

64029-1

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No. 64029-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES ERIC GROTH,

Appellant.

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

BRIEF OF APPELLANT

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2008 OCT 1 11:44 AM
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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Groth's motion to dismiss the prosecution because the State destroyed evidence of the crime.
2. The destruction of material exculpatory evidence violated Mr. Groth's federal constitutional right to due process.
3. The destruction of potentially useful evidence in violation of police procedure violated Mr. Groth's federal constitutional right to due process.
4. The destruction of evidence that was reasonably likely to have assisted Mr. Groth's defense violated his state constitutional right to due process of law.
5. The trial court abused its discretion by permitted Joel Hardin to testify as an expert witness.
6. The State did not prove beyond a reasonable doubt that Mr. Groth was guilty of second degree murder.
7. The prosecutor committed misconduct in closing argument by misstating the State's burden of proof beyond a reasonable doubt.

8. The prosecutor committed misconduct in closing argument by misinforming the jury concerning the circumstantial evidence instruction.

9. The prosecutor committed misconduct in closing argument by misinforming the jury concerning the missing evidence instruction.

10. Mr. Groth's attorney effectively failed to represent him at sentencing.

11. Mr. Groth's attorney did not provide effective assistance of counsel at sentencing.

12. The trial court erred by ordering Mr. Groth to pay a victim penalty assessment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State's destruction of evidence that is material and exculpatory violated a defendant's constitutional right to due process. U.S. Const. amend. XIV. Where the State destroyed all of the physical evidence collected at the crime scene with the exception of the murder weapon, all physical evidence collected from two suspects, and also destroyed all evidence concerning forensic testing of that evidence. Where the evidence did not link Mr. Groth to the crime and was thus material to his defense, was

his constitutional right to due process violated by its destruction by the State? (Assignment of Error 1).

2. When evidence is only potentially useful to the defense, its destruction is not a violation of due process unless the destruction was in bad faith. Where the police destroyed the evidence in Mr. Groth's case in violation of their own procedures, was the destruction in bad faith and in violation of Mr. Groth's constitutional right to due process? (Assignment of Error 1).

3. Article I, § 3 of the Washington Constitution guarantees the right to due process of law. Destruction of evidence by the police and the fairness of criminal proceedings are matters of state concern. In light of growing criticism of the standard under which the destruction of evidence is evaluated under the Fourteenth Amendment, should this Court find Washington's due process clause is more protective of its citizen's rights than the federal constitution and return the test announced in State v. Wright, 87 Wn.2d 783 (1976) and State v. Vaster, 99 Wn.2d 44 (1983)? Was Mr. Groth's constitutional right to due process violated when (1) the State destroyed virtually all of the physical evidence and forensic testing connected to the crime, (2) that evidence did not lead the police to charge him with the crime, and (3) there is thus a

reasonable possibility the destroyed evidence was material and favorable to the defense? (Assignment of Error 2).

4. A witness may be an expert based upon experience and training, but he must offer an opinion that is reliable and based upon that expertise. Joel Hardin is an experienced tracker of human beings, but he offered testimony based solely on his examination of crime scene photographs. Where the crime scene photographs were not to scale and were at varying angles, a forensic footwear impression experts studied the photographs and could not see what Mr. Hardin purported to see, Mr. Hardin's work was not subject to peer review, and Mr. Hardin's opinions were based upon a comparison of impression characteristics, did the trial court abuse its discretion by admitting Mr. Hardin's expert opinion? (Assignment of Error 3).

5. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. The State presented evidence (1) that Mr. Groth gave inconsistent statements in 1975, (2) did not strongly deny his involvement in the crime when he was again interviewed in 2006, and (3) he was wearing boots with the same type of sole as that found at the crime scene "intermingled" with flat-solely shoes

similar to those worn by the victim. Viewing the evidence in the light most favorable to the State, must Mr. Groth's conviction be dismissed? (Assignment of Error 6).

6. A criminal defendant may only be convicted if the jury finds every element of the crime beyond a reasonable doubt, and reasonable doubt is defined in the jury's instructions. The prosecutor told the jury "unanswered questions" did not constitute a reasonable doubt. Can the State demonstrate beyond a reasonable doubt the prosecutor's misstatement of its burden of proof did not impact the jury's verdict? (Assignment of Error 7).

7. The prosecutor's argument concerning the law must be confined to the law contained the jury instructions. The jury is permitted to give any weight it sees fit to either direct or circumstantial evidence, but the prosecutor argued the jury had to treat the two equally. Is reversal required because the prosecutor's misstatement of the law and the court's instructions was so flagrant that a curative instruction would not have cured the prejudice? (Assignment of Error 8).

8. The court instructed the jury that it could infer that the evidence destroyed by the State would not have benefitted the State's case if the jury felt the inference was warranted in light of

the circumstances of the case. The prosecutor told the jury it could only utilize the inference if it found there was evidence the State destroyed the evidence intentionally or that the evidence was favorable to Mr. Groth. Is reversal required because the prosecutor's misstatement of the court's inference instruction was so flagrant that a curative instruction would not have cured the prejudice? (Assignment of Error 9).

8. Does the cumulative impact of the three instances of prosecutorial misconduct in closing argument require reversal? (Assignments of Error 7-9).

9. The defendant has a right to effective assistance of counsel at every crucial stage of the proceedings, including sentencing. Defense counsel did not present the sentencing court with any information concerning her client or the applicable sentencing law and did not make a sentencing recommendation. Is reversal of Mr. Groth's sentence required in light of defense counsel complete failure to advocate for her client? Was defense counsel's performance below objective standards for reasonable representation and did the deficient performance prejudice Mr. Groth such that a new sentencing hearing is required? (Assignments of Error 10-11).

10. The court must apply the sentencing law in effect at the time of the offense. Where the victim penalty assessment statute was not enacted until 1977, did the trial court err by ordering Mr. Groth to pay a \$50 victim penalty assessment for a crime that occurred in 1975? (Assignment of Error 12).

C. STATEMENT OF THE CASE

Early in the morning of February 15, 1975, George Peterson found his 16-year-old daughter Diana Peterson dead in their backyard.¹ 8RP 535, 631-32.² Mr. Peterson went inside to tell his wife and call his priest and the police, and he then returned to the backyard to cover his daughter's body with blankets. 8RP 632, 647. In addition to Mr. Peterson, the priest, medics and a deputy sheriff approached the body before several King County sheriff's detectives and the head of the crime lab processed the scene. 8RP 647-48; 10RP 835-37, 839-40, 843, 846-51, 867; 10RP 907-08; 11RP 1033, 1041.

The detectives took the blanket off the body, took photographs of the scene, collected physical evidence and

¹ Diana Peterson was called Dina and was often referred to as Dina or Dinah by the witnesses. 8RP 533, 535.

² Volumes of the verbatim report of proceedings prepared by court reporter TaraLynn Bates are referred to by the volume number found on the transcript cover. Volumes prepared by other court reporters are referred to by date.

prepared casts of three possible footwear impressions. 8RP 689; 9RP 780-81, 810-11; 10RP 853-55; Ex. 88. When the medical examiner arrived, Ms. Peterson's body was turned over and a bone-handled knife was found in her back. 9RP 780. She had been killed by a single stab wound to the left side of her back that entered her chest cavity and caused her lung to collapse.³ 11RP 1147, 1156, 1163.

The detectives also interviewed Ms. Peterson's family members, friends and neighbors to determine her activities on February 14-15.⁴ Ms. Peterson was an attractive and popular teenager. 8RP 569-70; 5/20/09RP 204. She was restriction on the evening of February 14, and she watched television in the basement family room, a neighborhood gathering spot, with Patricia Bartleson and James Groth. 8RP 583-84, 588, 609-10; 10RP 986, 988; 5/21/09RP 31. Ms. Bartleson did not notice anything unusual between Ms. Peterson and Mr. Groth. 10RP 1011. Mrs. Peterson's gave Ms. Peterson permission to order pizza and walk with Ms. Bartleson and Ms. Bartleson's little sister to a

³ The current King County medical examiner testified from the original autopsy report.

⁴ Many witnesses had little memory of the events that happened more than 30 years earlier and often related what was in their statements, which sometimes refreshed their memory and sometimes did not.

neighborhood pizza restaurant to eat it. 8RP 590-91; 10RP 986-87, 993. Mr. Groth was not asked to join the girls and remained in the basement until Mrs. Peterson explained they were not returning with the pizza. 8RP 592, 605; 10RP 994.

The girls arrived home by 10:30, and several people saw Ms. Peterson enter her house. 10RP 987-88, 998-99; 5/20/09RP 190-92; 5/21/09RP 20-21. Mrs. Peterson heard her daughter come home between 10:00 and 10:30. 8RP 594. Mrs. Peterson and her daughter Marilyn were watching television in an upstairs bedroom, and a little while later they heard Ms. Peterson in the backyard. 8RP 553-55, 589, 594. Marilyn heard Ms. Peterson saying something like "stop it" in a playful manner, and Mrs. Peterson said she heard her daughter scream, but not in a manner that caused her any alarm. 8RP 555, 572-73, 595, 596-97. Fourteen-year-old next-door-neighbor Ruth Dahl was in her bedroom at the time; she believed she heard a noise, like someone jumping from the Peterson's backyard to hers. 5/21/09RP 18, 24.

Mrs. Peterson opened the window and told her daughter to be quiet, and she thought she saw shadows of two people in the backyard. 8RP 595-96. Mrs. Peterson went downstairs and called her daughter but there was no answer. 8RP 556-57, 597. Mrs.

Peterson let Ms. Peterson's dog out and locked the back door.

8RP 597, 600. Sometime during the night Mr. Peterson checked his daughter's bedroom and she was not there. 8RP 629.

James Groth was a little bit younger than Ms. Peterson and was friends with her and her sisters. 8RP 547-48, 607. Mr. Groth's family lived two houses away from the Petersons. 8RP 547. Mr. Groth, like many other neighborhood kids, was often at the Peterson's home. 8RP 550, 571, 585, 605. While some witnesses said Mr. Groth and Ms. Peterson were friends, others suspected Mr. Groth was infatuated with Ms. Peterson and she was not interested in him. 10RP 880-81; 12RP 1396-97; 5/20/09RP 194, 202.

Unknown to her parents, Ms. Peterson was in a romantic relationship with 19-year-old Tim Diener who lived next door; she would sneak out of her house to see him. 8RP 585-86, 619, 642; 10RP 882-83; SuppCP ____ (Videotaped Deposition of Tim Diener, sub. no. 115B) (hereafter Deposition) at 7-11. That evening Mr. Diener was at a friend's house until about 11:00 PM, visiting and drinking beer. Deposition at 34-35; 5/20/09RP 13-15, 178-84. When he returned home, Mr. Diener watched television and fell asleep. Deposition at 36-37, 40.

It was Mr. Diener's hunting knife that the medical examiner found in Ms. Peterson's back. 11RP 1089. Mr. Diener, however, said the knife had been missing from his home. 11RP 1089; Deposition at 46-47. He claimed his friends often stopped by his house, which was never locked, and knew about the knife. 11RP 1089; Deposition at 84-88; 5/20/09RP 11-12, 175.

Mr. Diener was arrested shortly after the murder. The police seized the clothing and boots he was wearing and also the clothing he claimed to be wearing on the night of the murder.⁵ 11RP 1089-9, 1093-95. Diener was released from jail the next day pending analysis of his clothing, which was apparently never requested or completed. 11RP 1095-97; 12RP 1217-19. Once Mr. Diener was arrested, he refused to talk to the police again. 11RP 1096; 13RP 1451-53, 1499-1502.

Eventually in 2007 the prosecutor subpoenaed Diener to a special inquiry proceeding in superior court. Mr. Diener exercised his right to remain silent until his attorney negotiated an immunity agreement, after which Mr. Diener submitted to a videotaped deposition at his attorney's office.⁶ 11RP 1020-21, 1023-26.

⁵ Mr. Sweeney found blood in the pocket of Mr. Diener's pants but it was never typed. 11RP 1097-98; 12RP 1234.

⁶ The deposition was utilized at trial due to Mr. Diener's failing health.

Meanwhile the police interviewed Mr. Groth three times in 1975 without charging him. When interviewed by the police on February 15, Mr. Groth explained he left the Peterson home around 10:00 PM through the back patio door. 11RP 1076-77. He went to a friend's house and then to the bowling alley and returned home after 12:30. 11RP 1077. On his way home he checked Mr. Diener's house, but found him asleep. 11RP 1077.

When Mr. Groth was re-interviewed three days later, however, he admitted his first statement was not correct. 11RP 1080. He explained that he left bowling alley at about 10:10 PM and checked Mr. Diener's house but no one was home. 11RP 1082. Mr. Groth then walked through the Peterson's backyard and found Ms. Peterson's laying face down with a knife in her back. 11RP 1082.

Mr. Groth was frightened and ran to Richmond Beach to think. 11RP 1082-83. He then went briefly to the bowling alley and returned home. 11RP 1083. Tim Petrowitz was working at the bowling alley and confirmed Mr. Groth was there from about 11:15 until shortly after 12:00. 5/21/09RP 43, 46. Petrowitz said Groth did not appear injured or bloody and was wearing black and white tennis shoes. 5/21/09RP 44-45, 50

Mr. Groth explained he did not tell anyone about seeing Ms. Peterson's body because he did not want to get involved or be accused. 11RP 1083. The detectives showed Mr. Groth a photograph of the knife which he recognized as Mr. Diener's. 11RP 1084-86.

Also in 1975, Steven Larson told the police that when he returned to the neighborhood on the morning of February 15, Mr. Diener told him that Ms. Peterson had been knifed and Mr. Groth said she had been killed, probably beaten. 12RP 1400-02. At trial, however, Larson was almost certain it was Mr. Groth who said Ms. Peterson had been stabbed. 12RP 1398-99, 1402-03. He did not notice any injuries on Mr. Groth and reported that the Groths owned cats. 12RP 1400, 1409.

Eric Hansen also reported that Mr. Groth pushed him and broke his glasses in April 1975. 10RP 973-74. When Mr. Hansen threatened to tell his father, Mr. Groth reportedly said something to the effect that he had killed a girl before and could kill again. 10RP 973.

When the detectives did not resolve Ms. Peterson's murder, they ordered that the evidence be retained according to department policy, but instead everything but the knife was destroyed in 1987,

including the crime lab reports. 10RP 909-10; 11RP 1104-07; Ex. 130-31. No fingerprints were found on the knife when it was tested in 1995, and no DNA profile could be obtained in 2004. 9RP 753, 755, 766-68.

Police detectives interviewed Mr. Groth three times in 2006. 13RP 1471, 1477-78, 1481-82, 1501-11. Mr. Groth also voluntarily gave the detectives a DNA sample. 5/21/09RP 66-67; 13RP 1480. According to the detectives, Mr. Groth seemed defeated and teary when they accused him of being involved in the crime. 5/21/09RP 57-59, 60, 62; 13RP 1478-79. The detectives opined that Mr. Groth's only denial of guilt was "weak." 5/21/09RP 84-85; 13RP 1479. A few days later Mr. Groth again briefly met voluntarily with the detectives; they opined he seemed to have more to tell them and wanted to clear things up. 5/21/09RP 69; 13RP 1481-83.

In December 2007 the King County Prosecutor charged Mr. Groth with premeditated murder in the first degree. CP 1. Mr. Groth's pre-trial motion to dismiss the prosecution on the grounds his due process rights were violated by the State's destruction of evidence was denied by the Honorable Laura Inveen. CP 276. The court also permitted the State to call Joel Hardin to offer his

expert opinion as a tracker on the “sign” he saw in the crime scene photographs.⁷ CP 277-78.

A photograph of Mr. Groth’s boots shows Vibram soled shoes manufactured in the United States. Ex. 152. This type of boot was very popular in the 1970’s and were worn by Mr. Diener, a number of the neighborhood children, and possibly Mr. Peterson.⁸ 8RP 634-35 (Mr. Peterson described his possible footwear as lug-soled); 10RP 889, 891-92; 12RP 1410-41; 5/21/09RP 31-32; 14RP 1753-55.

Mr. Hardin identified the tread pattern in Exhibit 152 as a “stars and bars print,” which he said was not as well known in 1975. 5/20/09RP 48-49. Mr. Hardin testified to his expert opinion that he could clearly see pieces of a “stars and bars” tread pattern in the crime scene photos. He could not identify the pattern as coming from Mr. Groth’s shoes but was confident all of the stars and bars patterns he observed were from the same shoe because the pattern width and spacing was identical. 5/20/09RP 50-52.

⁷ Although Hardin testified the correct term is “sign cutting,” the terms “tracker” and “tracking” were used throughout the trial and will be utilized here. 1RP 10.

⁸ Mr. Peterson thought the shoes he was wearing in 1975 might have been lug-soled work boots. 8RP 634-35.

Mr. Hardin explained his opinion was based upon “just pieces, pieces and portions, sides of the ball of the foot or the sole, the toe, pieces of the heel, that sort of thing” as well as upon “the scuffs, the scrapes, the pulled grass, the compressions.”

5/20/09RP 52. 63. “If you see two or three of the bars and some compression and mashed grass, you know that the rest of it has to be the rest of that shoe. They only come from a whole shoe.”

5/20/09RP 63.

Mr. Hardin identified the soles of the shoes seen on Ms. Peterson as a Wallabee-type sole made of “kind of a gum rubber” that is not smooth but leaves a flat impression on the ground. 5/20/09RP57-58, 62; Ex. 79, 81, 163-64. He identified a Wallabee-type sole in the crime scene photographs, but could not say it was Ms. Peterson’s shoe. 5/20/09RP 58-59.

Mr. Hardin opined the two shoes were at the same place at “virtually the same time” in two photographs, Exhibits 56 and 81, indicating the two people were interacting at the time of Ms. Peterson’s death. 5/20/09RP 59, 61, 64, 90; Ex. 56, 81. Mr. Hardin also concluded the two impressions were made at the same time based upon the color tone and ground texture. 5/20/09RP 54, 94.

Finally, Mr. Hardin said that Exhibit 61 demonstrated that the stars and bars patterned shoe stepped in blood at approximately the same time the blood dripped onto the ground. 5/20/09RP 94-97. He did not see evidence of any other shoes in the photographs. 5/20/09RP 86.

In contrast, forensic scientist William Bodziak said it was difficult to even recognize acceptable footwear impression evidence in the photographs viewed by Mr. Hardin. 14RP 1754. Mr. Bodziak did not agree that the impressions in the crime scene photographs could only have come from one set of boots or that they were from a Vibram sole. 14RP 1753-54, 1759, 1778. He also could not match any of the impressions to the photographs of Mr. Groth's boots. 14RP 1756-58, 1765, 1778.

Mr. Bodziak also did not see anything that he could identify as the impression of a flat-soled shoe. 14RP 1767. Mr. Bodziak noted that Ms. Peterson's soles were so fine-textured that they would not leave a distinctive impression in grass or soil. 14RP 1766. He testified that her shoes could not be distinguished from any other flat-soled shoe at the crime scene. 14RP 1766-67.

Mr. Bodziak did not see evidence that footwear impressions were comingled, and he stated it was not possible to determine the

time at which any of the partial impressions were left. 14RP 1782-84, 1785-86. 1800-01.

Ms. Peterson would not have died immediately upon been stabbed, and two crime scene reconstruction experts with expertise in blood pattern analysis testified that Ms. Peterson moved before her final resting place on the ground. 11RP 1178-79; 13RP 1589-91, Dr. Jon Nordby believed Ms. Peterson was in the area where apparent blood can be seen on the rockery, above the rocks, possibly seated. 13RP 1631-34, 1640-44, 1707; see Ex. 173. Based upon the autopsy report of blood in Ms. Peterson's lungs, Dr. Nordby believed the blood probably came from Ms. Peterson's mouth. 13RP 1697-1700, 1713-17. Ross Gardner agreed that Ms. Peterson was near the rocks at some time, but believed the blood was due to a "gushing event" or streaming ejection from the wound on her back. 13RP 1718; 5/28/09RP 4-5, 13, 15-16, 22-23, 36-37.

The jury found Mr. Groth guilty of the lesser-included offense of murder in the second degree. He was sentenced to a maximum term of life with a recommended minimum term of 200 months. CP 461-62, 464-66. This appeal follows. CP 469.

D. ARGUMENT

1. THE STATE'S FAILURE TO PRESERVE MATERIAL EXCULPATORY EVIDENCE VIOLATED MR. GROTH'S CONSTITUTIONAL RIGHT TO DUE PROCESS

The State destroyed much of the evidence in this case. At the time the police had this evidence, they did not charge Mr. Groth with the murder, leading to the logical conclusion this evidence would not have incriminated him and was therefore material to his defense. Because the destroyed evidence was material and exculpatory, the destruction of the evidence violated Mr. Groth's federal constitutional right to due process, and his conviction must be reversed and dismissed. In the alternative, this Court should reverse and dismiss his conviction because the destruction of the potentially material evidence was in violation of sheriff's department protocol and thus in bad faith.

a. The destruction of material, exculpatory evidence violates a defendant's constitutional right to due process. Under the Fourteenth Amendment's due process clause, criminal prosecutions "must comport with prevailing notions of fundamental fairness," and a defendant must have a meaningful opportunity to

present a complete defense.⁹ California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Fundamental fairness requires that the government preserve and disclose to the defense favorable evidence that is material to guilt or punishment. Id. at 480, 488; Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Due process is violated when the State fails to preserve material, exculpatory evidence, but when the evidence the State destroys is only “potentially useful,” due process is not violated unless the defendant can demonstrate the police acted in bad faith. Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); Illinois v. Fisher, 540 U.S. 544, 547-48, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004) (per curiam); Olszewski v. Spencer, 466 F.3d 47, 56-57 (1st Cir. 2006), cert. denied, 550 U.S. 911 (2007). Evidence is considered material if it possesses an exculpatory value that was apparent before the evidence was lost or destroyed and if the defendant would be unable to obtain comparable evidence if the evidence were destroyed. Trombetta, 467 U.S. at 489.

b. Mr. Groth moved to dismiss the prosecution due to the destruction of material exculpatory evidence. King County Sheriff’s

⁹ The Fourteenth Amendment states in part, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

detectives collected physical evidence, including plaster casts of footwear impressions, from the Peterson's backyard, and the King County medical examiner collected evidence and took samples during the autopsy, which included Ms. Peterson's clothing, blood, and fingernail scrapings. The police also obtained the boots and clothing Mr. Diener reported he was wearing on the night his girlfriend was killed. 4RP 367. Detectives requested the crime laboratory analyze the blood, hair and plaster footprint cases. 11RP 1069; Ex. 126. Kay Sweeney, then head of the King County Sheriff's Crime Laboratory, went to the crime scene and the autopsy and conducted laboratory analysis of the knife and other items of physical evidence. 10RP 898, 907-11, 920, 923-24, 925-26. The detectives arrested Mr. Diener in 1975, but he was released pending the results of the physical tests. Mr. Groth was never arrested.

The case remained unresolved, and the sheriff's department protocol called for preservation of all of the evidence. The detectives ordered the evidence be retained. CP 102, 104-05; 4RP 367; 11RP 1104; Ex. 130. In 1987, however, all of the physical evidence except for the knife was destroyed. CP 107-15; 4RP 367; 11RP 1105-07; 5/21/09RP 90; Ex. 131. In addition, Mr. Sweeney

could not locate any of his notes, reports, or conclusions concerning the forensic testing he performed and he had no independent memory of what tests he performed. 4/20/09RP 117; 10RP 909-910, 933-34, 959; 5/21/09RP 95-96. As a result, the only evidence remaining at the time Mr. Groth was charged and tried were the police reports, witness statements, autopsy report, and photographs taken at the crime scene and autopsy.

Mr. Groth therefore moved prior to trial to dismiss the case based upon the State's destruction of the evidence. He argued the State destroyed evidence that was material and exculpatory or, in the alternative, the State negligently destroyed material evidence, thus depriving him of the opportunity to prove materiality. CP 81-178; 3RP 350-57, 359-60. The court denied Mr. Groth's motion, finding the lost evidence was only potentially material and law enforcement did not act in bad faith when destroying the evidence because they were unaware of its exculpatory value. CP 276; 4RP 368-70.

c. The evidence destroyed by the police was both material and exculpatory. At the time the evidence in this case was destroyed, the police were unable to tie either Mr. Groth or Mr. Diener to the homicide. In a case with no eyewitnesses, the fact

that the physical evidence did not implicate Mr. Groth is material and exculpatory. Additionally, there was no way he could replicate the evidence. The trial court therefore erred by finding the destroyed evidence was only potentially material and requiring a showing of bad faith.

The evidence at issue here involves virtually all of the physical evidence and forensic test results in the case. In addition, the evidence was destroyed before Mr. Groth was charged and did not implicate him in the crime. Mr. Groth's case is thus quite unlike the discrete pieces of evidence that clearly incriminated the defendant in Trombetta and Fisher.

In Trombetta, the defendants were charged with driving while under the influence of alcohol, and objected to the admission of the breath analysis test results because the breath sample had not been retained for testing by the defense. Trombetta, 467 U.S. at 482-83. In rejecting the defendants' due process claim, the Court noted that, given that the breath tests implicated the defendants, the chance that the samples would be exculpatory was extremely low. Id. at 489. Moreover, the defendants could demonstrate their innocence in other ways, such as through cross-

examination of the officer who administered the test or checking the calibration of the machine. Id. at 490.

Similarly in Fisher, cocaine seized from the defendant and tested at the crime laboratory was destroyed. The evidence was an integral part of the State's case for possession, but the evidence had been tested four times and the test results implicated the defendant. Thus, dismissal was not required as the cocaine that was destroyed was highly unlikely to help the defendant's case. Fisher, 540 U.S. at 545-46, 548 ("At most, respondent could hope that, had the evidence been preserved, a fifth test conducted on the substance would have exonerated him.") (emphasis in original). Similarly, Washington cases addressing this issue do not involve the destruction of virtually all of the evidence where the evidence did not lead to the arrest of the defendant. See State v. Wittenbarger, 124 Wn.2d 467, 880 P.2d 517 (1994) (maintenance and repair records for breath test machines); State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992) (semen samples); State v. Hanna, 123 Wn.App. 704, 871 P.2d 135 (skid marks on opposite side of road from collision, victim's vehicle), cert. denied, 513 U.S. 919 (1994), habeas affirmed on other grounds 87 F.3d 1034 (9th Cir. 1996).

Mr. Groth's defense is also stronger than that of the defendant in Youngblood, where the State failed to preserve blood and semen samples taken from a child rape victim's body and clothing after they were examined by the police criminologist but not yet tested for blood typing. 488 U.S. at 52-53. Whereas the evidence in Mr. Groth's case clearly did not incriminate him, the evidence in Youngblood's might have. The Youngblood Court concluded the evidence may or may not have exonerated the defendant had it been tested.¹⁰ Id. at 57-58.

Here, however, all of the physical evidence except for the murder weapon and all of the laboratory results were destroyed. And, when the evidence existed, the sheriff's detectives did not have a reason to charge Mr. Groth with the murder. Unlike Trombetta and Fisher, the test results did not implicate Mr. Groth, probably exonerated him, and certainly would have been material to his defense. Additionally, there was no way Mr. Groth could replicate the physical evidence or reproduce forensic testing done

¹⁰ In Youngblood, the jury was instructed that it was permitted to infer the evidence that the lost or destroyed evidence would not have been favorable to the State. Youngblood, 488 U.S. at 338 (Stevens, J., concurring). Here the jury was instructed it could only use that inference if the jury concluded the inference was "warranted," and the prosecutor told the jury it could not use the inference unless it determined the evidence was intentionally destroyed. CP 408; 5/28/09RP 78.

in 1975. This evidence is lost and there is no alternative way for Mr. Groth to show that the physical evidence exonerated him. The trial court erred by finding the destroyed evidence was only potentially material. Mr. Groth's due process rights were violated, and this Court should reverse the court's denial of Mr. Groth's motion to dismiss

d. The State destroyed the evidence in violation of its own procedures and thus in bad faith. If this Court concludes the destroyed evidence was not demonstratively material exculpatory evidence, it must then review the trial court's conclusion that the State did not act in bad faith in destroying evidence potentially material to Mr. Groth's defense. When potentially useful evidence is destroyed by the government, the defendant's right to due process is violated if the government acted in bad faith. Youngblood, 488 U.S. at 58.

Obviously, it is difficult for the accused to prove bad faith on the part of the government. Youngblood, 488 U.S. at 66-67 (Blackman, J., dissenting); Lolly v. State, 611 A.2d 956, 960 (Del. 1992); Norman C. Bay, Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith, 86 Wash. U. L. Rev. 241, 291-92 (2008). But the sheriff's department's

violation of its own protocols and directions from the investigating detectives is bad faith.

Courts of this state have found an absence of bad faith when a government agency follows its own protocols in destroying evidence of a crime. Wittenbarger, 124 Wn.2d at 477-79 (defendants conceded State acted in compliance with established policy; court rejects defendants' argument policy adopted in bad faith); Ortiz, 119 Wn.2d at 302 (state did not act in bad faith when state handled samples "its usual manner"). Logically, then, a law enforcement agency's destruction of evidence in violation of its own policies demonstrates bad faith. See United States v. Montgomery, 676 F.Supp.2d 1218, 1244 (D.Kan. 2009) (granting habeas petition where defense counsel failed to move to dismiss prosecution for possession of 100 or more marijuana plants with intent to distribute when government destroyed marijuana plants without photographing or videotaping the plants, thus violating DEA protocol); United States v. Elliott, 83 F.Supp.2d 637, 647 (E.D.Va. 1999) ("[T]he failure to follow established procedures is probative evidence of bad faith, particularly when the procedures are clear and unambiguous as the regulations upon which the government relies on here.").

This was the conclusion of the Ohio appellate court in driving while under the influence of alcohol prosecution where a state trooper destroyed a videotape showing the defendant prior to a traffic stop and while performing field sobriety tests. State v. Durnwald, 163 OhioApp.3d 361, 837 N.E.2d 1234 (2005). The State claimed the videotape had been erased and taped over when highway patrol cadets were given unsupervised access to the trooper's vehicle during a training session. 837 N.E.2d at 1238, 1241. The Ohio State Highway Patrol policy, however, required all traffic stops, pursuits, and crash scenes be recorded and the recordings preserved until all criminal and civil proceedings were over. Id. at 1241. The appellate court found the erasure of the tape, while perhaps not intentional, was "more than mere negligence" because preservation of the videotape was required by the highway patrol regulations and therefore dismissed the prosecution. Id. at 1241-42.

Here, the destruction of the physical evidence and forensic test results was contrary to the policy of the King County Sheriff's Department and the detectives' requests to preserve the evidence. 11RP 1104-07; CP 102, 104-05; Ex. 130-31. Thus, the Sheriff's Department acted in bad faith in destroying the irreplaceable

physical evidence of the crime and notes and results of forensic testing performed in 1975.

e. Mr. Groth's conviction should be dismissed. The State destroyed virtually all of the collected physical evidence from the crime scene and the reports of any crime laboratory analysis of the physical evidence. Not only was the destroyed evidence material and critical to the murder prosecution, it was exculpatory, as the State was unable to charge Mr. Groth based upon that evidence. Mr. Groth had no way to reconstruct the evidence or demonstrate it would not incriminate him. Without the evidence, no one could perform DNA analysis of fingernail scraping or compare Mr. Groth and Mr. Diener's boots to the footwear impression casts. Mr. Groth was forced to defend against unscientific tracking evidence and inconsistent statements made more than 30 years earlier when he was a teenager. Thus, his constitutional right to due process and to present a defense was violated.

Even if the evidence was only potentially exculpatory, Mr. Groth's right to due process was violated when the State acted in bad faith by destroying the evidence in violation of its own procedures and specific instructions from the investigating detectives. In light of the violation of his constitutional right to due

process, Mr. Groth's conviction for second degree murder must be reversed and dismissed. State v. Burden, 104 Wn.App. 507, 509, 17 P.3d 1211 (2001); United States v. Cooper, 983 F.3d 928, 933 (9th Cir. 1993).

2. THE STATE'S FAILURE TO PRESERVE MATERIAL EVIDENCE VIOLATED MR. GROTH'S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE WASHINGTON CONSTITUTION

Mr. Groth's case, with the almost complete destruction of the crime scene and forensic evidence, presents a compelling rationale for revisiting whether Washington's due process clause is more protective than its federal counterpart in cases where the government destroys material evidence of a crime. If this Court does not find the destruction of crucial evidence in this murder prosecution violated the federal due process clause, this Court should nonetheless reverse for violation of Mr. Groth's state constitutional right to due process. Const. art. I § 3.

The Washington Supreme Court has previously held that article I, § 3 is interpreted identically to the Fourteenth Amendment when the government destroys evidence of a crime.¹¹

Whittenbarger, 124 Wn.2d at 481. Many other states, however,

¹¹ In Ortiz, *supra*, four members of the court held article 1, § 3 did not provide greater protections than the Fourteenth Amendment, four members held it did, and one saw no need to address the issue.

have rejected the Youngblood rule and used an independent analysis under their state constitutions. State v. Tiedemann, 162 P.3d 1106, 1116 (Utah 2007) (citing cases from 8 other states); Daniel R. Dinger, Should Lost Evidence Mean a Lost Chance to Prosecute?: State Rejections of the United States Supreme Court Decision in *Arizona v. Youngblood*, 27 Am. J. Crim. L. 329, 348-53 (2000) (13 states have rejected Youngblood's bad faith requirement). Legal commentators have criticized the Youngblood doctrine and called for its reexamination. Bay, Old Blood, Bad Blood and *Youngblood*, 86 Wash. U. L. Rev. at 243 (and articles cited at n.4). Moreover, the Youngblood Court's determination that the evidence was not material to guilt or innocence was proven wrong when Mr. Youngblood was exonerated through modern DNA testing and the actual perpetrator of the crime convicted. Id. at 276-77; Rodney Uphoff, Convicting the Innocent: Aberration or Systemic Problem?, 2006 Wis. L. Rev. 739, 777-78.

a. Washington's due process clause should be interpreted independently from the Fourteenth Amendment. State constitutions were originally designed as the primary protection of individual rights. Robert F. Utter and Hugh D. Spitzer, The Washington State Constitution, p. 3 (Conn. 2002). To find that a Washington state

constitutional provision supplies broader protections than the federal constitution, however, requires the court to analyze six non-exclusive criteria. These are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions; (3) state constitutional history; (4) pre-existing state law, (5) structural differences between the state and federal constitutions; and (6) matters of particular state or local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

Article I, § 3 provides, “No person shall be deprived of life, liberty, or property, without due process of law.” This language is virtually identical to the Fourteenth Amendment. This does not end the inquiry, however, as the Washington court must also be persuaded the federal decisions are persuasive and well-reasoned. State v. Davis, 38 Wn.App. 600, 605 n.4, 686 P.2d 1143 (1984).

Even where state and federal constitutional provisions are identical, it is possible that the intent of the framers of the state constitution was different than that of the federal framers or that a different intent may be found in a different provision of the state constitution.

Gunwall, 109 Wn.2d at 61; Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491,

514 (1984). Identically worded provisions should be interpreted independently unless a very good historical justification for assuming the framers intended an identical meaning can be found. Id. at 515-16; Ortiz, 119 Wn.2d at 319 (Johnson, J., et. al., dissenting).

Concerning the third Gunwall factor, there does not appear to be any legislative history from the constitutional convention that demonstrates whether the state due process clause should be interpreted differently than the federal one. See Ortiz, 119 Wn.2d at 303 (citing Journal of the Washington State Constitutional Convention, 1889, at 495-96 (B. Rosenow, ed. 1962)).

Regarding the fourth factor, independent state law, Washington, utilized a different test that that announced in Youngblood. In determining if an individual's right to due process was violated by the State's destruction of evidence, Washington courts determined, after a review of the entire record, whether there was a "reasonable possibility" that the evidence destroyed by law enforcement was "material to guilt or innocence and favorable to the appellant." State v. Wright, 87 Wn.2d 783, 789-90, 557 P.2d 1 (1976) (citing In re Ferguson, 5 Cal.3d 525, 96 Cal.Rptr. 594, 487 P.2d 1234 (1971)); accord, State v. Vaster, 99 Wn.2d 44, 50, 52,

659 P.2d 528 (1983). The motives of the authorities in destroying the evidence was irrelevant except as the destruction might raise an inference that the evidence was harmful to the State. Vaster, 99 Wn.2d at 50; Wright, 87 Wn.2d at 791-92.

Moreover, in contrast to the federal court system, Washington recognizes criminal defendants are entitled to copies of the information possessed by the State in order to prepare a defense. Court rules require the prosecutor to disclose a wide variety of evidence to the accused. CrR 4.7(a), (c), (d), (e), (h); Former RCW 10.37.030; State v. Boyd, 160 Wn.2d 424, 158 P.3d 54 (2007); State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988).

The fifth Gunwall factor, differences in structure between the state and federal constitutions, will always support an independent constitutional analysis because the federal constitution is a grant of power from the states whereas the state constitution represents a limitation on the State's power. State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

Finally, state law enforcement measures are a matter of state and local concern. Young, 123 Wn.2d at 180. So is the fundamental fairness of trials within our state. State v.

Bartholomew, 101 Wn.2d 631, 643-44, 683 P.2d 1079 (1984). As a result, “[r]ules concerning [the] preservation of evidence are generally matters of state, not federal, constitutional law.”

Trombetta, 467 U.S. at 491 (O’Conner, J., concurring). The final Gunwall factor thus points towards an independent evaluation of Mr. Groth’s case given our state’s interest in encouraging fairness in its justice system, which calls for policies that encourage rather than discourage the preservation of evidence.

b. This Court should adopt its earlier *Vaster* test for evaluating cases involving the destruction of evidence. In concurring opinion in Youngblood, Justice Stevens agreed with the result reached by the majority but not with the rule of law it established. Youngblood, 488 U.S. at 60-61 (Stevens, J., concurring). “In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair.” Id. at 61. Mr. Groth asserts this is such a case and this Court should join the states that have adopted an independent approach under their state constitutions.

Prior to Youngblood, Delaware developed a three-part test for reviewing destruction of evidence cases that was similar to the test adopted by the Wright and Vaster Courts in Washington. Deberry v. State, 457 A.2d 744 (Del. 1983). If the lost or destroyed material would have been discoverable and the State had the duty to preserve the evidence, Delaware balanced “the nature of the State’s conduct and the degree of prejudice to the accused.” Id. at 750-52. “In general terms, the court should consider ‘(1) the degree of negligence or bad faith involved, (2) the importance of the lost evidence, and (3) the sufficiency of other evidence adduced at trial to sustain the conviction.’” Id. at 752 (quoting United States v. Loud Hawk, 628 F.2d 1139, 1152 (9th Cir. 1979) (Kennedy, J., concurring), cert. denied, 455 U.S. 917 (1980)). Delaware refused to abandon its “more exacting standard” in favor of that announced in Youngblood.¹² Lolly, 611 A.2d at 957; Hammond v. State, 569 A.2d 81 (Del. 1990).

We remain convinced that fundamental fairness, as an element of due process, requires the State’s failure to preserve evidence that could be favorable to the defendant “[to] be evaluated in the context of the entire record.” When evidence has not

¹² Article I, § 7 of the Delaware Constitution provides a number of individual rights to criminal defendants and also provides, “no shall he or she be deprived of life, liberty, or property, unless by the judgment of his peers or by the law of the land.”

been preserved, the conduct of the State's agents is a relevant consideration, but it is not determinative. Equally relevant is a consideration of the importance of the missing evidence, the availability of secondary evidence, and the sufficiency of other evidence presented at trial.

Hammond, 569 A.2d at 87 (internal citations omitted) (quoting United States v. Agurs, 427 U.S. 97, 12, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

Delaware's approach has been adopted by other states under their state constitutions. Dinger, Should Lost Evidence Mean a Lost Chance to Prosecute?, 27 Am. J. Crim. L. at 356 (citing State v. Schimd, 487 N.W.2d 539 (Minn.App. 1992); State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999); State v. Osakalumi, 194 W.Va. 758, 461 S.E.2d 504, 511-12 (1995); State v. Delisle, 162 Vt. 293, 648 A.2d 632 (1994)); Gurley v. State, 639 So.2d 557, 567-68 (Ala.App. 1993) (concluding Alabama Supreme Court adopted the Delaware analysis in theory if not in name in Ex Parte Gingo, 605 So.2d 1237 (Ala. 1992), cert. denied, 506 U.S. 1049 (1993)).

Similarly, Connecticut's constitution requires a independent test for reviewing the destruction of evidence.¹³ State v. Morales, 232 Conn. 707, 657 A.2d 585 (1995). Connecticut has long

¹³ Article I, § 8 of the Connecticut Constitution provides, "No person shall . . . be deprived of life, liberty, or property without due process of law."

recognized the right of a criminal defendant to present evidence to demonstrate his innocence. 657 A.2d at 591. Like Washington, Connecticut had developed its own balancing test replying on decisions of federal courts interpreting the Fourteenth Amendment, Id. at 591-92. “These factors included ‘the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by the unavailability of the evidence.’” Id. at 720 (quoting State v. Asherman, 193 Conn. 695, 724, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050 (1985)). The Connecticut Supreme Court adopted this test under its state constitution, because it (1) promotes the search for the truth, thus protecting defendant’s constitutional right to due process, (2) permits the reviewing court to address the missing evidence even if its precise nature was unknown or disputed, and (3) did not require law enforcement agencies to preserve every shred of physical evidence, no matter how remotely relevant. Id. at 592-93, 594-95. Connecticut’s rule also permits courts to fashion appropriate remedies short of dismissal when potentially exculpatory evidence is destroyed. Id. at 595-96. “Put simply, a trial court must decide each case depending upon its own

facts, assess the materiality of the unpreserved evidence and the degree of prejudice to the accused, and formulate a remedy that vindicates his or her rights.” *Id.* at 596 (citing Vaster, 99 Wn.2d at 52).

Like Connecticut, Delaware, and many other states, Washington’s due process clause demands greater protection of its citizen’s right to due process than that provided under the Fourteenth Amendment. This Court should follow Connecticut’s lead back to its own test developed in Wright and Vaster.

c. The Wright and Vaster test requires the dismissal of Mr. Groth’s case. In Wright, the State failed to preserve most of the physical evidence remaining at the scene of a murder after the body was removed, and the defendant was convicted upon largely circumstantial evidence. Wright, 87 Wn.2d at 785-86. The court could not determine if the destroyed evidence would have been favorable to the defense or material to guilt or innocence, but it was obvious the evidence could easily have assisted the defendant. *Id.* at 787-88, 790. The Wright Court found the defendant’s due process rights were violated because there was a “reasonable possibility” the destroyed evidence was “material and favorable to the defense.” Wright, 87 Wn.2d at 792; accord Vaster, 99 Wn.2d at

50. In determining sanctions, the court weighed (1) the degree of negligence or bad faith, (2) the importance of the lost evidence, and (3) the evidence of guilt adduced at trial. Id. at 792.

That test is certainly met here. It is clear the destroyed evidence was material and could easily have helped Mr. Groth. Weighing the destruction of evidence in violation of department policy, the large quantity of important evidence destroyed, and the circumstantial nature of the State's case, Mr. Groth's case should be reversed. Wright, 87 Wn.2d at 792-93 (dismissal warranted due to serious violation of due process).

3. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING JOEL HARDIN TO TESTIFY ABOUT FOOTWEAR IMPRESSIONS AS AN EXPERT WITNESS

An experienced forensic scientist with expertise in footwear impression comparisons testified that no valid comparisons could be made from the crime scene photographs and photograph of Mr. Groth's boots. Another forensic scientist opined such a comparison would be unethical. The trial court nonetheless permitted a human tracker, Joel Hardin, to testify based upon what he observed in the photographs. Hardin opined (1) a boot with the same type of tread as Mr. Groth's was visible in photographs of the murder scene, (2)

a flat-soled shoe that like Ms. Peterson's was also visible, (3) that the two shoes were there at the same time and the two people interacted, and (4) signs from both shoes were made on the night of the murder. The trial court abused its discretion by permitting Hardin to testify outside his expertise, and the admission of the unreliable testimony so prejudiced Mr. Groth that a new trial is required.

a. An expert may offer an opinion within his expertise if the opinion is reliable and helpful to the jury. Washington's evidence rules permit the use of expert witnesses when the jury would be unable to understand the evidence without the use of scientific, technical or specialized knowledge. Karl B. Tegland, 5B Washington Practice: Evidence Law and Practice, § 702.1 at 30 (4th ed. 1999). The admission of expert testimony is governed by ER 702 and requires a case by case analysis. State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Scientific testimony is admissible only if (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory

theory generally accepted in the relevant scientific community, and (3) the testimony will assist the trier of fact. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003). Witnesses with practical experience in non-scientific fields, such as police officers with expertise concerning activities the jury might not understand, have also been permitted to testify as experts, State v. Yates, 161 Wn.2d 714, 762-63, 763-66, 168 P.3d 359 (2007) (FBI agent called as expert in crime scene investigation and “linkage;” health department worker testified as expert on prostitution), cert. denied, 128 S.Ct. 2964 (2008); State v. McPherson, 111 Wn.App. 747, 761-62, 46 P.3d 284 (2002) (detective permitted to testify as expert on methamphetamine production based upon experience and specialized training); State v. Campbell, 78 Wn.App. 813, 823, 901 P.2d 1050 (police officer testified about gangs), rev. denied, 128 Wn.2d 1004 (1995); Goodman v. Boeing Co., 75 Wn.App. 60, 81, 877 P.2d 703 (1994) (nurse testified about whether plaintiff’s medical condition would worsen over next 12 years), aff’d, 127 Wn.2d 401 (1995).

The Washington Supreme Court has upheld the trial court’s admission of Mr. Hardin’s testimony based upon his practical experience and acquired knowledge in the field of tracking. Ortiz,

119 Wn.2d at 308-311. In Ortiz, Hardin was called to a home where an elderly woman had been murder and testified at trial (1) only one person other than the victim had been in the house, (2) Hardin followed the trail left by that person across a field and through a raspberry patch to the housing development where the defendant lived, and (3) Hardin could tell the height, weight, sex, and national origin of the person he tracked.¹⁴ Id. at 297-98. The court upheld the trial court's decision to admit Hardin's testimony based upon Hardin's experience and training as a tracker and found the Frye test did not apply. Id. at 310-11.

b. Mr. Groth moved to exclude Hardin's testimony. The King County Prosecutor retained Mr. Hardin to see if evidence of the tread pattern from Mr. Groth's boots could be seen in the crime scene photographs. 2RP 92-93; 5/20/09RP 108. Mr. Hardin created a written report, entitled "Forensic Photo Examination," and

¹⁴ In a dissenting opinion, two members of the court found there was no rational foundation for Mr. Hardin's testimony that he was tracking a young male "Mexican national" and pointed out the testimony was not only prejudicial but inconsistent with modern concepts of fundamental fairness. Ortiz, 119 Wn.2d at 325-33 (Smith, J., dissenting with Utter, J.). Mr. Hardin, for example, testified the way the tracks passed through the raspberry patch was characteristic of Hispanic field workers and that he could tell the difference between a Mexican crossing the border to find a job and one carrying contraband. Id. at 332-33. He testified similarly but more obliquely to the same thing in Mr. Groth's case. 5/20/09RP 29-30 (able to determine difference between guides, syndicate personnel, and those being smuggled into the United States), 39 (able to see human's strong emotions "almost clearly written in the footfalls"); 1RP 70-71 (able to tell nationality of Mr. Ortiz based upon his familiarity with the scene and the manner in which he ran); 1RP 73-74 (could tell if defense counsel making her point by her footfall).

stated he was retained for a “forensic photo examination of the crime scene.”¹⁵ CP 103; Ex. 185 at 1.¹⁶ In his written report, Mr. Hardin provided descriptions of 38 photographs and concluded four of the photographs showed two people “physically engaged” because of the appearance of the “stars and bars” pattern seen in Mr. Groth’s boots and a flat-soled shoe similar to Ms. Peterson’s. Ex. 185 at 17. He opined the footprints impressions were made between 5:00 PM on February 14 and the time the body was discovered and that the person in the “stars and bars” patterned boots was at the scene after Ms. Peterson was stabbed. Ex. 185 at 7. He could not identify the “stars and bars” pattern he saw was from Mr. Groth’s boots, but concluded all were made by the same person. Ex. 185 at 8.

Prior to trial, Mr. Groth moved to exclude Mr. Hardin’s testimony on the grounds that his proposed testimony concerning footwear impressions was outside his expertise as a tracker and

¹⁵ The report was revised after Mr. Hardin was provided with a set of the crime scene photographs created from the negatives. Ex. 185 at 5. Mr. Hardin opined the second set of photographs enabled him to be more definite in his findings because they had different lighting and camera angles. Ex. 185 at 5.

¹⁶ A color copy of Hardin’s report, marked at trial as Exhibit 185, will be designated to aid this Court because it is easier to read than the black and white copy in the clerk’s papers, CP 205-22. The report was not introduced at trial.

was not based upon a scientific method.¹⁷ At the pretrial hearing, Hardin said he was testifying as an expert and related his extensive experience as a border patrol officer and later established his own tracking business and school. 1RP 9-10, 18-26, 63-64. He described tracking as a scientific field drawing on geology, biology, weather, and psychology, acknowledging his knowledge of those fields was not based upon formal training.¹⁸ 2RP 123, 129.

For a tracker, a sketch is more accurate than a photograph or a cast. 13RP 1365-68. Mr. Hardin acknowledged that tracking from a photograph is much more limited than at the scene, and he believed he is the only professional tracker who will work only from photographs. 1RP 39-40, 41-45; 2RP 89-90, 139-40, 165. He was unaware of any other cases where a court was asked to determine if a tracker's opinion based only on photographs was admissible. 2RP 91.

When asked to describe his methodology, Mr. Hardin said his conclusions were based on "the totality of the characteristics of the evidence in the sign line" based upon his experience. 1RP 69-

¹⁷ Defense counsel also the testimony was not relevant and that its prejudicial value outweighed any probative effect. CP 7-80, 255-60, 267-75.

¹⁸ Kathy Decker, however, described tracking as "more of an art than a science" and explained it was very subjective because everyone sees and recognizes things differently. 12RP 1319-20.

71, 74, 77-79, 81. In Mr. Groth's case, Mr. Hardin and two other trackers looked individually at the photographs and took notes, then came together to compare points of view, and then separated; they repeated this procedure three times until reaching an agreement that "what we're seeing in the photograph that actually relates to the object it was that we're asked to reach." 1RP 60. The notes were not saved; Hardin's only documentation of his work was his report itself. 2RP 125; CP 202-25.

According to Mr. Hardin, his company's certification program and methodology are so unique he cannot find anyone other than his own students for purposes of peer review. 92RP 124, 128. Hardin reviewed the photographs with Sharon Ward and King County Sheriff's Detective Kathy Decker, but only Ms. Ward's name is on the written report.¹⁹ Both women are Hardin's students; Decker has never trained with any other tracker and said her review was partly for her own education. 1RP 61; 2RP 163-64; 12RP 1354-55; CP 202.

Forensic scientist William Bodziak has extensive experience and training in footwear examination. 2RP 172-75; Pretrial Ex. 10.

¹⁹ Mr. Hardin apparently employs both Detective Decker and Ms. Ward, as they are listed a personnel on his company's website. www.jhardin-inc.com/profiles.html (last viewed August 28, 2010).

After explaining the established method for footwear comparisons, 2RP 175-80, 183, Bodziak testified he received high resolution scans of the negatives and was still unable to see what Mr. Hardin testified was visible in the photographs. 2RP 194-95, 203-04.

“There was really nothing in the majority of [the photographs addressed in Hardin’s report] that I would consider anything at all that was worthy of an examination. You might see a ripple in the soil, but nothing that you could reliably . . . associate or disassociate with an item of footwear.” 2RP 197. With the photographs where Bodziak could see footwear impressions, Bodziak opined there was not sufficient evidence to make conclusions those apparent impressions were consistent with Mr. Groth’s or Ms. Peterson’s shoes or that they were made by the same shoe. 2RP 201, 215-16. He explained that photographs that are not taken at a 90 degree angle and do not have a scale are worthless for purposes of footwear comparison. 2RP 205. Had the three casts taken of shoeprints and the shoes themselves been preserved, a more accurate comparison might have been made. 2RP 206-09.

John Nordby, a forensic science and forensic medicine expert, testified that a scientific report must be based upon reliable

methods that can be seen, replicated and validated. 3RP 279-80; CP 51-52; Pretrial Ex. 14. He described the importance of objectivity and peer review. 3RP 280-83. He agreed with Mr. Bodziak that the photographs in this case were not useful for making comparison because they were not at a 90 degree angle, did not have scales, and were difficult to view because of side lighting. 3RP 297-98. Dr. Nordby opined Mr. Hardin's conclusions were in the area of shoe impression and crime scene reconstruction and thus out of his field of expertise. 3RP 300-01; CP 56-66. Dr. Nordby could not see any scientific basis for the conclusions in Mr. Hardin's report, which appeared to be "anecdotal." 3RP 303, 307; CP 55-56. He simply did not see what Mr. Hardin claimed to see in the photographs. 3RP 321.

c. The trial court erred by admitting Hardin's testimony concerning footwear identification and comingling. Two forensics scientists informed the court that valid comparisons could not be made from the photographic evidence, Hardin's methods were unscientific, and his results were unsubstantiated, and one opined it was unethical to offer an expert opinion that was so unsupported by facts or scientific theory. Even the court noted some of Mr. Hardin's testimony lacked foundation and prohibited him from

testifying that Vibram soled footwear was unusual in 1975 without proof. CP 278. The court nonetheless permitted the State to call Mr. Hardin to testify about his apparently intuitive visual comparisons of the partial footwear impressions. He was permitted to testify the footwear impressions were from soles like those worn by Mr. Groth and Ms. Peterson, but could not opine they matched Ms. Peterson or Mr. Groth. CP 277-78. The trial court's ruling was incorrect because Mr. Hardin was testifying outside his area of expertise, he could not explain his methodology, he did not utilize genuine peer review, and his opinion was not helpful to the jury.

In Ortiz, Mr. Hardin testified as a tracker, going to the scene, finding footprints in the home and following them into the neighborhood. Ortiz, 119 Wn.2d at 297-98. Here, however, Mr. Hardin believed he was providing the court with a forensic evaluation of photographic evidence, but he was not a forensic scientist. In order to offer an expert opinion, a witness must have expertise in the area of testimony. For example, a counselor with a sociology degree was not qualified to offer an opinion as to the effect of alcohol upon the defendant. State v. Swagerty, 60 Wn.App. 830, 810 P.2d 1 (1991). While Mr. Hardin was experienced at recognizing signs that humans have been in a

particular place, he was not qualified to offer the comparison opinions he offered here.

Few appellate cases deal with whether a tracker is qualified as an expert in shoe comparisons. In one case where a Border Patrol tracker testified footprints he found near marijuana could have been made by defendants' shoes, the jury was instructed the tracker was not an expert. The district court then dismissed the case for lack of evidence after the verdict was entered, concluding the jury must have considered evidence not properly before it and "must have had surer belief in the similarity of the footprints than the evidence would permit." United States v. Hernandez-Bautista, 159 F.Supp.2d 410, 414 (W.D.Tex. 2001), aff'd, 293 F.3d 845 (5th Cir. 2002). When the government appealed, the appellate court agreed with the district, finding, finding it was unable to determine from photographs that the tracks found in desert matched the soles of defendant's footwear shown in photographs. 293 F. 3d at 854. Moreover, in reported cases that mention trackers as witnesses, the trackers are testifying about tracks they observed or followed at the scene. United States v. Miguel, 952 F.2d 285 (9th Cir. 1991) (tracker followed footprints); United States v. McQuillan, 507 F.2d 30 (9th Cir. 1974) (border patrol agent backtracked from defendants

to 80 kilograms of marijuana); State v. Salazar, 173 Ariz. 399, 844 P.2d 566 (1992) (tracker testified zigzag patterns found under and over deceased came from same brand of running shoe worn by defendant), cert. denied, 509 U.S. 912 (1993); State v. Dixon, 153 Ariz. 151, 735 P.2d 761, 765 (1987) (expert qualified both as tracker and crime scene reconstructionist testified based upon fitting defendant's shoe into track and comparing tread on soles to tread in dirt). In only one case did the tracker appear to be testifying from photographs rather than personal knowledge obtained at the crime scene. State v. Henry, 176 Ariz. 569, 863 P.2d 861, 867-68 (1993) (tracker testified as expert without objection that footprints in photograph matched defendants' and showed how they drug, killed and then hid victim).

Mr. Hardin's experience as a tracker of human beings does not qualify him to compare footwear impressions and testify they are from the same shoe based upon photographs. For example, the Massachusetts Supreme Court found latent fingerprint examiners' testimony inadmissible when they identified the defendant's fingerprints on a murder victim's car based, not upon the match of a single latent impression, but rather the "cumulative similarities observed between the impressions and their

corresponding fingers,” which the examiner believed were simultaneously made. Commonwealth v. Patterson, 445 Mass. 626, 840 N.E.2d 12, 14, 18-19 (2005). While the underlying theory of latent fingerprint identification was accepted in Massachusetts, the court concluded the State could not establish that process could be reliably applied to purportedly simultaneous impressions that could not be matched to any of the defendant’s fingers. Id. at 15, 24-26. “[T]he evidence can only be admitted if, in addition to the reliability of the theory and process in general, the process is reliable when applied to the specific issue about which the expert is proposing to testify.” Id. at 26 (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 153-54, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)). The court may not admit “every application of a testing method no matter how dubious” because of its function as a gatekeeper, protecting juries from unreliable evidence. Id. at 28. There was no evidence that any jurisdiction except for the then-disbanded Boston police fingerprint and Great Britain used simultaneous impressions for purposes of identification and an expert described its use as a “weird doctrine” with no supporting rationale. Id. at 29.

As in Patterson, the issue before the court was not whether tracking in general is admissible in court, but whether it was reasonable for Hardin to draw conclusions about footwear impressions from inadequate photographs based upon his expertise as a tracker. The photographs had no scale and were not all taken at the same angle, yet Mr. Hardin told the jury he could tell all of the “stars and bars” pattern parts were made by the same boot because the spacing was identical. An experienced footwear impression expert explained this was unscientific and unreliable. And, as in Patterson, there was no evidence that any trackers except Mr. Hardin and his students purport to provide forensic analyses or make footwear impression comparison based upon inadequate photographs.

Finally, a witness may express an opinion only if the opinion will assist the jury in either understanding the witness’s testimony or the facts at issue in the case. ER 701. For example, a lay witness may testify as to the defendant’s identity as the person shown in surveillance photography or video tape only if there is a reasonable basis to conclude the witness is more likely to correctly identify the defendant than the jury. ER 701; State v. Collins, 152 Wn.App. 429, 216 P.3d 463 (2009), rev. denied, 168 Wn.2d 1020 (2010);

State v. George, 150 Wn.App. 110, 118, 206 P.3d 697, rev. denied, 166 Wn.2d 1037 (2009). Here, the jury was just as capable of looking at the photographs with a magnifying glass as Mr. Hardin, and his expert testimony was thus not of value to them.

This court normally reviews a lower court's evidentiary rulings for an abuse of discretion. George, 150 Wn.App. at 117. A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). Basing an evidentiary ruling upon unsupported facts or a misunderstanding of the testimony, taking a view no reasonable person would take, applying the wrong legal standard, or misunderstanding the law all constitute an abuse of discretion. Id. at 284. The court's interpretation of the evidence rules and the application of a court rule to the facts of the case, however, is reviewed de novo. State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001).

Here, the trial court permitted Mr. Hardin to provide his view that the bits and pieces of shoe wear patterns and other "sign" shown in photographs showed one Vibram-soled shoe and one flat-soled shoe were together at the crime scene at the time of the murder. Mr. Hardin's opinion, however, was based only upon crime

scene photographs that lacked scale and were taken at unknown angles and exposures. The trial court abused its discretion

d. Mr. Groth's conviction must be reversed. An error in the admission of evidence is harmless if it is minor in reference to overwhelming evidence as a whole. George, 150 Wn.App. at 119. In George, this Court held police officers' identification of two defendants as the people in the motel surveillance photographs was harmless as to one defendant and required reversal as to the other. Critical to the court's determination that the error was harmless was the identification of one defendant by an eyewitness to the robbery and the fact the defendant drove the van containing property taken in the robbery and fled from the police. George, 150 Wn.App. at 119-20. As to the other defendant, however, there was no eyewitness identification and he did not fit the eyewitness's description. Id. at 120.

As in George, the court's error is not harmless here. The backyard where Ms. Peterson died was commonly used by the neighborhood children to walk between houses. 8RP 644; 10RP 1021; 5/21/09RP 24. On the morning Ms. Peterson was discovered, a number of people walked through the area, including her father, a priest, three medics from the fire department, at least

one patrol officer, and several detectives. Several of these people were probably wearing both shoes with Vibram or imitation Vibram soles like Mr. Groth and flat-soled shoes like Ms. Peterson. Mr. Hardin's faulty expert opinion was particularly prejudicial to Mr. Groth's defense.

The only other evidence of guilt were Mr. Groth's inconsistent statements made when he was 16 and the detective's testimony that he made only a "weak denial" of his involvement in the crime when interviewed 30 years later. Mr. Groth's conviction must be reversed and remanded for a new trial.

4. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. GROTH MURDERED MS. PETERSON

The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d

560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Groth was convicted of murder in the second degree under RCW 9A.32.050(1)(a), which required the State to prove beyond a reasonable doubt that he caused her death with the intent to do so. CP 414-15, 419. The statute reads:

A person is guilty of murder in the second degree when:
(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.

RCW 9A.32.050(1)(a). Here, there is no question that Ms. Peterson was murdered; the issue is whether the State proved beyond a reasonable doubt that it was Mr. Groth.

The State had no physical evidence connecting Mr. Groth to the death of Ms. Peterson. Instead, the State relied upon Mr. Groth's prior statements to the police and to friends in 1975, his failure to deny his guilt sufficiently to the police in 2005, and Mr. Hardin's testimony about a "stars and bars" patterned shoe. This is not sufficient to prove beyond a reasonable doubt that Mr. Groth murdered Ms. Peterson.

In addition, the murder weapon belonged to Ms. Peterson's boyfriend, Mr. Diener, who lived next door. Mr. Diener offered an

alibi only until 10:30 to 11:00 PM, and he refused to speak to the police after his initial interview. Thus, the evidence points as clearly to him as to Mr. Groth.

Viewing the evidence in the light most favorable to the State, there is not sufficient evidence to conclude beyond a reasonable doubt that Mr. Groth murdered Ms. Peterson. His conviction must be reversed and dismissed.

5. THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT DENIED MR. GROTH A FAIR TRIAL

The prosecutor committed misconduct in her closing argument by misstating the burden of proof, thus violating Mr. Groth's constitutional right to a fair trial. The prosecutor also incorrectly told the jury it was required to give circumstantial and direct evidence equal weight and misinformed the jury as to the meaning of the court's missing evidence instruction. The prosecutor's misconduct both violated Mr. Groth's constitutional right to due process and was so flagrant and ill-intentioned that it could not have been cured by a limiting instruction. Mr. Groth's conviction must be reversed and remanded for a new trial.

a. The prosecutor's misconduct may violate the defendant's constitutional right to a fair trial. A criminal defendant's right to due

process of law ensures the right to a fair trial. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). When a prosecutor commits misconduct, the defendant's constitutional rights to due process and a fair trial may be violated. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

Here, the prosecutor committed misconduct in her closing argument by (1) misstating the burden of proof beyond a reasonable doubt, (2) misstating the law concerning circumstantial evidence, and (3) misinformed the jury concerning their use of the court's missing evidence instruction. Mr. Groth may raise prosecutorial misconduct on appeal even though his attorney did not object at trial.

To determine if a prosecutor's comments or argument constitute misconduct, the reviewing court must decide first if the comments were improper and, if so, whether a "substantial likelihood" exists that the comments affected the jury verdict. Fisher, 165 Wn.2d at 747; State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where the defendant does not object to the

improper argument, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice would not have been cured with a limiting instruction. Id. If, however, the prosecutor's misconduct implicates the defendant's constitutional rights, the State must demonstrate the error was harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); State v. Toth, 152 Wn.App. 610, 614-15, 217 P.3d 377 (2009); see State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008) (suggesting but not deciding if constitutional harmless error standard applicable when prosecutorial misconduct violates specific constitutional right), cert. denied, 129 S.Ct. 2007 (2009)

b. The prosecuting attorney committed misconduct by misrepresenting the State's burden of proof beyond a reasonable doubt. A criminal defendant has a constitutional right to be convicted only upon proof beyond a reasonable doubt of every element of the crime. Apprendi, 530 U.S. at 476-77; Warren, 165 Wn.2d at 26; U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. A conviction cannot stand if the jury has been instruction in a manner that relieves the State of this burden of proof. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)

(constitutionally deficient reasonable doubt instruction); State v. Jackson, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999) (incorrect instruction on elements of crime).

Thus, the prosecutor may not argue to the jury in a manner that improperly states the burden of proof or suggests the defendant is not entitled to the benefit of any reasonable doubt. Warren, 165 Wn.2d at 26-27. It is misconduct for the prosecutor to argue the defendant is not entitled to “the benefit of the doubt” or to the presumption of innocence. Id. at 27; State v. Venegas, 155 Wn.App. 507, 523-25, 228 P.3d 813 (2010).

Prosecutors in Pierce County told the jury in closing arguments that in order to find the defendant was not guilty, the jury would have to say, “I doubt the defendant is guilty and my reason is - blank.” Id. at 523; State v. Anderson, 153 Wn.App. 417, 431, 220 P.3d 1273 (2009). The prosecutor in Venegas added that the presumption of innocence was eroded every time the jury heard evidence showing the defendant was guilty. Venegas, 155 Wn.App. at 524. The first argument misstated the State’s burden of proof and the presumption of innocence by implying the jury had a duty to convict unless it came up with a good reason not to and suggesting the defense was responsible for supplying the reason.

Id.; Anderson, 153 Wn.App. at 431. The second argument also misstated the presumption of innocence, which continues throughout the entire trial and may overcome during jury deliberations. Venegas at 524-25; The Court of Appeals noted that both arguments were improper and constituted flagrant misconduct requiring reversal even in the absence of an objection. Id. at 525.

Here, the prosecutor argued in her closing argument that the jury did not have a reasonable doubt if it had unanswered questions. 5/28/09RP 77-78. The prosecutor returned to that theme in rebuttal, stating “[W]hen you go into that jury room, there are going to be unanswered questions. That doesn’t equal reasonable doubt.” 5/28/09RP 131. The constitution, however, requires the State to prove every element of the crime beyond a reasonable doubt. An unanswered question about any element of the crime may in fact constitute a reasonable doubt that would prevent the jury from convicting Mr. Groth. The prosecutor’s argument in this case misstated the State’s burden of proof and encouraged the jury to convict Mr. Groth even if the State did not prove its case.

Because the prosecutor improperly diminished the burden of proof in her closing argument, this Court cannot be convinced

beyond a reasonable doubt that the jury understood the State's burden of proof of every element of the crime. Mr. Groth's conviction must be reversed.

c. The prosecuting attorney committed misconduct by misrepresenting the court's circumstantial evidence instruction. A prosecutor's argument on the law must be confined to the law contained in the court's instructions. State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). Washington courts do not distinguish between direct and circumstantial evidence, leaving the jury free to decide what weight to give any of the evidence produced at trial. State v. Gosby, 85 Wn.2d 758, 764-67, 539 P.2d 680 (1975). In Mr. Groth's case, the jury was so instructed. CP 406. Instruction 4 informed the jury:

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

Id.

The prosecuting attorney correctly read to the jury the penultimate sentence from the instruction, but then informed that jury that Instruction 4 meant that circumstantial and direct evidence are “equal” and the jury was to give them “equal weight.” 5/28/09RP 47 (“The are equal. They are to be given equal weight.”) This is incorrect.

The purpose of the circumstantial evidence instruction is to give the jury freedom to give any weight to either direct or circumstantial evidence as the jury sees fit. Gosby, 85 Wn.2d at 766-76. “[W]hether direct evidence or circumstantial evidence is more trustworthy and probative depends upon the particular facts of the case and no generalizations realistically can be made that one class of evidence is per se more reliable than is the other class of evidence.” Id. at 766. It is up to the jury to decide what weight to give to all of the evidence presented at Mr. Groth’s trial, and the prosecutor incorrectly told the jury the two kinds of evidence were “equal.” 5/28/09RP 47. Where much of the evidence of the crime had been destroyed by the State and the jury was faced with evaluating largely circumstantial evidence, this misstatement of the law improperly benefitted the State and unfairly prejudiced Mr. Groth.

d. The prosecuting attorney committed misconduct by misinforming the jury about the missing evidence instruction. In light of the significant amount of evidence that had been destroyed prior to the trial, the court instructed the jury that it could infer the destroyed evidence would not have supported the State's case.

CP 408. Instruction 6 reads:

If you find that the state has destroyed, caused to be destroyed, or allowed to be destroyed, any evidence, the contents or quality of which is in issue, you may infer that the evidence would have been unfavorable to the state, if you believe such inference is warranted under all the circumstances of the case.

Id. The instruction is similar to that given in Youngblood, but the trial court here added the language after the last comma.

Youngblood, 488 U.S. at 60-61 (Stevens, J., concurring).

The prosecutor, however, told the jury that it could only infer the evidence was not favorable to the State if it found there was evidence the State had destroyed evidence intentionally or if there was evidence the destroyed evidence would have exculpated Mr. Groth. 5/28/09RP 78-79. The prosecutor thus misrepresented the instruction.

The jury was not required to find evidence supported the inference. As the State argued when opposing the giving of the

instruction, neither party had presented evidence as to why the evidence was destroyed. 15RP 1822. Instead, the instruction simply permitted the jury to make the inference if it believed the inference was “warranted under all the circumstances of the case.” CP 408. The prosecutor misled the jury by arguing it could not utilize the inference unless there was evidence to support it, and the argument prejudiced Mr. Groth.

e. Mr. Groth’s conviction must be reversed. The prosecutor’s misconduct in misstating the burden of proof must be evaluated using the constitutional harmless error standard. Easter, 130 Wn.2d at 242; Toth, 152 Wn.App. at 614-15. In determining if a constitutional error is harmless, the State must convince this Court beyond a reasonable doubt that the guilty verdict was not attributable to the prosecutor’s misconduct or if there is overwhelming untainted evidence to support the conviction. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (repeated use of defendant’s failure to testify to prove guilt required reversal of convictions); Easter, 130 Wn.2d at 242 (evidence of defendant’s pre-Miranda silence and references to it in closing argument required reversal).

Given the lack of evidence that Mr. Groth committed this crime, this Court cannot be convinced beyond a reasonable doubt that the prosecutor's misstatement of its burden of proof did not prejudice Mr. Groth. Mr. Groth was entitled to have the jury decide if the State proved every element of the crime beyond a reasonable doubt and to consider if there were unanswered questions relevant to his guilt. Thus, Mr. Groth's conviction must be reversed and remanded for a new trial.

In reviewing the prosecutor's misstatements of the court's instruction concerning circumstantial evidence and destroyed evidence, this Court reviews the misconduct to determine if it was flagrant and ill-intentioned in light of the total argument, the instructions, and the evidence in the case. Warren, 165 Wn.2d at 28. Here, the prosecutor's discussion of the two instructions contained two misstatements of the law that undermined the court's instructions. The improper arguments were isolated comments, but an effort to misdirect the jury's consideration of the evidence to the benefit of the State.

In addition, "there comes a time . . . when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error."

State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Accord, State v. Henderson, 100 Wn.App. 794, 998 P.2d 907 (2000). This Court should conclude the prejudicial misconduct in the prosecutor's closing, minimizing the burden of proof beyond a reasonable doubt and misrepresenting the court's instructions on jury's consideration of evidence, could not have been cured by a curative instruction. Belgarde, 110 Wn.2d at 510. Misconduct in closing argument - the last words heard by the jury – violated Mr. Groth's constitutional right to a fair trial and his conviction must be reversed. Belgarde, 110 Wn.2d at 510; State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984).

6. MR. GROTH'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HIS ATTORNEY DID NOT PRESENT ANY INFORMATION OR ARGUMENT AT SENTENCING

Mr. Groth's sentencing was far from routine, as his crime occurred when he was a juvenile and before both the Juvenile Justice Act of 1977 (JJA) and the Sentencing Reform Act of 1985 (SRA). Mr. Groth's attorney did not act as his advocate at his sentencing hearing, as she did not make a sentencing recommendation, present mitigating information to the court, or offer any argument concerning the applicable sentencing law. As a

result, Mr. Groth was effectively denied counsel at sentencing. This Court must therefore vacate his sentence and remand for new sentencing hearing.

a. The accused has the constitutional right to effective assistance of counsel. The federal and state constitutions provide the accused with the right to representation of counsel and to due process of law. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Sentencing is a critical stage of the proceeding where the defendant is entitled to effective assistance of counsel. State v. Saunders, 120 Wn.App. 800, 819-25, 86 P.3d 232 (2004); In re Personal Restraint of Morris, 34 Wn.App. 23, 658 P.2d 1279 (1983); CrR 3.1(b)(2). “Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process.” State v. Ford, 137 Wn.2d 472, 484, 973 P.2d 452 (1999).

The right to counsel necessarily includes the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). The adversarial process requires both sides be represented by attorneys who perform as advocates. United States v. Cronin, 466

U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland, 466 U.S. at 685. The right to effective counsel is not met simply because an attorney is present in court; the attorney must actually assist the client and play a role in ensuring the proceedings are adversarial and fair. Strickland, 466 U.S. at 685.

When a defendant alleges he did not receive effective assistance of counsel, the appellate court normally reviews (1) whether the attorney's performance fell below objective standards of reasonable representation, and, if so, (2) whether counsel's deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687-88; State v. Thiefault, 160 Wn.2d 409, 414, 158 P.3d 580 (2007). When, however, the defendant is actually or effectively denied counsel, prejudice is presumed. Cronic, 466 U.S. 658-62. Personal Restraint of Davis, 152 Wn.2d 647, 673-74, 101 P.3d 1 (2004). Prejudice is presumed when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing" at a critical stage of a proceeding, where the circumstances prevent any competent attorney from providing effective assistance, or where counsel has a conflict of interest. Cronic, 466 U.S. at 658-62; Davis, 152 Wn.2d at 674.

[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there had been a denial of the Sixth Amendment that makes the adversary process itself presumptively unreliable.

Cronic, 466 U.S. at 659.

b. Mr. Groth's attorney's performance was deficient because she failed to act as his advocate at the sentencing hearing. Mr. Groth's attorney clearly subjected the prosecutor's case to a meaningful adversarial testing at trial. At the time of sentencing, however, she simply stopped, apparently upset because her client had been convicted. 18RP 1858-59, 1871-72.

The trial court was not bound by the limitation of the Sentencing Reform Act of 1985 in sentencing Mr. Groth. The court set a minimum term and sent Mr. Groth to prison, but it also had the power to impose a suspended or deferred sentence. State v. Theroff, 33 Wn.App. 741, 743, 657 P.2d 800 (court did not abuse its discretion by granting deferred sentence for second degree murder), rev. denied, 99 Wn.2d 1015 (1983). However, defense counsel did not mention this option to the court. Nor did defense counsel provide the court with any information about Mr. Groth's life even though the court was permitted to rely on any information it felt relevant in sentencing Mr. Groth. 18RP 1874; State v. Wilcox,

20 Wn.App. 617, 581 P.2d 596 (1978) (“The trial court is generally expected to consider any and all information deemed helpful in making sentencing decisions.”); State v. Buntain, 11 Wn.App. 101, 106, 521 P.2d 752 (trial court “not to be narrowly confined in his attempt to learn as much as is available about the circumstances of the crime, the defendant’s past life, and his personal characteristics” in order to tailor sentence to individual, not the crime), rev. denied, 84 Wn.2d 1007 (1974). In the absence of any such information except for Mr. Groth’s prior record, the sentencing court had no choice but to impose a sentence based on “pure punishment and pure protection of society.” 18RP 1874.

c. Mr. Groth’s sentence must be vacated and his case remanded for a new sentencing hearing. In light of defense counsel’s complete failure to perform her role as advocate for Mr. Groth at sentencing, Mr. Groth was effectively denied counsel at the hearing. Thus, he need not show prejudice, and his sentence must be vacated and the case remanded for a new sentencing hearing.

If this Court does not find Mr. Groth was denied counsel, it must determined if his defense counsel’s performance fell below objective standards of reasonable representation and, if so,

whether Mr. Groth was prejudiced by his lawyer's deficient performance. Strickland, 466 U.S. at 687-88; Thiefault, 160 Wn.2d at 414. Competent trial counsel is aware of the sentencing law applicable to her client's case. Saunders, 120 Wn.App. at 825 (counsel deficient for not making same criminal conduct argument supported by case law). The American Bar Association Standards call for defense counsel to learn all of the sentencing alternatives available to her client and with community resources or facilities that can be of assistance. Defense counsel is also required to "present to the court any ground which will assist in reaching a proper disposition favorable to the accused" and submit all favorable information relevant to sentencing. American Bar Association, Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-8.1(a), (b) (3d 1993); see State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010) (referring to ABA standards in determining if defense counsel's performance was deficient).

Because this crime occurred in 1975, the court was not familiar with the sentencing law that applied and asked the parties to provide briefing on the court's sentencing alternatives, including those if Mr. Groth had been sentenced in juvenile court. 17RP

1850-51. The prosecutor responded by filing a memorandum. CP 451-56. If Mr. Groth's attorney provided a memo, it is not in the court file. See 18RP 1871.

At sentencing, the prosecutor explained why her sentencing recommendation was consistent with the sentencing law at the time of the offense but also took into account the standard range Mr. Groth would have been subject to had the crime had occurred after 1985; she also argued the absence of any SRA mitigating factors. 18RP 1854-56, 1858. The State provided the court with Mr. Groth's criminal record. 18RP 1859-60. Mr. Groth's attorney, however, presented no recommendation, stating she would not make a recommendation because her client was innocent. 18RP 1871.

Defense counsel, however, failed to familiarize herself with the 1975 sentencing scheme, which permitted the court to consider any mitigating information it felt relevant and to fashion an individualized sentence. Her performance was thus deficient.

Mr. Groth was prejudiced by his attorney's performance. Without the information counsel did not present, Mr. Groth cannot prove Judge Inveen would have imposed shorter minimum and maximum terms or even a suspended sentence if his attorney had represented him at sentencing. However, Mr. Groth was required

to pay a \$50 victim penalty assessment. CP 465. The court imposed the victim penalty assessment because the prosecutor stated it was mandatory in 1975. CP 465; 18RP 1876. The victim penalty assessment statute referenced by the court, however, was not enacted in 1977, after the date of the current offense. RCW 7.68.035; Laws of 1977 ex.s. ch. 302 § 10; State v. Humphrey, 139 Wn.2d 53, 983 P.2d 1128 (1999) (amendments to victim penalty assessment statute apply prospectively). Mr. Groth was thus prejudiced by his attorney's failure to research the sentencing law in 1975.

Because Mr. Groth was not afforded the effective assistance of counsel guaranteed by the federal and state constitutions, this Court must vacate his sentence and remand for a hearing where he will be represented by competent counsel. Thiefault, 160 Wn.2d at 417; Saunders, 120 Wn.App. at 825. In the alternative, this Court should vacate the improperly-imposed victim penalty assessment.

E. CONCLUSION

Mr. Groth's conviction for second degree murder must be reversed and dismissed because the State's destruction of a substantial portion of the physical evidence and crime lab test results violated his constitutional right to due process under the

federal and/or state constitutions. Dismissal is also required because the State failed to prove every element of the crime beyond a reasonable doubt.

In the addition, Mr. Groth's conviction should be reversed and remanded for a new trial because the trial court improperly permitted testimony from a tracker concerning footwear impression comparisons and because the prosecutor committed misconduct in closing argument. In the alternative, this Court should vacate Mr. Groth's sentence and remand for a new sentencing hearing with competent counsel and/or to vacate the victim penalty assessment.

DATED this 31st day of August 2010.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 64029-1-I
)	
JAMES GROTH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF AUGUST, 2010.

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2010 AUG 31 PM 4:51

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