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## **I. STATUS OF PETITIONER/PROCEDURAL HISTORY**

Petitioner Sione P. Lui is currently incarcerated at the Washington State Reformatory in Monroe, Washington.

The King County Prosecutor charged Lui with Murder in the Second Degree. CP 16. He was convicted as charged. CP 19. The Honorable Michael Trickey sentenced Lui within the standard range to 200 months. CP 36-44.

The Court of Appeals affirmed the conviction in *State v. Lui*, 153 Wn. App. 304, 221 P.3d 948 (2009). His petition for review was granted on December 31, 2009. Oral argument before the Supreme Court took place on September 14, 2010.

Lui's motion for post-conviction DNA testing was granted by the trial court on December 22, 2009. App. 1. The testing is currently pending. Lui will amend this PRP if the testing produces useful results.

Lui was represented in the superior court by Anthony Savage. He is represented in the direct appeal by undersigned counsel.

Lui is not seeking to proceed at public expense.

## **II. STATEMENT OF THE CASE**

### **A. SOURCES OF FACTS**

The facts relating to this petition are based on the clerk's papers and transcripts filed in the direct appeal, and the additional materials filed as an appendix to this PRP.

B. TRIAL TESTIMONY

On February 9, 2001, Elaina Boussiacos was found dead in the trunk of her car, which was parked in the lot of the Woodinville Athletic Club (WAC). Her fiancé at the time was Sione Lui. The evidence against Lui was entirely circumstantial. There was no eyewitness to the crime, no confession, and no history of domestic violence between Lui and Boussiacos. The State concedes that the crime was “unsolved” until 2007. Brief of Respondent at 13; App. 10 (Declaration of David Zuckerman) at Ex. E. The only additional evidence acquired at that time, however, was a new interview of Lui, in which he continued to deny the crime, and some new DNA testing, which is discussed below.

Lui and Boussiacos met in 1999. V RP 425. By the end of 2000 they were living together at an apartment in Woodinville. V RP 414. Their relationship was somewhat volatile and both were jealous. V RP 403-04. But at times they were very happy with each other and spoke of getting married. VI RP 695-96 (testimony of Boussiacos’s mother). The status of their engagement frequently changed. Boussiacos would alternately wear or remove her engagement ring, depending on how she was feeling about Lui at the moment. IV RP 371.

In late January, 2001, Boussiacos learned that Lui had been talking with a woman named Sina Packer. Packer and Lui had a sexual relationship in the past but were now just friends. V RP 504-05, 508-11; VI RP 641; VI RP 1424. Nevertheless, Boussiacos was mad at Lui, in particular because he lied about how often he was in touch with Packer. V

RP 500-01. Boussiacos told Packer that the engagement was off. V RP 502.

On January 28, 2001, Boussiacos bought a ticket to California. VI RP 623. She planned to visit her mother, Maria Phillips. VI RP 697-98. Phillips testified that Boussiacos spoke of ending the engagement, but Phillips advised her not to do anything rash. VI RP 698-99. On Friday, February 2 at 9:30 p.m., Boussiacos dropped off her son from a previous marriage with his father, Anthony Negron. VI RP 651, 660. Boussiacos's flight was scheduled to leave at 8:30 a.m. on Saturday, February 3, 2001, but she was not on the flight. VI RP 623.

On Monday, February 5, Phillips informed Lui that her daughter never arrived. VI RP 703. Lui and his friends then made various efforts to search for Boussiacos, including posting missing person flyers around Woodinville. VI RP 725, 733; XVI RP 1742. Sam Taumoefolau testified, in particular, that he and Lui were in the mall next to the WAC copying and posting flyers on Tuesday, February 6 and Wednesday, February 7. XVI RP 1739-42. They did not see Boussiacos's car in the club's lot. XVI RP 1775-76. Taumoefolau recalled asking someone at the WAC to put up a flyer. XVI RP 1772. Katherine Wozow, the owner of the WAC, believed that Boussiacos's car had been sitting in her lot since the morning of February 3. VI RP 742-45. She was not aware of anyone requesting to put up missing person flyers at her club. VI RP 747.

On Friday, February 9, WAC staff contacted the police about the car, and the police confirmed that it belonged to the missing person. VI

RP 745. Detectives arrived at the club that evening. VII RP 837; VIII RP 948-49. They found Boussiacos's body in the trunk of her car. VII RP 951. She was wearing sweatpants and a long-sleeved t-shirt. VII RP 865-66. She had some injuries including bruising in the area of her neck. VII RP 865. Her bra was stuffed up inside of her shirt. VII RP 866-67. It appeared that she had been dressed by someone else. IV RP 344; XVI RP 1726-28; XVI RP 1832. There was a suitcase, gym bag and "travel bag" in the car. VII RP 886, 895. She wore little makeup.

Several witnesses testified that Boussiacos was in the habit of dressing nicely and putting on makeup whenever she went out. When Sina Packer met with Boussiacos at a restaurant on January 31, 2001 (V RP 494-96), however, her hair was pulled back in a pony tail and she had hardly any makeup on. V RP 503.

Nine identifiable fingerprints were found on the car. None of them belonged to Lui. XII RP 1578, 1581.

The detectives found a small blood stain by the stick shift. VII RP 883. It was collected into evidence. VIII RP 1031. The Washington State Patrol Crime Laboratory (WSPCL) obtained a DNA profile from the blood. IX RP 1194-95. It did not match Lui or Boussiacos. IX RP 1224-25.

The steering wheel contained Boussiacos's DNA with a trace of unidentified male DNA. IX RP 1218.

A very small number of Lui's sperm cells were found on Boussiacos's underpants. IX RP 1220-21, 1271. The cells could have

been there for a long time. IX RP 1269-71. Similarly, a very small amount of Lui's sperm was found in the vaginal swabs taken from Boussiacos. IX RP 1235-36. Again, the WSPCL scientist could not say how long they had been present. IX RP 1254.

The crime scene team from WSPCL was not called out to examine Boussiaco's car for trace evidence. IX RP 1260. Nobody tested her clothing to see whether the perpetrator left skin cells on it when putting her in the trunk. IX RP 1274.

The victim's shoelaces contained DNA belonging to either Lui or his son<sup>1</sup>, DNA belonging to either James Negron or his son, and DNA belonging to an unidentified male. XI RP 1514-20, 1553-54. The DNA testimony also raised the possibility of a weak, unknown male profile in the vaginal wash. XI RP 1569-70. The record does not reflect any attempt to determine whether the unidentified profiles found on the stick shift, the shoelaces, the steering wheel, and the vaginal wash matched each other.

Lui's home was in the total control of the Sheriff's Office for several weeks, beginning on February 9, the day Boussiacos's body was found. XVI RP 1714-15. During that time the police were free to examine and seize any items they wished. XVI RP 1715-16. Lui had no advance notice that he would not be allowed back in the house after February 9. XVI RP 1716. The police found no signs of violence. VIII RP 943-48, 957-58, 1009-11.

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<sup>1</sup> The "Y-STR" testing used on these samples cannot distinguish between members of the same paternal lineage.

On Wednesday, February 14, eleven days after Boussiacos went missing and five days after she was found dead, Detective Denny Gulla arranged for dog tracker Richard Schurman to meet him at the WAC parking lot. VIII RP 959-60. Detective Gulla brought with him an article of male clothing he had found in the Lui household. VIII RP 961. The dog sniffed the clothing and then pursued a track that led through the mall adjacent to the WAC, and ultimately to Lui's home. VIII RP 1072-77. The State's theory was that Lui killed Boussiacos, put her body in the trunk of her car, drove it to the WAC parking lot, and then walked back to his apartment. XVI RP 1840-41. The defense suggested that the dog was following the more recent path Lui took when he walked through the area with Taumoefolau. VIII RP 1104-06. Schurman could not say when the scent trail was laid down. *Id.* Schurman acknowledged that scent deteriorates over time. VIII RP 1087-89. Bloodhounds are certified based on their ability to follow 24-hour-old trails. VIII RP 1089-90. Regarding an 11-day-old trail, Schurman stated: "I would start to be real cautious about watching my dog's behavior, because they tend to go off trail." VIII RP 1106. The oldest trail he had ever followed was 12 days old. VIII RP 1097.

Medical examiner Dr. Richard Harruff testified that Boussiacos had various injuries and that death was caused by strangulation. X RP 1357-98.

The jury convicted Lui of murder in the second degree, as charged. CP 19. He was sentenced within the standard range to 200 months. CP 36-44.

### C. APPELLATE PROCEEDINGS

Lui has argued on direct appeal that his right to confrontation was violated when the State presented surrogate expert witnesses in place of the doctor who actually performed the autopsy and the scientists who actually analyzed the DNA samples. As noted above, the Court of Appeals affirmed and the Washington Supreme Court granted review.

### III. GROUNDS FOR RELIEF

1. Lui was denied his Sixth Amendment right to effective assistance of counsel.
2. The State's misconduct violated Lui's Fourteenth Amendment right to due process.
3. Juror misconduct violated several of Lui's constitutional rights.

### IV. ARGUMENT

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

##### 1. Legal Standards

A criminal defendant has a Sixth Amendment right to competent counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This right is violated when the defendant is prejudiced by counsel's deficient performance, that is, when there is a reasonable likelihood that counsel's error could have affected the result.

*Id.* The prejudicial effect of counsel's errors must be considered cumulatively rather than individually. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1515, 146 L.Ed.2d 389 (2000); *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995).

2. General Problems with Defense Counsel

Lui was represented at trial by Anthony Savage, who was approximately 78 years old at the time of trial. Mr. Savage expressed little interest in interviewing State witnesses, finding defense witnesses, or locating helpful experts. He left it to Lui's family to work with investigator Denise Scaffidi, with little attorney guidance. Celese Lui, the defendant's wife, spent many hours reviewing the discovery and leaving post-it notes with comments or questions for Savage, but he would never directly answer her questions or discuss her ideas. He spent very little time meeting with his client. *See* Declarations of: Celese Lui (App. 2); Sione Lui (App. 3); Ray Taylor (App. 4); Grant Mattson (App. 5); Denise Scaffidi (App. 13). For example, Ray Taylor's declaration includes the following:

I attended several meetings with Mr. Savage and Celese Lui at Savage's office. I had several specific questions for Mr. Savage, including how he planned to deal with the DNA and the dog tracking evidence. He never gave any clear answers. Sometimes in mid sentence he would seem to forget what we were talking about. He would give vague responses, such as, "they don't have anything on him. All they have is a big story." Sometimes, he didn't seem to recall things that we had just discussed.

App. 4 at para. 5.

During trial, Mr. Savage was not always alert. He dozed off several times. App. 3 (Declaration of Sione Lui) at para. 5; App. 6 (Declaration of William Harris) at para. 2; App. 5 (Declaration of Grant Mattson) at para. 4. Towards the end of the trial, Mr. Savage had a falling accident that caused him to deteriorate significantly, both mentally and physically. XI RP 1466-71; App. 2 (Declaration of Celese Lui) at para. 11; App. 3 (Declaration of Sione Lui) at para. 5; App. 7 (Declaration of Joan Byers); App. 5 (Declaration of Grant Mattson) at paras. 2-4; App. 6 (Declaration of William Harris) at para. 2.

These problems with Mr. Savage led to several errors during the trial, as discussed below.

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

As discussed above in section II(B), the State's theory of the case was that Lui killed Boussiacos at their home in the early morning hours of Saturday, February 3, 2001, placed her body in the trunk of her car, drove the car to the lot of the Woodinville Athletic Club (WAC), and walked home. XVI RP 1840-41, 1849. It supported this theory with dog tracking evidence and with testimony from the manager of the WAC that the car appeared in the lot by Saturday morning. The defense failed to adequately challenge that theory. It could have presented evidence from several witnesses that 1) Boussiacos's car did *not* appear in the lot until several days after she disappeared; 2) Lui had been putting up missing person flyers in the general area of the dog's route, which gave an innocent explanation for the presence of his scent; and 3) the tracking dog's

behavior did not, in any event, prove that Lui followed precisely the same route as the dog, and certainly did not prove that he did so around the time Boussiacos disappeared.

In opening statement, the prosecutor stressed the importance of the dog tracking. “[O]ne other little thing that he couldn’t have anticipated that is that the defendant unwillingly left behind a clue to who had parked that car, and then ran away.” IV RP 347. The prosecutor then spent three pages of transcript discussing the work of Sarah, the bloodhound. IV RP 347-51. The State’s theory was also based in part on the testimony of WAC employee Katherine Wozow, who claimed that that the victim’s car sat in the parking lot from the morning of Saturday, February 3, 2001, until February 9, 2001 (the day the police found Boussiacos’s body in the trunk of her car). IV RP 342; VI RP 735-48. The State repeated its theory in closing argument. XIV RP 1849.

The defense maintained that Boussiacos left the home on Saturday morning and was killed by some unknown perpetrator. Defense counsel recognized before trial that the time the victim’s car appeared in the WAC parking lot was critical to his case. I RP 54-55. The trial court agreed. *Id.* If the car did not appear in the lot until later, it was more likely that Boussiacos was killed by someone else, who later drove her car to the lot.

The defense supported its theory, however, only with witness Sam Taumoefolau, who testified that the car was not in the WAC lot when he and the defendant put up missing person flyers in the area several days after Boussiacos’s disappearance. *See* section II(B). Because defense

counsel failed to prepare him for testimony, Mr. Taumoefolau had difficulty getting his point across. Taumoefolau's first language is Tongan and he has difficulty expressing himself in English. *See App. 8* (Declaration of Sam Taumoefolau) at para. 3. Nevertheless, defense counsel failed to meet with him prior to trial to prepare his testimony. Instead, the two spoke together briefly in the hallway just before Taumoefolau took the stand. *Id.* at para. 2. Further, although most of Taumoefolau's testimony involved describing the route he and Lui took while posterizing, defense counsel failed to prepare an exhibit that covered the relevant area. Instead, counsel asked Taumoefolau to use a State exhibit which did not cover many of the areas Taumoefolau was trying to describe. This left his testimony often incomprehensible. *Id.* at paras. 5-8. Further, counsel inexplicably ended his questioning when Taumoefolau had discussed only about half of the route he and Lui followed. *Id.* at para. 12. In fact, defense counsel forgot to ask Taumoefolau whether Boussiacos's car was in the WAC lot when he and Lui put up posters. Taumoefolau was forced to blurt that out during the prosecutor's questioning. XIV RP 1775-76. Taumoefolau's testimony came off so poorly that some jurors believed he was claiming to visit a mall that did not even exist at the time. *See App. 9* (10/10/09 Declaration of Denise Scaffidi) at para. 9.

In closing argument, the State maintained that the trail Sam Taumoefolau described was "hardly the path of two men passing out flyers." XIV RP 1841. "Especially since we heard testimony, that really

all that is down by the gym is a construction site for fire station and a post office. That's it." *Id.* "Why on earth would you twice go back around and come up and go to where the dog did, climb up through the bushes and start through here without stopping at Target, Cost Plus or Cineplex Odeon, if you are so anxious to get flyers out and do it while walking around." XIV RP 1841-42.

In fact, Taumoefolau was trying to explain that there was a good reason why he and Lui looped from the Kinko's to the gym and back. They had only a few flyers when they began their efforts that day, so they began by dropping off an order at Kinko's. While waiting for it, they took the few flyers they had and did the relatively short loop that took them by a restaurant, the WAC and back to the Kinko's. Inexplicably, Mr. Savage ended his questioning without asking where the men went after obtaining their new copies. Taumoefolau would have explained how they went through the larger mall mentioned by the prosecutor, and then headed home through the Park and Ride. App. 8 at paras. 6-12.

Taumoefolau has now explained in detail how he could have presented credible testimony that he and Lui covered much of the area later followed by the tracking dog, and how he knew that Boussiacos's car was not in the WAC lot on as of Tuesday, February 6, 2001. App. 8 at paras. 5-19.

Further, the defense did not need to rely solely on Taumoefolau because at least three additional witnesses could have testified about Lui's postering and/or explained when Boussiacos's car appeared in the WAC

lot. According to a police report, WAC employee Amber Mathwig reported that she first saw Boussiacos's car in the lot on Wednesday, February 7, 2001 – four days later than Ms. Wozow reported seeing the car. The same report indicated that a coworker of Mathwig's knew the car was not in the lot as of the afternoon of Tuesday, February 6. *See* App. 9 (10/10/09 Declaration of Denise Scaffidi) at Ex. A. Mr. Savage's copy of this discovery page (LUI 1319)<sup>2</sup> contained a note from the defendant's wife, Celese Lui: "This is very important! Worker from Woodinville Athletic says car was not there on 2-6-01 at 1400 hours." App. 10 (Declaration of David Zuckerman) at para. 4; App. 2 (Declaration of Celese Lui) at para. 5.1 and Ex. A.<sup>3</sup> When Ms. Scaffidi, the defense investigator, interviewed Mathwig, she explained how she could be certain the car was not in the lot as of Monday, February 5. App. 9 (10/10/09 Declaration of Scaffidi) at para. 4 and Ex. B (report of interview). (Mathwig could not say whether the car appeared on Tuesday or Wednesday because she worked only on Mondays, Wednesdays and Fridays.) Although defense counsel called Mathwig to the stand and asked her some questions about the dog tracking, he inexplicably failed to ask her the critical questions about the car. XIV RP 1733-35.

The failure to question Mathwig properly may have been due to an injury suffered by defense counsel during the trial. On April 17, 2008, Mr.

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<sup>2</sup> The State numbered the discovery pages LUI 0001 through LUI 3939.

<sup>3</sup> Mr. Savage permitted Ms. Lui to view the discovery in his office. She made numerous notes on it. *See* App. 2 (Declaration of Celese Lui) at paras. 5-5.4.

Savage appeared in court with a walker. XI RP 1466. After observing Savage, the trial court recessed the trial out of concern that Savage could not provide effective assistance. XI RP 1467-71. Savage reported that he would go directly to the hospital for x-rays. XI RP 1470-71. Although Savage returned to court on April 21, 2008, several observers maintain that he was in little better condition by then. *See* App. 2 (Declaration of Celese Lui); App. 3 (Declaration of Sione Lui); App. 4 (Declaration of Ray Taylor); App. 5 (Declaration of Grant Mattson); App. 6 (Declaration of William Harris); App. 7 (Declaration of Joan Byers).

The defense could also have called witness Paul Finau. In a taped statement with Detective Doyon on February 13, 2001, Finau explained how he searched and postered with Lui on both Monday, February 5, and Wednesday, February 7, 2001. *See* App. 10 (Declaration of David Zuckerman) at Ex. B (LUI 2387-2397). This statement was made one day before Richard Schurman and his dog performed their trailing. VIII RP 959-60. Mr. Savage's copy of the interview contains a post-it note from Celese Lui pointing out that Finau might be able to confirm that Boussiacos's car was not in the WAC lot until several days after she disappeared. App. 2 (Declaration of Celese Lui) at para. 5.3. When interviewed by investigator Scaffidi, Finau confirmed that he and Lui were specifically searching for Boussiacos's car on Monday, February 5, 2001, and it was definitely not in the WAC lot on that date. App. 9 (10/10/09 Declaration of Scaffidi) at para. 8 and Ex. C. When Finau later heard that the car had been found in the WAC lot on February 9 he found that strange

because he knew it was not there on February 5. *See* App. 11 (9/1/09 Declaration of Paul Finau).

Further, counsel could have confirmed Lui's poster activities in the area of the dog search through Lui's sister Falepaine Harris. *See* App. 12 (8/31/09 Declaration of Falepaine Harris). *See also*, App. 10 (Declaration of David Zuckerman) at para. 7 and Ex. A. Harris, who lives on Oahu, first gave this information to the Honolulu police on May 31, 2001. A transcript of the interview was provided to the defense in discovery. *Id.* Harris explained that she flew to Washington at Lui's request after he informed her that Boussiacos was missing. *Id.* When asked to describe Lui's friends, Harris said she met Sam and various members of Lui's rugby team while staying with Lui. *Id.* at 2472-73. There were "[a] lot of phone calls from his rugby guys" because they were helping Lui put up flyers. *Id.* at 2473. She knew they had been putting up flyers in the neighborhood because she went with Lui to Kinko's to run off more copies and he pointed out flyers he had already put up in the area. "The neighborhood was covered, yeah." *Id.* at 2474. She was aware that this had been going on since Monday. "[T]hey were going out almost every night." *Id.* at 2474. Discovery page 2474 contains a post-it from Celese Lui stating: "witness to Sione walking around Woodinville." *See* App. 2 (Declaration of Celese Lui) at para. 5.2.

Ms. Harris returned home shortly after Boussiacos's body was found. She knew nothing about dog tracking and had no idea why the

Honolulu police were asking her questions about Lui putting up flyers.

App. 12 (8/31/09 Declaration of Falepaina Harris) at para. 6.

The State called Harris as a witness at trial. Neither side asked her any questions about Lui's postering efforts. VII RP 804-36.

Lui's family believed it important to present their own expert on dog tracking. App. 2 (Declaration of Celese Lui) at para. 8. At their request, investigator Denise Scaffidi located such an expert, Van Bogardus, and prepared a report concerning him which she forwarded to Mr. Savage. Counsel declined to use the expert, however. In his view, the dog tracking was unimportant because it was explained by Lui's postering in the area. *See* App. 13 (Declaration of Denise Scaffidi) at para. 4. The defense was on notice, however, that the State would emphasize the evidence at trial. In a document provided to the defense in discovery, prosecutor Kristin Richardson described the dog tracking as "the best piece of evidence we have." App. 10 (Declaration of David Zuckerman) at 10 and Ex. D. As discussed above, the State relied extensively on the dog tracking evidence as proof of guilt, and the defense failed to convince the jury that Lui's postering explained the presence of his scent in the area of the WAC.

An expert could have explained why the dog tracking in this case should not be taken as proof that Lui followed a path from where Boussiacos's body was found to his home. *See* App. 14 (9/27/09

Declaration of Dr. James C. Ha).<sup>4</sup> Dr. Ha, a professor at the University of Washington, has a Ph.D. in zoology with a specialization in animal behavior.

First, under the State's theory of the case, Mr. Schurman's dog would have been following an 11-day-old trail, laid down on the same day Ms. Boussiacos disappeared. As Dr. Ha explains, the likelihood of a dog following such an old trail is quite low. *Id.* at paras. 6-7. It is more likely that the dog was following a more recent trail, such as one Lui would have left when postering the neighborhood the following week. *Id.* at 8.

Second, "[a] bloodhound can detect a person's scent only if some biological material from the person's body comes in contact with the dog's scent organ." *Id.* at 9. This microscopic material "could be blown a great distance in even a light breeze." *Id.* Therefore, the dog is "not necessarily following a person's trail," but is "merely detecting the current position of the scent particles." *Id.*

Third, "a dog cannot tell *when* scent particles left a person's body." *Id.* at 10 (emphasis in original). "The path the dog follows could be based on scent particles left on different days and in different areas, as long as the various areas visited by the person are sufficiently close together that the dog does not lose the scent entirely." *Id.*

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<sup>4</sup> Undersigned counsel chose to work with Dr. Ha rather than with Mr. Bogardus in part because he is located in Seattle rather than in California. It appears that any qualified expert on animal behavior would reach similar conclusions.

Fourth, it is hardly surprising that the dog ultimately trailed to Lui's home. A person would normally leave a large quantity of scent particles near his home, and some of them "could easily travel out into the nearby streets through wind or through the disturbance of a car." *Id.* at para. 13. "One would expect a bloodhound to track to the home once it was anywhere near it, since a person's scent gradient would normally point strongly towards his own home." *Id.*

Fifth, it is possible that Schurman's dog was trailing Boussiacos's scent rather than Lui's. It was detective Gulla, not Schurman, who gathered the scent articles, which Gulla described as items of men's clothing found in the Lui/Boussiacos house. VIII RP 961. "If those items came into contact with the victim or her clothing, however, they would have contained some of her scent as well. According to his testimony in *State v. Sherer*, Mr. Schurman believed such a transfer had taken place in that case." App. 14 (9/27/09 Declaration of Ha) at 14.

Defense counsel should himself have reviewed Schurman's testimony in *State v. Sherer*, King County No. 00-1-00183-1SEA. In discovery provided to the defense, the prosecutor noted the connection to *Sherer*. App. 10 (Declaration of David Zuckerman) at para. 11 and Ex. E. A brief inquiry would have revealed that undersigned counsel was currently handling Mr. Sherer's federal habeas case and had a transcript of Schurman's testimony available. Mr. Savage would then have learned that, in the *Sherer* case, Schurman believed one of the bloodhounds was

tracking the scent of the male defendant, even though the scent article belonged to the missing female victim. *See id.* at Ex. I.

In fact, had defense counsel done his homework, he could have excluded the dog tracking evidence entirely. In *State v. Lord*, 161 Wn.2d 276, 165 P.3d 1251 (2007), the Supreme Court found that dog tracking testimony proffered by the defense was properly excluded as irrelevant. The State's theory in that case was that the defendant abducted the victim from a stable, brought her to his workshop where he raped and killed her, and then drove her body to another location. *Id.* at 281, 293. A bloodhound handler attempted to locate the missing victim shortly after her disappearance. *Id.* at 283. His dog tracked the victim's scent from the stable, through the woods and out to a road. The handler maintained that his dog followed the "freshest scent" although he also stated that his dogs had the ability to follow a scent up to two weeks old. *Id.* As the defense noted, if the victim traveled from the stable through the woods on the day she disappeared, that would be inconsistent with the State's theory of the abduction. The trial court properly found the testimony irrelevant, however, because the handler could not rule out that the dogs were following a trail from one of the victim's earlier visits to the stable, rather than from her visit on the day of her disappearance. *Id.* at 294-95.

Similarly, in this case Mr. Schurman could not say that his dog was following a scent trail left on the same day that Ms. Boussiacos's car appeared in the WAC parking lot and his testimony was therefore irrelevant. In fact, as noted above, Schurman could not even state with any

certainty that his dog was following Lui's scent. The defense could therefore have successfully excluded the evidence as irrelevant under ER 401 and 402.<sup>5</sup>

Thus, the defense could have easily defeated the State's theory of the case.

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

Prior to trial, Celese Lui explained to Anthony Savage that Sione Lui could not have committed the crime because he was recovering from a serious arm injury at the time. Celese provided Savage with Sione's medical records but he dismissed the subject out of hand, in the belief that a large man like Lui would have been capable of committing the crime even if injured. Mr. Savage never consulted with an expert on that point. App. 2 (Declaration of Celese Lui) at para. 9.

After trial, Ms. Lui provided the same records to Dr. Theodore Becker, who holds a Ph.D. in Human Performance (a field that includes biomechanics). App. 15 (9/1/09 Declaration of Dr. Theodore Becker) at para. 1. Dr. Becker also reviewed other information including the files and testimony of the medical examiner in this case, and detailed measurements of Lui's hands. *Id.* at 3. As he explains, Lui suffered a severe right forearm fracture on September 30, 2000. A plate was fixed over the bone with six screws. Lui was in a "long arm upper extremity fiberglass cast"

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<sup>5</sup> Alternatively, even if the trial court found some marginal relevance, it should have excluded the evidence under ER 403 as more prejudicial than probative.

from October 11 to November 13, 2000. “The forearm muscles will atrophy significantly after a month in such a cast.” *Id.* at 5. Lui’s right hand grasping strength would have been significantly less than his left as of early February, 2001 (the time of the murder). In fact, Lui’s physical therapy notes from March, 2001, show that his right hand had little more than half the strength of his left even then. *Id.* at 6. Boussiacos’s injuries, however, were caused by an attacker whose right hand was stronger than his left. *Id.* Boussiacos could easily have pulled Lui’s right hand off her neck. *Id.* at 7.

In addition, “[s]everal of Boussiacos’s injuries are clearly caused by the hands of her attacker.” *Id.* at 8. “To determine whether Lui’s hands could have caused these injuries, I requested precise measurements of multiple aspects of Lui’s hands and fingers.” *Id.* Investigator Denise Scaffidi took these measurements and provided digital photographs for verification. *Id.* at para. 8 and Exs. B and C. *See also*, App. 9 (10/10/09 Declaration of Denise Scaffidi) at para. 11. Several of Boussiacos’s injuries clearly correspond to specific parts of the assailant’s hands. Lui’s hands are not even close in size to those of the assailant. App. 15 (9/1/09 Declaration of Dr. Theodore Becker) at 9-11.

Sam Taumoefolau could have confirmed that Lui’s right arm was still quite weak as of February 2, 2001. App. 8 (9/21/09 Declaration of Taumoefolau) at para. 20. For that reason, Lui could not play his usual instruments, ukulele or guitar, at a luau on Saturday, February 3. He had to rent a bass instead. *Id.* at 21. *See also*, App. 16 (10/20/09 Declaration

of Sione Lui) at Ex. A. Dr. Becker's detailed evaluation of the mechanics of playing each instrument shows that Lui's choice of instruments was consistent with the weakness that would be expected from the arm injury. App. 15 (9/1/09 Declaration of Dr. Theodore Becker) at 12-17. Several witnesses could have confirmed that Lui did not normally play bass. *See* App. 17 (10/5/09 Declaration of Robert Talbott); App. 18 (10/7/09 Declaration of Mark Jensen); and App. 19 (10/22/09 Declaration of Julia Makous).

Based on his review, Dr. Becker's opinion is that "Lui could not have been the killer of Elaina Boussiacos." App. 15 (9/1/09 Declaration of Dr. Theodore Becker) at para. 4.

It is true that Jaimee Nelson testified at trial that Lui once moved a heavy dresser for her and that this "probably" took place in November or December, 2000. IV RP 374-75. As Dr. Becker points out, Lui could not have done that during those months because he would either have had his arm in a cast or had the cast very recently removed (in which case the arm would be atrophied and very weak). App. 15 (9/1/09 Declaration of Dr. Theodore Becker) at para. 18. Of course, at the time of trial, Nelson was attempting to remember the date of a relatively unimportant event that took place nearly eight years earlier. She must have been off by a couple of months. If Lui moved a dresser for her in 2000, it happened before he broke his arm on September 30, 2000.

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

After Elaina Boussiacos disappeared, her friends and family consistently pointed to her ex-husband, James Negron, as the likely perpetrator. Detective Doyon's report includes the following:

According to family members and friends of the missing, they are suspect of the former husband, Mr. NEGRON because there was apparently some discussion between NEGRON and BOUSSIACOS regarding modifying their parenting plan and child support. Their feeling are [sic] that this would be a motive for Mr. NEGRON to "get rid" of ELAINA.

App. 10 (Declaration of David Zuckerman) at Ex. G (LUI 2231). The group also informed Detective Doyon that Negron "used to be a gang member in the Riverside, California area, a group called the East Side Longos." *Id.*

Detective Gulla's follow-up report of February 6, 2001 includes the following:

EVAMARIE GORDON called. She is an ex-roommate of the victim's, for 2.5 years. EVAMARIE says that the victim has a hostile ex-husband named JAMES NEGRON, whom victim just had a huge fight with about 2 weeks ago. EVAMARIE said JAMES NEGRON is gang or previously gang related and has a hot temper. EVAMARIE says she was at the victim's home on occasions when their child would come home from JAMES NEGRON's, all covered in bruises from JAMES beating him. EVAMARIE said JAMES NEGRON had full custody of the boy, but he couldn't afford to keep him all the time anymore, so he stayed with the victim and visited JAMES. EVAMARIE says the victim asked JAMES for money towards the boy and he had a fit and the fight broke out.

App. 2 (Declaration of Celese Lui) at para. 5.4 and Ex. D (LUI 2288). Anthony Savage's copy of this discovery contains a post-it note from Celese Lui that includes the following: "Very important [large asterisk]. Evamarie thinks James did it. Gangs, beating son. I think there is big \$ problems with James." *Id.* The same detective's report is repeated at LUI 3079. On that page, Celese Lui's note reads: "Evamarie states James and Elaina just had a huge fight [large asterisk]. James could not afford Anthony. James *beat* Anthony." *Id.*

Ms. Gordon gave a taped interview with Detective James Doyon on February 12, 2001. App. 10 (Declaration of David Zuckerman) at Ex. F. She had known Boussiacos for six or seven years and the two were roommates, friends and co-workers for much of that time. *Id.* at LUI 2407. James Negron had primary custody of Boussiacos's son Anthony,

but he has a [sic] anger problem and he couldn't handle it. I don't if [sic] I can say this, but he'd always beat his little boy, and when Anthony would come back on Sunday nights, I'd see bruises all over him, and Elaina told me he had an anger management, and so I talked to Anthony every now and then about it, and he told me yeah, my daddy did this, my daddy did that, but see, Elaina feared him. Elaina totally feared James.

*Id.* at LUI 2410.<sup>6</sup> For that reason, Boussiacos would not let Negron know where she lived. *Id.* When asked what Boussiacos said about her marriage to Negron, Gordon replied: "[W]e talked about how he'd fight, how they'd fight. He had no hesitation as far as hitting a woman . . . I

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<sup>6</sup> Again, Celese Lui placed a note informing Savage of the importance of this passage. App. 2 (Declaration of Celese Lui) at para. 5.4 and Ex. D.

guess he had a very bad anger management.” *Id.* at LUI 2411. Although the police apparently told Gordon that Negron had an alibi, she still considered him a likely suspect:

I have one question is, if they haven't ruled this out, I know that James has a tight alibi, but he does have connections, as far as knowing that Elaina planned on going out of town, picking the son up on Monday, why couldn't he have got one of his, I'm sorry I'm saying this, his friends from Tacoma to plan it where he followed Elaina home and camped out? . . .

*Id.* at LUI 2418-19. Detective Doyon then ended the interview. *Id.* at LUI 2419.

Boussiacos's sister, Sofia Harman, reported that

JAMES NEGRON had a friend beat SOFIA'S boyfriend, while a gun was held to SOFIA. SOFIA says JAMES NEGRON used to be associated with the East Side Longo Gang out of Long Beach. SOFIA said that JAMES NEGRON had to get out of that area, probably due to drug dealing or gang activity, so he fled with their son to Washington, even though he and the victim were still married at the that time. Victim found out they were here, then came up here too...They confirm that JAMES NEGRON has full custody of ANTHONY, but the victim told JAMES NEGRON she was going to take him to court for child support because she has him most of the time.

App. 2 (Declaration of Celese Lui) at Ex. D. (LUI 2294).

In his interview with Detective Doyon, Negron admitted that Boussiacos had spoken to him about changing the parenting plan and child support. App. 10 (Declaration of David Zuckerman) at Ex. G (LUI 2233). Negron knew a week in advance that Boussiacos was planning a trip to California on Saturday, February 3, 2001, because he and Boussiacos

changed their usual parenting schedule to accommodate the trip. *Id.* at Ex. H (LUI 2668-69). Never in the course of two taped interviews with detectives, however, was he asked about his gang connections, his history of violence against Boussiacos, or his arguments with her regarding child custody. *Id.* at LUI 2666-89.

On April 25, 2007, Attorney Richard Pope sent an e-mail to Anthony Savage. App. 20 (Declaration of Richard Pope) at para. 2 and Ex. A. Pope explained that he had represented both Sione Lui and Elaina Boussiacos in their respective divorce proceedings. Pope possessed information relevant to the murder charge. *Id.* Savage wrote back to Pope, promising to call him after reviewing the discovery. *Id.* at Ex. B. But Savage never followed through. *Id.* at para. 3.

Pope provided to Celese Lui a timeline of events relating to Boussiacos's divorce. *Id.* at para. 3 and Ex. C. Pope could have explained that James Negron, while still married to Elaina Boussiacos, fled from California to Washington with their son Anthony. In 1995, Negron forged Boussiacos's signature on dissolution papers, granting himself custody of Anthony. When Boussiacos finally learned of this, she retained Pope, who obtained an order vacating the dissolution. In a letter to Negron's counsel, Pope noted that "my client still has major concerns about your client as a parent, given the history of incidents with violence and police." *Id.* at Ex. C, p. 5. Celese Lui passed this information on to Mr. Savage. App. 2 (Declaration of Celese Lui) at para. 7.

Prior to trial, the State moved in limine to exclude: evidence pointing to James Negron as an alternate suspect; Negron's and Boussiacos's gang life; and Negron's violence. CP 9. Savage conceded the points. I RP 49-52.

Savage likely believed the evidence to be inadmissible, but he was mistaken. Other suspect evidence is properly excluded when it is speculative and there is a danger of jury confusion and waste of time. *State v. Clark*, 78 Wn. App. 471, 477-78, 898 P.2d 854, review denied, 128 Wn.2d 1004, 907 P.2d 296 (1995). "By contrast, if the prosecution's case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime." *Id.* at 479, citing *Leonard v. The Territory of Washington*, 2 Wash. Terr. 381, 7 P. 872 (1885). Here, the evidence against Lui was entirely circumstantial and he was entitled to present circumstantial evidence pointing instead to Negron. The evidence was not merely speculative. Negron had a history of violence against Boussiacos and had a strong motivation to maintain primary custody of his son Anthony, as evidenced by his commission of forgery and perjury in the dissolution case. At the time of the murder, Negron and Boussiacos had recently quarreled over her desire to obtain primary custody of Anthony. Negron knew when Boussiacos planned to travel to California, so he could have lain in wait for her when she left her house. DNA matching his profile was found on Boussiacos's shoelaces. His "alibi" was hardly airtight; only his

wife maintained that he was home at the time Boussiacos disappeared. The wife was present during Negron's interview by Detective Doyon and then agreed with his account. App. 10 (Declaration of David Zuckerman) at Ex. H (LUI 2679-80). In any event, as Ms. Gordon pointed out, Negron had arranged in the past to have others commit violence for him.

In addition, regardless of state-law standards, Lui had a right to present other suspect evidence and argument under the due process and compulsory process clauses of the Sixth and Fourteenth Amendments to the federal constitution. *See Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). In fact, the Washington Supreme Court has recognized that the exclusion of probative "other suspect" evidence would violate the federal constitution. *See State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

Further, even if the evidence pointing to Negron were not admissible initially, it became admissible after the State opened the door. After redacting Lui's statement to Detective Peters (*see* I RP 46), the State chose to leave in Lui's comments about Negron's gang membership. App. 31 (Trial Ex. 169) at 27-28. Among other things, Lui said that Boussiacos told him that Negron used to kill people and that she feared him. The State also asked Detective Bartlett to confirm that Negron had an alibi and she responded: "That is correct." X RP 1428. Defense counsel failed to object that the question was leading and that the answer could only have

been based on hearsay. The State's purpose was apparently to suggest that Lui was making outlandish accusations against Negron to deflect blame from himself. In fact, the State's brief in the direct appeal makes this point. *See* Brief of Respondent at 14 and n.15; App. 10 (Declaration of David Zuckerman) at Ex. C.

After the State presented this evidence, the defense was entitled to rebut it by showing that Lui's statements about Negron were not fabrications, but were consistent with what Boussiacos's close friends and family members had related to him. The defense was also entitled to show that Negron did not truly have a strong alibi for the crime.

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

In its trial memorandum filed on December 24, 2007 (App. 21), the State moved to exclude any allegations of misconduct by Detective Denny Gulla.

In 2005, the Seattle Post-Intelligencer ran an article that included information about Det. Gulla, who is now a patrol officer. The story involved allegations of misconduct through inappropriate contact with underage girls (including an incident 23 years ago!), threatening behaviors with the husband of a girlfriend, allowing gang members to assault another member who consented as part of an initiation, and rough handling of a suspect (20 years ago). There is reference in the article to Gulla being found to have "lied twice to investigators" in the incident from 23 years ago. None of these alleged incidents have ever resulted in criminal charges. The State has received nothing related to the "lying" allegations or anything else in the article.

While arguably titillating, information derived from the newspaper exposé is not admissible in our trial as impeachment or for any other reason.

App. 21 at 10.

The newspaper article is attached as App. 22. It revealed that Gulla's "23-year career has been marked by numerous instances of misconduct." This included assaulting a prisoner in custody, encouraging gang members to beat a new recruit so that Gulla could videotape the initiation, and pulling over his lover's husband on a "bogus traffic stop" and threatening to kill him. The paper also reported allegations that Gulla "sexually molested four teenage girls." In one case, Gulla told an 18-year-old DUI arrestee that he would "make the Breathalyzer go away" if she agreed to go out with him. Gulla then "made an unusual error in conducting the breath test and pointed out his own error in officer's notes, with the result that its use as evidence was invalidated." In many of these incidents, Gulla's superiors concluded that he lied to them when questioned about his misconduct. According to the King County Sheriff Sue Rahr, the department should have fired Gulla "a long time ago" but had been thwarted by a powerful union. As early as 1988, Gulla had "accumulated 3 written reprimands and 5 suspensions. That is a total of 8 separate sustained complaints and 11 manual violations in the past 4 years." *Id.*

In its trial memorandum, the State devoted four pages to excluding information impeaching Denny Gulla. For the most part, the argument seemed to assume that the *only* impeachment information concerning

Gulla would be the article itself. For example, under the heading of “Hearsay”, the State argued that “[e]verything contained in the article would be double hearsay in a court of law.” *Id.* at 10. The State characterized the misconduct as too old to be relevant, but in fact the article laid out a history of misconduct beginning more than 20 years ago and continuing until the date of the article. For example, one of the most serious allegations involved an incident in 2004 in which Gulla pulled over for no reason the husband of a woman Gulla was dating, threatened to kill the man and, by some accounts, admitted that he would freely lie about his conduct. App. 23F. Gulla was found to have abused his power, was demoted to the rank of deputy, and was suspended for one day without pay. *Id.*

The defense investigator offered to gather further information concerning Det. Gulla, but Mr. Savage expressed no interest. App. 13 (Declaration of Denise Scaffidi) at para. 6. Although the prosecutors had an obligation to learn of and provide complete impeachment information on Gulla, *see* Section IV(B)(1), below, Savage never requested discovery. *See* App. 10 (Declaration of David Zuckerman) at para. 13. There was every reason to believe that further information could be uncovered, since the newspaper article noted that the Sheriff’s office resisted disclosure of information and continued to withhold a significant portion of its records on Gulla. App. 22 at pg. 6.

Instead, at a hearing on March 24, 2008, defense counsel conceded that Gulla’s misconduct was not admissible at trial. I RP 59. On April 9,

2008, however, defense counsel expressed his belief that the prosecutor would likely not call Gulla as a witness “because of matters referred to in pretrial arguments.” VI RP 644. In fact, Det. Gulla did testify to several incriminating matters. *See* VIII RP 940-1042. Among other things, he pointed out that Lui’s house, and particularly his garbage can, seemed suspiciously clean. VIII RP 943-44. He also described an interview with Lui, suggesting several times that Lui seemed to be faking concern for Elaina Boussiacos, and concluding that the detectives obtained “nothing useful” from Lui. VIII RP 955-56. He also testified that there were many leaves and pine needles in Lui’s driveway but no debris on the victim’s shoes, suggesting that she did not walk out the house but rather was carried out after being killed. VIII RP 988. Perhaps most importantly, Gulla was the one who obtained scent samples for the dog trailing that took place on February 14, 2001. He claimed that he carefully followed the instructions of the dog handler in gathering items that would contain Lui’s scent, and that he avoided spreading the scent himself along the path ultimately followed by the dog. VIII RP 959-61. But there was no corroboration of that testimony. Mr. Savage made no attempt to impeach Detective Gulla’s credibility.

While the article might not itself have been admissible evidence, it certainly suggested some fertile ground for cross-examination. For example, King County Sheriff Sue Rahr is quoted in 2005 as saying that Gulla not only showed poor judgment in the past, but *currently* “lacks the judgment to do the job.” When asked why he had not been fired, she

responded: "I've done everything I could do within the confines of the labor contract. I disciplined him, and the discipline was overturned." She blamed that on the Guild, which "is very, very, very successful in overturning discipline cases."

These statements indicate that Gulla's position in the Sheriff's Office had been tenuous for some time as of 2005. It seems doubtful that his position improved much by the time of trial in this case. When he took the stand, Gulla identified himself as a deputy rather than a detective, indicating that his demotion had now lasted for three or four years. RP 941. Thus, it seems reasonable that KCSO records would show that Gulla had concerns about discipline and possibly termination in 2001, when he initially investigated this case, as well as in 2008, when he testified before the jury.

Gulla's tenuous status with KCSO goes directly to his motivation to trump up a case against Lui. Working under a Sheriff who wants to see him fired places him in essentially a probationary status. He would likely have been motivated in 2001 to solve the Boussiacos murder at any cost. Similarly, he would have motivation in the 2008 trial to deny any misconduct.

Gulla's motivations fall within the constitutional right to present evidence of bias. "Bias" is a general term incorporating various factors that can cause a witness to fabricate or slant her testimony, such as prejudice, self-interest, or ulterior motives. *See Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); 5A Karl B. Tegland,

*Washington Practice: Evidence Law and Practice*, §§ 607.7 through 607.11 at 384-402 (5<sup>th</sup> Ed. 2007). “Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” *United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). The right of a criminal defendant to cross-examine witnesses against him as to their bias in favor of the State is guaranteed by the Sixth Amendment to the United States Constitution. *Davis*, 415 U.S. at 315-316. *See also*, *State v. Spencer*, 111 Wn. App. 401, 45 P.3d 209 (2002), *review denied*, 148 Wn.2d 1009, 62 P.3d 889 (2003); *State v. Roberts*, 25 Wn. App. 830, 611 P.2d 1297 (1980); *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319, *review denied*, 79 Wn.2d 1008 (1971) (“It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility.”); 5A Teglund § 607.7 at 320 (“the defendant enjoys nearly an absolute right to demonstrate bias on the part of the prosecution witnesses”). Among other things, the defense is entitled to explore a witness’ “vulnerable status as a probationer.” *Davis v. Alaska*, 415 U.S. at 318. Gulla’s entire history of misconduct and discipline was relevant to show his exposure to termination and perhaps even to criminal charges.

Some of Gulla’s misconduct may also have been admissible under ER 404(b) to show motive and common scheme or plan. For example, that Gulla would sabotage a breath test to get a date tends to show his

motivation to distort evidence for his own gain. In Lui's case, the gain would not have been sexual favors, but rather enhanced status with the Sheriff's Office.

The defense could also likely have presented witnesses to Gulla's reputation for lying under ER 608(a). The State's brief on that point noted that "[t]he defendant in our case has not endorsed any reputation witnesses." App. 21 (12/24/07 State's Trial Memorandum) at 12. In view of Gulla's documented history of lying during investigations, it seems likely that members of the Sheriff's Office – perhaps the Sheriff herself – could have testified at trial to Gulla's poor character for truthfulness based on his current reputation.

The defense could also have cross-examined Gulla about specific instances of conduct reflecting on his credibility. ER 608(b). "Conduct involving fraud or deception is likely to be indicative of the witness's general disposition with regard to truthfulness." 5A Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 608.6, at 361-62. For example, Gulla told Mike Kelly in 2004 that he was prepared to shoot him with a gun taken from a "crack head" and then give a false story about what happened. According to the 2005 article, there were at least two other incidents in which Sheriff's investigators concluded that Gulla lied to them. It is true that these two incidents were somewhat old. The Court could well find them sufficiently probative, however, when they are part of continuing pattern of engaging in misconduct and then lying about it.

Undersigned counsel made his own request to the Sheriff's Office under the Public Records Act. Key portions are attached as App. 23.

They include the following:

- **1984** – Gulla was reprimanded for coming to work late and failing to complete his cases. App. 23A.
- **1986 – Kay Bellows incident.** This 15-year-old girl reported that Gulla made a pass at her, lied to her mother during a phone conversation to explain her whereabouts, and continued to call the girl four or five times after the initial contact. When asked to provide his notebook for the relevant date, Gulla falsely claimed he did not have one. When Internal Investigations obtained the notebook, pages were missing and there was no mention of Bellows, although Gulla admittedly spent time with her while on duty. App. 23B.
- **1986 – Jennifer DePriest Incident.** This 18-year-old girl alleged that Gulla offered to make her breath test go away if she would go out with him. Gulla then committed an unusual error that did cause the breath test to be suppressed. Gulla denied that DePriest rode in his patrol car after the incident, but the girl's mother produced a ride-along form with Gulla's fingerprint on it. Once again, Gulla would not produce any notes regarding the contact. Internal Investigations concluded that Gulla engaged in conduct unbecoming an officer and that he made false statements during the investigation. App. 23C.

- **1988** – Gulla committed conduct unbecoming an officer by hitting and cursing at a hit-and-run suspect and then denying his conduct. App. 23D.
- **1992** – Gulla videotaped gang members beating a boy as part of a jump-in, and made no effort to intervene. App. 23E.
- **2004 – Michael Kelly incident.** Gulla threatened to kill the estranged husband of Gulla’s girl friend. Gulla was found guilty of inappropriate use of authority and was suspended without pay for one day. He was also demoted from the rank of sergeant to the rank of deputy and transferred to a different patrol. App. 23F.

Many hundreds of pages of allegations remain undisclosed, however, on the ground that the Sheriff’s Office found them to be “unsustained.” App. 24.

Undersigned counsel also made a written request for discovery from the prosecutor regarding Gulla. App. 25. When the request was denied, Lui filed a motion for discovery. App. 26. That too was denied. App. 27. If the Court finds the present record insufficient to grant relief on this claim, it should order a reference hearing at which Lui can engage in the same discovery his trial attorney should have pursued.

Even without discovery, Savage knew or should have known that Gulla provided false testimony under oath in a trial handled by Savage himself. In 2001, Savage represented the defendant in *State v. Steven Kozol*, King County Superior Court No. 00-1-09050-8 KNT. See App. 28. While executing a search warrant, the police seized numerous common

hardware supplies and tools from Mr. Kozol's garage and car on the theory that Kozol used them to build a silencer for the gun used to assault Mr. Wolter. The trial court ruled that the supposed silencer parts were not covered by the warrant. The State then convinced the court that the items were nevertheless properly seized under the "plain view" doctrine, based on the testimony of Detective Denny Gulla. He claimed to immediately recognize the items as silencer materials after viewing them all in "close proximity" to each other in the garage. *See* App. 28.

Kozol's postconviction investigation revealed that many of the items were actually seized by Gulla and other officers from Kozol's car the day after the search of the garage. The federal district court agreed that Gulla's testimony was faulty.

While the record before this Court supports petitioner's contention that Detective Gulla's pretrial testimony was erroneous, this record does not reveal whether Detective Gulla's testimony was intentionally misleading or just carelessly inaccurate. The record does suggest, however, that both Detective Gulla and the prosecutor who elicited Detective Gulla's testimony at the suppression hearing should have known that the testimony was erroneous.

Report and Recommendation of Magistrate Judge Monica Benton at p. 17, *Kozol v. Payne*, W.D. Wash., C06-1074-MJP-MJB. App. 29. Whether Gulla's testimony in Kozol's case was "intentionally misleading" or "carelessly inaccurate," it certainly reflected poorly on his credibility as a witness.

Thus, had defense counsel aggressively pursued impeachment information regarding Detective Gulla, including appropriate pretrial

discovery requests, he could have undermined Gulla's credibility on the stand. In fact, it seems unlikely the prosecutor would have called Gulla as a witness at all if defense counsel had not conceded that he would not impeach him with his prior misconduct.

7. Defense Counsel Failed to Object to Prosecutorial Misconduct

The State committed misconduct several times during the trial yet defense counsel failed to object.

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

In her closing argument, the prosecutor emphasized that Pineda's testimony was inconsistent with Lui's claim that he did not have sex with Boussiacos close to the time she disappeared.

That is the second thing that he will never admit and has never admitted to any one, probably himself included, that is the intercourse that night. He has adamantly denied throughout that they had sex.

He loved the idea of religious righteousness, but he can't even admit to himself, even in the face of semen in her vagina, because whatever happened in that regard that night was very bad.

XIV RP 1828. The prosecutor then suggested that Lui might have sexually assaulted Boussiacos. XIV RP 1829. "Maybe it happened at the same time she was being strangled, maybe not." XIV RP 1830. *See also*, XIV RP 1853. The prosecutor explained the small amount of semen detected as follows: "It is entirely possible that there was no completed sex act and that would have been the final humiliation for him." XIV RP 1830.

In fact, as discussed above the testimony of the State's DNA expert was merely that a tiny amount of Lui's semen was found on the victim's panties and in the vaginal wash. The expert conceded that the sperm cells could have been there for a long time. Therefore, there was no evidence to support a claim that Lui had sexual contact with Boussiacos on the night before she disappeared, much less that any contact was non-consensual.

"Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record." *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008), citing *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007). *See also, State v. Rose*, 62 Wn.2d 309, 382 P.2d 513 (1963) (improper for prosecutor to refer to defendant as a "drunken homosexual" where the only homosexual act in evidence was the alleged offense and, despite defendant's admission to having seven or eight drinks, no witness described him as drunk); *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005) (prosecutor improperly suggested in closing that the reason child victim did not confirm all charges originally alleged was that she felt uncomfortable relating such facts in front of the jury).

The United States Supreme Court discussed the prejudice resulting from similar evidence and argument in *House v. Bell*, 547 U.S. 518, 540-541, 126 S.Ct. 2064, 2079, 165 L.Ed.2d 1 (2006). At trial, the prosecution maintained that the semen stains found on the murder victim's underpants

came from the defendant, House. Years later, DNA testing proved that the semen belonged to the victim's husband. The State maintained that this was "immaterial" because "neither sexual contact nor motive were elements of the offense." The Supreme Court disagreed:

When identity is in question, motive is key. The point, indeed, was not lost on the prosecution, for it introduced the evidence and relied on it in the final guilt-phase closing argument. Referring to "evidence at the scene," the prosecutor suggested that House committed, or attempted to commit, some "indignity" on Mrs. Muncy. . . . Law and society, as they ought to do, demand accountability when a sexual offense has been committed, so not only did this evidence link House to the crime; it likely was a factor in persuading the jury not to let him go free.

*Id.* at 240-41.

Similarly, the State used the DNA evidence in this case to argue that Lui must have had some form of forced sexual encounter with Boussiacos. Recognizing that there was little sperm found, the State suggested that perhaps Lui was unable to complete the sexual act, and that "final humiliation" so enraged him that he committed the murder. This argument was not a reasonable inference from the evidence and was highly prejudicial. Defense counsel should have objected.

(b) *Two Detectives Opined that Lui was Lying*

When asked why she wished to re-interview Mr. Lui in 2007, Detective Bartlett replied: "Well, the main purpose was beyond the one that I already told you. *But he had told so many lies* and inconsistencies to different detectives, part of it was to see if he would talk to me about these

issues. The other part was to see if, indeed, he would tell me something differently.” X RP 1449 (emphasis added).

Later, Detective Peters was asked whether the object of the 2007 interview was to obtain a confession. She replied: “I definitely would have loved to have a confession, *the truth*. . . . Well, the object of this interview was to get more information on specifics that had never been answered and my goal was to get *the truth* and a confession.”

XIV RP 1720 (emphasis added).

“Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.” *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citations omitted). Testimony from law enforcement officers concerning the veracity of another witness may be especially prejudicial because the “testimony often carries a special aura of reliability.” *Kirkman*, 159 Wn.2d 928 (citation omitted). Thus, police officers may not testify at trial that they believe a defendant lied to them during interrogation. *See State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001); *State v. Saunders*, 120 Wn. App. 800, 812-13, 86 P.3d 1194 (2004) (error for police officer to testify that defendant’s answers during interrogation “weren’t always truthful”). A prosecutor commits misconduct by eliciting this type of trial testimony. *State v. Jerrels*, 83 Wn. App. 503, 507-08, 925 P.2d 209 (1996).

Mr. Savage should have objected to this testimony.

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

When the detectives re-interviewed Lui in 2007 they began by falsely telling him that they had two good suspects in the case. X RP 1436, 1453. Detective Bartlett repeated that twice to Lui because “I wanted to elicit any inquiry of whether or not he would ask about anybody who was a suspect in the death of his fiancée or what their relationship was or questions that I thought he would, anybody would ask.” X RP 1437. The prosecutor had her explain that he never asked for any specifics of what happened to Boussiacos and never appeared “angry, or upset, or wonder[ed] why it was taking so long to charge someone.” *Id.*

On cross-examination, Bartlett further explained: “I think that one of the common things that someone would say is, “oh, I feel some sense of relief, some sense of wanting to know what happened to the love of their life, who was involved, how it happened, how we got to this information and do expect some relief.” X RP 1454. She emphasized that Lui never questioned her about the other suspects even though she “offered that more than one time.” *Id.*

When Detective Peters was asked whether she and detective Bartlett lied to Lui, she said they gave Lui “test questions” to see whether he would respond like a “grieving fiancée.” XIV RP 1720. She insisted that a reasonable person would ask “Who are those suspects? When are you going to arrest them?” XIV RP 1722.

In closing argument, Ms. Richardson argued that “an innocent man would have kicked and screamed over the length of this investigation and how long it took to solve.” XV RP 1849.

While it may be proper for a witness to describe the defendant's general demeanor so long as the testimony is based on the witness's first hand observations, *State v. Clark*, 143 Wn.2d 731, 768, 24 P.3d 1006 (2001), it is not proper for a witness to offer expert testimony regarding how a defendant should react to the death of a loved one. *State v. Stenson*, 132 Wn.2d 668, 723-24, 940 P.2d 1239 (1997). In *Stenson*, the Court cited with approval the Court of Appeals decision in *State v. Haga*, 8 Wn. App. 481, 491-92, 507 P.2d 159 (1973). The *Haga* Court properly reversed for misconduct where an ambulance driver “purported to testify as an expert on whether the defendant’s reaction was that of a truly bereaved person.” *See Stenson*, 132 Wn.2d at 723. It does not appear that the ambulance driver was ever formally offered as an expert witness in *Haga*. Rather, it was enough that the driver claimed to know from experience how spouses tended to react when their mate was mortally injured. *See Haga*, 8 Wn. App. at 489-92; *Stenson*, 132 Wn.2d at 722.

Similarly, in this case, the detectives claimed to have professional experience regarding how a person should react to an investigation into the death of a loved one.<sup>7</sup> In fact, they explained how they “tested” Lui to see

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<sup>7</sup> Such testimony is particularly troubling because it assumes that people from all cultures will act the same. Even if it would be common for a native Seattleite to challenge the police in the manner suggested by the prosecutor and the detectives, that does not mean it would be common for a Tongan.

whether he would give the proper responses. This amounted to expert testimony that the defendant behaved like a guilty person. Defense counsel should have excluded such testimony through a motion in limine, or at least objected when it first came up at trial.

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

In his cross-examination of Sam Taumoefolau, the prosecutor asked whether the witness knew that Lui was having an affair with Sina Packer while dating Boussiacos. Taumoefolau said he did not know that. XIV RP 1778-79. The prosecutor also brought out, for no apparent reason, that Lui and Taumoefolau are practicing Mormons. XIV RP 1779.

On redirect, Taumoefolau explained that in Tongan culture it is not appropriate to discuss intimate relations. The prosecutor's re-cross included the following:

Q. You said that you don't discuss these issues in your culture. What about in your religion?

A. So is my religion.

Q. In fact, in your religion, you aren't supposed to sleep with someone out of wedlock?

A. Yes.

Q. You are not supposed to live with someone out of wedlock?

A. Yes.

Q. You are not supposed to drink?

A. Yes.

Q. You are not supposed to smoke?

A. Yes.

Q. You are not supposed to do caffeine?

A. Yes.

Q. Those are all things that are against the Mormon religion; correct?

A. That is everything. That is what we believe in.

Q. Correct.

A. They teach that principle.

Q. That is the word of wisdom?

A. Yes, the Mormons.

Q. That is the word of wisdom?

A. You have three days that you --

MR. CASTLETON: Thank you. Nothing further.

XIV RP 1783-84.

Article I, section 11 of the Washington Constitution is entitled "Religious Freedom." It includes the following:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual . . . No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

Here, the prosecutor's questioning specifically focused on conduct prohibited by the Mormon church, but engaged in (by some witness accounts) by Lui and/or Boussiacos. The apparent purpose was to show that Lui did not live up to the ideals of his religion. There was no relevance to such testimony, but it clearly suggested to the jury that Lui was a person of bad character. This is not a case like *State v. Dhaliwal*, 150 Wn.2d 559, 79 P.3d 432 (2003), in which the defendant's religious beliefs were relevant to his motive to commit a crime.

Again, the defense should have objected.

8. Counsel Failed to Seek Additional DNA Testing

Trial counsel's performance was deficient in failing to obtain additional DNA tests that the State failed to conduct. As noted above, the trial court has granted Lui's motion for postconviction DNA testing, finding a "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). Lui cannot demonstrate prejudice, however, until the testing is completed. He will supplement this PRP once favorable results are obtained.

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

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

As discussed in section IV(A)(6), above, defense counsel failed to request impeachment information concerning detective Gulla. Nevertheless, the State had an independent duty to obtain and provide this impeachment evidence on its own.

The Supreme Court has long held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *see also United States v. Bagley*, 473 U.S. 667, 674-76, 105 S.Ct. 3375, 3383-84, 87 L.Ed.2d 481 (1985); *Kyles v. Whitley*, 514 U.S. 419, 432-33, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The Court has established the following three-part test to determine whether a *Brady* violation has occurred: (1) the evidence must have been suppressed by the State, either willfully or inadvertently; (2) the suppressed evidence must be favorable to the accused, either because it is exculpatory or impeaching in nature; and (3) the evidence must be material to the defense, meaning that there is a “reasonable probability” that it would have changed the result. *Strickler v. Greene*, 527 U.S. 263, 280-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The State’s obligations are not contingent on a defense request for the information. *Bagley*, 473 U.S. at 682-83.

The *Brady* rule encompasses evidence not actually known by the individual prosecutor. “In order to comply with *Brady*, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in this case, including the police.’” *Strickler v. Greene*, 527 U.S. at 281 (quoting *Kyles v. Whitley*, 514 U.S. at 437). *Carriger v. Stewart*, 132 F.3d 463, 479-82 (9<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1133, 118 S.Ct. 1827, 140 L.Ed.2d 963

(1998) (prosecution had a duty to obtain and review a Department of Corrections file of its principle witness); *United States v. Wood*, 57 F.3d 733 (9<sup>th</sup> Cir. 1995) (in prosecution for conspiracy to defraud Food and Drug Administration, prosecutor was required to disclose information known to FDA).

The State did not meet its *Brady* obligations regarding Denny Gulla. Mr. Savage's file does not reflect any discovery from the prosecutor concerning Gulla's credibility. As discussed above, the prosecutor's trial memorandum suggests that the individual prosecutors made no effort to learn of impeachment evidence concerning Gulla beyond what everyone knew from the newspaper article.

Lui filed a postconviction motion asking the trial court to order the State to provide impeachment information regarding Gulla. App. 26. As Lui pointed out, the *Brady* duty continues after the trial has concluded. *See Smith v. Roberts*, 115 F.3d 818, 819-20 (10th Cir. 1997) (direct appeal pending); *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992) (state has duty to disclose exculpatory evidence under *Brady* during a habeas corpus proceeding); *Monroe v. Butler*, 690 F. Supp. 521, 522-23, 525-26 (E.D. La.), *aff'd*, 883 F.2d 331 (5th Cir.), *cert. denied*, 487 U.S. 1247, 109 S.Ct. 7, 101 L.Ed.2d 958 (1988) (holding that state's failure to disclose exculpatory evidence discovered after conviction violated habeas petitioner's *Brady* rights). Similarly, CrR 4.7(h)(2) provides for a "continuing duty to disclose" discovery. The trial court, however, denied the motion. App. 27.

The discussion in section IV(A)(6), above, shows that significant information was not disclosed. If the Court finds insufficient prejudice based on those facts, however, it should order a reference hearing so that Lui can obtain additional discovery. Although Lui obtained some information through his request under the Public Records Act, the Sheriff withheld many hundreds of pages because she found the allegations to be “unsustained.” Impeachment information cannot be withheld from the defense at trial, however, simply because the police or even the prosecutors believe it to be unfounded.

For example, in *United States v. Alvarez*, 86 F.3d 901 (9<sup>th</sup> Cir. 1996), *cert. denied*, 519 U.S. 1082, 117 S.Ct. 748, 136 L.Ed.2d 686 (1997), the prosecutor failed to disclose a witness statement because the prosecutor thought the witness was “obviously lying.” The Ninth Circuit explained:

It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false. It is “the criminal trial, as distinct from the prosecutor’s private deliberations” that is the “chosen forum for ascertaining the truth about criminal accusations.”

*Id.* at 905, quoting *Kyles*, 514 U.S. at 440. Further,

[b]ecause the government's failure to turn over exculpatory information in its possession is unlikely to be discovered and thus largely unreviewable, it is particularly important for the prosecutor to ensure that a careful and proper *Brady* review is done. Delegating the responsibility to a nonattorney police investigator . . . is clearly problematic.

*Alvarez*, 86 F.3d at 905.<sup>8</sup>

A similar rule applies to evidence a prosecutor believes may not be admissible. In *Griffin v. United States*, 183 F.2d 990, 87 U.S. App. D.C. 172 (D.C. Cir. 1950), the defendant was convicted of killing a man in a barroom brawl. He claimed he acted in self defense when the victim approached him making threats with his hand in his pocket. A coroner later discovered an open pen knife in the victim's pocket. The prosecution did not disclose the evidence to the defense, believing that evidence of uncommunicated threats was inadmissible. The Court of Appeals first held that the evidence was in fact admissible. The court also expressed the following policy concerning a prosecutor's duty to disclose evidence to the defense:

It would be unfair not to add that we have confidence in the good faith of the prosecution. Its opinion that evidence of the concealed knife was inadmissible was a reasonable opinion, which the District Court sustained and no court has overruled until today. However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful.

*Id.* at 992-93; accord *United States v. Hibler*, 463 F.2d 455, 459-60 (9th Cir. 1972). Washington law is also in accord.

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<sup>8</sup> The Court did not reverse in *Alvarez* because the information was ultimately disclosed prior to trial. "Our affirmance, however, does not lessen our disapproval of the government's actions." *Id.* at 908.

There is no exception to this obligation to disclose which would allow either the prosecutor or the court to determine whether the [evidence] is false and, if so, to permit nondisclosure. A rule of disclosure which depended on the, perforce, subjective analysis of a deputy prosecutor made during preparation of a case would be meaningless. It is far too tempting to merely dismiss the unfavorable version as false.

*State v. Garcia*, 45 Wn. App. 132, 137, 724 P.2d 412 (1986); *see also State v. Wright*, 87 Wn.2d 783, 787, 557 P.2d 1 (1976) (“Of course, neither the police nor the prosecution are to decide for the defense what is favorable or material evidence.”), *overruled on other grounds as stated in State v. Ortiz*, 119 Wn.2d 294, 303-04, 831 P.2d 1060 (1992).

Thus, the State should have obtained and disclosed all negative information in the Sheriff’s internal investigation files on Detective Gulla. To the extent it believed any of it to be non-discoverable, it could have presented the information to the Court *in camera*. This Court should remand for a reference hearing so that the superior court can determine whether material impeachment information was withheld.

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

As discussed above in section IV(A)(7), defense counsel failed to object to significant misconduct. Even without an objection, however, this misconduct was so flagrant and ill-intentioned that a curative instruction could not cure the errors. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d

1005 (1995). This Court should therefore review each instance of misconduct independently from the ineffective assistance claim.

Particularly when considered cumulatively, the misconduct “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

C. JUROR MISCONDUCT VIOLATED LUI’S CONSTITUTIONAL RIGHTS

Based on an interview with juror Clare Comins, the defense has learned that the jurors considered extrinsic information based on one of the juror’s purported personal knowledge of the crime scene. *See* App. 9 (10/10/09 Declaration of Denise Scaffidi) at Ex. C.

3. [Clare Comins] informed me that he was one of the jurors for the trial and that during deliberations in the above captioned matter there was discussion concerning the credibility of one of Mr. Lui’s defense witnesses, a man named Sam.
4. I took this to be Sam Taumoefolau as this is the only witness with the first name of Sam who testified for Mr. Lui and I am aware that his testimony concerned the issue below.
5. When asked what the concerns were with Mr. Taumoefolau’s credibility, Mr. Comins stated that there were a few issues raised. He stated that one issue concerned Mr. Taumoefolau’s testimony that both he and Mr. Lui had distributed missing person’s leaflets at a particular mall that was described on the witness stand. The location of this mall was outside the area of the aerial photographs that had been introduced as exhibits in the case, however, Mr. Taumoefolau was

able to describe where this mall was that he and Mr. Lui went to while distributing the leaflets.

6. Mr. Comins stated that during the deliberations by the jury, one of the female jurors explained she had lived in Woodinville at the time of the murder and she knew that the mall described by Mr. Taumoefolau could not possibly have been leafleted in the days following Ms. Boussiacos's disappearance because the mall had not yet been built. Mr. Comins stated further that he believed that the jurors discussed this information during deliberations and that it reflected poorly on Mr. Taumoefolau's overall testimony.

*Id.* Mr. Comins would not sign a declaration.

In the trial court, the defense moved for an opportunity to contact the remaining jurors to corroborate the statements of Mr. Comins. The trial court denied the defense request for access to juror contact information from the clerk's office. App. 27.

A criminal defendant has state and federal constitutional rights to trial by an impartial jury. *See Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968); U.S. Const. amend. 6; Washington Const. art. I, § 22. The Sixth Amendment also guarantees the rights to confrontation of witnesses and to the assistance of counsel. The Fourteenth Amendment due process clause guarantees the right to a fair trial. All of these rights are violated when the jury receives material information outside of the courtroom. *See Turner v. Louisiana*, 379 U.S. 466, 472-73, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); *Gibson v. Clanon*, 633 F.2d 851, 854 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035, 101 S.Ct. 1744, 68 L.Ed.2d 231 (1981). "When a juror communicates objective

extrinsic facts regarding the defendant or the alleged crimes to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation Clause.” *Jeffries v. Wood*, 114 F.3d 1484, 1490 (9<sup>th</sup> Cir. 1996), *cert. denied*, 522 U.S. 1008, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997). Such facts will not have been subject to objection, cross examination, explanation, or rebuttal by either party. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990), *review denied*, 116 Wn.2d 1014, 807 P.2d 883 (1991) (quoting *Lockwood v. A C & S, Inc.*, 44 Wn. App. 330, 357-58, 722 P.2d 826 (1986), *aff’d*, 109 Wn.2d 235, 744 P.2d 605 (1987)). When misconduct has occurred, “a new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.” *United States v. Bagley*, 641 F.2d 1235, 1242 (9th Cir. 1981), *cert. denied*, 454 U.S. 942, 102 S.Ct. 480, 70 L.Ed.2d 251 (1981) (quoting *Gibson v. Clanon*, 633 F.2d at 855); *State v. Briggs*, 55 Wn. App. 44, 55-56, 776 P.2d 1347 (1989) (citing numerous cases). There is no need for a petitioner to show that all the jurors were exposed to improper extrinsic information. *See Lawson v. Borg*, 60 F.3d 608, 613 (9th Cir. 1995). Jurors may testify to the fact that misconduct occurred, but may not testify to the subjective effect that the misconduct had on their internal deliberations. *State v. Jackman*, 113 Wn.2d 772, 782, 783 P.2d 580 (1989).

This Court should find that Lui has at least established a prima facie case of juror misconduct. The Court should remand for an evidentiary hearing at which Lui can question all the jurors about this.

**V. REQUEST FOR RELIEF**

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

**VI. OATH**

After being first duly sworn on oath, I depose and say that: I am the attorney for petitioner, I have read the petition, know its contents, and believe the petition is true.

DATED this 28<sup>th</sup> day of December, 2010.

Respectfully submitted,



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

SUBSCRIBED AND SWORN TO before me, the undersigned  
notary public, on this 28<sup>th</sup> day of DECEMBER, 2010.



Notary Public for Washington

My Commission Expires: 11/09/12



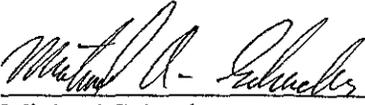
**CERTIFICATE OF SERVICE**

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

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

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

December 28, 2010  
Date

  
Michael Schueler