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No. 92816-9  
Court of Appeals No. 72478-9-1

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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In re the Personal Restraint of:

SIONE P. LUI,

Petitioner.

FILED  
Feb 18, 2016  
Court of Appeals  
Division I  
State of Washington

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MOTION FOR DISCRETIONARY REVIEW

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## **I. IDENTITY OF MOVING PARTY**

Petitioner Sione Lui, through his attorney David B. Zuckerman, moves for discretionary review.

## **II. DECISION**

A panel of the Court of Appeals, Division One, dismissed Lui's personal restraint petition (PRP) on January 19, 2016. Ex. A. "Opinion."

## **III. ISSUES PRESENTED FOR REVIEW**

1. Was Lui denied effective assistance of counsel when his lawyer made multiple, prejudicial errors?
2. Did the State commit misconduct when the prosecutor argued without evidence that Lui committed a sexual assault; two detectives opined that Lui was lying; and the detective and prosecutor maintained that Lui showed his guilt by failing to act like an aggrieved fiancé?
3. Did the State violate its obligation to produce impeachment information regarding Detective Gulla?
4. Did a juror inject extrinsic evidence into the deliberations when she told the other jurors that, based on her purported knowledge of the crime scene, a key defense witness's testimony was faulty?

5. Is Lui entitled to a new trial based on newly discovered evidence when DNA has linked a specific violent felon to blood found in the victim's car at the time of the murder?

#### IV. REASONS FOR GRANTING REVIEW

1. The Court of Appeals held that trial counsel was not ineffective in failing to present another suspect because such evidence would have been inadmissible. It rejected the newly discovered evidence of another suspect for the same reason. The standards applied by the Court of Appeals conflict with this Court's decision in *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014).

2. The ineffective assistance of counsel claim presents a significant question of law under the Sixth Amendment.

3. The State's failure to produce impeachment information regarding Detective Gulla presents a significant question under the federal Due Process Clause.

4. The State's misconduct during the trial presents a significant question under the federal Due Process Clause, and Washington's right to religious freedom under Article I, section 11.

5. The juror's reliance on extrinsic evidence presents a significant question under the Sixth Amendment rights to an impartial jury, to

confrontation of witnesses, and to the assistance of counsel, and also violates the Fourteenth Amendment Due Process Clause.

## V. STATEMENT OF THE CASE

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. On direct appeal, the State conceded that the crime was “unsolved” until 2007. Brief of Respondent at 13. 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 showed only that Lui had sex with his fiancée some time before the murder.

Lui and Boussiacos met in 1999. V RP 425.<sup>1</sup> 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

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<sup>1</sup> Lui has filed a motion today for the Court to obtain the full record from the direct appeal and from the PRP in the Court of Appeals.

getting married. VI RP 695-96 (testimony of Boussiacos's mother). The status of their engagement frequently changed. In late January, 2001, Boussiacos learned that Lui had been talking with a woman Lui previously dated. Boussiacos was mad at Lui, in particular because he lied about how often he was in touch with the woman. V RP 500-01. Boussiacos told the woman 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, James 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 Woodinville Athletic Center (WAC) copying and posting flyers on February 6 and 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 February 9, WAC staff contacted the police about the car, and detectives found Boussiacos's body in the trunk. VII RP 951. She was wearing sweatpants and a long-sleeved t-shirt. VII RP 865-66. Her injuries included bruising in her neck area. VII RP 865. Her bra was stuffed up inside 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. The car contained a suitcase, gym bag and "travel bag." VII RP 886, 895.

Nine identifiable fingerprints were found on the car. None of them belonged to Lui. XII RP 1578; 1581. There was a small blood stain by the stick shift. VII RP 883. The Washington State Patrol Crime Laboratory (WSPCL) obtained a DNA profile which 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 tiny number of Lui's sperm cells were found on Boussiacos's underpants and in her vaginal swabs. IX RP 1220-21, 1271; IX RP 1235-36. The cells could have been there for a long time. IX RP 1269-71; IX RP 1254.

The victim's shoelaces contained DNA belonging to Lui or his son, James Negron or his son, and 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.

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. XVI RP 1716. The police found no signs of violence. VIII RP 943-48, 957-58, 1009-11.

On February 14, 11 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. Gulla brought with him an article of male clothing he 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.* He 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.

Medical examiner Dr. Richard Harruff testified that Boussiacos died by strangulation. X RP 1357-98.

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

On direct appeal, the Washington Supreme Court denied in a 5-4 decision Lui’s claim that his right to confrontation was violated when the State’s DNA and medical expert witnesses testified to analysis performed by others. *State v. Lui*, 179 Wn.2d 457, 315 P.3d 493 (2014).

## VI. 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, *reh’g denied*, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d

864 (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);

2. General Problems with Defense Counsel. See PRP at 8-9; Reply at 4-5.

Lui was represented at trial by Anthony Savage, who was approximately 78 years old at the time. 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 never directly answered her questions or discussed her ideas. Savage spent very little time meeting with his client. Towards the end of the trial, Savage had a fall that caused him to deteriorate significantly, both mentally and physically. These problems with Savage led to several errors during the trial, as discussed below.

3. Defense Counsel Failed to Present Evidence Pointing to Another Suspect, See PRP 23-29; Reply at 13-16.

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.

PRP at App. 10 (Decl. of David Zuckerman) at Ex. G (LUI 2231<sup>2</sup>). 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

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<sup>2</sup> LUI # refers to the prosecutor's discovery pages.

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.

PRP at App. 2 (Decl. of Celese Lui) at para. 5.4 and Ex. D (LUI 2288).

Gordon gave a taped interview with Detective James Doyon on February 12, 2001. PRP at App. 10 (Decl. of 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. 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. 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 hesitance as far as hitting a woman . . . I 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.

PRP at 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, PRP at App. 10 (Decl. of Zuckerman) at Ex. G (LUI 2233). Negron knew a week in advance that Boussiacos was planning a trip to California on 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 Negron 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. PRP at App. 20 (Decl. of Richard Pope) at para. 2 and Ex. A. Pope explained that he had represented both Lui and 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 could have explained that Negron, while still married to 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 Savage. App. 2 (Decl. of Celese Lui) at para. 7.

Prior to trial, the State moved in limine to exclude: evidence pointing to 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. He later explained his reasoning in a declaration defending himself from Lui's claim of ineffective assistance:

I did not argue about admissibility of "another suspect" evidence because it was not legally colorable under current case law. The victim's ex-husband, James Negron, was a church pastor. He had been alibi'd by three people, and there was nothing to suggest they lied. There also was nothing to suggest a motive he might have to kill the mother of his son. Their child custody arrangements were in place, they rarely saw each other, and there was no evidence of a fight or disagreement. DNA on the victim's shoelaces could have been from Negron or his son and could have been deposited at any time by either one of them. Nothing beyond that tied him to the crime or crime scene. A proffer of him as another suspect would not have been allowed and, for the reasons discussed above, even if admitted could have diminished the defense case.

State's Response to PRP at App. C, para. 7.

Savage's response shows that he misunderstood the facts and the law. That Negron was currently a church pastor was hardly proof that he had left his violent past behind.<sup>3</sup> Negron's supposed alibi did not come from three independent people. Rather, only Negron and his wife maintained that he was home at the time Boussiacos disappeared. The wife was present during Negron's interview with Detective Doyon and then agreed with his account. PRP at App. 10 (Dec. of Zuckerman) at Ex.

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<sup>3</sup> Had the State attempted to bolster Negron's character with his current position, that would surely have opened the door to all of his unsavory past.

H (LUI 2679-80). In any event, as Gordon pointed out, Negron had arranged in the past to have others commit violence for him. Negron most certainly had a motive to kill Boussiacos because he fought with her recently about her request to change the parenting plan and child support. Savage's conclusion that pointing the finger at Negron could have hurt the defense case, even if admissible, appears to be based on these same misconceptions.

Further, Savage seemed to accept the State's position that "other suspect" evidence must pass a high bar for admissibility. In fact, it is merely a specific application of the general evidence rule permitting a judge to exclude evidence if its probative value is outweighed by such factors as unfair prejudice, confusion of the issues, or potential to mislead the jury. *State v. Franklin*, 180 Wn.2d 317, 378, 325 P.3d 159 (2104), citing *Holmes v. South Carolina*, 547 U.S. 319, 327, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The only requirement for admissibility is that "some combination of facts or circumstances must point to a non-speculative link between other suspect and the charged crime." *Franklin* at 381. The evidence need not be conclusive, but must merely tend to create a reasonable doubt of the defendant's guilt. *Id.* The denial of such evidence violates the state and federal constitutional right to present a defense. *Id.* at 382.

Here, 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, 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 their son. 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, suggesting that he was the one who dressed her after her death.<sup>4</sup>

Further, the State presented Lui's statement during interrogation that Negron had a violent history as a gang member. The lead detective then testified that Negron had an alibi, which surely opened the door to evidence pointing to Negron. *See* PRP at 28-29.

Despite the clear evidence that Savage's reasoning did not hold water, the Court of Appeals summarily accepted his position. Opinion at 6.

4. Counsel Failed to Challenge the State's Theory of the Case.  
*See* PRP at 9-20; Reply at 5-10.

The State's theory of the case was that Lui killed Boussiacos at their home in the early morning hours of February 3, 2001, placed her

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<sup>4</sup> Lui recognizes that the DNA could have come from Negron's son. But as discussed above, the evidence pointing to another suspect need not be conclusive.

body in the trunk of her car, drove the car to the lot of the 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. Counsel failed to adequately challenge that theory. He 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.

Savage relied solely on 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. Because Savage did not prepare him for testimony, he had great difficulty getting his points across. This was aggravated by a language barrier and by Savage's reliance on the State's map, which did not cover much of the area Taumoefolau was trying to describe. Savage inexplicably stopped questioning Taumoefolau when he had described only about half the route, and never even asked him whether Boussiacos's

car was in the lot at that time. (By all accounts, Taumoefolau planned to testify that the car was not there at the time.) 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* section C below. In closing argument, the State emphasized that the route Taumoefolau apparently described made no sense for the purpose of passing out flyers.

In any event, Savage had available to him much better witnesses to the postering. In a taped statement with Detective Doyon on February 13, 2001, Paul Finau explained how he searched and postered with Lui on both February 5 and 7, 2001. *See* PRP at App. 10 (Decl. of Zuckerman) at Ex. B (LUI 2387-2397). This statement was made one day *before* Schurman and his dog performed their trailing, so the prosecutor could not have argued Finau's statement was an attempt to defuse the dog evidence. VIII RP 959-60. Finau would also have confirmed Boussiacos's car was not in the lot on February 5. PRP at App. 9 (10/10/09 Decl. of Scaffidi) at para. 8 and Ex. C.

Similarly, Lui's sister Falepaine Harris could have confirmed Lui's postering without any concern that she was trying to rebut the dog tracking evidence. *See* PRP at App. 12 (8/31/09 Decl. of Falepaine Harris). *See also*, PRP at App. 10 (Decl. of Zuckerman) at para. 7 and Ex. A. Harris, who lives on Oahu, flew to Washington to assist Lui after Boussiacos

disappeared. She returned home shortly after Boussiacos's body was found. When interviewed by the Honolulu police on May 31, 2001, she had no idea why they were asking about Lui's postering. She confirmed that Lui and his friends were putting up flyers in the area nearly every day. *Id.* at 2474. The State called Harris as a witness at trial. Neither side asked her any questions about Lui's postering efforts. VII RP 804-36.

Further, according to a police report, WAC employee Amber Mathwig reported that she first saw Boussiacos's car in the lot on February 7, 2001 – four days later than Wozow reported seeing the car. She confirmed this account with the defense investigator. Although her recollection had apparently changed at the time of trial, Savage could have brought out what she said when her memory was fresher.

The defense investigator located an expert on dog tracking, but Savage declined that help because he believed the tracking evidence was unimportant in view Lui's postering. *See* PRP at App. 13 (Decl. of 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." PRP at App. 10 (Decl. of 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* PRP at App. 14 (9/27/09 Decl. of Dr. James C. Ha).<sup>5</sup> For one thing, Dr. Ha would have explained that the dog follows the scent particles emitted by the subject, which may be moved about through wind and traffic. Thus, the path taken by the dog may be quite different from the one actually walked by the subject. Further, it is not surprising that the dog would ultimately track to Lui's home because his scent would be increasingly powerful as the dog came near that area. Further, the State's theory that the dog followed an 11-day-old trail was very unlikely because scent generally dissipates by that time. It is far more likely that the dog was following a more recent trail, which would be consistent with the postering.

In view of these facts, defense counsel 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

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<sup>5</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.

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 Schurman could not say that his dog was following a scent trail left on the same day that Boussiacos's car appeared in the WAC parking lot and his testimony was therefore irrelevant. The defense could have successfully excluded the evidence.

Thus, the defense could have easily defeated the State's theory of the case. But instead, the prosecutor was able to argue at length that the

trail Taumoefolau described was “hardly the path of two men passing out flyers.” XIV RP 1841.

Savage stated in his 2011 declaration that the time Boussiacos’s car appeared in the driveway was not important. State’s Response to PRP at App. C at para. 9. But in a hearing prior to trial in 2007 he described the timing as critical. I RP 54-55. The trial court agreed. *Id*

The Court of Appeals found Savage’s actions to be reasonable in view of his “general philosophy that it is preferable to explain circumstances rather than to directly confront them.” Opinion at 5. But the testimony Savage omitted would have furthered his strategy. For example, the testimony of Harris and Finau would have been fully consistent with Savage’s explanation of the dog tracking. Further, there was no reason to fear a “battle of experts.” The dog handler would likely have agreed with all of the expert’s points. But without consulting an expert, Savage did not know all the points that could be made. Certainly, excluding the dog tracking in its entirety would obviate *any* confrontation before the jury. But Savage did not even attempt that. The Court of Appeals ignored this last point entirely.

5. Defense Counsel Failed to Present Evidence that Lui’s Injury Precluded Him From Committing the Crime; See PRP at 20-23; Reply at 10-13.

Prior to trial, Celese Lui explained to Savage that Lui could not have committed the crime because he was recovering from a serious arm injury at the time. Celese provided Savage with Lui'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. Savage never consulted an expert on that point. PRP at App. 2 (Dec. of Celese Lui) at para. 9.

After trial, Celese provided the same records to Dr. Theodore Becker, who holds a Ph.D. in Human Performance (a field that includes biomechanics). PRP at App. 15 (9/1/09 Decl. 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. "The forearm muscles will atrophy significantly after a month in such a cast." *Id.* at 5. As would be expected, Lui's right hand grasping strength was significantly less than his left as of early February 2001 (the time of the murder). Even a month later, physical therapy notes showed that his right hand had little more than half the strength of his left. *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.

Dr. Becker also determined that many of Boussiacos's injuries were clearly caused by the hands of the attacker, and that the hand measurements did not even come close to matching Lui's.

Tamoefolau could have confirmed that Lui's right arm was still quite weak as of February 2, 2001. PRP at App. 8 (9/21/09 Decl. of Tamoefolau) at para. 20. For that reason, Lui could not play his usual instruments, ukulele or guitar, at a luau on February 3, 2001.

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). PRP at App. 15 (9/1/09 Decl. of Dr. 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.

Savage defended his failure to investigate the issues of Lui's strength by noting that Lui was an athlete, that he moved furniture, that he changed a tire on the date that Boussiacos disappeared, and that the

assailant might have used a ligature. State's Response to PRP at App. C (Decl. of Anthony Savage) at para. 11. But, as noted below, it would have been physically impossible for Lui to have moved a heavy piece of furniture unless that took place before his injury. That Lui changed a tire near the time of the murder proves little. The task does not take great strength when done with a good jack and tire iron. Taumoefolau explained that Lui took a long time to change the tire on that day because he was working the jack with his left arm. PRP at App. 8 (Decl. of Taumoefolau) at para. 20. Finally, while the medical examiner said it was possible that the assailant used a ligature, Dr. Becker was able to rule that out. There would not have been any concern about a "battle of experts" because nothing in Dr. Becker's analysis contradicted the medical examiner's testimony. Dr. Becker simply used his expertise to make some further conclusions.

Savage's strategy on this point is not entitled to deference because he did not first perform a reasonable investigation. *See Strickland*, 466 U.S. at 691; *Douglas v. Woodford*, 316 F.3d 1079 (9th Cir.), *cert. denied*, 540 U.S. 810, 124 S.Ct. 49, 157 L.Ed.2d 23 (2003).

6. Defense Counsel Failed to Impeach Detective Denny Gulla's Credibility. See PRP at 29-39; Reply at 16-17.

In its trial memorandum filed on December 24, 2007 (PRP at App. 21), the State moved to exclude any allegations of misconduct by Detective Gulla. The impetus for that motion was a Seattle Post-Intelligencer article detailing Gulla's long history of misconduct. According to King County Sheriff Sue Rahr, the department should have fired Gulla "a long time ago" but had been thwarted by a powerful union. The defense investigator offered to gather further information concerning Gulla, but Savage expressed no interest. PRP at App. 13 (Decl. of Scaffidi) at para. 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, 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 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 of 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. Savage made no attempt to impeach Gulla's credibility.

Undersigned counsel made his own request to the Sheriff's Office under the Public Records Act. Key portions are attached as PRP at App. 23. They show a continuous pattern of lying and misconduct beginning in 1984 and continuing until 2004, overlapping Gulla's work on Lui's case by three years. Further, in 2006 a federal judge found that Gulla presented information in a King County trial that was either "intentionally misleading or just carelessly inaccurate." Report and Recommendation of Magistrate Judge Monica Benton at p. 17, *Kozol v. Payne*, W.D. Wash., C06-1074-MJP-MJB. PRP at App. 29. The inaccurate statements were made in 2001, the same year that Gulla investigated the Lui case. Savage should have known of this because he was the trial attorney for Kozol.

In his 2011 declaration, Savage stated his incorrect belief that Gulla's only false statement was 20 years old. He described his strategy as follows:

I told the prosecution that any attempt by the State to portray Gulla as particularly experienced or capable would result in my argument that the door was opened to his entire history. As a result, I believe the State kept his testimony tightly constrained to avoid an open door.

State's Response to PRP at App. at C-5.

If that was indeed Savage's strategy then he failed miserably in pursuing it. Savage began his cross-examination of Gulla by asking: "Mr. Gulla, in February of 2001, what had been your experience with the King County sheriff's office." VIII RP 991. Savage then asked Gulla about his training. VIII RP 992. With Savage's encouragement, Gulla went on for four pages of transcript about his apparently impressive experience, training and credentials. VIII RP 991-94. That is precisely the sort of evidence that Savage says he was trying to keep *out*. Despite Gulla's testimony bolstering his credibility, Savage never argued that the door was open to his misconduct.

The Court of Appeals repeated the error that Gulla's false statements were all 20 years old. Opinion at 7. It somehow found Savage's stated strategy to be effective even though Savage clearly did not follow that strategy.

7. Defense Counsel Failed to Object to Prosecutorial Misconduct. See PRP at 39-47; Reply at 17-20.

The State committed misconduct several times during the trial, yet defense counsel failed to object. First, in her closing argument, the prosecutor emphasized that the DNA expert'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).

Second, two detectives opined that Lui was lying. When asked why she wished to re-interview 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). 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).

Third, the detective and prosecutor opined that Lui showed his guilt by failing to act like an aggrieved fiancé. 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 fiancé.” 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, 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, *cert. denied*, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (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), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998).

Third, the prosecutor violated Lui’s right to religious freedom by questioning a witness about religious beliefs he and Lui shared. In his cross-examination of Taumoefolau, the prosecutor asked whether he knew that Lui was having an affair with another woman 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.

XIV RP 1783. The prosecutor then confirmed with Taumoefolau that Mormons are not supposed to sleep with or live with someone out of wedlock, nor to drink, smoke, or imbibe caffeine. He then had Taumoefolau confirm that this was the Mormon "word of wisdom." XIV RP 1783-84. The apparent purpose was to show that Lui did not live up to the ideals of his religion.

Article I, section 11 of the Washington Constitution is entitled "Religious Freedom." Among other things it provides that no witness shall be "questioned in any court of justice touching his religious belief to affect the weight of this testimony."

Although Savage defended himself from ineffective assistance on every other point, he did not attempt to justify his failure to object to the prosecutor's misconduct.

In the alternative to ineffective assistance of counsel, the prosecutor's 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).

B. THE STATE VIOLATED ITS OBLIGATION TO PROVIDE IMPEACHMENT INFORMATION REGARDING GULLA. *SEE* PRP AT 48-52; REPLY AT 20-21.

"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). The State did not meet its *Brady* obligations regarding Gulla. 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. 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 law enforcement officials believe it to be unfounded. *See, e.g., 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). Lui filed a post-conviction motion in the trial court for complete *Brady* information but it was denied. This Court should order that complete information be provided at a reference hearing.

C. JUROR MISCONDUCT VIOLATED LUP'S  
CONSTITUTIONAL RIGHTS. *SEE* PRP AT 53-56; *REPLY* AT  
21-23.

Based on an interview with juror Clare Comins, the defense learned that the jurors considered extrinsic information based on one of the juror's purported personal knowledge of the crime scene. *See* PRP at App. 9 (10/10/09 Decl. of Scaffidi) at Ex. C. A female juror told the others during deliberations that she was familiar with the area Taumoefolau claimed to have postered with Lui, and she knew that the mall described by him had not yet been built at that time. The jurors discussed this during

deliberations and concluded that it reflected poorly on Taumoefolau's credibility.

The jurors' reliance on extrinsic evidence violates the Sixth Amendment rights to an impartial jury, to confrontation of witnesses, and to the assistance of counsel. It also violates the Fourteenth Amendment due process clause guarantee of the right to a fair trial. When such 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).

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.

The Court of Appeals opined that the juror's information was not extrinsic evidence, but rather the juror's intrinsic thought process. Opinion at 12. That conclusion is untenable. Extrinsic evidence is "information that is outside all the evidence admitted at trial, either orally or by document." *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); *see also State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Other

than the juror's comment, there was no evidence that Mr. Taumoefolau described a mall that did not exist at the time. Further, as required by WPIC 1.01, the trial court informed the jurors that they should not seek evidence out on their own or inspect the scene of an event involved in this case. The Court admonished them to consider only "proper evidence admitted in the courtroom." IV RP 315.

The Court of Appeals also believed that the information was not prejudicial. But by all accounts, the dog tracking evidence was critical to the case. As Savage pointed out in his declaration, his only rebuttal was that the dog was following a scent generated when Lui and Taumoefolau posted flyers in the mall. If the jurors believed the mall did not exist at the time that would significantly weaken the defense. The evidence against Lui was quite weak and circumstantial. The juror's misconduct was certainly not harmless beyond a reasonable doubt.

D. NEWLY DISCOVERED EVIDENCE. *SEE* SUPPLEMENT TO PRP AT 1-7; REPLY ON SUPPLEMENT TO PRP AT 1-2.

While the PRP was stayed pending a ruling on the direct appeal new evidence pointing to another perpetrator came to light.

On August 8, 2013, undersigned counsel became aware of a television documentary concerning the Lui case. DNA expert Jody Sass, trial prosecutor Kristen Richardson, and the case detectives appear in it.

The documentary focuses on the mysterious blood stain found on the stick shift of Boussiacos's car at the time of the murder. The documentary suggests at first that this appeared to be a clue to an alternate suspect. But Sass is then heard explaining that the blood proved to be from a mechanic who had worked on Boussiacos's car.

Undersigned counsel promptly contacted Sass to find out how she obtained that new information. She told me that the CODIS system revealed the match to a particular felon on May 6, 2010. A copy of her report is attached as Ex. B to App. 1 to Supplement to PRP. It identifies "Sandro M. Enciso" as the donor of the stick shift blood. Sass said she passed that information on to the case detectives. She said she could not clearly recall how she learned that "Enciso" had worked on the car, but she believed that came from the detectives. On September 18, 2013, prosecutor Castleton provided me with a 20-page "IRIS" printout. It shows that the blood donor's real name is Alesandro Biagi. Castleton confirmed that it was the only follow-up regarding Biagi. No attempt had been made to interview him. The printout also shows that Biagi worked at some point for an automobile dealership, but says nothing about him being a mechanic. The IRIS printout also details Biagi's criminal history. In addition to the assault, Biagi had three felony convictions and seven misdemeanor convictions.

Apparently due to my urging the State did eventually interview Biagi. This took place in ICE detention in Oakdale, Louisiana. The defense was not invited. Biagi explained that he changed his name in 2001 (the year Boussiacos was murdered). When he worked for car dealerships it was as a salesman, not a mechanic. When shown a picture of Boussiacos's car he was "100% sure" he had never seen it.

Detective Bartlett then revealed that Boussiacos was murdered and placed in the trunk of her car and that Biagi's blood was found in the car. He could not initially explain how this could be. He acknowledged that this was not a car he had sold. Eventually, he "remembered" that he might have worked on the car during a couple of weeks that he was working for Auto Mart.

Biagi said he suffered from Bipolar disorder. He worked out in gyms, and he admitted he might have gone to the WAC at some point. Biagi is apparently subject to deportation due to his criminal convictions.

To obtain a new trial based on newly discovered evidence, a defendant must prove that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

There can be no question in this case that elements 2 and 3 are satisfied. Lui had no way to identify the person who left his blood on the stick shift until he was informed of the CODIS hit, long after the trial. The evidence is certainly material because it points to a specific, alternate perpetrator. Further, Biagi flatly denies ever seeing Boussiacos's car and therefore has no innocent explanation for leaving his blood in it. The DNA hit does not merely impeach a witness who testified at trial, but rather directly implicates a new person. Finally, the evidence against Biagi would likely change the result of the trial. Once again, the evidence against Lui was quite weak and circumstantial. The State did not even charge him with the crime until six years went by. Had the jury known there was evidence pointing to a named suspect, and one with a history of violent criminal activity and mental illness, it is probable that it would have found a reasonable doubt that Lui was the perpetrator.

The Court of Appeals rejected this claim solely on the basis that the evidence would have been inadmissible under Washington's "other suspect" standards. Once again, the Court applied a special high barrier for such evidence, rather than analyzing it under the general evidence rules regarding relevance and unfair prejudice. *See* section A(3).

## VII. CONCLUSION

For the foregoing reasons, the Court should take review and reverse Lui's conviction. In the alternative, if the Court finds that the facts are disputed, or that they require further development, the Court should remand to the superior court for a reference hearing. *See In re Khan*, 363 P.3d 577 (2015).

DATED this 18th day of February, 2016.

Respectfully submitted,



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

**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by email where indicated and First Class United States Mail, postage prepaid, one copy of this brief on the following:

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Date

Peyush J.  
Peyush Soni

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of  
SIONE P. LUI,

Petitioner.

No. 72478-9-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: January 19, 2016

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STATE OF WASHINGTON

APPELWICK, J. — Lui filed this personal restraint petition challenging his conviction for murder in the second degree. He seeks a new trial based on ineffective assistance of counsel, violations of his rights of due process and religious freedom, and prosecutorial and juror misconduct. In a supplement to his petition, he argues for relief on the basis of newly discovered evidence. Because Lui fails to establish any ground for relief, we deny his petition.

FACTS

On February 9, 2001, detectives found the body of Elaine Bousiacos, Sione Lui's fiancée, in the trunk of her car in a parking lot. State v. Lui, 179 Wn.2d 457, 463-64, 315 P.3d 493, cert. denied, 134 S. Ct. 2842, 189 L. Ed. 2d 810 (2014). She had been strangled. Id. at 465. In 2007, detectives reviewing cold cases interviewed Lui again, ultimately charging him with murder in the second degree. Id. at 464. The late defense attorney Anthony Savage represented Lui at trial.

**Exhibit A**

At trial, the State called as a witness a "dog track" expert, who testified that after smelling an article of Lui's clothing, bloodhounds followed a scent trail from the parking lot where Boussiacos's car was found back to Lui's house. Id. Deputy Denny Gulla, a detective who worked on Boussiacos's case, also testified about the dog track evidence. The State presented DNA (deoxyribonucleic acid) evidence, along with circumstantial evidence that Boussiacos wanted to end their volatile relationship and that Lui had motive and opportunity to kill her. Lui, 153 Wn. App. at 310-13. The State called witnesses who placed Boussiacos's car in the parking lot as early as Saturday, the day before she was reported missing and nearly a week before police discovered her body. The prosecutor also attacked Lui's credibility, noting, for example, that he gave friends several different accounts of his and Boussiacos's relationship and denied having sexual intercourse with Boussiacos despite DNA evidence suggesting the contrary. State v. Lui, 153 Wn. App. 304, 312-13, 221 P.3d 948 (2009), aff'd, 179 Wn.2d 457, 315 P.3d 493 (2014), cert. denied, 134 S. Ct. 2842, 189 L. Ed. 2d 810 (2014).

The defense theory was that Boussiacos left the home on Saturday morning and was killed by an unknown perpetrator. Counsel called Lui's friend Sam Taumoeolau, who testified that Boussiacos's car was not in the parking lot when he and Lui posted flyers in the area a few days after Boussiacos disappeared. Defense counsel cast doubt on the DNA and other forensic evidence. A jury convicted Lui as charged. Lui, 179 Wn.2d at 466.

Lui appealed to this court, which affirmed. Lui, 153 Wn. App. at 325. In 2014, our Supreme Court affirmed, transferring Lui's personal restraint petition to this court. Lui, 179 Wn.2d at 498. On June 23, 2014, the U.S. Supreme Court denied certiorari. Lui v. Washington, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2842, 189 L. Ed. 2d 810 (2014).

## DISCUSSION

In order to obtain collateral relief by means of a personal restraint petition, Lui must demonstrate either an error of constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that "inherently results in a complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). If a petitioner makes a prima facie showing of actual prejudice, but the reviewing court cannot determine the merits of the claims solely on the record, the court should remand for a full hearing on the merits or for a reference hearing under RAP 16.11(a) and RAP 16.12. In re Pers. Restraint of Rice, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992). But "[t]his does not mean that every set of allegations which is not meritless on its face entitles a petitioner to a reference hearing. Bald assertions and conclusory allegations will not support the holding of a hearing." Id. 886. A petitioner "must state with particularity facts which, if proven, would entitle him to relief" and must show that he has "competent, admissible evidence" to establish those facts. Id.

### I. Ineffective Assistance of Counsel

In his petition, Lui claims that trial counsel Savage's deficient performance violated his constitutional right to effective assistance of counsel. To prevail on a

claim of ineffective assistance, Lui must show both that (1) his attorney's representation fell below an objective standard of reasonableness, and (2) resulting prejudice, that is, a reasonable probability that the result of the trial would have been different absent the deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The reviewing court "must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." Rice, 118 Wn.2d at 888-89. If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697.

Lui makes several allegations of "general problems" with defense counsel. He alleges that Savage "was not always alert" and "dozed off several times." Lui contends that "Mr. Savage had a falling accident that caused him to deteriorate significantly, both mentally and physically." Lui argues that these problems led to errors during trial.

But, as Savage pointed out in a declaration, the trial judge was in an excellent position to observe counsel during this lengthy trial. Yet there is no indication in the record of any concern on the judge's part that Savage was falling asleep or not alert enough to be effective. And, contrary to Lui's contention, the court's decision to recess early one day during trial to allow Savage to seek treatment for a knee injury does not support a claim of ineffective assistance.

Next, Lui faults Savage for failing to challenge the State's theory of the case. He asserts that Savage failed to properly interview and then call to testify several witnesses to impeach the State's witnesses. Lui contends that

Woodinville Athletic Club employee Amber Mathwig could have testified that she did not see the victim's car in the parking lot until the Wednesday after Bousslacos disappeared, contrary to another witness's testimony that the car was in the lot as early as Saturday morning. He argues that Lui's friend, Paul Finau, and Lui's sister, Falepaine Harris, would have also testified that they did not see the car early in the week, and that they could have corroborated Sam Taumoefolau's testimony about posting missing person flyers in the area of the dog search. Lui argues further that the defense should have presented its own expert witness on dog tracking, as Lui's family wished, in order to impeach the State's expert.

Generally, the decision to call witnesses is a matter of trial tactics that will not support an ineffective assistance claim. State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). As he states in his declaration, counsel made a strategic decision to follow his "general philosophy that it is preferable to explain circumstances rather than to directly confront them." In this case, rather than set up a direct confrontation by denying the possibility that the dog tracked Lui's path from Bousslacos's car to his home, counsel explained that the dog tracked the scent that Lui left in the area while posting flyers. The decision to avoid a "clash of experts" is consistent with reasonable trial strategy. In re Pers. Restraint of Khan, No. 89657-7, slip op. at 13 (Wash. Nov. 25, 2015). Moreover, Mathwig told Savage before testifying that she had seen the car in the lot on Monday and again on Wednesday. This information contradicted the defense investigator's notes which reported that she first saw the car on Wednesday. This was not

favorable to the defense. It was not objectively unreasonable for Savage to decide not to present witnesses whose testimony would be favorable to the State or whose testimony would, at best, attempt to prove a negative.

Lui alleges further that Savage was ineffective for failing to present evidence that Lui's arm injury "precluded him from committing the crime," for not introducing evidence that Boussiacos's ex-husband committed the crime, and for failing to "aggressively pursue[ ] impeachment information" about Deputy Gulla. He establishes none of these claims.

In his declaration, Savage noted Lui's size and athletic ability, as well as the possibility that Boussiacos was strangled with some kind of ligature. He stated that an argument that Lui would not have had the strength to strangle the much smaller Boussiacos "seemed tenuous, at best." Rather than help, he viewed it as another example of evidence that could hurt by diminishing the defense case.

Savage made a reasonable strategic decision that a proffer Boussiacos's of ex-husband Negrón as another suspect "was not legally colorable under current case law," and, "even if admitted [that evidence] could have diminished the defense case." Savage noted that Negrón had an alibi, DNA evidence on a shoelace could have come from either Negrón or the son he had with Boussiacos, and no evidence suggested a motive for killing his son's mother.

Finally, Lui does not show either deficient performance or prejudice related to Savage's alleged failure to impeach Gulla's credibility. Before trial, the State moved to exclude evidence of disciplinary actions against Gulla. Lui

argues that "Gulla's tenuous status with [King County Sheriff's Office] goes directly to his motivation to trump up a case against Lui." He contends that Savage should have impeached Gulla for bias as well as previous dishonesty. But, as Savage knew, findings of Gulla's misconduct that were related to dishonesty were more than 20 years old, and Savage told the trial court, "I don't see any nexus between the alleged misconduct of Detective Gulla [in] other cases and this case." The record indicates, however, that Savage did not overlook or ignore Gulla's past misconduct. Savage expressly put the court and the prosecutor on notice that if the State attempted to portray Gulla as particularly experienced or expert, Savage would consider the door opened to Gulla's entire history. Lui counters that "[i]f that was indeed Savage's strategy then he failed miserably in pursuing it," given his own questions that elicited facts about Gulla's training and experience. But, Lui does not show how Savage's decisions fell below an objective standard of reasonableness or prejudiced him. Matters that go to trial strategy or tactics do not show deficient performance, and Lui bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001). Lui's speculation and conjecture based on Gulla's alleged actions in other matters, without more, does not meet that burden or overcome the presumption that counsel's strategic decisions in his case were reasonable.

Lui also claims that Savage was ineffective for failing to object to several instances of alleged prosecutorial misconduct. He asserts that "the prosecutor argued, without evidence, that the defendant committed a sexual assault." He

argues that the State elicited opinion testimony from officers that Lui lied, and that he "showed his guilt by failing to act like an aggrieved fiancée [sic]." And, he alleges that the prosecutor violated Lui's constitutional rights by questioning Taumoefolau about the Mormon religious beliefs he and Lui shared.

The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." Id. Lui maintained that he had not had sex with Boussiacos for weeks, a claim contradicted by evidence of Lui's DNA on Boussiacos's underwear and in the vaginal wash taken from Boussiacos's body. Lui, 179 Wn.2d at 466; Lui, 153 Wn. App. at 312. Refraining from lodging an objection that could have highlighted the inconsistencies between Lui's statements and the evidence was a reasonable tactical decision. While Savage did not object to the detectives' testimony about Lui's truthfulness and response to news of the victim's death, Savage impeached the detectives' conclusions and inconsistent statements during cross-examination.

As for Lui's claim of that his right to religious freedom was violated, he does not show how he suffered prejudice from Savage's failure to object to the State's questions to Taumoefolau. The Washington Constitution guarantees that no person shall "be questioned in any court of justice touching his religious beliefs to affect the weight of his testimony." WASH. CONST. art. I, § 11. Here, the State's questions highlighted an area of disagreement between Lui and

Boussiacos and were relevant to Lui's activities during the weekend Boussiacos disappeared. They did not touch on Taumoefolau's "religious beliefs to affect the weight of his testimony." Id. And, contrary to Lui's assertion, they were not analogous to the prosecutor's improper injection of racial stereotypes in State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011).

Finally, Lui contends that counsel was ineffective for failing to request additional DNA testing. In his declaration, however, Savage describes a reasonable tactical decision:

The DNA testing and results provided by the State indicated the presence of the defendant's semen in the victim's vagina and underwear. Partial profiles of the victim's husband and/or son were also detected on the victim's shoes. The presence of unidentified male profiles in any of these samples allowed me to argue that we don't know who else had been in contact with the victim (thus leaving behind his unidentified DNA profile) and, therefore, a reasonable doubt existed as to who killed her. Had I taken additional steps to have the unidentified DNA results further analyzed, there was a high probability that none of them would have matched each other, thereby weakening the argument that the unidentified male profiles belonged to the real killer. If the blood on the stick shift and the unidentified male profiles on the steering wheel, vaginal swabs, and the shoe laces did not match one another, then any argument that another person committed this crime would be severely weakened.

Lui does not establish any claim of ineffective assistance.

## II. Prosecutorial Misconduct

Next, Lui contends that prosecutorial misconduct violated his constitutional rights. He raises an argument under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), that the prosecution violated his due process rights by failing to provide impeachment information about Gulla. And, he

maintains that the prosecutor's questions about Taumoefolau's religion violated Lui's constitutional rights.

In Brady, the United States Supreme Court held that due process requires the State to disclose evidence that is favorable to the defendant and material either to guilt or punishment. Id. at 87. This includes material impeachment evidence. State v. Knutson, 121 Wn.2d 766, 771-72, 854 P.2d 617 (1993). Evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 772 (quoting Rice, 118 Wn.2d at 887). "Wrapped up in this standard of materiality are issues of admissibility; if evidence is neither admissible nor likely to lead to admissible evidence[,] it is unlikely that disclosure of the evidence could affect the outcome of a proceeding." Id. at 773. Here, Lui does not show a reasonable probability that even admissible evidence about Gulla's alleged past misconduct would have changed the outcome of the trial. Because he does not show that the additional evidence was material, he does not establish grounds for relief under Brady.

Defense counsel did not object to the prosecutor's allegedly improper questions about religion. Therefore, Lui has waived this claim of error unless he can show that the prosecutor committed misconduct that was "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." State v. Emery, 174 Wn.2d 741, 760-61, 278 Wn.3d 653 (2012). Lui must show both (1) that "no curative instruction would have obliterated any prejudicial effect on the jury" and (2) that the misconduct resulted in prejudice that "had a substantial

likelihood of affecting the jury verdict." State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). Because Lui shows neither, his claim fails.

### III. Juror Misconduct

Lui also alleges that juror misconduct violated his constitutional right to an impartial jury. He presents a declaration from investigator Denise Scaffidi, in which Scaffidi reported that she learned from juror Clare Comins that the jury considered extrinsic information based on one juror's purported personal knowledge of the area around the crime scene. According to Scaffidi, Comins stated that during deliberations, a female juror said that Lui and Taumoefolau could not have placed leaflets at the mall in Woodinville because that mall had not yet been built. Scaffidi alleges that Comins believed that "jurors discussed this information during deliberations and that it reflected poorly on Mr. Taumoefolau's testimony." However, Comins refused to sign a declaration to that effect. The trial court denied defense counsel's request for access to the other jurors' contact information. Lui argues that this court should remand for an evidentiary hearing for purposes of questioning all the jurors about Comins's statements.

A criminal defendant is constitutionally entitled to a fair trial before an unbiased and unprejudiced jury. State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994). Jurors are expected to bring their opinions, insights, common sense, and everyday life experiences to their deliberations. State v. Briggs, 55 Wn. App. 44, 58, 776 P.2d 1347 (1989). A juror's introduction of specialized or expert knowledge, however, may be grounds for a new trial. Id. at 59.

Generally, however, in evaluating a claim of juror misconduct, a court may not consider matters that inhere in the verdict. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). This includes the mental processes, both individual and collective, by which jurors reach their conclusions. Id. at 777-78. Even if Comins or other jurors were willing and available to submit declarations, their statements would likely be inadmissible as pertaining to matters inhering in the verdict. And, the alleged statements themselves are based on the juror's everyday life experiences, not the product of specialized knowledge or outside sources.

An evidentiary hearing is not warranted in a collateral challenge if the defendant fails to allege facts that establish prejudice. Rice, 118 Wn.2d at 889. Here, the alleged extrinsic evidence may impeach one portion of Taumoefolau's testimony. But, it does not tend to disprove the defense theory that Lui and Taumoefolau posted flyers near where the victim's body was found and that this explains why bloodhounds tracked Lui's scent in the area. Therefore, Lui does not show actual prejudice. He fails to establish grounds for relief.

#### IV. Newly Discovered Evidence

In 2001, crime scene investigators found a blood stain on the stick shift "skirt" of Boussiacos's car. Two years after trial, in 2010, the Washington State Patrol Crime Laboratory matched the DNA from this blood sample to Sandro M. Enciso, who later changed his name to Alessandro Blagi. On November 4, 2013, police questioned Blagi.

Biagi had moved to Washington around 1992. He held a number of jobs in the Seattle area, mostly related to automobiles. He worked at dealerships and auto detailing shops, and also had a side business buying, detailing, and selling cars on his own. When detectives showed Biagi a picture of Boussiacos, he was "100 percent" certain he had seen her somewhere before, but could not say where. He denied murdering her. In a later conversation with a detective, he opined that he probably worked on her car. He stated that he did not recognize Lui.

In a supplement to his personal restraint petition, Lui contends that evidence of the DNA match is grounds for a new trial. He argues that the evidence "is certainly material because it points to a specific, alternate perpetrator" who "has no innocent explanation" for leaving his blood in Boussiacos's car.

Newly discovered evidence is grounds for relief in a personal restraint petition if those facts, "in the interest of justice," require vacation of the conviction or sentence. RAP 16.4(c)(3). To warrant this relief, this evidence would have been admissible at trial and would have probably changed the outcome. In re Pers. Restraint of Jeffries, 114 Wn.2d 485, 493, 789 P.2d 731 (1990). To prevail here, Lui must show that the evidence: "(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." In re Pers. Restraint of Lord, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994) (quoting State v. Williams, 96 Wn.2d 215, 223, 634 P.2d

868 (1981)). The absence of any one of these five factors justifies the denial of a new trial. State v. Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996).

Washington courts have long followed the rule that in order to present evidence suggesting another suspect committed the charged offense, the defendant must show "such a train of facts or circumstances as tend clearly to point out some one besides the prisoner as the guilty party." State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932). In other words, "some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." State v. Franklin, 180 Wn.2d 371, 381, 325 P.3d 159 (2014). "Mere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged." State v. Kwan, 174 Wash. 528, 533, 25 P.2d 104 (1933). The evidence must show "some step taken by the third party that indicates an intention to act" on the motive or opportunity. State v. Rehak, 67 Wn. App. 157, 163, 834 P.2d 651 (1992). The defendant must lay a foundation establishing a clear nexus between the other person and the crime. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). The defendant bears the burden of showing that the other suspect evidence is admissible. State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986).

Lui does not carry this burden here. He establishes no nexus between Blagi and the crime—no motive, threat, or step taken that would indicate any intention on Blagi's part to act on any opportunity. Because Lui does not show

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that this "other suspect" DNA evidence is admissible, he cannot show that it would have changed the outcome of his trial. For the same reason, he does not establish his claim that Savage was ineffective for not seeking additional DNA testing. Speculation and conjecture based upon a small amount of DNA deposited in the victim's car by a person who has held several Seattle-area jobs selling and detailing automobiles does not justify relief here.

We deny the petition.

WE CONCUR:

*Leach, J.*

*Appelwick, J.*

COX, J.