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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint of

SIONE P. LUI,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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 ORIGINAL

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I.
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 (BOR) 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. 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. 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 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, 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, 1235-36. The cells could have been there for a long time. IX RP 1254, 1269-71.

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, Lui challenged the testimony from the medical examiner and a DNA expert. The State responded that any error was harmless because the forensic evidence was not an important part of its case. BOR at 33-36, 50-51. The Washington Supreme Court denied in a 5-4 decision Lui's claim that his right to confrontation was violated when the State's expert witnesses testified to analysis performed by others. *State v. Lui*, 179 Wn.2d 457, 315 P.3d 493 (2014).

The State's response to the personal restraint petition (PRP) mirrored its response to Lui's opening brief on appeal (AOB). Whenever

Lui poked holes in the State's theory, the State said that it was not important anyway. For example, the State relied at trial on a witness who maintained that Elaina Boussiacos's car was in the WAC parking lot shortly after she disappeared. When Lui presented new evidence that the car appeared much later, the State said the timing was "hardly the linchpin" of its case. State's Response to PRP (PRP Response) at 7. The State did not suggest what that linchpin might be.

Similarly, at trial the State emphasized that dog tracking evidence showed that Lui walked from his home to the spot where Boussiacos's body was found. The State ridiculed Taumoefolau's testimony that the track was laid when he and Lui were putting up missing person posters. When Lui showed that defense counsel failed to present much stronger evidence that the tracking dog was following Lui's postering, the State responded that the jury must have already known that. PRP Response at 12-15.

At trial, Detective Gulla testified that Lui appeared unconcerned about Boussiacos's disappearance, that Lui's garbage can was suspiciously empty, and that there was no debris on Boussiacos's shoes, even though the ground near her car was messy. When Lui showed that Detective

Gulla's credibility should have been impeached, the State responded that his testimony was insignificant. PRP Response at 37.

Lui does not mean to suggest that any of this trial evidence was highly incriminating. But the State certainly portrayed it that way at trial, and the jury apparently bought the State's arguments. If the State is right that none of these points mattered very much, then what was the key evidence against Lui? Essentially all that remains is that Lui was living with Boussiacos on the night she disappeared, the two of them were having some problems in their relationship, and Lui was not always truthful in his statements to the police.¹ That is weak evidence for a murder conviction.

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

¹ For example, Lui claimed he abstained from sex with Boussiacos for some time due to his religion, but some of his sperm cells were found on Ms. Boussiacos.

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. The prosecutors had this information for at least nine months before attempting to inform the defense. The only investigation was an "IRIS" printout, with no follow-up. The printout showed that the blood belonged to Alesandro Biagi, a violent criminal with four felonies and seven misdemeanors on this record.

When undersigned counsel finally learned of the CODIS hit and complained about the lack of follow-up, a prosecutor and detective interviewed Biagi in ICE custody. Contrary to Ms. Sass's statement in the documentary, Mr. Biagi was "100% sure" he had never seen Ms. Boussiacos's car. 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.

On January 19, 2016, the Court of Appeals dismissed the PRP in an unpublished opinion.

II. ROAD MAP

Mr. Lui's issues have been extensively briefed in the Court of Appeals and in the motion for discretionary review. Rather than reiterating

earlier briefing, it may be more helpful to provide an index to the briefing by issue.²

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

1. Legal Standards

PRP at 7-8.

2. General Problems with Defense Counsel

PRP at 8-9; Reply on PRP (PRP Reply) at 4-5.

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

PRP at 23-29; PRP Reply at 13-16; MDR at 14-15 discussing *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2104).

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

PRP at 9-20; PRP Reply at 5-10.

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

PRP at 20-23; PRP Reply at 10-13.

² Because the motion for discretionary review (MDR) mostly summarizes the prior briefing, Lui will cite to it only when it discusses case law that was not available earlier.

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

PRP at 29-39; PRP Reply at 16-17.

7. Defense Counsel Failed to Object to Prosecutorial Misconduct

PRP at 39-47; PRP Reply at 17-20.

B. THE STATE VIOLATED ITS OBLIGATION TO PROVIDE IMPEACHMENT INFORMATION REGARDING DETECTIVE GULLA

PRP at 48-52; PRP Reply at 20-21.

C. JUROR MISCONDUCT VIOLATED LUI'S CONSTITUTIONAL RIGHTS

PRP at 53-56; PRP Reply at 21-23.

D. NEWLY DISCOVERED EVIDENCE

Supplement to PRP at 1-7; Reply on Supplement to PRP at 1-2.

**III.
CONCLUSION**

For the foregoing reasons, the Court should 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*, 184 Wn.2d 679, 363 P.3d 577 (2015).

DATED this 23 day of November, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Zuckerman", written over a horizontal line.

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CERTIFICATE OF SERVICE

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

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Dear Sir/Madame:

Enclosed for filing in the Washington State Supreme Court in *In re the Personal Restraint of Sione P. Lui*, Supreme Court No. 92816-9, is the **Petitioner's Supplemental Brief**.

Please feel free to contact me with any questions or concerns.

Thank you for your kind attention to this matter.

Best,

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