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NO. 31238-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JULIO DAVILA,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Jurors deciding whether Julio Davila caused the death of John Allen only heard part of the story about the State's actions in pursuing the case. The jurors were told that the likely murder weapon, a baseball bat, had a mixed sample of DNA consistent with Mr. Davila's profile. But neither the jurors nor Mr. Davila knew that the forensic scientist who handled and tested this DNA evidence for the state had been fired due to a long history of incompetence, including mislabeling evidence, mixing samples, and risking contamination while testing DNA in multiple cases.[1]

Jurors also heard that another person, Jeramie Davis, was convicted for killing Mr. Allen. They did not know that at Mr. Davis's trial, the State had argued that Mr. Davis was the person who swung the baseball bat that killed Mr. Allen and had claimed that DNA on the baseball bat was irrelevant because the bat was old and the police had thoroughly investigated the case. Four years later, at Mr. Davila's trial,

[1] The report detailing the investigation into Denise Olson's unsatisfactory performance in conducting DNA tests, obtained by the defense after Mr. Davila's trial, is attached as Appendix A.

the prosecution argued that the DNA on the bat proved that Mr. Davila killed Mr. Allen but at the same time, it argued that Mr. Davis was properly punished for what he did.

The State's failure to disclose material evidence about misconduct by the State Patrol Crime Laboratory's forensic analyst who tested DNA and the prosecution's use of inconsistent theories of guilt when seeking convictions against two people for the same offense denied Mr. Davila his right due process of law.

B. ASSIGNMENTS OF ERROR.

1. The prosecution's failure to disclose favorable material evidence known to law enforcement denied Mr. Davila his rights to due process and to present a defense.

2. The court erroneously denied Mr. Davila's post-trial motion based on prosecutorial misconduct.

3. Mr. Davila was denied his right to due process by the prosecution's reliance on inconsistent theories and its deliberate deception about facts not in evidence.

4. The cumulative effect of the prosecutorial misconduct denied Mr. Davila a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The prosecution is obligated to inform an accused person of favorable evidence known to law enforcement that would be valuable to impeach the State's case. The prosecution did not tell Mr. Davila that the Washington State Patrol's forensic analyst who tested critical DNA evidence had been fired from her job due to a long history of incompetence. Did the prosecution fail to disclose material exculpatory evidence that prejudiced Mr. Davila's right to present a defense and undermines confidence in the outcome of the case?

2. The prosecution violates due process when it seeks a conviction based upon deceptive arguments about facts not in evidence or simultaneously pursues different theories against two people for the same crime. The prosecution argued both that Jeramie Davis was properly convicted for killing John Allen but also that Julio Davila should be convicted for causing Mr. Allen's death, even though there was no evidence that the two men knew each other. Did the prosecution deceive the jury by arguing inconsistent theories that made two men separately responsible for the same crime when the two men did not act together?

D. STATEMENT OF THE CASE.

On June 17, 2007, John Allen was found fatally injured in the adult book store he owned in Spokane. 1RP 116-18, 127.[2] In 2008, Jeramie Davis was convicted of first degree murder for causing Mr. Allen's death. 2RP 286. Mr. Davis admitted he "hit a lick" at Mr. Allen's adult book store, stealing cash, checks, magazines, "sex toys," and other items from Mr. Allen's store that night, but said Mr. Allen was already lying on the ground, bloody, when he entered and he did not cause his death. 1RP 137; 2RP 227, 242.

Investigating police officers did not find any fingerprints or DNA from Mr. Davis inside the store even though he was there long enough to steal numerous items and had returned to the store several times that night. 1RP 135; 2RP 244-45, 290,312. They surmised that he wore gloves, and found gloves in Mr. Davis's car along with multiple items of pornography taken from Mr. Allen's store. 1RP 190; 2RP 227, 312.

The cause of Mr. Allen's death was two blows to the head from a baseball bat. 3RP 421-22. A police officer found a baseball bat lying

[2] The verbatim report of proceedings is contained in five consecutively paginated volumes of transcripts.

under Mr. Allen's body and he put it on top of a stack of magazines in the bookstore. 1RP 129. An investigator later swabbed four areas of the baseball bat and submitted these four swabs for testing at the Washington State Patrol's Crime Laboratory. 2RP 293, 374.

Forensic analyst Denise Olson tested these four swabs on or about November 11, 2007. CP 274. Ms. Olson's report claimed she used "standard DNA extraction protocol" but offered no details of how she executed this protocol. CP 274-75. After handling the swabs and extracting DNA, Ms. Olson "quantified" and "amplified" DNA extracts from swabs labeled A, B, C, D, as well as reference samples from Mr. Allen and Mr. Davis. *Id.* She concluded that swab A was consistent with Mr. Allen's DNA, and excluded Mr. Davis from this swab. CP 275. She obtained a "partial DNA typing profile from swab D" which was "a mixture of at least two individuals." CP 275. She concluded that that major contributor was an unidentified male, and Mr. Allen could not be excluded as a potential contributor, while Mr. Davis was excluded. *Id.* She did not find any DNA profiles in swabs B or C from the baseball bat. *Id.*

At Mr. Davis's trial for first degree murder for causing Mr. Allen's death in the course of a robbery, the prosecution argued that the

detectives had "ruled out any other suspect" other than Mr. Davis. CP 76. The prosecution claimed Mr. Davis "hit" Mr. Allen "over the head with the baseball bat," then "clean[ed] out the store." CP 76. In response to Mr. Davis's argument that Ms. Olson's finding of "unidentified individual A's" DNA on the bat showed someone else was the "killer," the prosecution countered that the Mr. Davis had worn gloves while inside the store so he did not leave DNA behind, and "no stone [was] left unturned" by the police in determining who was responsible. CP 91, 105. Furthermore, the prosecutor claimed that the DNA on the bat was too tenuous to connect "unidentified individual A" to the murder since the bat was old and his DNA could have been left on the bat at any time. CP 106.

The police also found a number of fingerprints throughout the store. 2RP 331-37, 352-53, 363-64. Mr. Allen's truck had been moved one block from its usual parking space and the steering wheel of the truck had a mixed sample of DNA from which Mr. Davis could not be excluded. 1RP 180; 3RP 446-47.

Because there were numerous fingerprints of unidentified individuals found in Mr. Allen's bookstore as well as the unidentified DNA, the police asked for additional tests of other individuals even

after Mr. Davis's conviction. 2RP 278, 286; 3RP 331-32. Several fingerprints inside the store belonged to Mr. Davila, but many other people had also left fingerprints in the store. 3RP 331-38, 352-53, 363-64. When checking the DNA profile that Ms. Olson obtained in the available DNA database, the state found a "match" with Mr. Davila's DNA. 2RP 290.

In 2011, the prosecution charged Mr. Davila with murder under two separate theories: first degree felony murder for working with Mr. Davis to commit a robbery and thereby cause Mr. Allen's death; and second degree felony murder for causing Mr. Allen's death in the course of an assault or attempted assault in the second degree. CP 1-2; CP 134-35. The trial court dismissed the first theory at the close of the prosecution's case because there was no evidence that Mr. Davila and Mr. Davis knew each other and no one saw Mr. Davila inside Mr. Allen's bookstore near the time of the incident. 3RP 503-04.

At Mr. Davila's trial, the State did not call Ms. Olson to discuss her testing of the evidence taken from Mr. Allen's store. Instead, Ms. Olson's supervisor Lorraine Heath retested "swab D" but not any other swabs from the bat. 3RP 436, 444, 448, 453-54; CP 237. She found a mixed DNA profile. 3RP 455-57. Once she "subtracted" the alleles that

belonged to Mr. Allen's DNA profile, the remaining alleles matched Mr. Davila's DNA profile. 3RP 457. Ms. Heath also testified that she is a supervisor of the State Patrol Crime Lab's DNA division, the lab is accredited annually, and all scientists are routinely tested for their proficiency. 3RP 431, 440, 442-43.

Ms. Heath did not tell the jury, or Mr. Davila, that Ms. Olson had been fired from her job as a state-employed forensic analyst due to her long history of poor performance in conducting DNA tests. CP 252-60. When defense counsel discovered Ms. Olson's termination, and obtained a report detailing many years of misconduct by Ms. Olson, he filed a motion for a new trial. CP 162-260. The prosecutor denied being aware of the report and the court found he was not obligated to disclose the report because he did not know about it. CP 283; 4RP 596, 613. The court also found there was insufficient evidence that Ms. Olson had actually contaminated "swab D" and therefore Mr. Davila was not entitled to a new trial. 4RP 622, 624.

Mr. Davila was convicted of one count of second degree murder while armed with a deadly weapon. CP 156-57. During the prosecutor's closing argument, he told the jury that Mr. Davis "had already been convicted for what he did" and the jury was not there to "reconvict him

all over again." 3RP 543. The prosecutor did not explain that Mr. Davis was trying to reverse his murder conviction and had filed a motion for a new trial.[3] He also claimed that "according to the evidence, Mr. Davis didn't swing the bat." 3RP 556. The prosecutor did not mention he had argued Mr. Davis was the person who hit Mr. Allen with the baseball bat when seeking Mr. Davis's conviction. CP 76.

The court denied Mr. Davila's post-trial motion for a new trial based on the prosecution's failure to disclose evidence of Ms. Olson's history of misconduct and termination from her job due to her lack of credibility and unacceptable performance. 4RP 622-24. The court also denied Mr. Davila's motion for a new trial based on the prosecutor's improper arguments to the jury in vouching for Mr. Davis's conviction when he had been convicted based on an inconsistent theory. 4RP 589-92. Mr. Davila received a standard range sentence. CP 343-44.

[3] *See* Thomas Clause, "Prosecutor Intends to Try Man Again on Murder Charge," The Spokesman Review (Sept. 20, 2012), available at: http://www.spokesman.com/stories/2012/sep/20/davis-detained-on-bond/

E. ARGUMENT.

1. **The State's failure to reveal that the state employee who tested critical DNA evidence had been fired due to incompetence undermines confidence in the verdict and denied Mr. Davila a fair trial**

A mixed sample of DNA on the handle of a baseball bat was the critical evidence connecting Mr. Davila to a homicide for which he was arrested years after the incident, having never been seen at the scene of the offense. Neither before nor during his trial did the State reveal that the forensic scientist from the state's crime lab who originally extracted and tested this DNA had been fired due to incompetence. The State discouraged Mr. Davila from calling this scientist as a witness. In its closing argument, the State emphasized the care in which the evidence containing the DNA had been treated and argued that because the DNA evidence showed Mr. Davila "held the bat," he caused the death at issue. The State's failure to disclosure material evidence impeaching an important witness for the State denied Mr. Davila a fair trial.

a. *The prosecution must disclose material evidence impeaching a state's witness who gathered critical evidence in her role as a state employee.*

"[O]ne essential element of fairness" in a criminal case "is the prosecution's obligation to turn over exculpatory evidence." *Milke v.*

Ryan, 711 F.3d 998, 1002 (9th Cir. 2013); *see Brady v. Maryland*, 373 U.S 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The requirement that the government disclose material favorable evidence to a criminal defendant is required by the due process clauses of the State and Federal Constitutions as well as the constitutional guarantee of meaningful opportunity to present a defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 21, 22.

The prosecution's duty to disclose evidence favorable to an accused arises even when there has been no request by the accused. *In re Pers. Restraint of Stenson*, 174 Wn.2d 474, 486, 276 P.3d 286 (2012). The prosecution's duty "encompasses impeachment evidence as well as exculpatory evidence." *Id.* "The scope of the duty to disclose evidence includes the individual prosecutor's 'duty to learn of any favorable evidence known to others acting on the government's behalf.'" *Id.* (citing *Strickler v. Greene,* 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

There are three components of a *Brady* violation. The evidence must be favorable to the accused, either as exculpatory or impeachment evidence; the State must have failed to disclose the evidence, "either willfully or inadvertently"; and "prejudice must have ensued." *Strickler,* 527 U.S. at 281-82.

b. *The requirement to disclose favorable evidence includes impeachment evidence.*

The prosecution's constitutional obligation to disclose impeachment evidence is "well-established." *Milke*, 711 F.3d at 1006. "Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness." *United States v. Jackson*, 345 F.3d 59, 70 (2d Cir. 2003); *see Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *see e.g., United States v. Blanco,* 392 F.3d 382, 387 (9th Cir. 2004) ("*Brady/ Giglio* information includes 'material ... that bears on the credibility of a significant witness in the case.' ") (omission in original) (quoting *United States v. Brumel-Alvarez,* 991 F.2d 1452, 1461 (9th Cir.1992)).

Material evidence includes information that "opens up new avenues for impeachment." *Gonzalez v. Wong*, 667 F.3d 965, 984 (9th

Cir. 2011). The value of impeachment evidence is not controlled by the fact that other impeachment evidence exists. *United States v. Price*, 566 F.3d 900, 914 (9th Cir. 2009); *cf. Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir. 2002) (holding that *Brady* material is especially likely to be prejudicial if it "would have provided the defense with a new and different ground of impeachment"). Evidence is material when it might have been used to impeach a government witness, including "any inference therein which bears on credibility." *Price*, 566 F.3d at 912, 913 n.14.

c. *The withheld information was significant impeachment evidence that would have substantially benefitted Mr. Davila's defense.*

As a forensic scientist employed by the Washington State Patrol Crime Lab, Denise Olson extracted and tested the sample taken from the baseball bat that purportedly contained a mixture of at least two people's DNA and tested other items for DNA as well. 2RP 284; CP 274-75. At the time of trial, neither Mr. Davila nor his attorney knew that Ms. Olson had lost her job after repeated instances of failing to follow laboratory protocols when testing items for DNA, resulting in formal findings by the State Patrol Crime Lab's acting director of

forensic services Larry Hebert that she engaged in "unacceptable conduct" and "unsatisfactory performance." 4RP 575-76; CP 237.

Although DNA evidence carries a perception of infallibility among jurors or judges, "the accuracy of the test results are largely dependent on the methods used by the analyst." W. Thompson, et al, "Forensic DNA Statistics: Still Controversial in Some Cases," The Champion, at 22 (Dec. 2012); Brief of Innocence Network as Amicus Curiae, *Williams v. Illinois*, U.S. Supreme Court No. 10-8505, at 6 (filed Sept. 7, 2011).[4] There are many steps in DNA analysis and "errors can occur during each stage." Brief of Innocence Network at 7. The reliability of DNA evidence is "subject to the problems of human error and misconduct." *Id.* at 13.

DNA must be extracted from a biological sample and "[t]he extraction process is probably where the DNA sample is more susceptible to contamination in the laboratory than at any other time in the forensic DNA analysis process." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 82, 129 S. Ct. 2308, 174 L. Ed.

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[4] Available at: http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-8505_petitioneramcuinnocencenetw.authcheckdam.pdf (last viewed Sept. 27, 2013).

2d 38 (2009) (Alito, J., concurring, quoting J. Butler, Forensic DNA Typing 42 (2d ed. 2005)). Because DNA testing technology "is sensitive enough to pick up such trace amounts of DNA," it is also affected by "even the slightest, unintentional mishandling of evidence." *Id.* at 82.

After extracting DNA, the analyst must "measure the amount of DNA in the sample accurately" which is "essential" because later stages of DNA analysis require a specific concentration of DNA. Brief of Innocence Network at 17. Too much or too little DNA used in the test can result in an inaccurate profile. *Id.* at 17-18.

Generating DNA profiles requires amplifying the extracted alleles, which is a "challenging" process. *Id.* at 19. Amplification requires the analyst to add chemicals to water in a "proper volume and concentration," "precisely set" the temperature in the thermal cycler machine, and pay close attention to the number of cycles run. *Id.* at 18-19. This process "is very sensitive to small amounts of DNA, [and] even minute contamination can skew the results." *Id.* at 19.

Additional potential for error occurs in separating the DNA and detecting the alleles. *Id.* at 20. If multiple samples are tested, cross-sample contamination may occur and some types of tests are more

susceptible to contamination. *Id.* at 20-21. Interpreting the data, particularly in a mixed sample of two or more individuals depends on subjective judgment. *Id.* at 22-23; *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 320, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (forensic analysis includes methodology that "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination").

Ms. Olson lost her job due to her repeated failure to follow these protocols and numerous instances of inaccuracy when testing samples for DNA over the course of many years. CP 255-60. The multiple steps involved in testing biological samples for DNA require precise attention to detail, yet "her attention to detail is very poor," according to the State Patrol Crime Lab's DNA Technical Leader Dr. Gary Shutler. CP 243.

After Mr. Davila's trial was over, defense counsel filed a public disclosure request after he had a "just sort of a hunch" that he had not received all pertinent information about the DNA testing. 4RP 575, 576. He received a report explaining the reasons for Ms. Olson's firing. CP 237-60. The report written by the director of the State Patrol's Forensic Laboratory Services Bureau explained that after numerous

errors in performing DNA tests, Ms. Olson was given a final opportunity to improve her performance under a 90-day "job performance improvement plan" which assessed Ms. Olson's performance in 15 "routine and straightforward" cases "for the purpose of assessing her competency." CP 239. She received a lighter caseload so she could "focus in her improvement plan." CP 246.

Even at a time when Ms. Olson knew she was under close scrutiny, she "continue[d] to make major and minor errors on a routine basis and struggle[d] to perform a minimum amount of casework." CP 247. Five reviewing scientists, including DNA supervisor Lorraine Heath, reviewed and criticized the quality of Ms. Olson's work. CP 237-44. In the report, Ms. Heath summarized Ms. Olson's incompetence as including: "a lack of attention to detail"; using "incorrect mixture interpretations and calculations"; and making a "number of technical mistakes" such as "amplifying the wrong amount of target DNA, "selecting inappropriate screening tests," and "using the incorrect number of reagent blanks." CP 239. "[A]n extremely high number of errors were found by each peer reviewer in each case." CP 239. According to the report, "poor performance and critical work

deficiencies prevail despite numerous opportunities to improve." CP 240.

The report said that Ms. Olson's faulty DNA analysis had resulted in "many problems over the years." CP 255. Documented issues included processing DNA samples in a way that increased the risk of contamination and incorrectly concluding a suspect's DNA was included in a mixed sample. CP 255. She had "two years of poor evaluations" dating from 2006-2008, which was the time Ms. Olson tested DNA in the case at bar. CP 255, 274. She received a 5-day suspension after a 2007 audit of her work revealed errors in 21 of 27 cases. CP 256. She received a 15-day suspension one year later after she made a number of additional DNA processing errors. CP 256, 258. In the portion of the report authorizing her termination, the director of the forensic service division of the State Patrol Crime Lab concluded that "her work cannot be trusted." CP 259. Her own reputation had been "irreparably damaged" because her "long term poor performance . . . has now become known to both prosecuting and defense attorneys." *Id.* "[E]ven if she were able to return to criminal casework, attorneys and courts would not be able to use her work product." *Id.*

Instead of calling Ms. Olson as a witness in Mr. Davila's trial, the prosecution had Ms. Olson's supervisor, Lorraine Heath, re-analyze "swab D," the biological matter taken from the handle of baseball bat that Ms. Olson had originally tested. Ms. Heath assured the jury that the State Patrol Crime Lab guards against contamination by "controls" in the process; the lab is accredited and annually audited, and "every scientist" in the DNA section "gets proficiency testing." RP 440, 442-43. Ms. Heath tested Mr. Davila's DNA but not Jeramie Davis's, and did not re-analyze Ms. Olson's results that had excluded Mr. Davis. 3RP 447. She also "extensively reviewed prior testing," presumably by Ms. Olson. 3RP 448. Ms. Heath made no mention of any issues Ms. Olson's work, either when testifying or when interviewed by the defense. 4RP 575-76.

During the course of the trial, defense counsel briefly interviewed Ms. Olson over the telephone and considered calling her as a witness. 2RP 399; 4RP 575. However, the prosecutor told defense counsel he could elicit the same information from Ms. Heath, thus encouraging the defense not to have Ms. Olson testify. 2RP 399. At this time, defense counsel did not know and was not advised about Ms. Olson's firing or the reason for it. Defense counsel also did not know

and was not made aware that Ms. Heath had reviewed Ms. Olson's work in other cases and found "an extremely high number of errors." 4RP 577; CP 240.

At trial, Mr. Davila questioned Ms. Heath about Ms. Olson's conclusions, including the fact that Ms. Olson's report viewed the DNA from the baseball bat as a mixture of "at least two people," while Ms. Heath considered it to be only two people's DNA. 3RP 455. Ms. Heath did not work in the State Patrol Crime Lab at the time Ms. Olson performed her tests and had no personal knowledge about Ms. Olson's performance. 2RP 399; 3RP 431.

Defense counsel was unaware that Ms. Olson had failed several proficiency exams in the time frame in which she tested the DNA at issue. Her misconduct resulted in "23 Brady letters" sent to "11 major prosecuting attorneys offices." CP 310. The forensic bureau's director, Mr. Hebert, who reviewed Ms. Olson's 2006 and 2007 casework, concluded her mistakes were "egregious" and that Ms. Olson could not be rehabilitated as a competent employee. CP 259, 311.

The State Patrol's report on Ms. Olson's "unacceptable conduct" would have given Mr. Davila significant new area of impeachment. The prosecutor conceded that the report documenting the reasons for Ms.

Olson's firing "would cause a great deal of concern" about her work. 4RP 582. DNA expert Gregory Hampikian explained during a post-trial motion,

> It is important to realize that each time the lab amplifies DNA, a billon copies are made of every molecule; so, having a careless worker continue on casework for more than two years (of documented problems) is unconscionable.

CP 311. The defense could have called Dr. Hampikian or another expert to explain the risk of error generated by a forensic analyst who does not strictly adhere to procedures and who has admitted poor attention to detail when testing DNA. CP 250; CP 301-11.

Due to the prospect of contamination or false results, Ms. Olson's conduct would have been pertinent, favorable evidence that should have been disclosed. Mr. Davila could have impeached Ms. Heath's assertions about the careful attention to protocol, proficiency testing, and accreditation that she spoke of to bolster the credibility of the lab. Had he known, he would have moved to suppress the DNA evidence from being admitted at trial. 4RP 576-77. The highly critical report detailing multiple types of faulty DNA testing by Ms. Olson would have opened an area of impeachment of which Mr. Davila was

unaware at the time of trial. It constitutes favorable evidence that should have been disclosed by the prosecution.

d. *The prosecution had a duty to disclose favorable evidence from the Crime Lab under Brady.*

Brady imposes a duty on the State to learn of pertinent evidence from those acting on the state's behalf. *Strickler*, 527 U.S. at 280-81, *quoting Kyles v*, 514 U.S. at 437.

> Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them.

United States v. Zuno-Acre, 44 F.3d 1420, 1427 (9th Cir.), *cert. denied*, 516 U.S. 945 (1995).

The individual prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437-38. It is the government's obligation to ensure a fair trial occurs and this obligation is not excused by good faith or inadvertence. *Id.* The prosecution's

good faith or inadvertence has no role in whether the failure to disclose evidence constitutes a *Brady* violation. *Strickler*, 527 U.S. at 281-82.

The "prosecution" for *Brady* purposes includes police officers, agents, and other investigatory personnel who participated in the investigation and prosecution of the instant case. *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992); *Carey v. Duckworth*, 738 F.2d 875, 878-79 (7th Cir. 1984). The prosecutor bears responsibility for ensuring police officers disclose all pertinent information *Giglio*, 405 U.S. at 154.

The government's obligation to disclose exculpatory and impeachment applies to nontestifying witnesses. *Jackson*, 345 F.3d at 70; *see e.g., Leka v. Portuondo,* 257 F.3d 89, 99 (2d Cir. 2001) (*Brady* violation where prosecution did not disclose crime scene observations of nontestifying officer that were "favorable to the defense" and contradicted other witnesses). The prosecution may not avoid disclosing exculpatory or impeachment material simply by not calling the relevant witness to testify. *Id.* at 71.

The Washington State Patrol is a law enforcement agency and its crime laboratory supports criminal investigations by gathering

evidence for use by law enforcement agencies throughout the state. *State v. Gregory*, 158 Wn.2d 759, 829 n.37, 147 P.3d 1201 (2006).

The report summarizing the reasons for Ms. Olson's termination stated that the State Patrol Crime Lab had sent 11 prosecuting attorney's "Brady letters" notifying them of Ms. Olson's "problems and her faulty results" in the course of a 2008 review of Ms. Olson's work in 2007. CP 256. The report states that the "Crime Laboratory Division must report problems/issues that could be exculpatory to an accused person to the affected prosecuting attorney who in turn must provide that information to defense counsel." CP 256 n.46. The State Patrol Crime Lab views itself as a part of the law enforcement that must comply with the disclosure requirements of *Brady* and its progeny. *Id.*

Furthermore, the prosecution is required to locate material impeachment information from its witnesses even when not in its direct control. *See Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (finding state's obligation related to witness credibility includes obtaining and providing witness's prison records); *see also United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995) (prison files held by the Bureau of Prisons were in the possession and control of the United States Attorney's Office for *Brady* purposes); *see also United States v.*

Brooks, 966 F.2d 1500, 1502-03 (D.C. Cir. 1992) (government duty to search Internal Affairs files regarding officer credibility).

The trial court did not determine whether the prosecutor should have disclosed the report detailing Ms. Olson's long history of poor performance. It ended its analysis by finding that the prosecutor did not actually know about this report. 4RP 613, 622. But even if the prosecutor did not know about this detailed, critical report, Ms. Heath knew because she wrote the job improvement plan as Ms. Olson's "immediate supervisor" and she concluded that Ms. Olson "failed" to show job improvement. CP 238-29. Larry Herbert, the director of the State Patrol Crime Lab's forensic laboratory services bureau, wrote the report, and Ms. Olson knew of it at the time of Mr. Davila's 2012 trial. CP 237 (report dated February 25, 2011). The "court's reliance on the prosecutor's lack of personal knowledge of the *Brady* material demonstrated a clearly erroneous understanding of the law as it has existed at least since *Kyles*." *Price*, 566 F.3d at 908.

> [T]he prosecution has a *duty to learn* of any exculpatory evidence known to others acting on the government's behalf. Because the prosecution is in a unique position to obtain information known to other agents of the government, *it may not be excused from disclosing what it does not know but could have learned.*

Id. at 909 (quoting *Carriger,* 132 F.3d at 479-80 (citations omitted) (emphases added in *Price*).

Mr. Davila's attorney did not know about the report's existence at the time of trial and was unaware there was any basis to question the quality of Ms. Olson's performance until after trial. 4RP 575-77. The court made no finding that defense counsel knew or should have known about the report, when the prosecution did not know about it, thus the State may not be excused from its *Brady* obligation by claiming that Mr. Davila should have known about Ms. Olson's failings.

As an employee of the Washington State Patrol Crime Lab, Ms. Olson was a member of "law enforcement personnel." The State was required to disclose information possessed by Ms. Olson, Ms. Heath, or co-workers at the State Patrol's laboratory that Ms. Olson had a longstanding history of making errors in the course of DNA testing and lost her job as a result.

e. *The failure to disclose evidence of Ms. Olson's poor performance reasonably affected the outcome of the case.*

Whether the prosecution's failure to disclose the evidence prejudiced Mr. Davila is reviewed *de novo. Stenson*, 174 Wn.2d at 491. Sufficient prejudice exists where there is a reasonable probability of a

different result. *Kyles*, 514 U.S. at 434. A "reasonable probability" of a different result is shown when the government's failure to disclose favorable impeachment evidence "undermines confidence in the outcome of the trial." *Id.* (*quoting Bagley*, 473 U.S. at 678).

> In cases in which the witness is central to the prosecution's case, the defendant's conviction indicates that in all likelihood the impeachment evidence introduced at trial was insufficient to persuade a jury that the witness lacked credibility. Therefore, the suppressed impeachment evidence, assuming it meets the test for disclosure, takes on an even greater importance.

Benn, 283 F.3d at 1055.

In several recent confrontation clause cases, the United States Supreme Court has emphasized the critical role of cross-examination at trial. "It is not up to us to decide, *ex ante,* what evidence is trustworthy and what is not." *Williams v. Illinois*, _ U.S. _, 132 S. Ct. 2221, 2275, 183 L. Ed. 2d 89 (2012) (Kagan, J., dissenting); *see Melendez-Diaz*, 557 U.S. at 317–318; *see also Bullcoming v. New Mexico,* 564 U.S. _, 131 S.Ct. 2705, 2714–2715, 180 L.Ed.2d 610 (2011). "[T]he Confrontation Clause prescribes its own 'procedure for determining the reliability of testimony in criminal trials.'" *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 67, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). "Dispensing with cross-examination because testimony is

obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* (quoting *Crawford*, 541 U.S. at 62).

The importance of meaningful cross-examination to the jury's weighing of evidence underscores the critical nature of presenting jurors with reasons to question the DNA evidence at the root of the prosecution's case. Here, the prosecution assured the jury that the State Patrol Crime Lab followed all routine protocols, was staffed by proficient scientists, and was audited to ensure the reliability of its evidence. 3RP440, 442-43. In his closing argument, the prosecutor emphasized the "great care" with which the bat was handled and DNA extracted by law enforcement. RP 537. He defended the "quality" of the sample of DNA taken from the bat. RP 539.

Had the jury known that the swabs taken from the bat's handle, which formed the only potentially direct connection between the incident in which Mr. Allen was killed and Mr. Davila, had been handled, processed, and tested by a forensic scientist whose work "cannot be trusted" due to her "long term poor performance," the jury would have thought differently about the value of the DNA evidence. CP 259. Ms. Olson was a critical link in the chain who handled multiple

DNA swabs and the possibility that she tainted that evidence cannot be erased by having someone else retest the swabs.

If "there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment" of the DNA evidence, the outcome would have been different and the *Brady* violation requires a new trial. *Price*, 566 F.3d at 914.

In *Gregory*, the defense objected to the court's refusal to provide impeachment evidence contained in a witness's sealed file from a dependency proceeding. 158 Wn.2d at 798. The file included inconsistent statements from the witness regarding her use of drugs and whether she was court-ordered to attend drug treatment. *Id.* The prosecution argued that the defense had numerous other available means to attack the complainant's credibility. *Id.*

In evaluating the materiality of evidence relevant to the credibility of a witness, the *Gregory* Court noted that the question was not whether there were other means of challenging the witnesses' credibility, but rather, whether all of the impeachment material, taken together, would have affected the jury's assessment of the case. *Id.* at 800. If so, the nondisclosure is prejudicial and requires reversal.

Here, the impeachment material of Ms. Olson's multiple instances of failing to properly test evidence for DNA would have affected the jury's assessment of the case. Mr. Davila could have presented a defense expert explaining the importance of following DNA protocols and the risk of contamination presented by Ms. Olson's conduct. *See* CP 310-11. He could have questioned Ms. Heath about the possibility that Ms. Olson had contaminated the swab from the bat, or that Ms. Olson improperly excluded Mr. Davis from other samples.

As the prosecution argued at Mr. Davis's trial, the bat was old and DNA on the handle could have been there for other reasons. CP 106. No one saw Mr. Davila at the scene even though there were several people in the area, including a prostitute who walked the streets and saw Mr. Davis that night. 2RP 221-26.

The prosecution relied on the DNA from the bat and instituted its prosecution of him only because of the DNA test. *See* 3RP 539. Evidence casting doubt on the reliability of the DNA, showing Ms. Olson's "work cannot be trusted," as the report stated, unfairly limited Mr. Davila's strategic choices during the trial, deprived the jury of a reasonable basis to question the State's case, and undermines confidence in the outcome of the trial. It is reasonably probable that the

State's failure to disclose Ms. Olson's long history of poor performance and Ms. Heath's assessment of Ms. Olson's shoddy work affected the outcome of the trial.

2. The prosecution's inconsistent and unreasonable insistence that the jury should consider two people as independently and personally responsible for the murder at issue violated Mr. Davila's right to due process

a. *The prosecution may not mislead the jury as to the reasons to convict the accused person*

A prosecutor may not solicit false evidence or deliberatively deceive the trier of fact. *Giglio*, 405 U.S. at 153; *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). A prosecutor has a constitutional duty to correct evidence he knows is false, even if he did not intentionally submit it. *Giles v. Maryland,* 386 U.S. 66, 74, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967). Under RPC 3.3(a), a prosecutor has a duty of candor that prohibits making or failing to correct a false statement of material fact. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

It violates the principles of due process for the prosecution to present contradictory theories in trials for different defendants.

Smith v. Groose, 205 F.3d 1045, 1052 (8th Cir. 2000); *State v. Roberts*, 142 Wn.2d 471, 498, 14 P.3d 713 (2000). When the prosecution's cases against two defendants are inconsistent, the inconsistency undermines the verdicts. *Smith*, 205 F.2d at 1052.

Additionally, trial proceedings must not only be fair, they must "appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). A prosecutor's misconduct violates the "fundamental fairness essential to the very concept of justice." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 21, 22.

Prosecutors play a central and influential role in protecting the fundamental fairness of the criminal justice system. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A prosecutor is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

> Because the public expects that the prosecutor acts impartially,
>
> improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much

> weight against the accused when they should properly carry none.

Berger, 295 U.S. at 88.

As the Washington Supreme Court has said:

> [T]he prosecutor represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of his office, for his misconduct may deprive the defendant of a fair trial. . . . We do not condemn vigor, only its misuse. . . . No prejudicial instrument, however, will be permitted. His zealousness should be directed to the introduction of competent evidence.

State v. Hunson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096 (1969); *see also State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Prosecutorial misconduct requires reversal when the improper conduct is substantially likely to affect the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

b. *The prosecution improperly and falsely defended its prosecution against Mr. Davis while seeking a conviction against Mr. Davila for the same act.*

After the prosecution rested its case against Mr. Davila, the court dismissed count one, which alleged first degree murder based on the theory that he killed Mr. Allen in the course of committing a first degree robbery. 3RP 504. The court found no evidence connecting Mr. Davila to a robbery and no evidence that Mr. Davila knew or aided

Jeramie Davis in stealing property from Mr. Allen's store. 3RP 502-03. Absent any evidence connecting Mr. Davila to Mr. Davis, the court ruled that the prosecution could not sustain a theory of accomplice liability in Mr. Davila's trial. 3RP 504.

Mr. Davis had been convicted of first degree murder based on the theory that he killed Mr. Allen in the course of a robbery. *See* CP 52. At Mr. Davis's trial, the State argued that the detectives had "ruled out any other suspect." CP 76. The prosecution claimed Mr. Davis went into Mr. Allen's store and "hit[ ] him over the head with the baseball bat," then "clean[ed] out the store." CP 76. In response to Mr. Davis's argument that "unidentified individual A is your killer," the prosecution countered that the Mr. Davis had worn gloves during the murder that were found in his car, which is why his DNA was not at the scene, and "no stone [was] left unturned" by the police in determining who was responsible. CP 91, 105. Furthermore, the prosecutor told the jury to disregard the DNA on the bat belonging to "unidentified individual A" because the bat was old and his DNA could have been left on the bat at any time. CP 106.

At Mr. Davila's trial, the court prohibited the prosecution from arguing an accomplice liability theory because there was no evidence

supporting it. 3RP 502-04. The prosecution argued instead that the DNA on the bat could only have been left by the person who killed Mr. Allen and that Mr. Davila acted alone, killing Mr. Allen by hitting him with the baseball bat. 3RP 539, 543.

Yet the prosecution refused to acknowledge that Mr. Davis's conviction was premised on an inconsistent theory and insisted Mr. Davis's conviction was properly obtained and remained valid. The prosecutor told the jury that Mr. Davis's "case is done" and he has "already been convicted for what he did that day." 3RP 543. He called Mr. Davis a "horrible man" but said "he's been punished for what he did that night." 3RP 556, 558.

This argument misled the jury based on facts not in evidence and deceived the jury about the prosecutor's actual knowledge. Mr. Davis was convicted of hitting Mr. Allen himself with the bat. CP 76, 106. The trial court dismissed the allegation that Mr. Davis and Mr. Davila were working together due to a complete lack of proof, which meant both men could not be guilty of being the person who killed Mr. Allen. 3RP 504. Either Mr. Davis hit Mr. Allen on the head, as the State argued at Mr. Davis's trial, or Mr. Davila did so, but there was no evidence that both did so together. At the time of Mr. Davila's trial in

July 2012, Mr. Davis had filed a motion to dismiss his conviction, and the prosecution knew that his case was not "done."[5]

The trial court rejected Mr. Davila's post-trial claim of prosecutorial misconduct, finding that the State's theory was "no different" because the State had always viewed unidentified individual A as an accomplice. 4RP 591. However, the court misunderstood the distinctions between the cases. The prosecution did not merely refine its theory of the incident based on evidence identifying individual A, it simultaneously pursued inconsistent theories. It had argued that Mr. Davis was solely responsible for killing Mr. Allen and then it insisted to Mr. Davila's jury that Mr. Davis's murder conviction was properly obtained and Mr. Davis was being punished for what he did. See CP 52, 76, 105-06; 3RP 539, 543. The jury knew Mr. Davis had been convicted of first degree murder, and by arguing Mr. Davis's case is "done" and he has been properly punished, the State was arguing inconsistent theories to the jury. 2RP 286.

[5] The docket for Mr. Davis's case shows that he filed a motion and memoranda for a new trial on June 22, 2012, Spokane Co. No. 07-1-02548-8, while Mr. Davila's trial started July 10, 2012. The existence of judicial records may be subject to judicial notice and is appropriate here to show the factual information known to the prosecution at the time of Mr. Davila's trial. ER 201; RAP 9.11.

> The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for truth. . . . [T]he prosecutor changed his theory of what happened to suit the state. This distortion rendered [the] trial fundamentally unfair.

Thompson v. Calderon, 120 F.3d 1045, 1059 (9th Cir. 1997), *rev'd on other grounds*, 523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) (quoting *Drake v. Kemp,* 762 F.2d 1449, 1479 (11th Cir.1985) (Clark, J., concurring).

By insisting that both men could be legitimately guilty of actually killing Mr. Allen, the prosecutor deceived the jury about the incompatible nature of the two convictions. When the State obtained one conviction based on the claim that DNA on the bat was irrelevant, it fundamentally distorted the fact-finding process to simultaneously assure the jury that Mr. Davis's conviction was properly obtained yet that Mr. Davila's DNA on the bat was irrefutable proof of his responsibility for Mr. Allen's death. The inconsistent theories that would make both men responsible for the same act denied Mr. Davila the fundamental fairness to which he is entitled and requires a new trial at which the jury is not misled about facts not in evidence.

c. *The prosecution's use of deceptively inconsistent theories and its failure to disclose material evidence favorable to the defense denied Mr. Davila a fair trial.*

The cumulative effect of prosecutorial misconduct may deny a person a fair trial, even if one instance of misconduct would not alone undermine confidence in the verdict. *State v. Case,* 49 Wn.2d 66, 73, 298 P.2d 500 (1956). No jury instruction could have cured the deception involved in defending Mr. Davis's conviction without commenting on the evidence and explaining that the two men could not be found to be accomplices, because there was no evidence they knew each other. *See State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). Having informed the jury that Mr. Davis was convicted of first degree murder for killing Mr. Allen, and by continuing the defend that conviction while also asking that Mr. Davila be convicted of the same crime, the prosecution was left pursuing inconsistent theories that undermined the jury's ability to accurately weigh the evidence against Mr. Davila.

More egregiously, the jury was not provided with essential information undermining the weight to accord the DNA evidence by not being told the long-standing errors committed by the analyst who

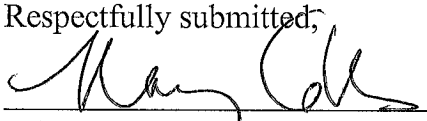
first tested them. These errors, taken together, demonstrate the deprivation of a fair trial by jury and require reversal.

F. CONCLUSION.

For the reasons stated above, Julio Davila respectfully asks this Court to reverse his conviction and remand his case for a new trial.

DATED this 1st day of October 2013.

Respectfully submitted,



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APPENDIX A

INTEROFFICE COMMUNICATION

WASHINGTON STATE PATROL

TO: Captain Michael DePalma, Office of Professional Standards

FROM: Mr. Larry D. Hebert, Forensic Laboratory Services Bureau

SUBJECT: Administrative Insight - Code 23 [redacted]

DATE: February 25, 2011 OPS Case No. 10-0454

RECEIVED
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OPS

SYNOPSIS:

On May 25, 2010, Internal Affairs initiated an administrative investigation into an allegation that Forensic Scientist 3 Code 23 [redacted] DNA Section, Spokane Crime Laboratory, engaged in the following misconduct:

It is alleged that on May 7, 2010, Code 23 failed to meet the requirements of her 90-day Job Performance Improvement Plan that was initiated on February 8, 2010.

I have reviewed the complete investigative file and determined that the allegation has been proven. The proven allegation represents violation of agency policy as shown in these findings:

2010 WSP Regulation	Title	Finding
8.00.030	Employee Conduct (A) Unacceptable Conduct	Proven
8.00.110	Unsatisfactory Performance (A) Unsatisfactory Performance	Proven

The investigation in this case is complete, comprehensive, and fair. All available evidence was considered in making these findings. The Eleven Elements of Just Cause have been met and all due process rights were provided to Code 23 I am contemplating termination.

A complete copy of the investigative file, OPS Case No. 10-0454, is incorporated herein by this reference and is being provided to the Code 23 [redacted] with the Administrative Insight.

NARRATIVE:

Documentation supporting the above allegations can be found within the administrative investigation conducted by Investigator Daniel E. Eikum, Office of Professional Standards, in OPS Case #10-0454. The allegation in this case stems from Code 23 failure to meet the requirements of her 90-day Job Performance Improvement Plan initiated on February 8, 2010. To investigate the allegation seven individuals were interviewed:

FS5 Lorraine Heath, Spokane DNA Supervisor

Attachment 4

FS5 Lisa Turpen, Spokane DNA Supervisor
DNA Technical Leader Dr. Gary Shutler
FS3 Kristi Barr, Spokane DNA
FS3 Stephen Greenwood, Spokane DNA
FS3 Anna Wilson, Spokane DNA
Code 23 Spokane DNA

FS5 Lorraine Heath

Code 23 Job Performance Improvement Plan was written by Heath, Code 23 immediate supervisor. In this plan, Code 23 was expected to:

1. Independently complete 15 non-probative DNA STR cases in the 90 days of the plan.
2. Thoroughly review all of her case files to ensure there were no errors and then submit the case files for technical peer review.
3. Find and fix her errors, both administrative and technical, and correct them prior to peer review to help reduce the burden on the peer reviewers. The peer reviewers were not expected to catch administrative case file errors.
4. Correct any errors discovered by the peer reviewers within two days of receiving case files back from the peer reviewers.
5. Complete her Time and Activity Reports by the payroll system cutoff date without having to be reminded by her the supervisor.
6. Refrain from volunteering or participating in any duties other than those already assigned to her by her supervisor.
7. Complete her assigned non-casework duties within the timeframe given to her by her supervisor.
8. Complete all of her work within the normal workweek with no overtime or compensatory time.
9. Provide her supervisor with weekly reports outlining the work activities she performed in the previous week and her work plan for the following week. In addition, Code 23 was to meet monthly with her supervisor to discuss her progress in toward completing her Job Performance Improvement Plan.
10. Improve the quality of her casework by not rushing through the casework and by scheduling sufficient time in her work plan so that she could thoroughly review all of her calculations and accurately transcribe her data prior to commencing the next step in the analysis process and/or completing the case.
11. Carefully review the relevant procedure manual before beginning work to ensure that she was in compliance with all of the procedural requirements at all times.[1]

Heath stated the following in the final paragraph of Code 23 Job Performance Improvement Plan:

[1] OPS Investigative File10-0454, Addendum A, Job Performance Improvement Plan dated 02/08/2010, see "Expectations" and "Methods Outlined to meet Those Objectives", pages 2-3.

"It is my goal to provide you every opportunity to be successful in your position. You will need to convey if you need any assistance, clarification, or information to assist you in a positive outcome. If you feel that personal issues may be impacting your ability to perform your job, you are encouraged to contact the Washington State Employee Assistance Program (EAP) by way of the Department of Personnel at (360) 753-3260, or you may contact our staff Psychologist, Dr. Dan Clark."[2]

A key component of the plan required Code 23 to receive 15 routine cases to work for the purpose of assessing her competency. The 15 cases were subsequently reduced to 14 cases due to a sample problem with one of the cases. These competency cases were not considered complex or difficult, but rather were chosen because they were routine and straightforward. Code 23 competency case files were reviewed independently by two DNA supervisors and three experienced DNA forensic scientists. These five scientists consistently gave negative feedback regarding the quality of Code 23 case documentation and file preparation. This led Heath to conclude on May 7, 2010, that Code 23 had failed to successfully complete her job improvement plan. Heath wrote:

"You have failed to meet this expectation. Your files were reviewed by 5 different scientists including your supervisor, the other DNA supervisor, and three peers. All gave negative feedback regarding the quality of your documentation and case file preparations. They all commented that the cases took far longer than expected to peer review, especially given the simple nature of the cases involved and that it was often difficult to determine and follow the analyses that were performed. There was an overall general impression of a lack of attention to detail throughout the case files. The mistakes ranged from small administrative errors to larger errors such as: inclusion of the wrong statistic in a report; incorrect mixture interpretations and calculations being performed; incorrect wording of conclusion; poor documentation of your examination of evidence items, their condition and the QA/QC of reagents; and a general lack of consistency in documentation. A number of technical mistakes were also identified such as: leaving the caps on the extract tubes during robotic extraction, resulting in a serious risk of both sample loss and possible instrument damage; amplifying the wrong amount of target DNA, resulting in extensive additional work and expensive reagents being required to obtain usable profiles; selecting inappropriate screening tests, wasting time and reagents; using the incorrect number of reagent blanks, resulting in unnecessary waste of expensive reagents and demonstrating a lack of understanding and an unwillingness to seek guidance regarding this policy; and being unfamiliar with allowable analysis method changes, resulting in extensive time and expensive reagent wastage. Most, but not all, of these errors were a result of you being unfamiliar with changes made to protocols in the last 12-18 months. However, you have been present during the numerous conversations within the section regarding the changes and specifically requested, and were granted, time prior to and during the JPIP to review the

[2] OPS Investigative File10-0454, Addendum A, Job Performance Improvement Plan dated 02/08/2010, see "Support", page 3.

manuals to update your knowledge. In addition, the opportunity to seek guidance on any procedural issues or changes from supervisors and other case-working scientists on any procedural issues or changes from supervisors and other case-working scientists was available throughout your JPIP, and you did not avail yourself of these resources. Finally, a few errors similar to those made during your previous JPIP and Corrective Action Report (CAR) were made, such as an incorrect calculation on the amplification sheet resulting in the incorrect quantity of DNA being amplified. Fortunately, the error did not result in additional work being required, unlike similar errors in the past. At the start of the JPIP, you were specifically instructed to ensure that you reviewed each complete case as if you were a peer reviewer, prior to submitting it to your supervisor. You indicated in person and via email that you were performing this step, yet still an extremely high number of errors were found by each peer reviewer in each case. In addition, you completed the peer review checklist as if you had reviewed all the points listed, but it seems apparent that you failed [to] do so at the appropriate level and rather completed the form for the sake of completing the form."[3]

This synopsis by Heath provides evidence that Code 23 failed to meet the requirements of her Job Performance Improvement Plan and that Code 23 poor performance and critical work deficiencies prevail despite numerous opportunities to improve.

FS3 Kristi Barr - Cases 205-0079 and 207-0529

Barr said the cases she reviewed were not difficult or complex. Barr stated that the cases she reviewed were very simple cases.[4] According to Barr, Code 23 did not ask her any questions or request assistance during the course of Code 23 Job Performance Improvement Plan. Barr stated:

"After looking at all of these, um, a lot of – a lot of the mistakes that I found were small, um, and mostly insignificant, the grammar type things. But, to me these little things can add up and can give you an overall picture of, of just kind of sloppiness. Um, and then also, uh, even after finishing these, um, uh, it felt like there were so many changes and so much stuff that I wasn't sure how confident I was that I actually found everything that I needed to. Uh, I didn't feel incredibly comfortable with these. If I – if I would have been—if I would have been sending these out into the world, um, I probably would have wanted to look over them another time or two, uh, just because it was hard for me to feel like I was finding everything when there was so much to look at."[5]

FS3 Stephen Greenwood – Cases 201-0350 and 208-1245

Greenwood said the cases were not overly complex. According to Greenwood, Code 23 did not

[3] OPS Investigative File10-0454, Addendum A, Job Performance Improvement Plan dated 02/08/2010, "Final Formal Review" conducted on May 17, 2010, pages 1-2.
[4] OPS Investigative File 10-0454, statement of Kristi Barr, page 13, line 18.
[5] OPS Investigative File 10-0454, statement of Kristi Barr, page 34, lines 26-30, and page 35, lines 1-5.

ask him questions or request assistance during the course of her Job Performance Improvement Plan. Greenwood said that Code 23 attention to detail on both cases he peer reviewed was lacking and her conclusions in Case 201-0350 were incorrect.[6]

Greenwood said during his peer review of Case 201-350 Code 23 had the wrong case number, incorrect agency number, wrong victim and suspect names, wrong item numbers, and on the conclusions were wrong. Greenwood stated in regards to Code 23 Case 201-350:

> *"There's no header that says 'conclusions.' And it goes into, uh, several conclusions. And these conclusions are actually, uh, um, all, all wrong. Um, they're the wrong conclusions. I think they were probably copied and pasted from another report. Um, yeah, the first one was com- -- completely wrong. I'm not sure where that was from. Um, and, yeah, there's, there's, there's different, different, uh, uh, on the first page of the report. And that looks like a, a copy-and-paste error. Um, I think – I, I, I noted down the correct conclusions are, are supposed to be at the – at the bottom and Item No. 3 matches Item No. 2, and Item No. 4 matches Item No. 1. But, uh, obviously, she copy and pasted a different conclusion, but it would be wrong. Um, so, uh, that was a – that was a big thing from the report having an incorrect conclusions and incorrect individuals."*[7]

FS5 Lisa Turpen – Cases 205-1534, 207-1555, and 209-0899
Turpen said the cases she reviewed were straight forward and not complex cases. Code 23 did not ask her questions or request assistance during the course of her Job Performance Improvement Plan.

Turpen described Code 23 quality of work and attention to detail as okay. Turpen stated in referring to her peer review of Case 205-1534:

> *"It's okay. I mean, Dan, I'm gonna be really honest with you. You know, I've worked with her for so long that – I mean, she's improved. Um, I mean, her cases were a nightmare, I mean, previously. I, I guess – and I'm kind of going off on a tangent here, so you can stop me. But I just know the expectation that was made of her, which she was had to, to do a really great job. I don't really think it falls into that. Um, I'm disappointed because I think it was made pretty clear to her that she needed to do, like a spot-on job, which I don't think this is. . ."*[8]

The expectation is that Code 23 must perform high quality work. This is a normal expectation of all forensic scientists. Turpen stated:

[6] OPS Investigative File 10-0454, Investigation Report, page 6, paragraph 1.
[7] OPS Investigative File 10-0454, statement of Stephen Greenwood, page 5, line 3, and page 6, lines 1-12.
[8] OPS Investigative File 10-0454, statement of Lisa Turpen, page 13 lines 28-30, and page 14 lines 1-5.

"You know, that she understood that she could really produce, you know, high quality, you know, casework. Um, and I think reporting out an incorrect stat (Note: stat used in this context means a forensic DNA statistic) *is, is pretty egregious, actually. Um, that would have required – if that would have gone out and not caught on peer review, which is an absolute possibility, um, 'cause she knew to do what humans do, right, but that would have been an amended report. You know it, it does affect things. I think that, uh, screening for semen from female clothing is not wrapping your brain around what you need to be doing. You, you know, you can't – females don't produce semen, so why are you screening for it on a suspect's shirt?* (Note: in this case both the suspect and the victim are female) *I just think – you know, I think she kind of lost perspective. And I think it's unfortunate, 'cause, like I said, I think she's a very bright individual. But, um, I, I think when you're, uh – you know, I know that – her history of of, you know, documentation errors and that kind of thing. So that does scare me with, with the incorrect stat, and then something like a no-brainer in terms of your amplification sheet, you know, being, you know, incorrectly filled in and, and that kind of thing. You know, those are kind of really – those are the things she's been documented on before and needed to make and effort. And I, I – you, it's, it's still there."*[9]

FS3 Anna Wilson – Case 207-1172, 208-1696, and 209-0065
Wilson stated that Code 23 did not ask her questions or request assistance during the course of her Job Performance Improvement Plan. When asked about Code 23 work, Wilson said the quality of the work was not what she expected to see. Wilson stated:

"It's not as clean as most of the cases that I, I normally see coming through my desk. There, there was, um, more than normal issues with the, the report. And the biggest thing, I think, would, would be the conclusions, because the conclusions are, are what detectives would see, if they read her Code 23 *report. And those really need to be spot-on, um, when you're writing your report. And even if you have to walk away for a day, come back and reread them before you print them out and send them in for peer review, that – that what needs to be done so that we can get a quality product out."*[10]

Wilson said Code 23 attention to detail in the cases she reviewed was lacking. Wilson stated:

"I would say that she – it, it seems to me that she probably just threw it together."[11]

"So putting the case file together, I think, again, she, she just didn't do those double-checking that you need to do; the, um, attention to detail that needs to happen before you send the case file out to peer review. Because, I mean, I can catch a lot of things, but you sh- -- you shouldn't rely on your peer reviewer to do your case – you know, make sure all

[9] OPS Investigative File 10-0454, statement of Lisa Turpen, page 15, lines 23-30, and page 16, lines 1-9.
[10] OPS Investigative File 10-0454, statement of Anna Wilson, page 11, lines 4-11.
[11] OPS Investigative File 10-0454, statement of Anna Wilson, page 11, lines 13-14.

your documentation is there. I'm there to double- -- as a double-check, but I can't catch everything."[12]

Dr. Gary Shutler

Shutler is responsible for ensuring the crime laboratories maintain their accreditation under ISO Standard 17025 and work in compliance with FBI quality assurance standards with respect to the forensic DNA services they provide on a statewide basis. Shutler monitors DNA corrective actions and system-wide issues encompassing the work of 48 DNA scientists involved in casework and DNA databanking. Shutler also reviewed Code 23 competency cases. Shutler stated:

"These are the very s- --simple, straightforward cases. Somebody at, um, forensic scientist level 2 should be able to do these cases quite easily."[13]

Code 23 a 12-year veteran forensic scientist, is at the Forensic Scientist 3 level. This is a rank reserved for journey level forensic scientists with significant experience in complex casework. As such, Code 23 should have been readily able to analyze the case samples, develop the correct conclusions, organize the case files, and review her work for both technical and administrative errors. The evidence shows that Code 23 is unable to demonstrate the knowledge, skills, and abilities she needs to satisfactorily perform her assigned duties.

Shutler's assessment is that Code 23 case work is not at the level he would expect from a qualified forensic scientist. Code 23 attention to detail is very poor and the quality of her work is inadequate. As for her technical ability, Shutler did not think she knew what she was doing.

Shutler said the quality of Code 23 work affected the courts, prosecuting attorneys, law enforcement, the public, and the DNA functional area. Shutler stated:

"Even if, um, the work she does is, is, um, uh, are, are, are right, and, and I believe that the peer review process would ensure that, it's just that all of the mistakes that she would make in the file, uh, once they're reviewed, would detract from the quality of, of the work, and, um, cause, uh, disrepute. And we could actually lose, um, a, a, a, court case, um, based on, on the sloppiness of, of her work. And the, the impact, uh, it would, would be huge, um, on the crime lab, and on, on the um, WSP, just a lack of – lack of credibility, lack of confidence in, in the quality of the work."[14]

"She can, uh, generate DNA profiles, uh, okay, but it's the, um – there's so many mistakes and issues with the documentation and the case file notes that, um, um, I just feel, um, feel sorry for the, the peer reviewer that has to, uh, uh, slog through that file to make it, um, uh,

[12] OPS Investigative File 10-0454, statement of Anna Wilson, page 21, lines 7-12.
[13] OPS Investigative File 10-0454, statement of Gary Shutler, page18, lines 4-5.
[14] OPS Investigative File 10-0454, statement of Gary Shutler, page 33, lines 28-30, and page 34, lines 1-5.

acceptable in the end. It's just, um – unfair to that, that peer reviewer to have to, uh, work that hard to, to, uh, make that file, uh, acceptable."[15]

According to Shutler, Code 23 relies entirely on the peer reviewer for her to successfully complete her casework. Shutler explained that when peer reviewers review Code 23 DNA cases it places them at risk. A traumatic level of responsibility is paced upon the reviewers because of the numerous mistakes Code 23 makes. Shutler stated:

"They, they have to do, um, uh, a, a, a good level of, of, uh, peer review, which is, uh, uh, expected and done by everybody else. And then there's Code 23 files, which require, um, so much more work, uh, from the peer reviewer that the peer reviewer is, is, um, is placed at risk, uh, having to, uh, go through that file and, and identify all those, those issues. It's a traumatic experience to, uh, review one of Code 23 files and, and have your name associated with that. Um, so I'm sure they're, they're terrified of, of reviewing her files."[16]

Shutler explained that when another scientist gives Code 23 a case file to review they cannot rely on the quality of her review. Shutler stated:

"Well, if she can miss that much in her own file, I can't imagine what she would miss in other people's files. So I don't think she'd be all that helpful."[17]

Peer review is one of the essential functions of a forensic scientist and is one of the guiding principles in any quality system. Scientists must therefore be able to critically evaluate the work of their peers with the same high level of quality they build into their own casework. There is sufficient evidence in the investigative file and in the statements of the personnel interviewed to demonstrate that Code 23 cannot perform her own casework or peer review the work of others in a competent manner. Allowing Code 23 to continue work at a forensic scientist at any level jeopardizes the quality and reputation of the Crime Laboratory Division's work product. Worse yet, Code 23 incompetence puts crime victims and accused suspects at risk of injustice and reduces the agency's ability to deliver public safety.

Code 23

The statements that Code 23 provided during her interview support the findings of proven in this investigation. Code 23 Position Description Form for her position describes her job expectations. Code 23 reviewed these job expectations and signed her form in 2008. In the portion of the form labeled "Essential Functions" there appears the following:

[15] OPS Investigative File 10-0454, statement of Gary Shutler, page 35, lines 16-21.
[16] OPS Investigative File 10-0454, statement of Gary Shutler, page 35, lines 25-30, page 36, lines 1-2.
[17] OPS Investigative File 10-0454, statement of Gary Shutler, page 36, lines 19-20.

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1. Scientifically analyzes biochemical evidence in routine, non-routine, and complex casework in an area(s) in which they have been validated. . . . The analyses must be of high quality, performed using forensically accepted scientific methods and in accordance with the Crime laboratory Division SOP, the Biochemical Procedures Manual and the STR Technical Manual.
2. Demonstrates an understanding of the theory and working knowledge of the analytical interpretation and techniques as they are related to biochemical and DNA analysis. . .
3. Applies laws, policies, and procedures, as specified in the RCW, the WAC and federal regulations as they relate to biochemical/DNA analysis.[18]

When asked about these essential functions during her interview Code 26 replied:

Q. *"Okay.* Code 23 *do you feel you have met the job requirements of the essential functions of your job position?"*
A. *"(Sighs) I think the, uh, answer to that is no, or I would not be here."*

Q. *"And can you explain why you feel that way?"*
A. *"Um, (long pause) I would say that the quality and quantity of the work I have been producing in recent months has not been up to my standards or the standards of the State Patrol."*

Q. *"And why do you think that?"*
A. *"I have made some, frankly, really stupid errors.*[19]*"*

It must be noted that the Code 23 problems are not a development of just the past few months. Code 23 performance issues date back to September 2006 as proven in OPS Case 08-765, continue as proven in OPS Case 09-576, and continue to the present investigation. Code 23 has been unable to improve along the way despite over four years of labor intensive effort.

When asked about her training Code 23 stated:

> *"Uh, since my employment with the State Patrol, I have been extensively trained in the techniques and procedures used in the crime laboratory. Um, specifically, uh, polarized light microscopy; bloodstain pattern analysis; specific coursework on DNA analysis by short tandem repeats, which is just simply the name of the technology that we are currently using. Um, there has been training in new procedures as they come aboard, uh, and just continuing education throughout the process. "*[20]

[18] OPS Investigative File 10-0454, Employee History, Code 23 Position Description Form.
[19] OPS Investigative File 10-0454, statement of Code 23 page 7, lines 8-16.
[20] OPS Investigative File 10-0454, statement of Code 23 page 7, lines 26-30, page 8 lines 1-2.

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In an effort to explain some of her errors Code 23 stated that there had been numerous changes in the DNA manual in the last 18 months:

> *"In the past 18 months since our most recent manual was adopted, there have been 53 changes to that manual. During that time period, I was not performing casework on a daily basis, and I do not feel I was given adequate time in the JPIP process to familiarize myself with these new procedures."*[21]

During this time period Code 23 was on her Job Performance Improvement Plan and did not carry the burden of casework and peer review as did her peers. Code 23 therefore had more time than her peers to assimilate the new information which should have been easy given her 12 years of experience. Code 23 peers successfully absorbed the manual changes, carried full caseloads, and provided quality peer review while Code 23 was free to focus on her improvement plan and assimilate the manual changes. Still Code 23 failed.

The evidence shows that Heath provided Code 23 with sufficient time to work through the manual changes. During Heath's interview she replied:

Q. *"And did you go over this plan?"* (With Code 23
A. *"Yes, we did."*

Q. *"And did you – at the time when you went over the plan, was it a two-way discussion as to how you can help her improve?"*
A. *"Yes. We discussed the expectations and what the purpose was, much like we've done here in this interview. Um, I offered her any opportunity for questions or concerns or comments. Um, she generally had, had none. Um, I ensured that everything was clear with her. And so it was, uh, offered as a two-way dialogue in, in terms of how, how we can proceed to a successful outcome."*

Q. *"So she, she could have provided input as to what she would have liked to have seen in the plan?"*
A. *"Yes. . . ."*[22]

Q. *"Okay. And did* Code 23 *provide input into the plan?"*
A. *"Um, not prior to its implementation, uh, necessarily. Although, we had discussed, um, uh, after following the, the previous plan and the conclusion of the relevant OPS investigation that, that results from that, I had discussed what was going to happen, that there would be another plan, the basic outlines of the plan. So, so we had discussed it quite a bit before the official document, if you like, was issued. So she, she was aware and could have provided input if she felt anything was inappropriate or unfair, that she*

[21] OPS Investigative File 10-0454, statement of Code 23 page 9, lines 8-11.
[22] OPS Investigative File 10-0454, statement of Lorraine Heath, page 20, lines 1-12.

required, um, anything additional. And that is why she had requested the additional time to examine the protocols, um, prior to February 8th, because we'd already discussed what the basic content of the job performance plan was going to be."

Q. *"Okay. And did* Code 23 *make any comments about the plan?"*
A. *"No, she did not, other than she understood what was expected."*[23]

Code 23 was asked during her interview:

Q. *"And the information we have is you were granted time prior to and during the JPIP to review the manuals to update your knowledge. Is that correct?"*
A. *"Um, yes."*[24]

Q. *"Did you have any questions or concerns with any portion of the JPIP when you first received it? I believe you actually signed it on February 10th."*
A. *"(Long pause) No. It seemed perfectly reasonable."*[25]

CONCLUSIONS:

Code 23 has worked for the Crime Laboratory Division for 12 years. Code 23 has received extensive training over the life of her forensic career including conducting STR DNA analysis in criminal casework. She has been assigned this work since February 2001.

Code 23 had been provided with constructive information regarding how to improve her job performance, opportunities for engaging in counseling, and unfettered access to her supervisor and peers during previous Job Performance Improvement Plans including the most recent plan which is the centerpiece of this investigation. At no time during her improvement plans did Code 23 request workplace accommodations. Likewise, Code 23 never asked for clarification or assistance from her supervisor or peers in assimilating new procedures. The plan instructed her to seek clarification or assistance whenever she was unclear as this was one of the cornerstones of the plan designed to help her improve.

Code 23 continues to make numerous major and minor errors on a routine basis and struggles to perform a minimum amount of casework. The cases Code 23 worked on during her job Performance Improvement Plan were simple in nature and the assignment was designed in such a way that she should have been able to complete them within the designated time period. At the midpoint of her improvement plan Code 23 was seriously behind schedule and barely managed to meet the quota.

[23] OPS Investigative File 10-0454, statement of Code 23 page 20, lines 18-30.
[24] OPS Investigative File 10-0454, statement of Code 23 page 44, lines 9-11.
[25] OPS Investigative File 10-0454, statement of Code 23 page 14, lines 2-3 and line 20.

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Code 23 had significant resources available to her including her supervisor, other experienced peers, and technical leaders. Despite numerous opportunities, Code 23 failed to interact with her resource personnel, did not ask questions, and did not seek clarification on any of her issues. During her interview Code 23 was asked:

> Q. *"So why didn't you ask your coworkers?"*
> A. *"Um, uh, there's two reasons: One is because I'm a very stubborn, independent person and, um, don't like asking for help on things that I think I should be able to figure out myself. And the other one is in –Item 1 of my expectation was that I was expected to independently complete 15 nonprobative DNA STR cases. Um, I put too much emphasis on "independently."*[26]

Heath made it clear in Code 23 Job Performance Improvement Plan that Code 23 was expected to ask for assistance or clarification when it was needed. As quoted earlier the plan stated:

> *"It is my goal to provide you every opportunity to be successful in your position. You will need to convey if you need any assistance, clarification, or information to assist you in a positive outcome."*[27]

The review of Code 23 work shows that she disregarded those work instructions and continued along her error-prone path without any attempt to mitigate her deficiencies. Some representative examples of Code 23 errors and her comments about those errors are shown below:

- Code 23 loaded samples on the capillary electrophoresis instrument out of order.
- Code 23 listed the wrong names of suspects and victims, wrong case numbers, and wrong item numbers in her work. When asked to explain, Code 23 stated:
  - *"I think that that, um, was – let me explain a little bit about the process that I go through. I write the report and print it out and review it; um, review the case file; go back a couple of days later and write the re- -- or review the report again and make corrections to it. I think what happened on that instance was that I printed out two reports at the same time and simply got the incorrect page into the incorrect file. There were a couple of instances where, in using the report template, um, not every name was changed."*[28]
- Code 23 forgot to remove the caps from the elution tubes during an automated extraction process.

[26] OPS Investigative File 10-0454, statement of Denise Code 23 page 42, lines 22-26.
[27] OPS Investigative File 10-0454, Addendum A, Job Performance Improvement Plan dated February 8, 2010, see "Support" page 3.
[28] OPS Investigative File 10-0454, statement of Code 23 page 56, lines 25-30 page 57 line 1.

- *Q. "Do you agree that leaving the caps on the extract tubes during a robotic extraction could result in serious risk of both sample loss and possible instrument damage?"*
- *A. "Yes."*[29]

- Code 23 reported the wrong statistics in a crime laboratory report. About that Code 23 stated:
  - *"I read the statistics report and misread one line and thought it was the most conservative when it was not the one I reported, but another line."*[30]
- Code 23 performed incorrect mixture interpretations and calculations. She stated:
  - *"Um, with regard to the incorrect, uh, calculations, I got confused about what calculation I was doing, and I ended up, I think, going down the CPI road when I was just trying to do major/minor (inaudible)."*[31]
- Code 23 incorrectly worded her conclusions. Code 23 commented:
  - *"That specifically is so embarrassing. When I first started working for the Patrol, we could call blood, blood. Um, about three years into my career with the State Patrol, we got an audit finding. We could no longer call it blood, but 'staining consistent with blood." Um, I wrote the report. I said blood was detected. Uh, uh, I have no idea where that came from."*[32]
- Code 23 documentation of her examination of evidence items was poorly done. She said:
  - *"Um, the only specific that comes to mind was a failure to note previous damage in a couple of instances. Um, for example, I'm looking at a piece of cloth this big. I failed to note that it had previously been sampled."*
  - *Q. "And so why wouldn't you have noticed that?"*
    A. "Um, I don't know. I should have noted that."
- Code 23 disregarded the condition and the quality assurance/quality control of her reagents.
  - *Q. "Would there be anything related to expiry dates or lots?"*

[29] OPS Investigative File 10-0454, statement of Code 23 page 39, lines 20-22.
[30] OPS Investigative File 10-0454, statement of Code 23 page 34, lines 11-12.
[31] OPS Investigative File 10-0454, statement of Code 23 page 35, lines 3-5.
[32] OPS Investigative File 10-0454, statement of Code 23 page 35, lines 14-18.

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A. *"(Sighs) I don't recall. Um, I know that because I was doing nonprobative casework at one point, I chose to use a different, uh, (sighs) control DNA than the kit I was using, because there was something prepared already. Uh, but the lot number for the (inaudible) kit that it came with was gone, so it was just essentially extra, leftover. So instead of staying within the same lot number of kit components, I used one from a different* [kit]."[33]

- Code 23 exhibits a general lack of consistency in her case documentation to which she stated:
  - *"Um, my documentation, uh, I think, was anal to the point of redundant in the beginning – or redundant to the point of being anal in the beginning. And trying to back off on that a little bit, I may have gone a little too far the other direction."*[34]

During her interview Code 23 commented on the quality of her work:

Q. *"Code 23 the information we have is the quality of your documentation and case file preparation is described as poor. How do you respond?"*
A. *"In seeing what the, uh, peer reviewers had to say, I would have to agree. Yes."*[35]

Q. *"Code 23 the JPIP states they all commented that the cases took far longer than expected to peer review, especially given the simple nature of the cases involved, ant that it was often difficult to determine and follow the analyses that were performed. How would you describe the complexity of these cases?"*
A. *"Um, they were not complex cases."* [36]

Q. *"Okay. The JPIP states "there was an overall general impression of a lack of attention to detail throughout the case file. The mistakes ranged from small administrative errors to large errors such as inclusion of the wrong statistic in a report; incorrect mixture interpretations and calculations being performed; incorrect wording of conclusions; poor documentation of you examination of evidence items, their condition, and the QA/QC of reagents; and a general lack of consistency in documentation."*

Q. *"Code 23 how would you describe your attention to detail with the cases you handled?"*
A. *"Not good."*[37]

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[33] OPS Investigative File 10-0454, statement of Code 23 page 37, lines 6-13.
[34] OPS Investigative File 10-0454, statement of Code 23 page 37, lines 24-26.
[35] OPS Investigative File 10-0454, statement of Code 23 page 31, lines 20-22
[36] OPS Investigative File 10-0454, statement of Code 23 page 31, lines 23-27
[37] OPS Investigative File 10-0454, statement of Code 23 page 32, lines 13-22

Q. *"Code 23 can you explain why there were so many administrative errors in your case files?"*
A. *"No, I really can't."* [38]

Q. *"Did you thoroughly review each case file yourself before having it peered?"*
A. *"I felt I did."*

Q. *"What does that mean?"*
A. *"That means I went through it page by page looking for omissions: cross-outs; reading over the information there, seeing if it, uh, made sense to me; you know, looking to make sure every case – uh, page had a case number, page number, all of that. Yeah."*

Q. *"Now looking back, do you think you thoroughly reviewed your cases?"*
A. *"No."* [39]

During her interview Code 23 was asked a critical question that speaks directly to the issues that are the focus of this investigation:

Q. *"Code 23 how can the State Patrol Crime Lab law enforcement community trust your analysis and testimony when they see the lack of attention to detail reflected in your JPIP?"*
A. *"(Very long pause) Um, (long pause) I have to, um, state that I find this question incredibility [sic] difficult to answer because you're asking me to speculate how someone other than myself thinks or feels."*

Q. *"Okay."*
A. *"But, um on the, I think, point that the question is trying to make, um, I think that the community would have to have reservations about the quality of my work."* [40]

To Code 23 credit she does not deny the allegations and indicates some understanding of the agency's concerns.

Throughout the progressive discipline process, Code 23 has been encouraged to obtain union representation but has not elected to do so prior to this investigation.

Code 23 has, since 2007, availed herself of the state's Employee Assistance Program. Code 23 stated in her interview that she has been counseled since 2007 and commented:

[38] OPS Investigative File 10-0454, statement of Code 23 page 32, lines 23-25
[39] OPS Investigative File 10-0454, statement of Code 23 page 34, lines 21-29
[40] OPS Investigative File 10-0454, statement of Code 23 page 58, lines 1-9.

"Um, I really thought that I would be successful this time, because I'd overcome the hump of my illness, but I can see now that I'm not quite there yet."[41]

Code 23 admitted refusing to discuss any health issues with her supervisor and only brought it up in the last investigation. Since then Code 23 has not requested FMLA leave for any reason nor has she used extensive sick leave. Likewise she has not requested any accommodation.

Clearly, the person standing in the way of improvement is Code 23 herself. The Crime Laboratory Division and its staff have made a significant and labor intensive effort to assist Code 23 overcome her issues and become successful. While she has a right to privacy regarding any personal health issues she may have, she also has an obligation to come to work and perform her duties in an acceptable manner and a professional responsibility to communicate her work related needs to her supervisor

The depth of Code 23 problems evidenced in this investigation combined with the long term persistence of these problems demonstrate that the job of a forensic scientist is a poor fit for Code 23 As Heath noted, Code 23 is a well-liked and bright individual, but is not suited for a stressful, highly detailed profession that is critical to public safety. The bottom line is that the work of the Crime Laboratory Division is far too vital to the proper administration of justice for it to be in the hands of someone who makes numerous mistakes on a routine basis.

The evidence obtained in this investigation substantiates that Code 23 violated 2010 WSP Regulation 8.00.030 Employee Conduct when she personally failed to acquire the knowledge, skills, and abilities required by her job with said failure impeding the ability of the department to effectively fulfill its responsibilities.

The evidence obtained in this investigation further substantiates that Code 23 violated 2010 WSP Regulation 8.00.110 Unsatisfactory Performance when she failed to maintain sufficient competency to properly perform her duties and assume the responsibilities of her position, failed to perform her duties in a manner that maintains the highest standards of efficiency in carrying out the functions and objectives of the department, and failed to conform to the work standards established for her position.

Contemplated Sanction
The allegations of misconduct on the part of Code 23 are therefore proven and I am contemplating termination.

ELEMENTS OF JUST CAUSE

The contemplated discipline is termination. In making this determination I have considered the Eleven Elements of Just Cause as they pertain to this case.

[41] OPS Investigative File 10-0454, statement of Code 23 page 65, lines 4-5.

1. **Have the allegations against the employee been factually proven?**

   Yes, the allegations are proven based upon a large volume of consistent evidence obtained in the interviews of Heath, Turpen, Shutler, Barr, Greenwood, Wilson, and Code 23

   Evidence obtained from the interview of Code 23 corroborate the statements of her supervisor, her peers, and the DNA Technical Leader. Code 23 did not deny the allegations. Code 23 admitted to making mistakes, failing to review her work, having poor attention to detail, and failing to ask for assitance. Code 23 stated that the community should have reservations about her work.

2. **Is the discipline considered proportionate to the offense?**

   Yes, the sanction of termination is progressive and is proportionate to the offense considering the long term nature of Code 23 difficulties, Code 23 personal failure to improve in spite of the enormous effort made by division management to salvage her career, and Code 23 knowing disregard for proper analytical and quality procedures. The work of the Crime Laboratory Division is too important and too impactful to our citizens' public safety to be entrusted to Code 23

3. **Was the investigation conducted fairly?**

   Yes, the investigation was conducted fairly with due regard given to all sides. All of the appropriate witnesses were interviewed including Code 23 The investigative file contained a significant amount of documentation all of which was considered.

4. **Is the discipline contemplated non-discriminatory or similar to what another employee in a comparable situation would receive?**

   Yes, the discipline is free of any discrimination or bias against Code 23 The sanction of termination is consistent with what any other employee would receive given this set of circumstances. The discipline in this case is progressive in nature and comes only after a long term effort to help Code 23 get to where she needs to be.

5. **Is it the employee who is at fault?**

   Yes, Code 23 is personally responsible for her failures. Code 23 has been a forensic scientist for 12 years and a journey level forensic scientist for the last seven years. Consequently she should already be performing at the level of her peers who have received the same training and professional opportunities in the same environment.

The evidence clearly shows that when Code 23 failures became apparent, management embarked on a long journey of rehabilitation that involved job performance improvement plans, reduced job responsibilities, additional time, retraining, and unlimited access to

supervisory and peer support. Despite this costly effort Code 23 failed to gain the essential knowledge, skills, and abilities that would have allowed her to do what all of her peers are doing successfully in the very same environment.

6. **Have mitigating circumstances been considered?**

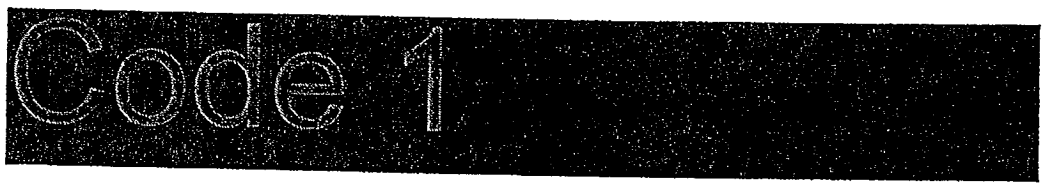
Yes. Code 23 WFSE Representative Dal Roberts has stated that Code 23 should have had representation during her last two investigations. The facts are that Code 23 was given every opportunity to have representation but she steadfastly refused representation saying that she did not want it.

Code 23 has been reluctant to talk about her personal issues which is her right and completely up to her discretion. Following her last investigation Code 23 did speak to Heath about some of her issues but on a very limited basis. Code 23 never requested any accommodations under the Americans with Disabilities Act. Roberts discussed the ADA issue and stated:

> *"And the reasonable accommodation process is, again, something for the employer. And it's up to the employee to bring it forward and make the request."*[42]

In her job performance improvement plans Code 23 was always offered access to the Employee Assistance Program ad well as access to State Patrol Psychologist Dr. Daniel Clark.

Code 1



Roberts stated that he was disappointed that Family Medical Leave Act opportunities have not been made available to Code 23.[45] It is important to note that FMLA is unpaid leave of up to 12 weeks per year provided by the employer to employees for:

- the birth and care of a newborn child of an employee;
- placement with the employee of a child for adoption or foster care;
- caring for an immediate family member with a serious health condition; or
- medical leave when the employee is unable to work because of a serious health condition or complication due to pregnancy.

[42] OPS Investigative File 10-0454, statement of Code 23 page 64, lines 3-5.
[43] OPS Investigative File 10-0454, statement of Code 23 page 63, lines 2-5.
[44] OPS Investigative File 10-0454, statement of Code 23 page 654-5., lines
[45] OPS Investigative File 10-0454, statement of Code 23 page 63, lines 22-23.

Code 23 did not make any request for an accommodation nor did she ever request FMLA leave due to any of the reasons for which FMLA is offered. It must be stressed that with or without FMLA, an employee still bears the responsibility for performing the essential functions of their job. To say that years of poor performance is now due to an as yet undisclosed illness or to a lack of taking any type of leave is clearly not reasonable.

Code 23 stated that there were many changes in the DNA protocols which made it difficult to be successful. While there were changes in the DNA protocols, Code 23 was provided with the appropriate training in order to assimilate the changes. Code 23 peers were successful within the same parameters yet Code 23 failed despite the fact that she was given more time than anyone else.

7. Has the employee's complete work record been considered?

Code 23 has had many problems over the years. Examples of these problems documented in the Crime Laboratory Division's DNA exception files are shown in the table below:

Date	Case No.	Problem Area
06/2002	101-00678	Code 23 recorded insufficient information in the case file during footwear analysis. Complaint received from detective and
Date	Case No.	Problem Area
		prosecutor. Evidence retested by private laboratory.
07/2002	102-01782	Code 23 violated analytical protocol by processing reference samples prior to evidence samples increasing risk of contamination.
12/2002	102-01644	Code 23 issued a verbal report prior to peer review stating that suspect was included in a mixture of DNA. Peer review showed that Code 23 was wrong and that the suspect was not included. Complaint received from detective.
11/2004	Proficiency	Code 23 made a typographical error when reporting her proficiency results in an allele table.

Code 23 poor performance and propensity to make serious mistakes continues and ultimately rose to the level of having to conduct administrative investigations.

OPS Case 08-0765

This was the original investigation which was initiated on May 22, 2008. It arose out of two years of poor evaluations dating back to 2006 and an error in Code 23 proficiency test. As this was her third proficiency error over the last few years and it triggered a full case review audit for 2007.

The audit reviewed 27 cases of which only six did not have errors. The errors ranged from administrative errors to technical errors and violation of standard protocols. This resulted in "Brady letters" being sent to eleven prosecuting attorneys notifying them of Code 23 problems and her faulty results.[46] DNA evidence if often the pivotal physical evidence in a case. Since Code 23 cases involved DNA analysis her problems in the laboratory could result in the exclusion of her report and/or testimony or even the dismissal of charges against a guilty subject. The allegations in this case were proven and are as follows:

WSP Regulation	Title	Finding
8.00.010	Rules of Conduct (A) Employees Required to Obey Rules of Conduct	Proven
8.00.030	Employee Conduct (A) Unacceptable Conduct	Proven
8.00.110	Unsatisfactory Performance (A) Unsatisfactory Performance	Proven

Code 23 received a 5-day suspension in this case.

OPS Case 09-0576

On February 9, 2009, Code 23 was placed on a 60 day JPIP (Job Performance Improvement Plan) because of continued poor performance. Due to continued areas of concern in the first 60 days, she was given an extension of 30-days in the hopes that these performance issues could still be resolved. Her output still remained below minimum acceptable levels. Based on the casework she was assigned, she made the following errors:

1. Two mathematical errors on the "quant" sheets of two competency cases. The error was a cut-and-paste issue based on the error in the first competency. This caused her to amplify more DNA than she intended.

2. Code 23 targeted an inappropriately low amount of DNA for amplification due to not concentrating a sample.

3. Code 23 diluted the wrong sample. She had two samples #5 from two different cases and she mixed up the samples.

[46] The Crime Laboratory Division must report problems/issues that could be exculpatory to an accused person to the affected prosecuting attorney who in turn must provide that information to defense counsel. The "Brady letter" is the formal written notification from the division to the prosecuting attorney. See U.S. Supreme Court ruling in Brady v. Maryland, 373 U.S. 83 (1963).

4. The incorrect preparation of quantification standards during a group quant (quantization). This resulted in less accurate quant results for multiple analysts impacting not just Code 23 work but the Spokane DNA Unit's work.

5. Code 23 used an expired DNA reagent kit during a group quant preparation. This affected all the scientists who used had samples in the quantitation. This is a protocol violation.

6. The error was a sample switch. The DNA casework questioned sample improperly ended up in the reagent blank.

7. Code 23 contaminated one sample with a non-adjacent sample during the setup of the amplification in her EZ1 competency.

8. The allegations in this case were proven and are as follows:

WSP Regulation	Title	Finding
8.00.030	Employee Conduct (A) Unacceptable Conduct	Proven
8.00.110	Unsatisfactory Performance (A) Unsatisfactory Performance	Proven

Code 23 received a 15-day suspension in this case.

OPS Case 10-0454

This is the current case in which Code 23 continues to demonstrate her poor performance and lack of job competency that has become her trademark.

1. Leaving the caps on the extract tubes during robotic extraction resulting in a risk of both sample loss and instrument damage.

2. Amplifying the wrong amount of target DNA resulting in additional work and expensive reagents to get a usable profile.

3. Selecting inappropriate screening tests, wasting time and reagents.

4. Using the incorrect number of reagent blanks, resulting in waste of reagents and demonstrating a lack of understanding of policies.

5. Incorrect calculation on the amplification sheet resulting in the wrong quantity of DNA being amplified.

6. Wrong statistics in the report.

7. Submitting a competency with the wrong victim, suspect names, and case number. Also, the evidence items were wrong.

8. Incorrect wording on conclusion.

The impact of Code 23 past performance can be profound. During his interview Shutler discussed an incident involving Code 23 at the Whatcom County Courthouse June 19, 2009. Shutler described a comment Code 23 had made in 2004 which was used by a defense attorney to attack the division's motion to exclude a defense expert from the laboratory. The motion was lost due to Code 23 poor performance. Shutler stated:

"And it was interesting to note that the defense counsel actually used a quote from Code 23 *from the PI article of 2004,. . . and featuring a quote from* Code 23 *where she had, uh, mixed up two samples in, in a case and, and she said she, uh, 'must have had a brain fart." And so, anyhow, the defense lawyer quoted her, and the, the quality variance – or the corrective action investigation that we did on her at, at, at that time and – which ended up getting published in, in the PI.*

And, uh, so that, that is a good example of the kind of damage that the type of work that she has had in the past and the type of mistakes that were evident in that 90-day succession of JPIPs, and, and, you know, the damage that, that that can cause to the reputation of the WSP and the Crime Lab Division and, and, and the DNA labs. And, subsequently – well, anyhow, we, we ended up losing that, that motion and, the defense expert is going to be in there – in the Marysville lab (Code 23 from the Spokane Lab)*– on a non-consumption case watching every move our analyst makes on, on doing that and affecting our efficiency and effectiveness on processing that, that particular case and, and others that would have been going on around that time, which – you know, since the lab pretty much has to shut down when a defense expert comes through in, in Marysville, this being such a small lab. So, so that's on other comment I'd like to throw in there of what the impact of, of work of that caliber can;, can have on us."*[47]

8. Is the discipline progressive?

Yes. Code 23 has received extensive counseling from her supervisor. She received a 5-day suspension in OPS Case 08-0765 and a 15-day suspension in OPS Case 09-0576.

[47] OPS Investigative File 09-0576, statement of Gary Shutler, page 15 lines 10-30.

9. Is the discipline free from anti-union sentiment?

Yes. There is no anti-union sentiment involved in the contemplated sanction of termination.

10. Can the employee be rehabilitated?

No. Code 23 has received intense intervention by two supervisors over four years with no sign of improvement. She has a documented history of serious technical and administrative errors in her casework, in her proficiency tests, and in her competency casework despite intensive attention paid to her by her supervisor and peers. She has failed all of the job performance improvement plans she has been given. She has failed to assimilate new information despite being given a reduced workload and more time than any of her peers.

Code 23 has received discipline consisting of a 5-day suspension and a 15-day suspension, neither of which provided her with sufficient motivation to improve her performance and job competency.

Agency Risk
Code 23 is a loose cannon and her work cannot be trusted. The work product of the Crime Laboratory Division is too vital to the administration of justice to allow Code 23 to place her hands on evidence. The risk of a wrongful conviction or the erroneous exclusion of a guilty subject because of Code 23 incompetence is far too great for the agency to undertake. The reputation and public confidence in the agency's ability to fulfil its mission would be seriously compromised if Code 23 were to continue her association with the agency.

Public Risk
Code 23 incompetence poses an unacceptable risk to public safety. If a guilty subject is improperly released through one of Code 23 casework errors or omissions, that subject could continue to commit crimes placing our citizens at risk. Likewise, if an innocent subject is not excluded or is wrongfully convicted through one of Code 23 casework errors or omissions, that person's life and liberty are destroyed.

Personal Risk
Code 23 is a decent person and has never denied the fact that her work does not meet agency standards. Nevertheless, Code 23 has irreparably damaged her reputation through her long term poor performance which has now become known to both prosecuting and defense attorneys. In so doing, Code 23 has sealed her own fate and even if she were able to return to criminal casework, attorneys and the courts would not be able to use her work product. Attempting to work around that fact would only leave Code 23 open to harsh public and legal criticism and potential lawsuits.

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11. Was the accused employee afforded procedural due process?

Yes. Code 2S has received all of her contractural and due process rights up to this point in the proceedings. Code 2S will continue to receive all of her future contractural and due process rights as the process continues.

LDH
LDH:ldh

Acting FLSB Director: _____ Date: 3/8/2011

OPS Commander Concurrence: Michael DePalma Date: 03/18/11

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 31238-1-III
	)	
JULIO DAVILA,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] JULIO DAVILA 318404 WSP 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF OCTOBER, 2013.

X_____

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