; and, the use of simulator solutions that were outside of the allowable range.

5 Rod Gullberg effectually ran the breath test section for the Washington State Patrol for 25
6 years. Mr. Gullberg, who, along with Trooper Ken Denton, completed a lengthy review of the
7 solution preparation worksheets from the WSTL, is also well acquainted with the WSTL and its
8 processes. In his opinion, the problems in the WSTL are not the result of bad faith. Instead,
9 Mr. Gullberg believes that the WSTL failures are the result of carelessness and complacency.

11 Motion to Suppress Granted

12 While we agree that trial courts should generally admit scientific evidence if it satisfies
13 the requirements of Frye, we also agree that trial courts should thereafter engage in a
14 meaningful ER 702 analysis, as we have here, when the circumstances require. Having done
15 so, we conclude that, under ER 702, the work product of the WSTL is sufficiently compromised
16 by ethical lapses, systemic inaccuracy, negligence and violations of scientific principals that the
17 WSTL simulator solution work product would not be helpful to the trier of fact¹⁵. This litany of
18 problems is indicative of a pervasive culture which has been allowed to exist in the WSTL. In
19 this culture, the WSTL compromises the accuracy of the work product. Accuracy becomes
20 secondary to the accomplishment of the work itself. Thus, because of this culture of the
21 expedient, the WSTL has lost its effectiveness.
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25 ¹⁵ Although many of the problems within the WSTL are of a general nature, our decision today concerns only the simulator solutions prepared and tested by the WSTL. Our decision does not, therefore, directly relate to any of the other work of the WSTL.

1 This conclusion is especially troubling because of the critical role the WSTL plays in
2 combating the crime of DUI. The criminal justice system is appropriately assigned the task of
3 discovering the truth. Simply stated, without the reliable evidence that a correctly functioning
4 breath test instrument can provide, the discovery of the truth in DUI cases suffers; the innocent
5 may be wrongly convicted, and the guilty may go free.

6 We wish to emphasize that our decision to suppress today results from the unique
7 multiplicity of WSTL problems highlighted during this motion. Because the identified problems
8 are multiple and diverse, and because the WSTL may find it difficult to prove, in any reasonable
9 manner, that they have corrected each individual problem, we are not able to indicate with
10 specificity, each correction required.

11 Therefore, while we provide a list of our concerns below, we emphasize that the WSTL is
12 not required to show that each has been corrected. Any one or two problems, standing alone,
13 would not likely have resulted in suppression.

14 While the WSTL has attempted to modify its practices and procedures as a result of many
15 of the problems noted in the findings herein, and improvements have been made,¹⁶ additional
16 effort is required.

17
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19 Ethics

20 The WSTL has not been able to explain how Ann Marie Gordon and Ed Formoso (and
21 perhaps the lab manager prior to Ann Marie Gordon), over a multiple year period, decided that it
22 was acceptable to engage in a practice of falsely signing CrRLJ 6.13 certificates. We are not
23 persuaded that this fraudulent activity should simply be laid at their feet. This apparently long
24

25 ¹⁶ Indeed, in reaction to a continuing series of discoveries, the State Toxicologist, Dr. Barry Logan amended
protocols several times within a recent three month period.

1 standing ethical lapse is more likely a symptom of a greater problem; a WSTL culture that was
2 tolerant of cut corners.

4 Errors

5 While the WSTL has made several policy changes to deal with many of the prolific errors
6 within the WSTL, it has not been able to point to the reasons for what Rod Gullberg stated was a
7 sense of complacency in the WSTL. The WSTL has, to date, simply corrected the systemic
8 errors that have been called to its attention or were discovered as a result of a review of other
9 problems called to its attention. The WSTL must establish procedures that, in the years ahead,
10 ensure that their processes are double checked for accuracy¹⁷.

12 Forensic Science

13 The State appropriately relies on the WSTL to produce (as is the case with the simulator
14 solutions) and analyze evidence. The WSTL was not created, however, as an advocate or
15 surrogate for the State. While the WSTL will always assist the State, it must never do so at the
16 cost of scientific accuracy or truth.

17
18 In City of Seattle v. Clark-Munoz, 152 Wn.2d 39 (2004), the Supreme Court agreed with
19 the statement that:

20
21 If the citizens of the State of Washington are to have any confidence in the breath testing
22 program, that program has to have some credence in the scientific community as a whole.
23

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25 ¹⁷ Here we use the word accuracy in its colloquial, non-scientific sense. By the use of the word accuracy, we mean
that the WSTL must establish a system which ensures reliability appropriate to the importance of the purpose of
each specific task.

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Clark-Monoz, 152 Wn.2d at 47. Although the Clark-Monoz holding has been brought into some question as a result of the ruling in Jensen, supra, the proposition that robust scientific standards are expected in the WSTL, still remains. And while Rod Gullberg testified that, after the changes made in the WSTL, in the fall of 2007, he now has more confidence in the WSTL, more work is required. In the summer of 2008 the WSTL plans to adopt the General Requirements for the Competence of Testing and Calibration Laboratories, ISO/IEC 17025:1999(E), promulgated by the International Organization for Standardization. These standards are neither required for a toxicology laboratory, nor are they a panacea for the past and current problems in the WSTL. Their adoption, however, is likely to move the WSTL a long way toward the type of reliable forensic science which should be expected of a state toxicology lab.

Conclusion

We hold that, under ER 702, the work product of the WSTL has been so compromised by ethical lapses, systemic inaccuracy, negligence and violations of scientific principals that the WSTL simulator solution work product would not be helpful to the trier of fact. The State, perhaps expecting the suppression of some of the work product of the WSTL, has asked this panel to be as specific as possible in our ruling. Specificity is made difficult, however, because of the nature of the problems identified. The State may, therefore, request that this panel reconvene at such time that the State believes it has sufficient evidence that the WSTL has adequately addressed the issues noted in this Order¹⁸.

¹⁸ The alternative, of course, is to seek the admission of breath test evidence before each individual judge who adopts this ruling and then, when the defendants raise the issue, argue case by case that the WSTL simulator solutions currently meet the requirements of ER 702.

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Dated this 30th day of January, 2008



Judge David Steiner

Judge Darrell Phillipson

Judge Mark Chow

**Forensic Investigations Council Report on the Washington
State Toxicology Laboratory and the Washington State Crime
Laboratory
April 17, 2008**

The Forensic Investigations Council (FIC) was created in 1995 by the Washington State Legislature to oversee Forensic Laboratory Services Bureau that is part of the Washington State Patrol. The Council is composed of twelve members representing county government, city legislative authority, private practice pathologists and the Chief of the Washington State Patrol.

In 2006 and 2007 a number of problems and allegations of problems arose regarding the work of a forensic scientist in the State Crime Laboratory and also employees of the State Toxicology Laboratory. Dr. Barry Logan, the Director of the Forensic Laboratory Services Bureau (FLSB) responded to these issues and a number of audits were conducted to evaluate the services provided by the FLSB and examine the procedures and policies that were in place. These matters were initially reported to the FIC by Dr. Logan and the progression of the audits was passed on to the Council. In addition, the Washington Association of Criminal Defense Lawyers (WACDL) and the American Civil Liberties Union (ACLU) both asked the FIC to investigate allegations relating to the FLSB in October and November of 2007.

The Washington State Crime Laboratories and the Washington State Toxicology Laboratory form the Forensic laboratory Services Bureau (FLSB) in the Washington State Patrol. The Director of the FLSB was Dr. Barry Logan, who reports to the Chief of the Washington State Patrol and the Forensic Investigations Council. The Crime Laboratory System consists of seven laboratories throughout the State and conducts forensic investigations on evidence secured by law enforcement in criminal cases. The Toxicology Laboratory system consists of one laboratory in the State and conducts testing as requested by County Coroners and medical examiners and law enforcement agencies and also runs the Breath Testing Program. The FLSB has 198 employees and eight laboratories.

Crime laboratory

The Crime Laboratory has a system of peer review for work done by the forensic scientists prior to the issuance of laboratory reports. There are also levels of supervision of these employees. During the ordinary course of peer and supervisory review of the work of Forensic Scientist Evan Thompson, deficiencies were discovered. Due to concerns he was placed on a work improvement program in April of 2006. During this review process an error was discovered on Mr. Thomson's work relating to bullet trajectory analysis. Due to concern raised about this type of work by Mr. Thompson, he was removed from bullet trajectory casework on October 2, 2006. As the review by Crime Laboratory supervisors took place, technical errors and violations of laboratory operating procedures were discovered, and Mr. Thompson was removed from all casework responsibilities on November 13, 2006. Mr. Thompson's case files were reviewed and irregularities were discovered, and then a focused casework review was undertaken of Mr. Thompson's work. During this process Mr. Thompson resigned from the State Crime Laboratory effective April 6, 2007.

In order to fully examine Mr. Thompson's work, Dr. Barry Logan contracted with two independent firearms examiners, Matthew Noedel, and Dwight Van Horn. They were initially directed to examine 13 cases that Mr. Thompson had completed. Other casework was also examined by the two examiners. Mr. Nodell reported that he discovered work that was poorly organized and poorly documented, but the conclusions did not appear to be wrong.

During the pendency of this review an independent Forensic Consultant, Larry Lorschach of American Society of Crime Laboratory Directors/Laboratory Accreditation Board [ASCLAD/LAB] was retained by the Washington State Patrol to audit the firearms function of the Seattle, Spokane, and Tacoma Crime Laboratories. The audit findings related to documentation of findings and for explaining why definite conclusions could not be reached in some cases. These recommendations were reviewed and adopted by the FLSB. The discovery and actions taken relating to Mr. Thompson, and the audit that was conducted, showed that the firearms division of the Crime Laboratory was functioning properly and appropriate safeguards were in place to identify work that was not up to the

standards that the lab requires. Once work quality was questioned, the employee was taken off casework and his work was examined. The process worked well in this instance and peer review and quality control issues were well positioned to insure that if work product was not thorough and professional in nature, it would be observable and remedied.

Problems in the State Toxicology Laboratory

In order to understand the problems that occurred in this section of the FLSB, that became apparent in the month of July, 2007, it is important to review the annual audits as well as the special audits conducted by the Washington State Patrol. As part of normal procedure internal audits are conducted annually on the evidence system at the State Toxicology Laboratory. In addition, independent audits were undertaken after discovering problems with the certifications of simulator test solutions submitted by Lab Manager Ann Marie Gordon relating to the Breath Test Program. The Risk Management Division of the Washington State Patrol conducted an audit of the evidence system at the State Toxicology Laboratory that was completed on September 4, 2007. This audit traced prior audits that had been conducted on the evidence system since 2004.

Evidence Audit in 2004

In 2004 the audit revealed no evidence of theft, tampering, or misappropriation, but outlined a number of findings. One of the major concerns of this audit was the storage of blood tubes and breakage due to freezing of the tubes. The audit also made findings relating to documentation and the shortcomings of the lab in this area. There was no destruction authorization documentation, no recording of discovery requests and no retention schedule relating to records. Ms. Gordon, the lab manager indicated that she did not have the time to follow the Toxicology Lab's Standard Operating Procedure (SOP) Manual relating to documenting disclosure requests. She stated that she would not be able to do this in the future due a lack of staffing. The audit indicated that the Lab Manager expressed frustration with the level of workload that the lab personnel had to deal with while still complying with the paperwork requirements of the agency. There appeared to

be a shortage of personnel to accomplish the tasks the lab was directed to perform. The audit findings were responded to by both Ms. Gordon and Dr. Barry Logan.

Evidence Audit in 2005

Another evidence audit was conducted in 2005 by the Washington State Patrol. This audit specifically commended Ms. Gordon for the effort she had shown in responding to the prior audit concerns. There were no major findings in this audit.

Evidence Audit in 2006

Another evidence audit was conducted by the Washington State Patrol in 2006 and there were no findings for this audit.

Evidence Audit in 2007

Another evidence audit was completed by the Washington State Patrol in 2007 and there were no findings for this audit. The auditors commended Mr. Formosa for managing the sizeable inventory stored by the lab. Responses from the staff during this audit showed that the recommendations from the prior audits had been implemented. In addition, staff had been added to assist in the evidence handling.¹

Breath Testing Section

On March 15, 2007, the Washington State Patrol's anonymous tip line received a call which stated that the "Simulator solutions are being falsified as far as the certification." On March 23, 2007, Dr. Logan was given a copy of the message. He then asked Ann Marie Gordon, the Toxicology Lab Manager to investigate the message. Breath instruments used in the State of Washington are BAC DataMaster and BAC DataMaster CDM. These machines utilize a simulator solution during the initial phases of the breath test to determine whether the breath test machine is accurately measuring

¹ It was apparent from this progression of evidence audits that lack of staffing in the Toxicology Lab was one of the major reasons for problems maintaining the proper documentation of records that had been cited earlier.

breath alcohol content. The external simulator solutions are prepared by the Toxicology Laboratory analysts pursuant to protocols established the State Toxicologist. The process of preparing and testing the solutions is called "certification." No less than three analysts must certify the simulator solution prior to its certification. The practice of the Toxicology Lab was to have up to sixteen analysts certify the simulator solution, which allowed all to testify if necessary on court cases. This was believed to be less intrusive to the lab work processes, since more analysts were available for trial testimony.

Ms. Gordon and Mr. Formosa responded in writing to Dr. Logan's request for an investigation on April 11, 2007. They indicated that all data had been reviewed from January 2007, through March, 2007, and all was found to be accurate. Ms. Gordon later met with Dr. Logan and revealed that she had not been testing her simulator solutions and had delegated this to another analyst. Dr. Logan told her that as the manager she should not be testing the simulator solutions and asked her to cease doing this.

On July 9, 2007, the Washington State Patrol's anonymous tip line received a second call, which stated, "Ann Marie Gordon doesn't really certify all those simulator solutions. If you look in the file you'll find a grammetigram with her name on it, but if you also check over the years of where she really was on the days that those things were certified you'll find once in a while she was in DC or Alaska, or somewhere else. She had somebody else do it and then she'll sign the form that says, under penalty of perjury I analyzed this. If you don't think that's a big deal just think what Francisco Duarte would think of that." Dr. Logan met with Ms. Gordon after he received the second anonymous message and told her that an investigation would be begun on this matter. Ms. Gordon indicated that there was no need for an investigation since she had signed the documents. She stated that Mr. Formosa had done her testing and she then signed the certification forms. Dr. Logan initiated an internal affairs investigation and Ms. Gordon subsequently resigned on July 20, 2007.

ASCLAD Audit Conducted by Michael Hurley

After these problems were brought to light, the Chief of the Washington State Patrol demanded an audit of the operational and management practices of the Toxicology Laboratory as they relate to the Breath Testing Program. This audit came under the Risk

Management section of the Washington State Patrol, but was contracted to an independent evaluator, Michael Hurley, an assessor with the American Society of Crime Laboratory Directors Consulting.[ASCLAD]. This audit was conducted during September, 2007. The procedures in place for the preparation and testing of simulator solutions and an assessment of the calculation error on breath test results were major areas in which Mr. Hurley concentrated his efforts. Mr. Hurley made a number of findings in this audit relating to the operational and management practices of the breath test program. He found that there was little communication between the Toxicology Laboratory and the Breath Testing Program. He also found that the Toxicology Laboratory management had not applied the same operational and quality control to the Breath Testing Program that had been applied to other parts of the laboratory. In addition, breath testing functions had not been evaluated by external auditors and were not part of the accreditation by ABFT.

The Toxicology Laboratory ordinarily prepares two different types of solutions for use in the breath testing machines: (1) The first is a 0.08 Simulator External Standard Solution mentioned above; (2) The second is a Quality Assurance Solution used to verify the accuracy and precision of the instruments. Both of these solution preparation procedures require a minimum of three analysts to do the required testing to be certified. However, in actual practice 12-16 analysts performed the tests in order to qualify all to testify in court relating to the solutions. During the audit Mr. Hurley found a calibration error on tests run on the breath test solutions. All of the tests were not calculated for the total number of analysts testing the data. In regard to this problem Mr. Hurley stated the following, "The laboratory policy did not create the problem, but the policy of having all analysts do the testing for convenience of having more people to go to court contributed to the subsequent, identified error."

Mr. Hurley identified a number of findings during this audit. The Washington State Patrol then provided a "Breath Test Audit Summary and Target Date Checklist", outlining agency action and steps to cure the problems that he found. The findings from this audit and recommendations from Mr. Hurley were adopted by the Chief of the

Washington State Patrol and almost all have been put into place. The remainder that have not yet been completed have completion dates and will be finalized during this year.²

ABFT Data Quality Audit

An additional audit was conducted on October 24-26, 2007 by the Risk Management Division of the Washington State Patrol to test the toxicology files signed or co-signed by Manager Ann Marie Gordon for the period of time from July, 2005, through June of 2007. The Risk Management Division contracted with the American Board of Forensic Toxicology (ABFT) and auditors Dr. Graham Jones, and Dr. Iain McIntyre as external auditors. In conducting this audit the auditors selected 300 cases at random during the target time period that were signed or co-signed by Ann Marie Gordon. During this review the auditors found ten files with reporting issues. Three cases contained clear errors that should have been noticed on review, but were not. Three cases contained errors that fall into the category of "typographical" errors. Four of the remaining ten cases had errors that were classified as "forensically significant." Some of these may be a matter of differing professional judgment rather than errors.

Drs. McIntyre and Jones congratulated the Toxicology Laboratory and Ann Marie Gordon for establishing two levels of report reviews, which is not done in other labs. The audit report concluded with the statement that although the noted errors were unfortunate, the reviews conducted by Ms. Gordon were professionally done and appear to reflect isolated oversights rather than unprofessional conduct.

Case Law Decisions

The problems associated with Ann Marie Gordon's false certifications and also the errors in the database and computations culminated in a number of court decisions relating to the admissibility of the breath test results in DUI prosecutions.

² See "Breath Test Audit Summary and Target Date Checklist" attached to this report as Appendix #1.

In Arntson v. Department of Licensing, [DOL case] the court admitted the breath test results, but gave them no weight due to the problems associated with the actions of Ms. Gordon and the culmination of errors dealing with the simulator solution. The action to suspend Mr. Arntson's driving privileges was dismissed.

In State v. Gilbert, et al [Skagit County cases], the court denied the motions to dismiss the charges or suppress the breath test results, but was very critical of the Toxicology Laboratory and Dr. Logan.

In State v. Lang, et al, [Snohomish County cases] the motion to suppress the breath test result was granted due to Ms. Gordon's actions.

In State v. Ahmach, et al, [Redmond cases] the court granted the motion to suppress due to Ann Marie Gordon's actions, and the errors committed by the lab personnel. The case was very critical of the Toxicology Laboratory and Dr. Logan's supervision.

Efforts to Correct Problems Discovered

Crime Laboratory

The FLSB under the supervision of Dr. Barry Logan and the Washington State Patrol has taken very thorough steps to examine and solve the problems in the Crime Laboratory relating to Forensic Scientist Evan Thompson and in the Toxicology Laboratory relating to the Breath Test Program.

The crime laboratory peer review, quality control analysis and supervision, were all adequate to identify problems with a forensic scientist's work and rectify them. This was done in an open manner and was remedied. The systems worked in the way that was intended when the checks and balances were put into place in the crime laboratory. In order to fully understand the checks and balances instituted in the crime laboratory it is important to review the audits that are done annually and also the creation of the Standards and Accountability Section (SAS). In 2006 Dr. Logan decided that it was important to create a section devoted to the demand for quality processes and to increase the vigilance of forensic quality issues such as audits and accreditation oversight. This section has been increased from one person to seven full time positions.

In order to insure compliance with ASCLAD/LAB Accreditation Criteria, Washington State Patrol Regulations, legal criteria, CALEA Accreditation Criteria and

Federal Requirements, many audits are required. The following are audits presently conducted on the crime laboratories:

1. Four Quarterly Evidence Audits per year per laboratory performed by the laboratory manager or designee;
2. One 100% Evidence Audit per year per laboratory performed by the Washington State Patrol Risk Management Division;
3. One 10% Spot Evidence Audit per year per laboratory performed by the Washington State Patrol Risk Management Division;
4. Three Firearms Reference Collection Audits performed by the SAS;
5. Six Controlled Substance Reference Collection Audits per year performed by the SAS;
6. One Quality and Technical Audit per year per laboratory performed by the SAS;
7. Six alternating internal and/or External DNA and CODIS Audits per year as required by the Federal FBI Guidelines; (Set up by the SAS;
8. Yearly ASCLAD/LAB Assessments performed by each of the seven laboratories and performed by the Laboratory Manager, monitored by the SAS.

After each audit is completed the SAS completes a report and the Laboratory Manager must file a response. This puts the focus on problems and their solutions. After a solution is reached the SAS Section conducts follow ups to check and see how the problem has been remedied. This program has changed the laboratory system from a reactive to a proactive environment. In addition, the ASCLAD/LAB is converting from a forensically nationally based Legacy Accreditation Program to the International ISO Program based on ISO testing and calibration laboratory criteria. This change will more than quadruple the essential accreditation criteria used, and is based on international standards and applications. The current Legacy Accreditation Program has an external assessment every five years, while ISO has a yearly assessment for the first five years and then adjusted based on the laboratories record of success. This project is the responsibility of the SAS and will result in a better laboratory system and product for the laboratory users.

Toxicology Laboratory

The external and internal audits that were conducted on the Toxicology Laboratory after the disclosure by Ms. Gordon of her false certifications, are certainly indicative of how seriously the Chief of the Washington State Patrol viewed this problem. In addition, after all of the audits, the Washington State Patrol and the FLSB have adopted all of the audit findings, in an effort to prevent this from ever happening again and to insure that checks and balances will be adequate to forestall this in the future.

In order to insure compliance with ABFT Accreditation Criteria, Washington State Patrol Regulations, legal criteria, CALEA Accreditation Criteria and Federal Requirements, many audits are required. The following are audits presently conducted on the Toxicology Laboratory:

1. Four Quarterly Evidence Audits per year performed by the laboratory manager or designee;
2. One 100% Evidence Audit per year performed by the Washington State Patrol Risk Management Division;
3. One 10% Spot Evidence Audit per year performed by the Washington State Patrol Risk Management Division;
4. One ABFT Accreditation Audit [The Toxicology Laboratory was accredited last year and will go through a mid-year assessment this year];
5. SAS Audit to insure the findings from the last year's audits are being implemented;
6. One evidence handling audit performed for the CALEA Accreditation.

After each audit is completed the laboratory manager must respond to any findings and make certain that problems are remedied. In addition, the Toxicology Laboratory is converting from ABFT Accreditation Program to the International ISO Program based on ISO testing and calibration laboratory criteria. This change will more than quadruple the essential accreditation criteria used, and is based on international standards and applications. ISO has a yearly assessment for the first five years and then is adjusted based on the laboratories record of success.

Conclusion

It is extremely unfortunate that Toxicology Manager Gordon filed false certifications on tests that were conducted by another analyst. The fact that this was done

by a high level laboratory employee is repugnant and antithetical to the goals and standards of the entire laboratory system. This was not a certification that was essential to any part of the program and truly defies logic. This action has prevented the utilization of breath test results in courts all over the State of Washington, and has raised a cloud of doubt over the Toxicology Laboratory. The crime and toxicology laboratory employees are a very dedicated, hard working, honest group of people and certainly did not deserve to have the actions of two people affect the public perception of their work. Dr. Logan has dedicated many years of his professional life to the goal of creating a laboratory system that is dedicated to the most efficient, well run, and ethical standards of forensic science. Under his leadership the Crime Lab and Toxicology Laboratory systems have grown to attempt to meet the need in this State for such services, and to keep abreast of the cutting edge technology in forensic science. The Toxicology Laboratory has doubled in size under his leadership and has achieved national accreditation. The crime laboratories have greatly increased in size, are fully accredited and have placed a major focus on DNA casework. The focus that Dr. Logan placed on quality assurance and the creation of the SAS division will ensure high quality laboratory processes and results in the future.³

The Forensic Investigations Council makes the following recommendations for the FLSB:

1. Adopt all of the findings of the audits conducted as set forth above.⁴
2. Appoint a State Toxicologist as a separate position from the FLSB Chief.⁵
3. Appoint a Laboratory Manager position for the Toxicology Laboratory.⁶

³ We are not unmindful of the criticism of Dr. Logan by a number of judges in the above-cited opinions. However, everyone who supervises a large number of employees, which does not include the aforementioned judges, realizes that sometimes employees do not follow the rules, do not follow directives and do not follow the law. If this is done in a manner which is not readily apparent, the results can be disastrous. That is exactly what happened here. The captain of the ship ultimately is always responsible, but it does not mean that he was asleep at the helm or was complicit in the activities of the employee or employees. Dr. Logan has built an extremely excellent crime laboratory and toxicology system in the State of Washington. He has contributed more to the forensic laboratory systems than anyone in the State. His vision and organizational ability will be felt in this system for years to come.

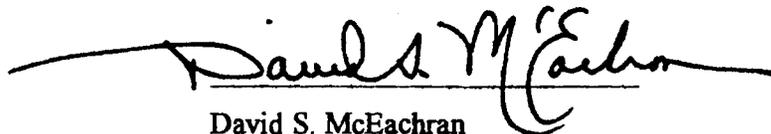
⁴ This has been done by the Washington State Patrol and all will be effective by mid year, 2008.

⁵ The duties associated with the State Toxicologist and the Bureau Chief of the FLSB are too numerous for one person to complete. [This recommendation has been completed and Dr. Fiona Couper was appointed as the State Toxicologist effective on March 10, 2008].

⁶ This position has been filled for the State Toxicology Laboratory and will provide support for the State Toxicologist.

4. Complete the ISO accreditation on both the Crime Laboratory System and the State Toxicology Laboratory System.
5. Expand the current Standards and Accountability Section to ensure vigilance for quality processes and to conduct audits and oversee accreditation over both the Crime Laboratories and the State Toxicology Laboratory.
6. Management of the crime laboratories and the toxicology laboratory should constantly monitor the staffing levels to insure adequate staffing levels to process the lab requests in a timely manner and to insure high quality, thorough casework.

The problems described above that occurred in the Toxicology Laboratory cannot overshadow the excellent, high quality forensic casework that has been completed day in and day out by the employees of the Forensic Laboratory Services Bureau. The above recommendations will ensure that these problems will not reoccur and will increase the quality of the laboratory results.

A handwritten signature in black ink, reading "David S. McEachran". The signature is written in a cursive style with a long horizontal line extending to the left and a large, stylized "C" at the end.

David S. McEachran
Chairman FIC

APPENDIX 1

Type of Audit	Target Date	Action Step	Completion date
BTA	08/01/07	Breath test attend training for new program offered by ASCLD-LAB for accreditation	done
BTA	09/01/07	Simulator solution certification database form updated to include date beside analysts name reflects the date analyzed.	done
BTA	10/05/07	Update & develop procedures for preparing, testing, certifying, and conducting quality control on simulator external solutions and QA solutions	done
BTA	10/05/07	Quality assurance check performed by breath test section on receipt of solution. Recalculate results.	done
BTA	10/05/07	Documentation of absolute ethanol w/simulator solution log	done
BTA	10/05/07	Language standardized to reduce any confusion about what documents are being referred to.	done
BTA	10/05/07	Revisions to simulator solution & QA procedures dated 10/5/07 and beyond, require to be included in batch file.	done
BTA	10/05/07	Validation of filemaker database. Old file locked to prevent editing or tampering	done
BTA	10/05/07	4-stage process for review of analytical data. Toxicology Supervisor assigned to oversee this process.	done
SSA	11/01/07	Refrigerator/freezer moved to vault. Evidence moved to vault each night.	done
SSA	11/01/07	Seattle Crime Lab PEC assigned to ToxLab 40% time.	done
BTA	11/07/07	Weekly training sessions for Tox Staff	ongoing
BTA	11/15/07	Analysts divided into 2 teams for simulator solution batches. 8-9 analysts performing tests rather than 16	done
SSA	11/22/07	Save sample process assigned to Barry Fung.	done
SSA	12/14/07	Audit of 2005 Samples	done
BTA	12/19/07	Joint meeting between Tox staff & Breath test program staff	done
SSA	01/01/08	Seattle Crime Lab PEC = ToxLab PEC 100%	done
SSA	01/01/08	Access to evidence vault limited to PEC & Supervisors only	done
SSA	01/01/08	Filemaker Pro installed on evidence officers computers	done
SSA	1//2008	Return/disposal of evidence process for PCME & KCME	done
SSA	1//2008	Steering committee meetings to start for returning ALL SAMPLES	done
SSA	01/01/08	Development of evidence disposal and return process w/documentation	done

APPENDIX 1

Type of Audit	Target Date	Action Step	Completion date
SSA	02/01/08	Identify conflicts between lab & agency policies.	done
SSA	02/01/08	Draft changes assigned to PEC Linda Edwards & Susan Sabillo	done
SSA	02/01/08	2nd ToxLab PEC expected hire date	done
SSA	02/01/08	Assessment of CITE system before final decision on LIMS	done
SSA	02/01/08	Recommendations for improvement on save process	done
BTA	02/04/08	Summary of the process used for calculating with mean and standard deviation - prepared by Breath Test program staff. Incorporate as an appendix in SOP	done
SSA	02/15/08	Draft policy on state wide evidence policy for Toxicology Laboratory due from steering committee	done
SSA	03/01/08	2 PEC's responsible for receiving evidence, entering into evidence system, etc	done
BTA	03/01/08	IIA compliant quarterly external audits will be developed by FLSB Standards and Accountability Section	done
BTA	04/01/08	Technical work group to be formed by new Toxlab management staff	
SSA	04/01/08	Audit of 2006 & 2007 Samples	in progress
BTA	07/01/08	Application for accreditation ASCLD-LAB	
BTA	07/01/08	Additional communication venues developed by Technical working group.	
BTA	07/01/08	Periodic internal audits on simulator solution program	
BTA	07/01/08	Create new database w/individual passwords and audit capabilities.	
BTA	07/01/08	Technical group will develop intergrated SOP for all aspects of breath test support functions by lab	
SSA	07/01/08	Return of all evidence upon completion of analysis	

Washington State Patrol

REPORT TO THE CHIEF

FORENSIC LAB SERVICES BUREAU

Evidence Audit
Toxicology Lab
Seattle, WA

Issue Date
September 4, 2007

RISK MANAGEMENT DIVISION

Dr. Donald Sorenson, CFE

EXECUTIVE SUMMARY

At the direction of the Chief, the Risk Management Division conducted an audit of the evidence system at the Washington State Patrol's Toxicology Laboratory in Seattle. Fieldwork was conducted August 6-15, 2007.

Procedures, processes, operations, and organizational efficiencies regarding the handling of evidence were examined to assess accuracy, compliance, and effectiveness. Issues were noted in the following areas:

1. **Division Manual** - A review of the division's Standard Operating Procedure (SOP) manual revealed some policies, rules, or regulations addressing the handling of property and evidence in conflict with department policies. Prior recommendations were made by RMD regarding these issues and can be found in attachment A.
2. **Evidence Intake/Packaging, Storage, and Disposal** – Approximately sixteen different personnel process the intake and storage of evidence and access the evidence vault on a continual basis. Incomplete records of the "Saved Samples" freezer prevented accurate accounting of the inventory. Timely disposal of evidence from adjudicated/closed cases did not occur.
3. **Case Files** - Files were generally well organized. Some inconsistencies in documentation were noted.
4. **Mandatory Audits** – Neither the required audits of the "Saved Samples" freezer, nor the quarterly audits, were performed.
5. **Supervision** – The Lab Manager performed the majority of tasks associated with the disposal of evidence in addition to other duties associated with the operation of the laboratory. Delegation of duties to the Quality Lead Technician was limited.

SCOPE

The audit scope was to test the accounting of evidence held in the "Saved Samples" freezer. Focusing on the handling and storage of evidence in the evidence vault at the Toxicology Laboratory, the audit included an inventory of contents held in the "Saved Samples" freezer and a review of approximately three hundred (300) case files for the years 2001-2007. Additionally, compliance testing of records to all governing policies, rules, regulations, and statutory requirements was performed. All items and paperwork presented were

thoroughly examined for compliance, accuracy, processing methods, and accountability.

ACCOUNTABILITY OF EVIDENCE

Audit team members found it necessary to conduct an inventory of the "Saved Samples" freezer. The auditors expanded portions of the existing evidence database to include 700 non-recorded cases and added a descriptive field for all items found within the freezer.

METHODOLOGY

The audit included a visual review of all paperwork and case files associated with the handling of evidence. RCW and CALEA compliance/non-compliance was determined through first-hand examination of supporting documents and observation of personnel.

Fieldwork included a review of the division manual and select Toxicology Lab computer databases, interviews of personnel, and a visual accounting of the evidence stored in the "Saved Samples" freezer. Fieldwork was completed on August 15, 2007.

Audit findings are detailed on the following pages. Twelve recommendations appear at the end of the write-up.

Audit Findings

Division Manual

Finding: Division manual "evidence storage area" procedures are in conflict with department policies. Prior recommendations from RMD have not been incorporated.

Description of Condition: The division manual does not restrict access to the evidence storage area. Approximately sixteen people have unrestricted access to the evidence vault at all times. Additionally, the "temporary storage" location housing evidence recently delivered and awaiting initial analysis is not located in the evidence vault. This refrigerator/freezer is located in the work area utilized by the scientists and is accessible to anyone entering the Toxicology Laboratory.

At Dr. Logan's request, RMD provided written recommendations for the division manual in April 2005. The majority of RMD's recommendations were not incorporated into the 2007 manual revisions.

Cause of Condition: Unknown.

Effect of Condition: The division manual provides standards regarding policy and procedural requirements. When those of the division conflict with those of the department, confusion emerges and non-standard practices develop. For example, the evidence vault door, which is a keycard restricted entry, is often "propped" open with the use of an implement (an empty tube storage rack or a container lid) placed between the door and the door jamb. During a previous audit, the Quality Lead Technician was questioned about this practice. The response provided was that the door was only propped open when a scientist was working inside of the vault. This practice originated due to the warmth caused by the seven freezers in the room. During this audit, team members arrived and found the evidence vault door propped open with a biohazard container lid. There was no one in the evidence vault and no scientists present in the work areas adjacent to the vault. It is unknown how long the door was propped open. Additionally, while the door was propped open, scientists entering the vault did not swipe their keycards. Audit team members observed numerous scientists entering the vault and removing evidence from the other freezers. There was no record of the scientist's entries on these occasions.

In April 2005, Dr. Logan requested that RMD review proposed changes to the Toxicology Laboratory Standard Operating Procedure (SOP) manual. A three page list of recommendations was forwarded to Dr. Logan. A review of the manual indicated that the majority of the recommendations were not incorporated.

At the start of the fieldwork portion of the audit (August 6, 2007), the audit team posted a notice restricting access to the "Saved Samples" freezer. The notice simply requested that personnel refrain from accessing or replacing items in the "Saved Samples" freezer until the conclusion of the audit. Two days later (August 8, 2007), the audit team observed that the bottom two shelves of the "Saved Samples" freezer had been accessed and "straightened-up." No explanation was offered or discovered as to why the notice was ignored.

Evidence Intake/Packaging, Storage, and Disposal

Finding: Access to the evidence vault area is restricted to authorized keycard holders. The restriction is not enforced. The computer database record of the "Saved Samples" freezer was found to be incomplete (it did not contain any description of the evidence held). Timely disposal of evidence from adjudicated/closed cases has not occurred.

Description of Condition: Access to the evidence vault is restricted by a keycard device. Approximately sixteen individuals have access to the evidence vault. Additional personnel may access the vault at any time when the evidence vault door is propped open. Access to the scientist's work areas is also restricted by keycard devices, but is also accessible by additional personnel. There is a refrigerator/freezer appliance storing newly arrived evidence in preparation for initial testing in this area. All evidence is not stored in the evidence vault. This is a direct violation of both department policy and CALEA standards.

Responsibility for the "Saved Samples" computer database is shared and assigned to one scientist at a time. The responsible individual is provided a copy of the database from the previous individual responsible for maintaining it. If errors occur, they are passed along as there is no validation of the accuracy of the information when the database assignment changes. The database used at the Toxicology Lab for the "Saved Samples" has no description field for the evidence stored. It is not possible to determine what evidence is actually stored in the freezer short of viewing it directly. Case files also contain a description of the evidence items submitted, but file notations regarding movement of evidence to the "Saved Samples" freezer is inconsistent. Validation is lacking.

A review of the case files revealed that timely disposal of evidence from adjudicated/closed cases is not occurring. A number of files contained documentation permitting the destruction of the evidence, or requesting a return of the samples provided, but the items were still stored in the "Saved Samples" freezer. During this audit, no analysis of intake versus disposal was conducted due to time constraints and inaccessibility of records - some of which could only be accessed by the former lab manager's computer.

Cause of Condition: Failure of personnel to comply with written policies and procedures. Failure of supervisor to access appropriate resources to ensure authenticity of computer database information. Failure of supervisor to delegate responsibilities.

Effect of Condition: An environment developed that operates outside the guidelines of the Washington State Patrol. Accountability to the chain-of-

command was noticeably absent as was delegation of responsibilities from the lab manager to Toxicology Lab personnel. Guidance in the form of written policies and procedures address testing processes in evaluating evidence, but minimal direction regarding chain-of-custody standards is provided.

The department is unnecessarily exposed to litigation due to insufficient documentation and disregard for evidence handling policies and procedures.

Case Files

Finding: Documentation in case files is inconsistent.

Description of Condition: A review of the case files for "Saved Samples" during the years 2001-2007 was conducted. Discrepancies were minor and took the form of incomplete or missing notations and paperwork.

Cause of Condition: High rate of staff turnover combined with failure of supervisor to provide adequate training and oversight to comply with established policies and procedures.

Effect of Condition: Successful prosecution of cases is compromised. The department is unnecessarily exposed to potential litigation.

Mandatory Audits

Finding: Mandatory audits are not being completed.

Description of Condition: The division manual identifies an audit of the evidence stored in the "Saved Samples" freezer. The audit is to provide for a 95% confidence level with a +/-5% confidence interval. The lab manager indicated in a memo to Dr. Logan that she would have a 100% inventory of the "Saved Samples" freezer completed by March 30, 2005. The audit concluded that the annual audit of the saved samples did not occur at any time during the last two years as the Toxicology Laboratory did not have a complete inventory of the "Saved Samples" freezer from which to generate a report.

Quarterly audits were not conducted for the latter half of 2006, and no reports have been received by RMD for 2007.

Cause of Condition: Failure to comply with established policies and procedures requiring an annual audit of the "Saved Samples" freezer.

Effect of Condition: Non-standard evidence handling procedures and insufficient documentation to ensure the same jeopardizes operational performance as well as CALEA accreditation.

Supervision

Finding: Proper delegation of tasks by the lab manager did not occur. Personnel are not held accountable for following departmental policies and procedures.

Description of Condition: The lab manager had a very large staff to supervise and voiced unwillingness to delegate tasks to employees that would "take them away from their primary tasks." As a result, disposal of evidence did not occur on a regular basis and, when it did happen, appeared to coincide with that time immediately before an audit.

Responsibility for completion of the Quarterly Audit was given to the Quality Lead Technician. The lab manager did not hold the Quality Lead Technician accountable for failure to complete and submit the quarterly audits.

Cause of Condition: Failure of the lab manager to take appropriate corrective action in a timely manner.

Effect of Condition: Non-standard evidence handling procedures and failure to perform required audits jeopardizes operational performance as well as CALEA accreditation.

Recommendations

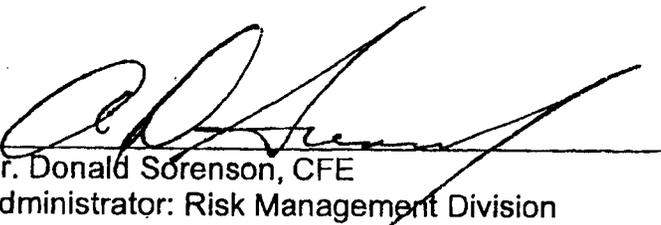
1. Immediate relocation to the evidence vault of the refrigerator/freezer housing incoming evidence.
2. Immediate temporary reassignment of one Property and Evidence Custodian from the Seattle Crime Laboratory to oversee the movement of evidence items in and out of the evidence vault for the Toxicology Laboratory until additional personnel can be hired.
3. Immediate lockdown of the evidence vault, thereby limiting access to the Property and Evidence Custodian and Quality Lead Technician only.
4. Immediate 100% inventory of all evidence held both in the evidence vault and at any other locations on the premises.
5. Establishment of a computer database system capable of tracking evidence items and reporting their status.
6. Transfer of database tracking of saved samples responsibilities to the Property and Evidence Custodian responsible for evidence handling for the Toxicology Laboratory.
7. Disposal of all evidence from adjudicated/closed cases.
8. Return of all samples submitted by the Pierce County Medical Examiner.
9. Addition of two Property and Evidence Custodians: one to oversee the vault and a second to oversee the file room and all paperwork associated with the evidence items.
10. Re-evaluate the procedure/policy addressing the long-term storage of evidence for other agencies.
11. Bring the Toxicology Laboratory's SOP into compliance with department evidence handling policies and procedures.
12. Copy the RMD with respective quarterly audit reports.

Acknowledgements

An audit requires the participation of individuals familiar with the processes in place and able to respond to questions for clarification. Toxicology Laboratory personnel were courteous and professional throughout this process. Without their understanding and assistance this task would have been much more difficult.

Special thanks to: Professional Staff Kim Miller, Sandra Distefino, and Forensic Scientists Brienne Akins and Amanda Black who provided information necessary to complete the task. RMD would also like to thank Property and Evidence Custodians Susan Sabillo and Barry Fung who assisted with completion of the inventory associated with this audit.

Respectfully submitted,



Dr. Donald Sorenson, CFE
Administrator: Risk Management Division

04 Sept 2007

Date

Destruction File**Non-Compliant****Violation: RCW 40.14.160**

No file was available for review

One (1) "Destruction Authorization Form" was found. Ms. Gordon indicated that she has not had time to file it.

Recommendation: Review all files and follow prescribed procedures for destruction or archiving as necessary. Develop and maintain a "Destruction Authorization" file.

Databases**Non-Compliant****Violation: RCW 40.14.060.**

A current listing of databases used at the Toxicology Lab was provided by Linda Collins. The list includes:

- Tox Database
- Discovery Excel (PD Tracking)
- Saving Samples Database

No databases were able to be audited for retention as no retention schedule has been established.

Recommendation: Schedule immediately.

Disclosure Requests**Non-Compliant****Violations: RCW 42.17.260****Regulation Manual 6.01.040 Public Records Requests
CALEA 46.1.4, 54.1.1, 54.1.3, 82.1.1, 82.2.5.**

Ms. Gordon refers to all records requests received by the Tox Lab as Discovery requests. Under WSP Regulation, all such requests are all to be retained and tracked as disclosure requests. Tox Lab's SOP Manual indicates adherence to WSP regulations for disclosure. Ms. Gordon indicated that that she didn't have time to follow WSP policies and therefore wouldn't be doing it.

- Redactions are being made without exemptions being explained to requestor.
- Not using WSP database for tracking – using excel spreadsheet.
- Not keeping requests in proper files, but rather in binders all together, or in envelopes.
- No tracking # assigned.
- Blood work requests are filed by the case #, BAC requests alphabetically by the requestor and/or date.

- No billing being done for non subpoenaed requests.

Recommendation: That the Bureau Director be informed of the gravity of these matters and request a mitigation plan within thirty (30) days.

Performance Records (DOC Books)

Non-Compliant

Violations: Regulation Manual 7.01.030, 15.00.030
CALEA 26.1.8, 35.1.10, 35.1.13

- No signed SCAN logs were found in the files.
- Two (2) of four (4) records reviewed contained materials past the retention period.
- One (1) Doc book was not transferred with employee when he transferred out of the Tox Lab.

Recommendation: Review all DOC books for proper contents and take appropriate inclusion or purging actions.

Case Files

Non-Compliant

Violations: Regulation Manual 10.04.100.
CALEA 11.4.2, 11.5.1, 11.5.2, 11.5.1, 11.6.4

Multiple sets of copies were found in the files.

Form numbers were present on only a few of the forms utilized.

Recommendation: Clarify and identify what documents are to be included in case files. Ensure that all forms utilized have been assigned a WSP form number.

TARs

Non-Compliant

Violation: TAR Manual

- TARs are stored in various places, with majority being stored in three-ring binders.
- TARs are unsecured.
- January 1, 2000 to June 30, 2000 TARs were discovered in an off-site storage area.
- Copy of an original TAR found with an attached note that read: "Original at HRD?"

Deleted: <#>One (1) TAR was found in an expandable file folder with eight (8) other employees.¶

Recommendation: Secure all TARs at one location at the respective employee's duty station. Create and utilize consistent filing system, either by date or employee.

Simulator Solution Logbooks**Status: Non-Compliant****Violation: Retention:** Ten (10) years for in-house records. No copies of archived files/records are to be kept locally.

A random sample of the Simulator Solution Logbooks (records of quality control results for simulator solutions produced by the lab) dating from 1991-1992, 1995-1997, and 2001-2003, were examined.

- Thirteen (13) years worth of records were found on file.
- All files examined were copies; no originals found.
- Ms. Gordon indicated that the originals were archived. This has not been confirmed.

Recommendation: Originals files/records are to be retained for full retention period, and then archived. Copies are to be destroyed.

Email**Status: Non-Compliant****Violation: Retention**

Checked four (4) employee's email systems. All four (4) had emails on the server more than a year old. Two (2) had emails 2-3 years old.

Recommendation: Review retention rules related to email and perform required compliance-driven activity.

Visitor Book**Compliant**

Recommendation: There is a five (5) year retention requirement. Current visitor book is a bound volume with multiple years of records. It contains pages which cannot be easily removed for destruction. Therefore it is recommended that the lab use a binder with removable pages.

Forensic Toxicology Case Files

The technical content of the files prohibited the auditors from determining a measure of accuracy for file contents.

Recommendation: A master list of required file components is to be prepared.

ISSUE PAPER PREPARED BY DR. BARRY LOGAN

This is a summary of the basis for the current legal challenges to simulator solutions prepared by the State Toxicology Laboratory and used in the state's evidential breath testing program. Simulator solutions are alcohol and water mixtures used to calibrate and check the calibration of evidential breath testing instruments.

Issue:

Following the departure of the Toxicology Laboratory manager in July, ongoing records review in the State Toxicology Laboratory has uncovered errors in processes and data that may impact breath test results in DUI cases.

Background:

In March 2007, WSP received an anonymous complaint alleging that "simulator solutions were being falsified as far as certifications". This complaint was assigned to Ms. Ann Marie Gordon, the Toxicology Laboratory manager to investigate. She evaluated the issue by tasking the Quality Manager to audit the records through the beginning of 2007 to ensure analytical data to support the results reported. The simulator solution process was also discussed with staff. Neither analytical review nor staff input revealed discrepancies.

At a follow up meeting with Ms. Gordon and Dr. Logan a few days later, she indicated that she was delegating testing to one of her staff due to time constraints. It was concluded her delegation of the testing was likely the behavior that was the subject of the complaint, and she was directed to stop delegating that testing. There was no expectation that she personally test simulator solutions in her capacity as laboratory manager. She complied with that direction.

In July 2007, a second call was received by WSP on the same subject containing more specificity. In addition to delegating the testing of simulator solutions, the complaint alleged Ms. Gordon had been signing a declaration under penalty of perjury that she had personally examined and tested the solutions. Affidavits from early 2007 posted on the WSP web site were reviewed and confirmed the substance of the complaint. The matter was referred to the WSP Office of Professional Standards (OPS). It is important to note that there is no evidence that results were being fabricated or falsified. All the tests reported were being correctly performed, however the alleged misconduct was that Ms. Gordon was taking credit in a sworn statement for having personally performed the test.

The complaint and accompanying documentation was reviewed and a criminal investigation to determine potential evidence of false swearing was initiated by the WSP. Ms. Gordon resigned from the WSP on July 20, 2007 when notified that criminal and administrative investigations would be conducted.

The WSP criminal investigation was completed and referred to the King County Prosecutor's office for a charging decision. On September 20, the WSP was verbally notified by King County that charges will not be filed due to the absence of intent on the part of Ms. Gordon.

In July, exhaustive reviews of toxicology laboratory processes and procedures were initiated. A review of calculations used to determine the average alcohol concentration of the simulator solutions revealed an error in the programming of the database, which omitted some of the test results from the average value. This calculation error occurred on 33 batches of simulator solutions prepared and tested between August 2005 and July 2007. Analysis of the impact of the error identified a potential material impact on eight breath tests conducted on one instrument in Spokane (out of ~70,000 tests statewide).

WSP immediately notified the prosecutor's office and continues the process of contacting those individuals.

In early September an audit of the simulator solution process was initiated by WSP, using an outside auditor. That report is expected to be delivered to the WSP in October. During the audit process, additional errors in the simulator solution database records have been identified, including inconsistent dates, transcription and data entry errors, and an error in the calculation of the standard deviation. The errors are mostly clerical, or affect numbers in a mathematically insignificant way, but it may be argued that they have legal significance. Some of the errors may affect the computed average for some simulator solutions in the third or fourth decimal place. WSP is working to secure independent experts review its process for identifying, reporting, and publishing corrections of these errors.

At a Department of Licensing (DOL) hearing on September 10, 2007, incomplete testimony and evidence concerning the above issues led to an adverse ruling for the state which may impact future license suspensions. Defense attorneys argued that employees from the State Toxicology Laboratory had committed perjury by signing affidavits containing the calculation error result. Without any legal representation for the state, these allegations were not rebutted.

Analysis:

The above deficiencies are traced to the following root causes:

1. Laboratory management and staff were overtaxed leading to inadequate delegation of authority and accountability. A survey has identified that the Washington State Toxicology Laboratory has a per FTE workload two to five times that of similar state labs. Management focus was highly attuned to

customer needs, which were successful. However, this was not balanced with attention to internal controls and agency policy compliance.

2. The Laboratory did not utilize an external process for evaluating the original complaint regarding the certification of simulator solutions.
3. The simulator solution testing process was a legacy program which had grown in scale and become overly complex due to the addition of staff (each solution tested over seventy times) without any assessment of its liabilities or the need for that complexity.
4. The process had been in place for over twenty years and had gone unchallenged, leading to complacency. This in turn led to under-emphasis of the significance of the procedure during staff training.
5. The process was a peer-to-peer reporting process with no end point supervisory or management review for accuracy.
6. Although the Toxicology Laboratory was accredited in 2005 by the American Board of Forensic Toxicology (ABFT) – one of only 22 laboratories in the country to be so accredited - the accreditation does not encompass the simulator solution process so there had been no external review of procedures or risk.
7. Written laboratory procedures were not comprehensive, and were open to varied interpretation by staff revealing management and training needs.
8. Washington State has a very aggressive and experienced DUI defense bar, which shares resources, insight, and market issues and challenges around the state leading to higher scrutiny than experienced in other states.

9. **Inconsistent communication between DOL and the WSP Toxicology Laboratory has lead to incomplete information being provided at administrative hearings.**

Remedies:

The following steps have been taken to address the root cause deficiencies.

1. **Mr. Kevin Jones, Laboratory Accreditation Manager for the Crime Laboratory Division has been assigned to manage the change process in the Toxicology Laboratory. Mr. Jones brings fifteen years of management and supervision in the WSP to this role. He is an expert in ISO (International Organization of Standards for Forensic Laboratories) standards and well acquainted with WSP policies and regulations.**
2. **Mr. Jones' priorities have been assigned as follows:**
 - i) **Pursue all means to restore public confidence in the Laboratory and meet stakeholder needs.**
 - ii) **Work with WSP risk management to identify any remaining weaknesses or deficiencies in the simulator solution process, and conduct any necessary retraining.**
 - iii) **Conduct the necessary notifications to prosecutors, defendants and the courts through the WSP website and other means.**
 - iv) **Assess the external audit report, once available, and secure additional auditing as necessary.**

- v) **Re-establish and hire a full time state toxicologist (PhD, ABFT Certified) to provide full-time, technical program oversight.**

- 3. **An assistant attorney general with special responsibility for toxicology issues is being retained by the WSP to assist the Laboratory, the DOL and County prosecutors in consistently addressing these issues.**

- 4. **Laboratory procedure will continue to be scrutinized to identify changes and improvements needed to clarify each individual's role and the steps required. Additional layers of validation, documentation and supervisory review are being added to the simulator solution preparation and testing process.**

- 5. **The WSP will pursue ongoing discussions with the Forensic Investigations Council for additional oversight of the laboratories and a consistent process for dealing with complaints regarding quality or allegations of impropriety.**

- 6. **ASCLD-LAB International, an ISO based forensic accrediting body is establishing accreditation standards for breath alcohol programs. WSP is participating in this previously unavailable process and will take steps to become one of the first accredited programs in the nation.**

- 7. **WSP has requested ABFT, the Laboratory's accrediting body, to conduct a data quality audit. This will be performed in October 2007.**

- 8. **WSP is seeking legislative funding to restore a full time state toxicologist and additional staff to provide better technical management oversight of the laboratory, reduce the risk of technical errors, and improve the quality standards.**

Unrelated but linked events:

Ms. Gordon, the former Laboratory manager is also the individual who in 2004 inadvertently destroyed the blood samples in the ongoing vehicular homicide prosecution of Frederick Russell in Whitman County. In that case the defense has sought to impeach Ms. Gordon's credibility by invoking the recent allegations, making the two events appear to be related when they are not.

Also revealed in the Russell trial are internal WSP audit reports critical of the Laboratory's sample handing and storage methods. The reports show procedures that are out of compliance with WSP requirements, and describe inadequate documentation of destruction of specimens, which were authorized to be destroyed. Audit recommendations made to Ms. Gordon by the WSP auditor in 2005 for changes in procedures were not immediately implemented.

The WSP and the Toxicology Laboratory are committed to scientific excellence in support of Washington's evidential breath testing program, and are acutely aware of the need for public confidence and accountability.

CHRISTINE O. GREGOIRE
Governor



JOHN R. BATISTE
Chief

STATE OF WASHINGTON
WASHINGTON STATE PATROL

General Administrative Building, PO Box 42600 • Olympia, WA 98504-2600 • (360) 753-6540 • www.wsp.wa.gov

February 12, 2008

Chief John R. Batiste
Washington State Patrol
PO Box 42601
Olympia WA 98504-2601

Dear Chief Batiste:

As of February 12, 2008, I am submitting my voluntary resignation from the exempt position of Forensic Laboratory Services Bureau Director/State Toxicologist with the Washington State Patrol. I agree to officially resign from my employment with the Washington State Patrol on April 30, 2008.

My last official day as the Forensic Laboratory Services Bureau Director/State Toxicologist will be March 14, 2008. From March 14 through April 30, 2008, I will be available to answer any operational questions and to respond to any subpoenas that may be served regarding the Toxicology Lab.

Sincerely,

Dr. Barry Logan

BL:sjs

A large, stylized handwritten signature in black ink, appearing to be "Barry Logan", written over the typed name and initials.

Test Anxiety

Scandal at the state's DUI lab has defendants lathered

By Bob Geballe

The state's toxicology lab has a headache worthy of a three-day binge.

It all started when Ann Marie Gordon, manager of the laboratory—whose purpose is to provide the technological clout behind the state's DUI laws—got caught falsifying verifications of breath-test equipment.

"I call it 'Ann Marie Gordon and the Temple of Perjury,'" says Kenneth Fornabai, an Auburn lawyer and president of the Washington Foundation for Criminal Justice, an organization of DUI lawyers. "It represents a departure from integrity so profound that you can't believe anything about the lab."



MASTERS TOUCH PHOTOGRAPHY

The state lab has lost all credibility, according to Kenneth Fornabai.

The Washington Association of Criminal Defense Lawyers sent a letter to the state Forensics Council asking for an investigation into the conduct of the entire State Patrol toxicology and criminal laboratory program, and saying that negligence or misconduct at the labs "has substantially affected the integrity of forensics results in Washington state."

Gordon resigned last summer after a whistleblower in the lab reported that she was signing certificates saying she had calibrated

breath-testing units for use in the field when she actually hadn't performed the calibrations. In fact, someone else in the lab had run the tests. The whistleblower told the State Patrol about the situation in March 2007. However, it took two months for the State Patrol to acknowledge the problem publicly, announcing it was withdrawing all the certifications done by Gordon.

It was a shocking revelation for attorneys involved in DUI defense, who say it calls into question the outcome of perhaps thousands of cases.

"We heard about it in June, when the State Patrol Web site said they were pulling all the certifications for breath-test units," says Fornabai. The accuracy of breath tests is crucial, he says, because minuscule differences in measured blood-alcohol levels can have large legal consequences. "If it's a first offense and your blood alcohol is over 0.15, there are more severe penalties than under 0.15. For example, right now, I have a client whose blood alcohol was measured at 0.151."

The repercussions are rippling across the state. The state Department of Licensing reinstated licenses for nearly 40 people arrested on suspicion of drunk driving, then decided the courts were better prepared to handle the remaining onslaught of cases. Defense attorneys in DUI cases are asking for the dismissals of cases, or the suppression of breath- and blood-test data. And several counties have been conducting hearings to decide how to handle the contested cases.

Several judges in King County threw out breath tests in their courtrooms and said they wouldn't accept any readings again until the state improves the lab's procedures. The Snohomish County District Court also suppressed about 40 breath tests. In Skagit County, judges refused to dismiss 51 DUI

Trouble in the East

While the entire state is dealing with the fallout from botched breath-test certifications, Spokane County has an additional issue, also involving DUI cases. Attorney Breann Beggs with the Center for Justice in Spokane helped two defendants get their convictions overturned because they were arrested within Spokane city limits but tried by a district judge. The city and county had an agreement that let district court judges—who are elected countywide—preside in Spokane's municipal court. But Beggs pointed out that state law says judges who hear municipal cases must be elected only by city residents.

The state Court of Appeals Division III agreed in November with Beggs, and the ruling threatens to upend a decade of litigation involving thousands of cases—traffic violations, DUIs, domestic violence, shoplifting—decided by the Spokane Municipal Court. The case now goes before the state Supreme Court. If it stands, dealing with the enormous volume of potential conviction reversals could have "unimaginable" effects lasting for years, Superior Court Judge Sam Cozza said in a *Spokesman-Review* article.

—Bob Geballe

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We focus on one area of the law:
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Washington's strict DUI laws can have a devastating effect on lives, even for first-time offenders. That's why anyone accused of a DUI needs the most tenacious and innovative defense lawyer around. They need a defense team that explores every avenue and relentlessly pursues every option. At Fox Bowman Duarte, we've successfully defended thousands of DUI cases. And our eight lawyers have accumulated more than 100 years of DUI litigation experience. Fox Bowman Duarte. Put your clients in the best of hands. Ours. To find out more visit foxbowmanduarte.com.

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SPECIAL FOCUS
CRIMINAL DEFENSE AND DUI/DWI LAW

"It represents a departure from integrity so profound that you can't believe anything about the lab."

—Auburn attorney Kenneth Fornabai

cases but castigated the lab and its director, Dr. Barry Logan.

The uproar doesn't end with the falsified documents. Defense attorneys are unhappy that King County Prosecutor Dan Satterberg has declined to prosecute Gordon. Gordon, who resigned on July 20, acknowledged that she signed certificates for tests she hadn't run, according to documents released by the State Patrol. She could have faced legal sanctions, but a statement released by Satterberg's office said there was "little to be accomplished by any criminal prosecution" because "the public has not suffered any harm."

The breath-test issue comes on top of several other instances of questionable performance at state crime labs. In April, State Patrol forensic scientist Evan Thompson resigned over questions of poor documentation. Thompson had provided crucial testimony in more than 1,000 cases since 1999.

That's not all. Francisco Duarte, also with Fox Bowman Duarte, was the lead attorney for Fred Russell, convicted in a drunk-driving accident in Eastern Washington that resulted in the deaths of three college students. During that trial, it came to light that vials containing blood from Russell were



STEWART TILGER PHOTOGRAPHY

Jon Fox thinks prosecutors are letting the lab manager off too easy.

Not so, says Jon Fox, with Fox Bowman Duarte's Bellevue office. "The prosecuting attorneys are understating this because of the magnitude of the problem," he says. "Allowing the prosecutor to make this decision is a conflict of interest. But it's clear to us that it's an incredible injustice. The charging decision should have been given to an independent prosecutor, like the state AG [attorney general's office] or the FBI."

destroyed at the lab before the trial. "There was complete disregard of proper handling of blood tests," Duarte says.

Gordon, who was in charge of the vials, resigned before testifying at the trial.

As these cases work their way through various courts, the fallout will have prosecutors, defenders and accused drunk drivers holding their breath for some time to come. L&P

Washington State Patrol Media Release

Chief John R. Batiste



Captain Jeff DeVere
Government and Media Relations
(360) 753-5299 – office
(360) 753-5469 – fax
<http://www.wsp.wa.gov>

*****For Immediate Release*****

Date: Feb. 7, 2008
Contact: Robert Calkins
Phone: (360) 570-3135

State Patrol Accepts All Findings in Audits of State Toxicology Lab

The Washington State Patrol announced today that it has accepted the findings of three separate audits of the State Toxicology Lab, and has begun implementing all of the auditors' recommendations.

Two of the auditors made a total of 39 recommendations for process changes in the Tox Lab. Twenty-three have already been implemented and most of the rest are expected to be completed by mid-2008.

A third audit team looked at specific testing errors, which were few in number, and recommended ways to prevent those from being repeated.

"Our goal is to make a good laboratory better," said WSP Chief John R. Batiste. "We appreciate the work of the auditors, and the thoughtful recommendations they made. These are solutions that are doable in the real world and we can implement them."

The Governor has included in her 2008 budget the funding for limited additional staff to ensure accountability.

The audits were begun last year, after errors in documentation were discovered in connection with solutions used in breath testing machines. The end result was a complete top-to-bottom review of everything the lab does.

"We will not stop with just these audits," Batiste added. "We will continue to look for ways to improve our processes, and improve the product that we provide to the criminal justice system."

The auditors' recommendations for process improvements fell into two general categories:

- Handling of evidence. Samples stored at the toxicology lab will now be handled in the same way that all other evidence is handled by the State Patrol. Only Property and Evidence Custodians (PECs) will have direct access to storage areas. Scientists performing lab tests will sign out samples, and sign them back in when testing is complete.

- Recording of test results and appropriate peer review to assure accuracy in recording. Errors in recording were far more common than actual errors in testing.

The third audit team reviewed about 300 cases. They found ten errors, none of which made a material difference in a case. Several were cases in which the actual test was done correctly, but the result was expressed in the wrong units. In lay terms, it would be like measuring your driveway, but then mistakenly expressing the distance in yards rather than feet. Additional peer review and changes in some computer defaults are expected to resolve those issues.

Weekly training for lab employees has been instituted, to assure they are aware of the latest procedures to be followed.

The State Forensic Investigation Council is now conducting a review of the audits. Appointed by the Governor, the Council has jurisdiction over the Lab. The FIC may conduct a field audit of its own as well.

Additionally, the American Society of Crime Lab Directors/Laboratory Accreditation Bureau (ASCLD/LAB) will institute an accreditation process for breath test programs later this year. WSP intends to apply for accreditation as soon as ASCLD/LAB begins accepting applications.

###

Guth, Dinah

PF

To: Olson, Paula
Subject: RE: Retirement
Priority: High

I can attach this e-mail to his IOC indicating his intention to retire and just change the date. However, do we pay him through 5 p.m. on 7/31/00? He will be cashed out on his annual leave and entitled to 1/4 of his sick leave on VEBA.

Our regulation manual states an employee with five or more years of service will receive a laser plaque and a certificate for the spouse. Because the Tox Lab people came to us on 7/1/99, based on Legislative action, am I to order the plaques for Glenn or not?

From: Olson, Paula
To: Guth, Dinah
Subject: FW: Retirement
Date: Tuesday, August 01, 2000 8:57AM
Priority: High

Dinah: Please see the e-mail below. Do we need anything else from Glenn, or is this e-mail enough. Also, what needs to be done about leave, etc.? Thank you!

From: Logan, Barry
To: Olson, Paula (HRDPO)
Subject: FW: Retirement
Date: Monday, July 31, 2000 7:52PM

Paula; Glenn Case was involved in an argument with some coworkers last Friday. He behaved inappropriately responding angrily to a minor scheduling conflict. I counseled him on this and told him his response was unacceptable. He felt aggrieved but we parted amicably. He came in this morning and told his supervisor was he was retiring today, cleaned out his desk and left. Where do we go from here?

BKL

—Original Message—

From: OCasey8@aol.com [mailto:OCasey8@aol.com]
Sent: Monday, July 31, 2000 2:38 PM
To: blogan@wsp.wa.gov
Subject: RE: Retirement

Barry
I am retired. Could you tell Beth so I can cash out my vacation and sick leave.
Glenn

1 9. My opinions about the accuracy or reliability of the test results that Ms. Weiss
2 indicates she obtained in this case, are based solely on my review of the content of the
3 case folder, and not on any direct observation of the testing she performed. This was my
4 routine practice in these cases.
5

6
7
8 10. Only by assuming that Ms. Weiss followed testing protocols, can I opine that her
9 test results were valid. However, following these protocols was expected of every
10 Washington State Toxicology Laboratory employee. Further, at the time of the trial, I did
11 not have any affirmative information supporting the conclusion that Ms. Weiss was not
12 following Laboratory protocols.
13
14

15 I declare under the penalty of perjury that the foregoing is true and correct.
16
17

18 Willow Grove, PA June 26th, 2009

19 Date and Place

20
21
22
23 Barry K Logan PhD, DABFT
24
25
26
27
28
29
30

APPENDIX C



Russell D. Hauge
Prosecuting Attorney

Carol I. Maves
Office Administrator

Christian C. Casad
Case Management
Division Chief

Timothy A. Drury
Felony and Juvenile
Division Chief

Claire A. Bradley
District/Municipal
Division Chief

**Jacquelyn M.
Aufderheide**
Civil/Child Support
Division Chief

www.kitsapgov.com/pros

Kitsap County Prosecuting Attorney's Office

Please reply to: Civil Division

April 17, 2009

Jack Guinn
Ellis, Holmes & Witchley, PLLC
705 Second Avenue, Suite 401
Seattle, Washington 98104

RE: Public Records Act Request, April 3, 2009 Correspondence

Dear Mr. Guinn:

I am writing to respond to your letter dated April 3, 2009 concerning the County's response to your firm's public records request. You have alleged four potential "missing" communications from our files. I have verified that these communications do not exist, nor did they exist at the time of your initial request to the County last year.

The emails that you received were stored in hard copy, in one of the fourteen boxes of materials from the Hacheney aggravated murder trial. None of them were printed in response to your firm's record requests. After your April 3, 2009 letter, I arranged for the County's Information Services (IS) department to search for emails on any county servers with the names of David Olson, Michael Delashmutt or Julia Delashmutt. No such emails could be found. I also arranged for the IS department to search for emails to and from all email addresses known to be used by those persons up to and during the time of trial, and no such emails could be found. These were the email addresses:

- David Olson: dolson@mde.com
- Julia Delashmutt: jjdelash@yahoo.com and jdelashmutt@attbi.com
- Michael Delashmutt: None known; all email communications were with his wife Julia.

IS informs me that any emails that were generated in the county during the year 2002 were overwritten in the year 2007, unless those emails were saved on an individual county employee's email account at the time of the overwriting. IS searched through

Adult Criminal & Administrative Divisions • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 337-7174 • FAX (360) 337-4949
Juvenile Criminal Division • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 337-5500 • FAX (360) 337-5509
Special Assault Unit • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 337-7148 • FAX (360) 337-7229

Bainbridge Island Municipal Court Division • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 337-7174 • FAX (360) 337-4949
Bremerton Municipal Court Division • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 478-2334 • FAX (360) 478-2303
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Civil Division • 614 Division Street, MS-35A • Port Orchard, Washington 98366-4681 • (360) 337-4992 • FAX (360) 337-7083
Child Support Division • 614 Division Street, MS-35 • Port Orchard, Washington 98366-4681 • (360) 337-7020 • FAX (360) 337-5733



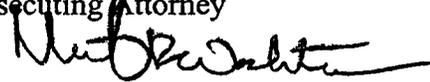
the account for each current and former employee for whom it possessed records. Therefore, if an email was not saved in "paper" form, it no longer exists in any form.

You have also alleged that a written response should exist in response to David Olson's June 5, 2002 letter. Our office previously searched everything in the boxes of Hacheney records for the presence of any of the relevant names, and pulled every document with any of those names. As you know, you visited our office and were afforded the opportunity to look through each document on which any of those names appeared. I do not believe such a letter exists in our files.

Thank you for your courtesy during the process of working through this public records request. As always, please do not hesitate to contact me if I can assist you further.

Sincerely yours,

RUSSELL D. HAUGE
Prosecuting Attorney



NEIL R. WACHTER
Senior Deputy Prosecuting Attorney

cc: Jeff Ellis
Don Burger, Kitsap County Public Records Coordinator

DECLARATION OF JOHN A. GUINN

I, John A. Guinn declare:

1. I received a phone call from David Olson on or about February 26, 2009. I had previously contacted Mr. Olson's son Karl and asked him to ask his father to contact me.
2. During our conversation, I asked Mr. Olson what he remembered about the video deposition he gave in the Hachenev murder trial. Specifically, I asked him what prosecutors told him with respect to his responsibility to return and testify at the trial. Mr. Olson said, "as far as I knew, I was done."
3. I asked Mr. Olson if he would be willing to put that information in a signed declaration. He told me that if I sent him a declaration, he would sign it if it accurately reflected his recollection of the events.
4. I emailed the declaration to Mr. Olson. He expressed no reservations about the accuracy of the statements it contained, but he refused to sign it. He told me that he was retired and did not want to get involved in the case. He further stated that he felt the information contained in the declaration was already part of the record, so he saw no reason to sign it.

I declare under penalty of perjury of the laws of the State of Washington that the above is true and correct.

4/24/09 SEATTLE, WA

Date and Place



John A Guinn

June 5, 2002

Russell D. Hague
Prosecuting Attorney
Kitsap County Prosecuting Attorney's Office
614 Division Street MS 35
Port Orchard, WA 98366-4681

Reference: State of Washington v. Nicholas Daniel Hachney
Kitsap County Superior Court No. 01-1-01311-2
MDE file #: 8671

Dear Mr. Hague,

I received your letter of May 28th advising me that the above trial has been rescheduled for mid October of 2002. I appreciate your keeping me informed.

I am planning to take a leave of absence from MDE for between 6 and 9 months. My wife and I will be traveling to South America to assist in the construction of a Christian Radio network. We were there last October for a short time to install the first transmitter. I returned in February for a design phase. We plan to return in late September and remain there until late spring. This is a trip that requires a great deal of coordination as it involves working with a construction team set to arrive at that time.

Is it possible to video tape my testimony in light of the fact that I will not be available during the trial? Do you have any other suggestions?

Sincerely,
MDE Engineers, Inc.



David B. Olson, P.E.
Vice President/Electrical Engineer
e-mail: olson@mde.com

DBO/dim

From: "David B. Olson, P.E." <dolson@mde.com>
To: "Amanda Jarrett" <AJarrett@MAIL1.CO.KITSAP.WA.US>
Date: 9/27/02 10:49AM
Subject: RE: Hachenev Murder Trial

Ms. Jarrett,

I have a letter ready to fax you on the 16th. I have a reminder in my calendar so hopefully I won't forget to send it. We are now in Pennsylvania visiting family but will be on our way to Bolivia next Tuesday.

Dave Olson

-----Original Message-----

From: Amanda Jarrett [mailto:AJarrett@MAIL1.CO.KITSAP.WA.US]
Sent: Wednesday, September 25, 2002 5:11 PM
To: Dave Olson
Subject: Hachenev Murder Trial

Mr. Olson,

Sorry to take this long to get back to you regarding an unavailability letter faxed to us on the day of trial. We are aware of the difficulty you might have getting to a fax machine on October 16 (beginning of trial), but it really is necessary to have something signed by yourself, dated and faxed to us on that day. This letter may follow the general format below (whatever is accurate).

October 16, 2002

To the Honorable Anna M. Laurie:

Re: Trial in State of Washington v. Nicholas Hachenev 01-1-01311-2

This letter is to confirm that am presently in _____, I traveled here on _____ to participate in a mission trip with the Evangelical Free Church of Canada. I will be here until _____. I am therefore unable to return to Kitsap County to testify in the trial of State v. Nicholas Hachenev.

Thank you for your attention.

Sincerely yours

/s/ David Olson (dated 10/16/02)

This letter should be faxed to us at 360-337-7229 on the morning of October 16. Please reply that you have received this email. Thank you for your understanding and continued cooperation.

00007

Amanda

Delaschmutts

From: "Julia DeLashmutt" <jdelashmutt@attbi.com>
To: "Claire Bradley" <CABradle@MAIL1.CO.KITSAP.WA.US>
Date: 6/5/02 5:32PM
Subject: RE: Nick Hachenev Case

6/12/02 left
mssg

Hello Claire,

Michael and I got our letters about the trial now being scheduled for October. As you well know we will be setting up home in Scotland by then. I just wanted to touch bases with you about what might be needed before we go.

Also, we have sold our home and will be moving by the 23rd of this month! Our address from June 23rd until we go to Scotland on Sept. 2nd, will be:

3950 NE Rova Road
Poulsbo, WA 98370

Our phone number, 360-697-4345 will still be effective until June 22nd or so. After that we will be using Michael's cell 360-981-5460 until we leave.

My email also will be changing as of this Friday. It is now jjdelash@yahoo.com.

Let us know what might be required of us, so that we can get it planned. We will be gone from June 9-20, 1 week in July (14-20) and 2-3 weeks in August, the dates are not quite nailed down yet.

Thanks,
Julia DeLashmutt

6/9-6/20
gone
July 14-20
gone
Aug. - a few
wks

-----Original Message-----

From: Claire Bradley [mailto:CABradle@MAIL1.CO.KITSAP.WA.US]
Sent: Monday, April 22, 2002 4:53 PM
To: jdelashmutt@attbi.com
Subject: Re: Nick Hachenev Case

Thank you so much for checking in! You sound like a busy woman!

You are correct that the trial date was delayed (again) until May 14. We sincerely hope it goes then, but I've stopped trying to predict as I am always wrong! I can tell you the recent delays are due to defense expert testing that was requested rather late in the game. We expect to be ready, but I just do not know. Expect another subpoena to arrive soon.

I would love to have both you and Michael come in and speak with me one more time, and I'll want to show you the courtroom like we talked about. Plan that we'll do that in early May/ closer to trial date IF I think we have a good chance of going out on May 14 or thereabouts. I'll know better about that in late April/early May.

Please give me the dates that you are planning to leave for Scotland (for good) or if you have any smaller vacation plans-- I can work around your vacations. Hang in there-- we'll get this done!

From: Amanda Jarrett
To: Bradley, Claire; Wachter, Neil
Date: 9/23/02 11:56AM
Subject: Re: Hachenev - Delashmutts

Everyone. I just spoke to Julia Delashmutt's mother. For the record, the Delashmutt's new address is as follows:

Michael and Julie Delashmutt
5 Thornwood Gardens
Flat 2/1
Glasgow
G117PJ
Scotland

Julia's email address, jjdelash@yahoo.com is still good.

OR

We can send mail for the Delashmutts to Julia's mother, Darlene Buckner, at:
3950 NE Rova Road
Poulsbo, WA 98370
(360) 779-5008

I just shot another email off to Julia re: getting something from her and Michael on 10/16 saying they are located in Scotland. Her mother is also going to try to contact them about this.

Amanda

>>> Claire Bradley 09/09/02 01:11PM >>>
I THOUGHT I SENT AN EMAIL AWHILE BACK THAT LAYED OUT THEIR WHEREABOUTS, ETC.
I COULDN'T FIND IT IN MY GW THOUGH. IS THERE ANY NOTE IN DAMION? IS THERE ANY INFO IN
THE TRANSCRIPT?

Claire A. Bradley
Deputy Prosecuting Attorney
360-337-4978

>>> Amanda Jarrett 09/09/02 12:41PM >>>
I have been trying to reach the Delashmutts by phone off/on for the last 2 weeks. Being unsuccessful, today I set out to write them a letter to contact me regarding getting a witness unavailability letter from them faxed to us on the day of trial.

I noticed deposition transcripts outside Neil's office, and decided to check in there to see if by chance they were asked at the beginning of the depo what their phone number is. Instead I discovered they left for Scotland September 2. Do we have ANY way now of contacting them?

Sorry!

Amanda

CC: Pederson, Leslie

00032

700 South Industrial Way
Seattle, WA 98108
(206) 622-2007
(206) 622-2248

MDE Engineers, Inc.

Fax

To: Amanda L. Jarrott

From: David B. Olson, P.E.

Fax: (360) 337-7229

Pages: 1

Phone: (360) 337-4446

Date: October 16, 2002

Re: Unable to testify at trial

CC:

Urgent For Review Please Comment Please Reply

To the Honorable Anna M. Laurie:

Re: Trial in State of Washington v. Nicholas Hachenev 01-1-01311-2

This fax letter is to confirm that I am presently in Santa Cruz, Bolivia, South America. I departed Washington State on September 25, 2002 and arrived in Santa Cruz on October 3, 2002. I am here serving the Evangelical Free Church of Canada Mission as a broadcast engineer to install a Christian Radio Network.

My return date is indefinite but is expected to be sometime in the month of July 2003. Depending upon the progress of the project I may extend my stay.

I am therefore unable to return to Kitsap County to testify in the trial of State v. Nicholas Hachenev.

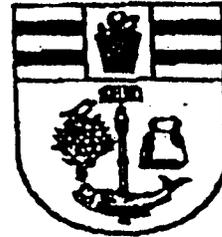
Thank you for your consideration.

Sincerely yours,


/s/ David Olson (dated 10/16/02)

FAX MESSAGE

STUDENTS'
REPRESENTATIVE
COUNCIL



UNIVERSITY OF GLASGOW

To: Amanda Jarrett

From: Michael DeLashmutt

Fax No: 001 360 337 7229 From Fax No. 0141337 3557

Date: _____ Time Sent: _____

Total No. of Pages including this page

3

Message:

If you do not receive all pages please telephone 0141 339 8541

FACSIMILE TRANSMITTAL SHEET

ATTN: Ms. Amanda Jarrett FROM: Mr. Michael W. DeLashmutt
 DATE: 15/10/2002
 FAX NUMBER: 001 360 337 7229 TOTAL NO. OF PAGES INCLUDING COVER: 2
 RE: Trial in State of Washington v. Nicholas Hachenev 01-1-01311-2

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

Amanda:

Attached is the letter for the Honourable Anna M. Laurie, in regards to our absence from the trial in State of Washington v. Nicholas Hachenev 01-1-01311-2.

Regards,

 Michael DeLashmutt

*This fax cost us £2.
 If possible, please send
 Reimbursement.*

5 Thomwood Gardens
 Flat 2/1
 Broomhill
 Glasgow
 G11 7PJ
 Scotland, United Kingdom

16 October 2002

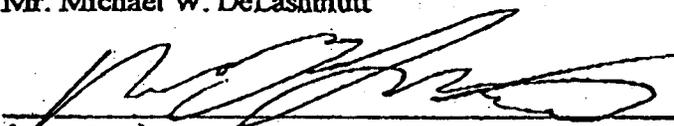
To the Honourable Anna M. Laurie:

Re: Trial in State of Washington vs. Nicholas Hacheney 01-1-01311-2

This letter is to confirm that we (Mr. and Mrs. Michael DeLashmutt) presently reside in Glasgow, Scotland, United Kingdom of Great Britain and Northern Ireland (UK). We moved here on 3rd September, 2002 and will remain residents of the UK for at least three years. The purpose of our residency is so that I, Mr. Michael DeLashmutt, can pursue my PhD at the University of Glasgow, Faculty of Arts, School of Theology and Religious Studies. We will live here in the UK until at least 30th October 2005, and will not be leaving the UK at any time during the remainder of the year 2002. We are therefore unable to return to Kitsap County to testify in the trial of State vs. Nicholas Hacheney.

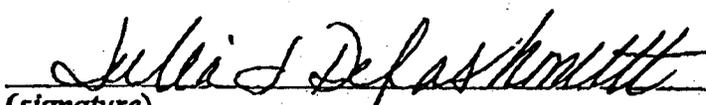
Regards,

Mr. Michael W. DeLashmutt


(signature)

16-10-2002
(date: dd/mm/yyyy)

Mrs. Julia J. Delashmutt


(signature)

16-10-02
(date: dd/mm/yyyy)



Jeff Ellis <jeffreyerwinellis@gmail.com>

Hacheny trial

messages

Jeff Ellis <jeffreyerwinellis@gmail.com>

Fri, Jul 31, 2009 at 8:42 AM

to: M.W.DeLashmutt@exeter.ac.uk

Mr. DeLashmutt:

I am an attorney who has been working with John ("Jack") Guinn on this case. Mr. Guinn has a family matter that he needs to attend to, so he asked me to contact you and forwarded your last email exchange.

Based on my conversations with Mr. Guinn and review of your email, I prepared a declaration for your review summarizing the facts (as I understand them). Can you please review the declaration, make any changes (if the declaration is inaccurate in any respect), and then sign it and either email or fax it back to me. If you have any questions, do not hesitate to ask. I very much appreciate your attention to this matter.

—
 Jeff Ellis
 Law Offices of Ellis, Holmes
 & Witchley, PLLC
 705 Second Ave., Ste 401
 Seattle, WA 98104
 206/262-0300 (o)
206/262-0335 (f)
 206/218-7076 (c)

 **HachenyDecDeLashmutt.doc**
 55K

Jeff Ellis <jeffreyerwinellis@gmail.com>

Sat, Aug 15, 2009 at 3:33 PM

to: M.W.DeLashmutt@exeter.ac.uk

Please let me know if you have any questions or concerns from my earlier email. However, I would much appreciate a reply.

Thanks in advance,

-Jeff Ellis

Quoted text hidden]

Jeff Ellis <jeffreyerwinellis@gmail.com>

Wed, Sep 23, 2009 at 2:29 PM

to: M.W.DeLashmutt@exeter.ac.uk

I am still hoping you'll send me a response regarding this matter. I don't mean to unnecessarily intrude, just trying to get to the bottom of the matter.

Thanks for your kind consideration.

Jeff



Jeff Ellis <jeffreyerwinellis@gmail.com>

Fwd: Nick Hacheny: Request for Information

5 messages

John Guinn <jaguinn78@gmail.com>
To: Jeff Ellis <ellis_jeff@hotmail.com>

Tue, Jun 23, 2009 at 10:01 PM

Just got this email from Michael DeLashmutt. If you want I can ask him for a declaration, but it will take a few days as I am in transit.

Thanks,
Jack

----- Forwarded message -----

From: **Delashmutt, Michael** <M.W.DeLashmutt@exeter.ac.uk>
Date: Mon, Jun 22, 2009 at 7:31 AM
Subject: RE: Nick Hacheny: Request for Information
To: John Guinn <jaguinn78@gmail.com>

Dear Jack,

I most definitely know that we would have been willing to testify if the state had paid our expenses. On a number of occasions Julia mentioned how nice it would have been to get a free trip home. Sadly, I have no record of any conversations with the prosecutors.

Best wishes,

Michael

From: John Guinn [mailto:jaguinn78@gmail.com]
Sent: 19 June 2009 23:44
To: Delashmutt, Michael
Subject: Re: Nick Hacheny: Request for Information

Dear Dr. DeLashmutt,

Thank you for responding to our request for information. I understand that the end of the academic year can be hectic, and I greatly appreciate you sacrificing your time. Based on your answer to the previous question, I have a couple of follow-ups that could help us shed some light on this matter. First, to the best of your recollection, if the state had offered to pay your expenses, would you and Julia have been willing to travel back to Washington to testify in Mr. Hacheny's trial? Second, have you retained any records of your conversations with prosecutors (electronic or otherwise) that you could provide us?

APPENDIX D

DECLARATION OF JOHN A. GUINN

I, John A. Guinn declare:

1. On January 16th, 2009, I met with Daniel Hacheny and Christopher Davenport, and we drove the route Nicholas Hacheny and his companions, Phillip Martini and Lindsey Smith (now Latsbaugh), used on their December 26th, 1997 hunting trip to Indian Island. Mr. Davenport recorded the journey on a video camera. It is my understanding that sunrise happened at the same time on both days. The weather on the morning of our trip was similar to the weather reported on the day of the hunt.
2. We left 2005 Jensen Avenue at approximately 6:45 a.m., the time that the State alleged Mr. Hacheny had left his home on December 26th, 1997, in order to portray – and, ultimately, to test – the State’s version of that morning’s journey. We drove the speed limit the entire trip and experienced no significant traffic delays.
3. We made the same stops the hunters did along the route to the site, but we deliberately made each stop shorter than it would have been had we done the things they did. We stopped for less than a minute at the filling station where Mr. Hacheny stopped for coffee. We stopped for less than two minutes at the east side of the Hood Canal Bridge where the hunters met, got out, and changed cars. We stopped for less than five minutes at the hunting site parking lot where they prepared for the hunt. (Mr. Martini changed the choke on his shotgun and Mr. Hacheny put on hip boots.)
4. It was already becoming light when we arrived at the Hood Canal Bridge at 7:23 a.m. According to the testimony, it was dark when the hunters were there. When we crossed the bridge to Indian Island at approximately 7:35 a.m., it was fully daylight. We reached the hunting blinds at the time the State alleged the hunters arrived, 7:50 a.m. According to the testimony, it was just beginning to get light when the hunters reached the blinds; obviously, it was still fully daylight when we arrived.
5. The trip from 2005 Jensen to the hunting site parking lot covered 42 miles. Including the walk to the hunting blinds, it took 74 minutes – not 51 minutes as the State alleged.
6. The walk down to hunting blinds took about five minutes. We were running short of video tape, so we only stayed a few minutes before walking back to the car. According to the testimony, the hunters spent 30-90 minutes in the blinds.

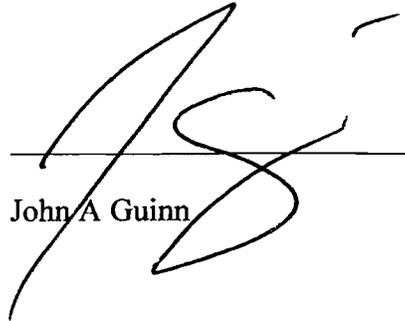
7. We stopped for less than a minute at the Chimacum Café, which had been closed on the day of the hunt. According to the testimony, the hunters took time to decide where else they could go to eat breakfast.

8. The trip from the hunting site to the site where Mitzel's Restaurant was located took 48 minutes. Had we stayed at the hunting blinds for the minimum possible time according to the testimony, 30 minutes, we would have arrived at the restaurant location at about 9:13 a.m., just 14 minutes before Mr. Hacheny used his credit card to pay for breakfast – clearly, not enough time to be seated, order, be served, and eat.

I declare under penalty of perjury of the laws of the State of Washington that the above is true and correct.

6/21/09 SEATTLE, WA

Date and Place


John A Guinn

DECLARATION OF DANIEL M. HACHENEY

I Daniel M. Hacheny, declare as follows:

1. I am the father of Nicholas Hacheny.
2. Both prior to and during my son's trial, I made several attempts to demonstrate to defense counsel Mark Yelish and Aaron Talney, that the timeline the state was proposing was not possible. I have been hunting with my son on several occasions at this sight and I knew a trip to this location in less than one hour was impossible. I purchased a map of the hunting area and delivered it to the attorneys. I also offered to take them to the site. They did not use the map at trial.
3. I attended every day of my son's trial and every hearing, except for the deposition hearings where I was excluded. As the evidence was presented and the State alleged that the party was in the duck blinds at 7:50 a.m., I again went to the attorneys and explained the difference between "shooting light" and sunrise.
4. I again offered to take them to the sight at 7:00 a.m. so that we could take photos to show the lighting conditions. Neither attorney accepted my offer.
5. On the morning of December 29, 2003, I traveled to the public hunting blinds on Indian Island and took video footage from approximately

6:47 a.m. until 7:45 a.m.. I verified the time stamp on the camera with my cell phone. I did this to be able to show the appellate attorneys in my son's case that the time line used by the prosecution was not possible.

6. Because appellate counsel was not able to use this footage on direct appeal, I stored the original footage in my office and maintained sole access to it.

7. On February 15, 2009, I copied the video onto a CD-Rom and sent it to Jeffrey E. Ellis.

8. I did so to illustrate the fact that the State's timeline of events was impossible the morning my daughter-in-law died.

9. I attest that the footage taken is in its original format and is accurate as to date, time and lighting conditions.

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

DATED this 18th day of June, 2009

6-18-09
Home office
Date and Place

Daniel M. Hacheney
Daniel M. Hacheney



Directions to NE Jensen Ave/Jenson Rd NE
89.0 mi - about 2 hours 36 mins

Save trees. Go green!
 Download Google Maps on your phone at google.com/gmm




 2005 NE Jensen Ave, Bremerton, WA 98310

-
- 

1. Head north on **NE Jensen Ave/Jenson Rd NE** toward **Cascade View**

go 141 ft
total 141 ft
 - 

2. **NE Jensen Ave/Jenson Rd NE** turns slightly left and becomes **Cascade View**

go 0.2 mi
total 0.2 mi
 - 

3. Turn right at **Trenton Ave**
About 1 min

go 0.3 mi
total 0.5 mi
 - 

4. Turn left at **NE Stone Way**
About 1 min

go 0.2 mi
total 0.8 mi
 - 

5. Turn right at **Perry Ave**
About 5 mins

go 1.6 mi
total 2.4 mi
 - 

6. **Perry Ave** turns slightly left and becomes **NE Riddell Rd**
About 2 mins

go 0.7 mi
total 3.1 mi
 - 

7. Turn right at **WA-303**
About 11 mins

go 5.9 mi
total 9.0 mi
 - 8. Take the **State Hwy 3** exit toward **Silverdale**

go 0.3 mi
total 9.2 mi
 - 

9. Merge onto **WA-3 N**
About 15 mins

go 13.7 mi
total 22.9 mi
 - 

10. Turn left at **WA-104**

go 223 ft
total 23.0 mi

Total: 23.0 mi – about 35 mins

 **WA-104**

-
- 

11. Head northwest on **WA-104** toward **Shine Rd**
About 2 mins

go 1.7 mi
total 1.7 mi
 - 

12. Turn right at **Paradise Bay Rd**
About 12 mins

go 6.0 mi
total 7.7 mi
 - 

13. Turn right at **Oak Bay Rd**
About 18 mins

go 8.6 mi
total 16.3 mi
 - 

14. Turn right at **Flagler Rd/WA-116**
About 3 mins

go 0.8 mi
total 17.1 mi

- 
15. Slight right to stay on Flagler Rd/WA-116
 About 4 mins
 go 1.6 mi
total 18.7 mi

Total: 18.7 mi – about 38 mins

 **Flagler Rd/WA-116** total 0.0 mi

- 
16. Head west on Flagler Rd/WA-116 toward Indian Island Ferry Rd
 About 4 mins
 go 1.5 mi
total 1.5 mi

- 
17. Slight left to stay on Flagler Rd/WA-116
 About 3 mins
 go 0.9 mi
total 2.4 mi

- 
18. Turn right at Oak Bay Rd/WA-116
 About 2 mins
 go 0.9 mi
total 3.3 mi

- 
19. Turn left at Chimacum Rd
 About 5 mins
 go 1.6 mi
total 4.8 mi

- 
20. Turn right at Rhody Dr/WA-19
 Destination will be on the right
 About 1 min
 go 404 ft
total 4.9 mi

Total: 4.9 mi – about 14 mins

 **Chimacum Cafe**
 9253 Rhody Dr, Chimacum, WA 98325 - (360) 732-4631 total 0.0 mi

- 
21. Head east on Rhody Dr/WA-19 toward Chimacum Rd
 Continue to follow WA-19
 About 14 mins
 go 9.2 mi
total 9.2 mi

- 
22. Turn left at WA-104
 About 9 mins
 go 6.6 mi
total 15.8 mi

- 
23. Turn right at WA-3
 About 8 mins
 go 6.7 mi
total 22.5 mi

- 24. Take the State Hwy 305 S exit toward Poulsbo**
go 0.4 mi
total 22.9 mi

- 
25. Turn left at Olympic College Way/WA-305
 Continue to follow WA-305
 About 4 mins
 go 1.7 mi
total 24.5 mi

- 
26. Turn right at NE Liberty Rd
go 79 ft
total 24.6 mi

Total: 24.6 mi – about 36 mins

 Liberty Way

total 0.0 mi

27. Head east on Liberty Way toward WA-305
go 79 ft
total 79 ft
 **28. Turn left at WA-305**
About 5 mins
go 1.5 mi
total 1.6 mi
 **29. Take the ramp onto WA-3 S**
About 8 mins
go 7.1 mi
total 8.6 mi
30. Take exit 45 for State Hwy 303 S toward E Bremerton/Silverdale
go 0.2 mi
total 8.9 mi
 **31. Turn left at WA-303/NE Waaga Way**
Continue to follow WA-303
About 11 mins
go 6.7 mi
total 15.6 mi
 **32. Turn left at NE Sylvan Way/WA-306**
About 3 mins
go 1.0 mi
total 16.6 mi
 **33. Turn right at Trenton Ave**
About 4 mins
go 1.1 mi
total 17.7 mi
 **34. Turn left at Cascade View**
go 0.2 mi
total 17.9 mi
 **35. Cascade View turns slightly right and becomes NE Jensen Ave/Jenson Rd NE**
Destination will be on the right
go 66 ft
total 17.9 mi

Total: 17.9 mi – about 31 mins

 NE Jensen Ave/Jenson Rd NE

These directions are for planning purposes only. You may find that construction projects, traffic, weather, or other events may cause conditions to differ from the map results, and you should plan your route accordingly. You must obey all signs or notices regarding your route.

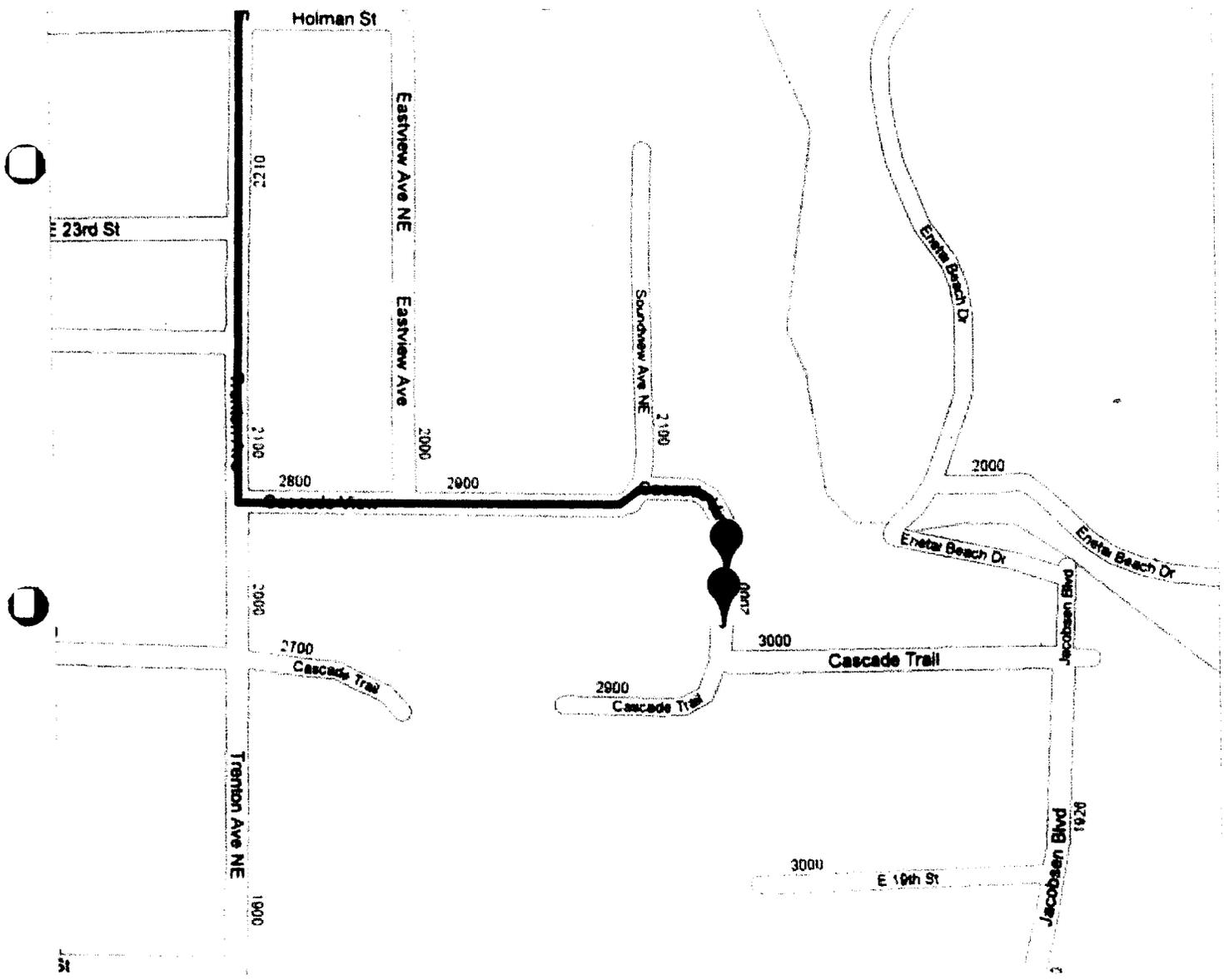
Map data ©2008, Tele Atlas



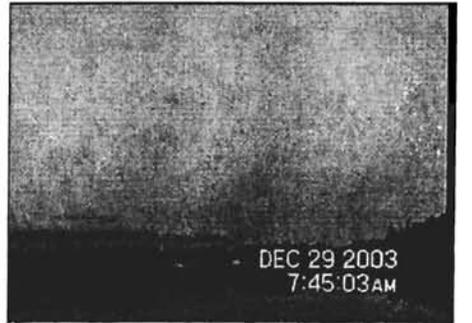
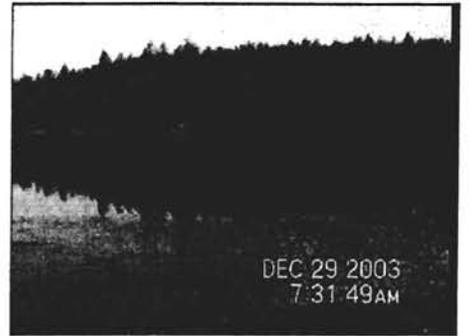
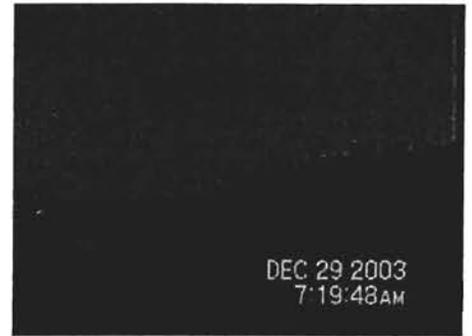
Directions to NE Jensen Ave/Jenson Rd NE

89.0 mi - about 2 hours 36 mins

Save trees. Go green!
 Download Google Maps on your phone at google.com/gmm

Clips taken from video camera on December 29th 2003 from 7:11-7:45 am

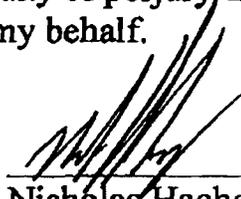


VERIFICATION BY PETITIONER

I, Nicholas Hacheney, verify under penalty of perjury that the attached PRP is true and correct and is filed on my behalf.

5-25-10 MONROE WA

Date and Place



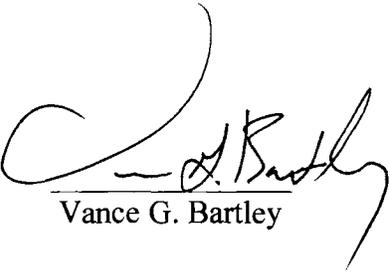
Nicholas Hacheney

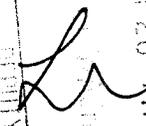
CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on May 25, 2010 I served the parties listed below with a copy of *Appellant's Revised PRP* as follows:

Randall Avery Sutton
Kitsap Co. Prosecutors Office
614 Division St.
Port Orchard, WA 98366-4614

5-25-10 Sea, WA
Date and Place


Vance G. Bartley

FILED
COURT REPORTERS
10 MAY 26 PM 12:25
STATE OF WASHINGTON
BY  DIVISION