

NO. 92816-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re Personal Restraint Petition of

SIONE P. LUI,

Petitioner.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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A. INTRODUCTION

The State detailed many of the facts underlying this case in its briefing below and the prosecutor's closing argument nicely summarizes the full picture presented by the evidence. State's Response to PRP, App. B (statement of facts from direct appeal); RP 1805-54. Because nine discrete issues are presented for review and due to the page limits imposed by the rules of appellate procedure, this supplemental brief will not repeat all of the relevant facts or attempt to respond to all of the issues presented. Counsel respectfully asks this Court to rely on the State's prior submissions for a full treatment of the issues. This supplemental brief will outline facts and arguments most critical to some key issues, respond to points raised in Lui's reply brief below or in his Motion for Discretionary Review, and present facts or points of law not addressed before.

This approach entails some risk, of course, because a retrospective is always susceptible to the distorting effects of hindsight, and a summary necessarily lacks detail and context. The *totality* of the evidence, and the importance of any given fact or allegation in the context of other facts, can get lost where exhibits are presented piecemeal as attachments to briefs, and the cold record cannot reveal the manner or demeanor of witnesses as they testified.

Still, it should be apparent after a careful review of Lui's claims against the backdrop of the entire record, that his trial lawyer, Anthony Savage, made very clear tactical choices in defending Lui, that these choices were reasonable, that other lawyers might have chosen differently, but that Lui was well-served (and certainly not prejudiced) by Savage's representation. Nor did the State withhold evidence that was material to Lui's case; given Denny Gulla's limited role in this trial, his disciplinary history would not have changed the result.

B. ARGUMENT

Lui bears the burden in this personal restraint petition of showing that he was actually and substantially prejudiced from a constitutional error or that a nonconstitutional error resulted in a complete miscarriage of justice. In re Pers. Restraint of Gomez, 180 Wn.2d 337, 347, 325 P.3d 142 (2014).

To establish ineffective assistance of counsel, Lui must show both that defense counsel's representation was deficient, i.e., that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for performance is whether counsel's conduct "so undermined the proper functioning of the

adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. A reviewing court must begin with a strong presumption that counsel was effective. Strickland, at 689; In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002). This includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, at 689-90.

Strickland must be applied with “scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity” of the adversary process. Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). “Judicial scrutiny of a counsel’s performance must be highly deferential” and “...every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Bell v. Cone, 535 U.S. 685, 698, 122 S. Ct. 1843, 1852, 152 L. Ed. 2d 914 (2002). Counsel’s representation is not required to conform to the best practices or even the most common custom, as long as it is competent representation. Richter, 562 U.S. at 105. “Reasonable competence” does not demand “perfect advocacy” and courts must combat the “natural tendency to speculate as to whether a different trial strategy might have been more successful. Maryland v. Kulbicki, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2, 4-5, \_\_\_ L. Ed. 2d \_\_\_ (2015).”

Decisions whether to call expert witnesses will generally not serve as a basis for an ineffective assistance claim. In re Pers. Restraint of Cross, 180 Wn.2d 664, 700, 327 P.3d 660 (2014) (mental health experts in a capital murder case); State v. Mannering, 150 Wn.2d 277, 287, 75 P.3d 961 (2003) (expert witness on duress).

Anthony Savage had a sophisticated, intelligent and nuanced trial strategy and he executed that strategy in a professional manner. See State's Response to PRP, App. C. He understood that "lawyering by checklist" was not generally effective. PRP, App. C2-3. He recognized that raising every conceivable motion or defense in a criminal trial was roughly equivalent to throwing spaghetti at the wall to see what sticks, and was not merely a waste of time, but could diminish the defense. PRP, App. C3-9. He realized that developing an effective strategy meant resisting the temptation to try the case by committee; counterproductive tactics that seem enticing to the Lui's family might undermine the defense. It is a testament to his professionalism and intellectual integrity that he refused to bend to such "advice."

The relatively recent U.S. Supreme Court decision in Harrington v. Richter vindicates Mr. Savage's approach to criminal trials, and reminds appellate courts that trial counsel need not test every possible item or call every possible expert in order to be effective. Richter was prosecuted for

a murder in which two people were shot. Leading up to trial, the State had not developed any evidence as to the source of blood pooled at the entry to a bedroom of the residence where one victim was shot. In opening statement, defense counsel exploited this hole in the State's case by describing a series of events and a theory of self-defense that would allow the jury to reasonably question Richter's guilt. The prosecution reacted by testing evidence not previously tested, calling witnesses that hadn't been planned, and attempting to shore up their theory of the case. Defense counsel responded with cross-examination of these new witnesses, but counsel did not call his own experts. Richter, 562 U.S. at 92-96.

On federal habeas review, the Ninth Circuit Court of Appeals—believing it could see the case more clearly with hindsight—held that counsel was constitutionally ineffective for failing to develop evidence of self-defense.<sup>1</sup> Richter, at 97. The Supreme Court granted certiorari and reversed, unanimously rebuking the federal appellate court for its approach to Strickland—an approach similar to the reasoning Lui now urges this Court to adopt. The Supreme Court spent no fewer than seven

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<sup>1</sup> The appellate court opinion opened this way: “To ... not prepare is the greatest of crimes; to be prepared beforehand for any contingency is the greatest of virtues. -Sun Tzu, *The Art of War* 83 (Samuel B. Griffith trans., Oxford University Press 1963).’ At the heart of an effective defense is an adequate investigation. Without sufficient investigation, a defense attorney, no matter how intelligent or persuasive in court, renders deficient performance and jeopardizes his client's defense.” Richter v. Hickman, 578 F.3d 944, 946 (9th Cir. 2009).

pages of its opinion correcting the circuit court's application of Strickland, Richter, at 104-11. The Supreme Court focused, not on what it thought defense counsel subjectively believed or should have done as to several strategies, but rather on what an objectively reasonable attorney might do under the complicated and shifting circumstances that were presented at trial. Id. The Court reaffirmed that counsel has wide latitude to choose strategies, id. at 106, that an attorney can avoid distractive or counter-productive strategies in favor of more productive ones, id. at 107, that other strategies may pose hidden risks, id. at 108-09, and that sometimes an effective strategy entails reserving a theory until later. Id. at 109.

Lui's PRP arguments against Anthony Savage's trial strategy are, like the approach taken by the Ninth Circuit, distorted by hindsight. His arguments ignore context and evidentiary detail in favor of hearsay, conjecture, and second-guessing. He proposes arguments that would have damaged his case in front of an actual jury, and fails to respect the experience and judgment that Mr. Savage brought to the case. Even if some of Lui's newly-proposed alternative strategies *might* have been pursued, the Constitution does not *demand* that they be pursued.

1. LUI HAS NOT SHOWN THAT SAVAGE WAS DEBILITATED OR SLEEPING.

Lui claims that Savage was old, injured, and slept during trial.

These claims should be rejected for the reasons already pointed out in the State's response below and in Mr. Savage's declaration. State's Response to PRP, at 5-6, App. C1-2. In addition, it should also be noted that the trial court was keenly aware of its responsibilities and would have intervened if it believed counsel was compromised. After Mr. Savage was injured during trial, the trial judge noted that he was going to inquire of Mr. Savage because "part of my job is to make sure that there is effective assistance of counsel." RP 1466. The court bluntly asked Savage whether he could proceed. RP 1466. Savage answered that he would feel better on behalf of his client if trial were recessed until the following Monday. RP 1469. The court noted, "I have known you for a lot of years, [and I] have a lot of concerns about your health today." RP 1470. It should also be noted that the trial court acted quickly on another occasion when he noticed a juror nod off. RP 1277. There is every reason to believe the court would have done the same were there signs that Savage was ill or dozing. Lui's speculation to the contrary should be rejected.

2. SAVAGE ADROITLY CHALLENGED THE STATE'S THEORY OF THE CASE.

A dog tracked Lui's scent for about one mile from the victim's abandoned car directly to Lui's front door. Apparently recognizing that this was damaging evidence against him, Lui attempts to undermine the evidence in his petition. The State has addressed many of his arguments in its briefing below. State's Response to PRP, at 15-21. The following observations are offered in addition to comments made below.

Lui asserts that Savage should have impeached Amber Mathwig—the employee who first noticed the car in the Woodinville Athletic Club's parking lot—with his investigator's interview. PRP, at 12-13. Such "impeachment" would have suggested to the jury that Boussiacos's car did not appear in the Woodinville Athletic Club parking lot until Wednesday. The State has pointed out that counsel reasonably chose not to confront this witness, because the witness was firm in her belief that the investigator was mistaken, and because counsel's theory was that Lui's scent was in the area based on innocent activity, i.e., putting up missing-persons posters. State's Response to PRP, at 8-11. As trial counsel astutely recognized:

I never did believe that the location of the car on a particular morning was a "smoking gun." If Mr. Lui was responsible for the murder, he could have hidden the car over the weekend and driven to the location at some later time. In other words, the location of

the car on Saturday, Tuesday, Thursday, etc., doesn't really convict or acquit him of the offense.

State's Response to PRP, App. C7, ¶ 9. It is also important to note, however, that the strategy proposed in Lui's petition is worse than innocuous---it would have backfired at trial.

A key point in the defense case was that the dog track was unreliable because 11 days had elapsed between the car appearing in the parking lot and the dog track, so the only way a dog could have followed Lui's scent was to have followed a scent he innocently laid down while trying to post missing-persons flyers. This point remains a key argument in Lui's PRP. Motion for Discretionary Review, at 19, App. 14.<sup>2</sup> The testimony of Denise Scaffidi, Paul Finau, and Falepaina Harris<sup>3</sup> would have seriously undercut this argument because such testimony would have established that Boussiacos's car did not appear in the parking lot until as late as Thursday, February 8<sup>th</sup>, a mere five days before the dog track, which occurred on February 14<sup>th</sup>. Thus, had Savage pursued the testimony Lui now recommends, he would have *bolstered* rather than undermined the dog track evidence. A scent trail laid down on Wednesday or

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<sup>2</sup> Proposed defense expert James Ha, PhD, would have said that "scent-dogs including bloodhounds, can accurately track for up to 10 days," and that "[i]n view of the low probability of a dog following an 11-day-old trail, it is much more likely that Mr. Schurman's dog was following a scent that had been laid down more recently." PRP, App. at 4, ¶¶ 7, 8.

<sup>3</sup> See PRP, at App. 9, App. 11, App. 12.

Thursday would have been many days stronger than a scent trail laid down early Saturday morning, February 3<sup>rd</sup>.

Lui's criticisms about the handling of Sam Taumoeofolau's testimony is similarly unfounded. Were Taumoeofolau correct that the car was not in the lot on Tuesday and Wednesday, then it would necessarily follow that the car was placed there more recently, perhaps on Thursday, again suggesting that the scent trail was *stronger*. This would have nullified any effect of Lui's expert and would have strengthened the value of the dog track evidence.

Savage clearly recognized the danger of trying to directly attack the dog track evidence and of placing too much weight on the timing of the car's appearance in the parking lot. He noted:

The handler and the dog had no way of knowing where the defendant and the victim lived. Even if the dog in fact tracked the victim's scent, rather than the defendant's, that argument would have inherently contradicted any defense expert testimony that the trail was too old to follow.

State's Response to PRP, App. C4.

Lui's newly-minted strategy in his PRP would have undermined one of counsel's best trial strategies. It would have made it more plausible that the dog tracked from the parking lot to Lui's doorstep because Lui had parked the car with the victim's body inside the trunk and then scurried back to his house. Trial counsel wisely avoided such a strategy.

Moreover, the critique in Lui's petition of Taumoefolau's trial testimony confuses rather than clarifies the issues. The State never disputed that Lui, Taumoefolau, and others distributed flyers in the area following Boussiacos's disappearance. But, as noted in the State's original response to the PRP, Lui and Taumoefolau's route while putting up posters is relevant only to the extent that it paralleled the path of the dog track. Thus, it would not have helped Lui to have Taumoefolau testify that they put up posters in other areas. It was reasonable for Savage to use this evidence to suggest a reasonable doubt existed as to whether the dog was following Lui's scent laid down while looking for his missing fiancée. This was a reasonable tactical judgment.

Additionally, Lui's present theory as to the dog track is incoherent. He seems to argue that expert testimony would have shown that the dog followed a trail left by *Boussiacos*, since Boussiacos may have been "waylaid and ultimately transported to the WAC lot." Reply on PRP, at 8. This makes no sense. Boussiacos was clearly dressed and placed in the trunk of her car after she was dead, and the car was necessarily driven over roads to the parking lot. There is no evidence that Boussiacos was placed in the trunk after being dragged over bushes and down side streets and alleys where the dog track led. There is simply no way Boussiacos could have left a scent trail from her doorstep to the parking lot when she

was dead in a trunk. And, according to Lui's own expert, a dog could not follow a trail more than 10 days old. Any trail left by Boussiacos while still alive would have been at least 12 days old.

For these reasons, it could have been self-defeating to argue that Boussiacos's scent misled the dog. A lawyer might choose to make such arguments, but it cannot be said that Savage was constitutionally ineffective for refusing to do so. His choices were reasonable.

3. "OTHER SUSPECT" EVIDENCE WOULD NOT HAVE CHANGED THE RESULT OF THIS TRIAL.

Lui argues that two other people might have killed Boussiacos and that Lui would have been acquitted had the jury heard about either (or both?) of these people. His arguments—one framed as ineffective assistance of counsel and the other as newly discovered evidence—rely on mere innuendo and rumor. He studiously avoids applying the settled legal standard for "other suspects" evidence. Also, as is typical with hindsight, his arguments ignore critical detail and context.

For more than eighty years, Washington's appellate courts have consistently held that "other suspect" evidence may be admitted only where there is such proof of connection or circumstances that tend to clearly point out someone besides the one charged as the guilty party. State v. Russell, 125 Wn.2d 24, 75, 882 P.2d 747 (1994); State v. Downs,

168 Wash. 664, 13 P.2d 1 (1932); State v. Strizheus, 163 Wn. App. 820, 830, 262 P.3d 100 (2011). This evidentiary foundation requires a clear nexus between the other suspect and the crime. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). Motive, ability, and opportunity to commit a crime are not sufficient standing alone. “Not only must there be a showing that the third party had the ability to place him or herself at the scene of the crime, there also must be some step taken by the third party that indicates an intention to act on that ability.” State v. Rehak, 67 Wn. App. 157, 163, 834 P.2d 651 (1992).

Washington’s appellate courts have repeatedly addressed the admissibility of “other suspects” evidence in homicide cases. Those cases provide a framework for assessing various fact-patterns that arise.

In State v. Mezquia, 129 Wn. App. 118, 118 P.3d 378 (2005), the defendant sought to present evidence that the victim’s former boyfriend, Jenkins, committed the murder. He argued that the following as evidence supported his “other suspects” theory: “(1) Zapata [the victim] was angry about Jenkins’ relationship with his new girlfriend, (2) she expressed extreme anger and frustration towards him just prior to her death when she was at T.V.’s apartment, (3) Zapata was looking for Jenkins that evening, (4) Jenkins called Zapata’s roommate the next morning asking to speak with Zapata and when told she might be in the shower responded that the

person in the shower probably wasn't Zapata, and (5) a friend of Zapata's said Zapata told her Jenkins sometimes went 'crazy' and had attacked her a couple of times in the past." Id. at 123-24. The Court of Appeals affirmed the exclusion of the "other suspects" evidence, holding:

[T]he evidence offered by Mezquia did not clearly point to Jenkins. There was no physical evidence connecting Jenkins to the crime. There was no evidence that Zapata had contact with Jenkins after she left T.V.'s apartment. Nor was there any evidence that Jenkins had the opportunity or a motive to commit the crime.

Id. at 125-26.

In State v. Rafay, 168 Wn. App. 734, 285 P.3d 83 (2012), the defendants sought to introduce evidence that violent Muslim groups had marked the homicide victim for assassination, but there was no evidence that any member of the groups had been near the scene or acted upon the motive. 168 Wn. App. at 800-01. The Court of Appeals affirmed the exclusion of the evidence, holding that "[m]ere 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." Id. at 801-02, quoting State v. Kwan, 174 Wash. 528, 533, 25 P.2d 104 (1933).

In State v. Wade, 186 Wn. App. 749, 346 P.3d 838, review denied, 184 Wn.2d 1004 (2015), the victim was found deceased in her apartment closet, apparently strangled. Wade, her drug dealer, sought to introduce

evidence that the victim's former boyfriend, Broutzakis, killed her. Wade noted that Broutzakis had been convicted of assaulting the victim in the past, that a court had previously issued an order barring him from contacting her and that he had left voice messages that could be interpreted as threatening. The State opposed admission, noting that Broutzakis did not appear on video surveillance, and that no witness could place him near the apartment around the time of the murder. The trial court excluded the "other suspect" evidence noting that it was speculative and was unsupported by any evidence that Broutzakis was at the scene.

The Court of Appeals affirmed and explained:

There was no physical evidence connecting Broutzakis to the murder and no evidence Broutzakis was anywhere near Thornton's apartment when the crime occurred. While, as the trial court described, the evidence indicates Broutzakis was a "bad actor with a violent history involving Ms. Thornton," the facts and circumstances do not show a nonspeculative link between Broutzakis and the crime.

Id. at 767.

In State v. Starbuck, 189 Wn. App. 740, 355 P.3d 1167 (2015), review denied, 185 Wn.2d 1008 (2016), Starbuck was charged with murdering his ex-wife. On the day of her death, she had been in communication with two other men, with whom she had romantic relationships. One of these men had stopped by her house twice that day. The Court of Appeals affirmed the trial judge's decision to exclude "other

suspect” evidence, noting that one of the men’s phone records provide him with an alibi, and rejecting the defense argument that it was improper to consider the alibi when judging the weight of the “other suspect” evidence. Id. at 755.

Lui claims, however, that trial counsel erroneously rejected other suspect evidence because he applied a more demanding admissibility standard. He also claims that the Court of Appeals decision in this case conflicts with this Court’s decision in State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2014). He is mistaken. The above cases are all consistent with Franklin. They illustrate that in no case has a court allowed “other suspect” evidence where there was a lack of evidence tying the person to the crime, rather than simply to the victim.

Franklin was charged with cyber-stalking a former girlfriend, and he sought to admit evidence that his live-in girlfriend had committed some of the cyber-stalking acts. The defense had evidence that this “other suspect” had a motive (jealousy), access to the computer and e-mail accounts at issue, and a prior history of sending earlier threatening e-mails to the victim. The trial court excluded the “other suspect” evidence after considering the “other suspect” evidence in comparison with the evidence against the defendant. This Court held that the trial court erred by considering the strength of the State’s case against the defendant and

requiring the defense to present direct rather than circumstantial evidence that someone else committed the crime. Id. at 378-79. However, the Court reaffirmed the Downs standard and held that there had to be a “train of facts or circumstances” connecting the other suspect to the crime. Id. at 379. The trial court’s ruling was reversed in Franklin because the evidence was essentially a toss-up. Id. at 383 (“...[S]ome of the circumstantial evidence against Franklin pointed equally to Hibbler. Though some of this evidence emerged at trial through other witnesses, some of it did not.”).

Neither Mr. Savage nor the Court of Appeals rejected “other suspect” evidence as to James Negron simply because the State’s evidence was stronger than the “other suspect” evidence. Savage refused to accuse Negron of murder because there was no nexus between Negron and Boussiacos’s murder.

First, it should be noted that the “other suspects” standard is uniquely difficult for Lui to meet in this case because, based on Lui’s own story, there was very little *opportunity* for anyone else to kill Boussiacos. She was alive, and with Lui, sleeping under the same roof on the same floor of a shared-living house, into the early morning hours of Saturday morning. She would have left for SeaTac Airport by approximately 6:30 a.m. in order to catch her flight at 8:30 a.m. Thus, it follows that if Lui

was not the killer, either Negron or Biagi entered the house, killed Boussiacos, put on her shoes, packed her bags with random items and clothing,<sup>4</sup> then put her body in the trunk and drove it about one mile away before parking it at the health club, all without disturbing Lui in his slumber. Such a story is so implausible it never would have been advanced at trial.

Even if Lui advanced a “kidnap” theory whereby Negron or Biagi encountered Boussiacos as she left the house, killed her, put her body in the trunk of the car, then dumped the car in the athletic club’s parking lot before the business opened at 5 a.m., when someone might have seen him, such a theory provides only the narrowest window of opportunity to commit this crime, and there is *absolutely no evidence* that either Negron or Biagi were near Boussiacos in the early morning hours she was killed.

Second, Lui asserts that trial counsel should have accused James Negron of killing Boussiacos because Negron was a former gang member, he had been violent against Boussiacos in the past, he had made false statements in a divorce proceeding, and he had a motive to kill Boussiacos because she was attempting to regain custody of their son. Motion for Discretionary Review, at 15. None of these assertions is supported by

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<sup>4</sup> Lui told differing stories about how Boussiacos packed. He told the 911 operator on Monday, February 4<sup>th</sup>, that she had packed the night before leaving and he had preloaded her car. He told detectives in 2007 that she had packed and loaded the car on the morning of her departure.

competent, admissible evidence. Instead, they rely on rumor, conjecture, bias, and the ruminations of a twice-disciplined lawyer who had opposed Negron in past litigation.<sup>5</sup> Savage wisely chose not to advance such a flimsy theory, one virtually identical to the one rejected in Wade.

Moreover, the admissible evidence suggests that Negron was not the killer. Lui asserts that only Negron's wife provided an alibi. Motion for Discretionary Review, at 13. He is mistaken. Negron's wife, his son (Anthony), and a friend from church (Bill Allen) all spent the night with Negron and could testify that he was home. PRP, App. 10. Ex. H, pp. 6-8 (statement of Negron). Thus, three people confirmed his alibi, not just one. And, Lui offers no evidence, whatsoever, that this alibi was false. Nor does he offer a shred of evidence that places Negron at Boussiacos's house early on Saturday morning.

Additionally, Lui's own statements days after the murder would have undercut the theory that Negron killed Boussiacos because he described their relationship in benign terms. When asked how Boussiacos

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<sup>5</sup> Mr. Savage sent a polite "thank-you" letter to Mr. Pope early in the case saying that he would follow up after reviewing the discovery. Evidently, after reviewing the matter, Mr. Savage realized the paucity of evidence connecting Negron to Boussiacos's murder. Also, Pope has a checkered history as a lawyer; a reasonable attorney would have been reluctant to rely on him. See <http://www.seattlepi.com/local/article/Political-gadfly-Pope-sneaks-into-council-race-as-1245767.php> ("The King County Bar Association rated Pope 'not qualified' for court sanctions imposed on him and acts of 'unprofessional conduct' as a lawyer, including filing frivolous motions. The bar also said Pope made a baseless accusation against LaSalata in campaign material."); <https://www.mywsba.org/DisciplineNotice/DisciplineDetail.aspx?dID=1713> and <http://archive.seattleweekly.com/home/931364-129/lawcourts>.

and Negron got along, Lui said that they were like “typical divorced people” who “try to work together because of the child.” PRP, App. 2, Decl. of Celeste Lui, Ex. D, p. 2288. He said that conflicts between Negron and Boussiacos were minimal and that they had “fights and arguments ... just like any other divorced couple, but nothing outrageous.” Id. at p. 2288. Lui said they had argued a week before but “it was not a huge deal.” Id. Thus, Lui’s own statements would likely have diminished any “other suspect” arguments in the eyes of a jury.

Lui’s claim of newly discovered evidence as to Biagi does not fare any better. The fact that a blood drop from a car mechanic and auto detailer was found in Boussiacos’s recently purchased car does not establish that he killed her.

In order to prevail on this claim, Lui must show that the blood evidence was material, admissible, and would have changed the result of the trial. State v. Williams, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981). He cannot meet the test for admissibility because he cannot show that Biagi was an “other suspect” under the law. Biagi was a car repairman and auto detailer in the Seattle area in February, 2001. He was obviously in Boussiacos’s car at some point in time, but it is impossible to say whether Boussiacos owned the car when he worked on it. Lui has no

evidence to show that Biagi was anywhere near Boussiacos or her car on the morning of February 3, 2001. Nor can he show any motive.

Lui exaggerates Biagi's history to portray him in a sinister light. He calls Biagi a "violent felon." Reply to Supp. PRP, at 1. Biagi's rap sheet shows felony convictions for possessing stolen property and forgery. Supp. PRP, Ex. H. Although he apparently fought with a security guard who tried to apprehend him after a shoplift, resulting in a misdemeanor conviction, that does not make him a "violent felon," nor does it make it more likely that he killed anyone, much less Boussiacos. Lui also asserts that Biagi has Bipolar Disorder without acknowledging that Biagi said that mental health providers later determined that Bipolar Disorder was a *misdiagnosis*. Supp. PRP, Ex. D, pp. 20-21.<sup>6</sup> Finally, Biagi's candor with investigators—he said that he recognized Boussiacos—suggests that he has nothing to hide. It is inconceivable that he would admit to investigators in a homicide that he recognized the victim if he was the actual killer.

In short, Lui's "other suspect" accusations have a "round up the usual suspects" flavor.<sup>7</sup> Rounding up suspects based on hearsay, rumor, or

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<sup>6</sup> Nor does he present evidence to show that Bipolar Disorder causes one to kill.

<sup>7</sup> Capitaine Renault instructed police arriving at the scene of a murder to "round up the usual suspects" in order to divert attention from Richard Blaine, the real shooter. *Casablanca* (Warner Bros, 1942).

innuendo does not meet the “other suspects” test under the law. The law requires admissible evidence that proves a nexus between the purported suspect and the crime. A new trial is not required based either on ineffective assistance of counsel or on newly discovered evidence.

4. **POTENTIALLY IMPEACHING EVIDENCE AND  
BRADY EVIDENCE.**

Denny Gulla apparently has a very poor disciplinary history reaching back many years and involving many complaints (some salacious) from citizens and supervisors. Some complaints have been determined to be credible, many have not. Lui spends considerable effort in his PRP discussing this information, with precious little legal analysis, apparently in the hope that the emotional impact of the disciplinary history will influence this Court to hold that he was deprived of a fair trial.

In order to establish a Brady<sup>8</sup> violation, a defendant must establish three things: (1) [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, (2) that evidence must have been suppressed by the State, either willfully or inadvertently, and (3) the evidence must be material. State v. Davila, 184 Wn.2d 55, 69, 357 P.3d 636, 643 (2015) (quoting Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). Of course

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<sup>8</sup> Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Petitioner Lui must also show that he was “actually and substantially prejudiced from a constitutional error or that a nonconstitutional error resulted in a complete miscarriage of justice. In re Pers. Restraint of Gomez, 180 Wn.2d at 347. In Davila, a direct appeal, the State failed to disclose in a murder prosecution that a forensic scientist who tested items of evidence for DNA had been fired for incompetence in performing DNA tests. This Court determined that the evidence was suppressed and favorable, but not material. Davila, 184 Wn.2d 70-78.

The circumstances here are markedly different. In this case, both the State and defense counsel were fully aware of Det. Gulla’s disciplinary history before trial because a detailed story on Gulla had been published in a major local newspaper. Over one month before trial, the lead prosecutor sent a message to defense counsel with additional information:

Tony – I wanted to let you know that we received some more specific information (beyond the newspaper articles) about the KCSO findings involving Det. Denny Gulla. There were two IIU cases that were sustained on “Conduct Unbecoming” violations. The underlying reason was that the IIU concluded he made false statements about his interactions with two young women with whom he came into contact while on duty. These findings were in 1986. Our briefing on the subject would remain the same.

State’s Response to PRP, at App. I. Being aware of all this information, defense counsel chose not to pursue all documents in Gulla’s apparently voluminous file, recognizing that its admissibility was questionable and

that the material would not be helpful. RP 59-60; State's Response to PRP, at App. C4-5. Lui does not explain how the State should have deemed this information to be "favorable" under Brady when Lui's trial counsel with 50 years' experience as a lawyer concluded otherwise. Nor can Lui establish that Savage was *required* to pursue this strategy.

Still, Lui repeatedly suggests that the State is hiding information, presumably the entire disciplinary file pertaining to Gulla. But the King County Prosecutor's Office does not have the full disciplinary file, nor is it at all clear that in 2008 (or now) the prosecutor was entitled to demand that entire file, including unfounded complaints and investigations.<sup>9</sup> Were Lui dissatisfied with the Sheriff's exceptions under the Public Records Act, he could have filed a suit to compel production of the full disciplinary file. He did not. Instead, he asks this Court to indulge its imagination.

Lui has also failed to show that the potentially impeaching information was material. "Evidence is material under Brady if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Davila, 184 Wn. 2d at 73 (internal quotation marks and citations omitted). Gulla's

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<sup>9</sup> Lui asserts without analysis that the State had a duty to obtain Gulla's entire police disciplinary file pursuant to Brady. This issue has not been sufficiently briefed to merit full discussion, and it is unnecessary to decide the case for the reasons explained below. In short, Lui makes no legal argument showing how the State could compel the sheriff, an independently elected official with contractual and legal obligations to his or her employees, to turn over unfounded complaints from an internal investigation.

role in this investigation and trial was limited, so any potentially impeaching information on collateral matters was of little value and would not have changed the result in this case.

Gulla testified that the victim's shoes were clean of debris, whereas her car and the areas around her home were littered with pine needles and other plant material. RP 988. These facts were obvious from the photographs admitted at trial, and numerous witnesses, including the occupants of the house, RP 565, could have testified to the condition of the property. See RP 982 (testimony by Det. Gulla regarding photograph showing pine needles around front door of house); RP 882 (testimony of Det. Sue Peters regarding photograph). It would never have been a seriously contested issue, even if Gulla's disciplinary record had been admitted at trial.

Likewise, although Gulla testified that the garbage can at Lui and Boussiacos's house was clean, any number of other people could have testified to this fact, had Gulla's credibility been called into question, and it seems to have been a tangential point in any event. And, although Gulla testified that Lui provided little useful information in their initial conversations, this relatively insignificant testimony was dwarfed by the numerous other statements Lui made, including to the 911 operator, the missing-persons employee, Boussiacos's mother, the neighbors, and the

detailed recorded and unrecorded statements made to Detectives Peters and Bartlett.

Lui's main argument seems to be that Gulla was instrumental in the dog track such that important evidence would have been diminished if Gulla's credibility was attacked. Lui is mistaken. Gulla's lone uncorroborated task with respect to the dog track was to obtain clothing from Lui's house that would provide a scent for the tracking dog. But, even if the jury were to believe Gulla was untrustworthy, the dog track evidence would not be affected.

Pursuant to instructions from the dog handler, RP 961, Gulla retrieved items of Lui's clothing from his house using a "double bag" technique; i.e., he used a bag to pick up Lui's clothes, turned the bag inside out, then tied a knot in the top of the bag.<sup>10</sup> RP 986-87. Gulla then *drove*, not walked, a circuitous route to the Woodinville Athletic Center parking lot. RP 961, 990-91. He met the dog handler, Richard Schurman, he gave Schurman the scent items, and Schurman took over from there.

The actual dog track was conducted by Schurman, who was an experienced tracker and volunteered his services to search for missing people. He presented the scent items to his dog, Sara, and personally conducted the track without direction from Gulla. RP 1069-83. Gulla

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<sup>10</sup> He gathered men's underwear, shoes, hats, socks, and pants. RP 961, 990.

“just sat back and observed what was going on.” RP 962. The track was witnessed by the Chief of Police for the City of Woodinville, who followed closely in a marked patrol car to assist with traffic control. RP 962, 1044-49. He and Schurman confirmed that Gulla was simply an observer. RP 1049, 1081-82. Thus, Gulla’s disciplinary history, even if admissible, would not have changed the result of this trial. It was simply immaterial, and trial counsel reasonably avoided it.

Lui also asserts—again, attempting to show that Savage was incompetent—that Savage spent four pages of the trial transcript developing Gulla’s credentials, after Savage had suggested a detailed inquiry into background might open the door to Gulla’s past misdeeds. Motion for Disc. Review, at 27. Lui exaggerates and misses the point.

Only two pages of the transcript are devoted to Gulla’s training, and about one page was devoted to the training of the lead investigator, Det. Doyon. RP 991-94. Savage concluded this inquiry by asking, “It would be fair to say that when the two of you started out on this case, you were working with two of the most experienced detectives in the King County Sheriff’s office, correct?” RP 994. Similar questions were posed to Detective Peters. RP 1712-14. The questions were designed to set up a theme for counsel’s closing argument, to wit: that a team of very experienced detectives descended on Mr. Lui, interrogated him, searched

his house, and still they could find very little evidence showing that he murdered his fiancée. RP 1863 (“The police, come in and take a look around. [Lui says], ‘Take what you want. Nothing is there.’”); 1865 (“I tried in cross examination and I want to set the stage for you as best I can. These are two experts. They have been to all of the classes. ... Nobody is going to be a match for them.”). Counsel did not simply bumble into the detective’s experience; he did so with a purpose, and his tactics were sound.

Lui asserts in conclusory terms that the disciplinary history would be admissible under vaguely described theories. First, Lui argues that he was entitled to show that Gulla was like a “vulnerable ... probationer” in Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), such that Gulla’s “entire history of misconduct and discipline was relevant to show his exposure to termination and perhaps even to criminal charges.” PRP, at 34. Davis is inapposite. Davis was “vulnerable” because, as a probationer, he might have incentive to taint his testimony in favor of the State. Gulla was not in a vulnerable position like that. In fact, Lui offers nothing but pure speculation as to whether or how Gulla might have tried to erase a troubled history with the department by setting up an innocent man for murder. While some lawyers may taken on the burden of convincing a jury to accept such an argument, it was certainly

reasonable for Savage to choose otherwise. He preferred to focus on more defensible arguments supported by evidence. State's Response to PRP, App. C3 ("[C]ross examination that does not bear close scrutiny may be easily attacked and neutralized.").

Second, Lui claims that "[s]ome of Gulla's misconduct may also have been admissible under ER 404(b) to show motive and common scheme or plan" insofar as Gulla may have gained "enhanced status" through setting up Lui for a murder he did not commit. PRP, at 34. This theory of admissibility stretches ER 404(b) far beyond its limits and no cases are cited in support of the argument. And, of course, Lui points to no prior misdeed by Gulla that was committed in order to enhance his own status within the department. This is simply an effort to achieve exactly what the rule forbids---evidence designed to show propensity.

Lui must show in this case that Anthony Savage unreasonably decided to forego potential impeachment material on these collateral issues. He has not done so. Alternatively, Lui must show that the State committed misconduct by withholding relevant, potentially helpful, and material information. He cannot show that either. His claims should be rejected.

5. ADDITIONAL DNA TESTING WAS FRUITLESS.

Lui argued below that Savage should have insisted on additional DNA tests. PRP, at 47. Savage opined that additional testing was unlikely to help, and might hurt, his case. State's Response to PRP, App. C7-8, ¶ 10. Lui asked for post-conviction testing as to eighteen separate evidence items, swabs, or cuttings. That testing was completed in February of 2012 and Lui has recently provided the State with the results. Upon preliminary review, it appears that the testing adds nothing to the State's trial evidence or to the PRP. Savage's tactical decision not to spend time and resources on additional testing was sound.

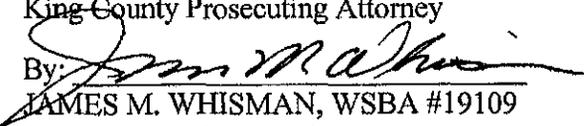
C. CONCLUSION

For the reasons set forth above and in the State's briefing in the Court of Appeals, Lui's personal restraint petition should be dismissed. He has failed to show that counsel was ineffective, or that the State deprived him of a fair trial through any form of misconduct.

DATED this 23<sup>rd</sup> day of November, 2016.

Respectfully submitted,

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By:   
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to David Zuckerman, the attorney for the petitioner, at David@DavidZuckermanLaw.com, containing a copy of the Supplemental Brief of Respondent, in Re Personal Restraint of Sione P Lui, Cause No. 92816-9, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 23<sup>rd</sup> day of November, 2016.

W Brame

Name:

Done in Seattle, Washington

**KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT**

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