No. ____

IN THE SUPREME COURT OF THE UNITED STATES

NICHOLAS HACHENEY,

Petitioner,

v.

MIKE OBENLAND,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Appendix A

FILED

MAY 01 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICHOLAS HACHENEY, Petitioner-Appellant, v. MIKE OBENLAND, Respondent-Appellee.	No. 16-35810 D.C. No. 3:15-cv-05492-RBL MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Submitted March 9, 2018**
Seattle, Washington

Before: RAWLINSON and CLIFTON, Circuit Judges, and FREUDENTHAL,*** Chief District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Nancy Freudenthal, Chief United States District Judge for the District of Wyoming, sitting by designation.

Petitioner Nicholas Hacheney appeals the district court's denial of his petition for a writ of habeas corpus. He obtained a certificate of appealability (COA) on one claim, and has also briefed an uncertified claim. We affirm and decline to expand the scope of the COA.

Hacheney petitions for a writ of habeas corpus on the ground that the state trial court violated his Sixth Amendment Confrontation Clause rights by admitting a toxicology report and testimony relying on the report, even though the toxicologist who performed the analysis was not available to testify. The Washington Court of Appeals was the highest state court to hear this claim on the merits. Hacheney argues that the state court's decision to deny his Confrontation Clause claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). However, when Hacheney's conviction became final, it was not clearly established 1) that reports that were not prepared specifically for use against a targeted defendant were testimonial; 2) that reports performed in connection with autopsies were testimonial; and 3) that a supervisor could not testify about reports performed by examiners that he oversaw.

Neither *Crawford v. Washington*, 541 U.S. 36 (2004), nor *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the key Supreme Court cases that had been

decided when Hacheney's conviction became final in 2010, addressed these points. These cases established only that forensic reports may be testimonial, and if they are, a witness must appear to testify in person for the report to be admitted. *See Fluornoy v. Small*, 681 F.3d 1000, 1005 (9th Cir. 2012). Indeed, the Supreme Court's subsequent plurality decision in *Williams v. Illinois*, 567 U.S. 50 (2012), makes plain that the state court's decision was not contrary to clearly established law. The four-judge plurality opinion held that admission of a test that was not prepared to furnish evidence against a specific individual did not implicate the Confrontation Clause. *Id.* at 84. Hacheney was not a target of investigation when the toxicology report was prepared. The state court therefore did not unreasonably apply clearly established law by denying Hacheney's Confrontation Clause claim.

We treat Hacheney's uncertified claim as a motion to expand the COA. *Murray v. Schriro*, 745 F.3d 984, 1002 (9th Cir. 2014). We decline to expand Hacheney's COA because Hacheney has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Hacheney requests that we expand the COA to include an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984). However, the record reflects that his trial counsel conducted a reasonable investigation into his purported alibi and then made appropriate tactical choices about how best to rebut the state's evidence.

His counsel's conduct thus was not deficient, as it fell "within the wide range of reasonable professional assistance." *Id.* at 689.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NICHOLAS HACHENEY,

Petitioner,

v.

MIKE OBENLAND,

Respondent.

No. 3:15-CV-05492-RBL-DWC

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court, having reviewed the Report and Recommendation of Magistrate Judge David W. Christel, objections to the Report and Recommendation, if any, and the remaining record, does hereby find and ORDER:

(1) The Court adopts the Report and Recommendation [Dkt. #39].

(2) Petitioner's federal habeas Amended Petition [Dkt. #37] is denied with prejudice. His claims are DISMISSED with prejudice.

(3) The issuance of a certificate of appealability is denied.

(4) The Clerk is directed to send copies of this Order to counsel for Petitioner and Respondent and to the Hon. David W. Christel.

DATED this 4th day of October, 2016.

Ronald B. Leighton
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NICHOLAS HACHENEY,

Petitioner,

v.

MIKE OBENLAND,

Respondent.

CASE NO. 3:15-CV-05492-RBL-DWC

REPORT AND RECOMMENDATION

Noting Date: September 16, 2016

The District Court has referred this action to United States Magistrate Judge David W. Christel. Petitioner Nicholas Hacheney, through court-appointed counsel Jeffrey E. Ellis, filed his federal habeas Petition ("Petition"), pursuant to 28 U.S.C. § 2254, seeking relief from a state court conviction. Dkt. 1. On June 15, 2016, Plaintiff filed an Amended Petition, which completely replaced the Petition. Dkt. 37. The Court concludes the state court's adjudication of the grounds raised in the Amended Petition was not contrary to, or an unreasonable application of, clearly established federal law. Therefore, the undersigned recommends the Amended Petition be denied.

BACKGROUND

I. Factual Background

The Supreme Court of the State of Washington summarized the facts of Petitioner's case as follows:

> Nicholas Hacheney was one of several pastors at a large church in Bremerton, Washington. On December 25, 1997, Nicholas and Dawn Hacheney attended a Christmas party, and they returned home late in the evening. Dawn's mother reported that Dawn had not been feeling well that day and she was taking Benadryl.
>
> Early the next morning, Nicholas Hacheney left to meet friends for a hunting trip. Soon after, the Hacheneys' neighbors noticed that a fire had erupted in the Hacheney home. Firefighters responded and put out the blaze, which had destroyed the bedroom. The firefighters discovered Dawn's badly burned body on the bed. They also discovered several propane canisters and an electric space heater in the bedroom.
>
> When interviewed by investigators, Nicholas Hacheney reported that he and his wife had opened Christmas presents late on Christmas night, and they had left wrapping paper in front of the heater. He said that he had turned the space heater on before he left that morning. He reported that Dawn had gotten up in the middle of the night to take Benadryl and suggested that her sensitivity to the drug might have explained her failure to escape the fire. He also explained that the case of propane had been a Christmas present that he opened the night before, and he had not yet removed it from the bedroom.
>
> The autopsy, completed by a forensic pathologist, revealed that Dawn did not have soot in her trachea or lungs. Tests submitted to the state toxicology lab and other labs revealed that Dawn had no carbon monoxide or cyanide in her blood, all of which suggested that she did not inhale after the fire began. She did have an elevated level of Benadryl in her blood. The autopsy report stated that Dawn suffered from pulmonary edema or fluid in her lungs, which can occur as a result of asphyxiation, suffocation, or a long list of other causes. The forensic pathologist concluded that Dawn was asphyxiated when her larynx reflexively closed as the result of a flash fire. The pathologist based his flash fire conclusion in part on the fact that there was no suspicion of foul play at the time. The original police and insurance investigations concluded that the fire and Dawn's death were accidental, though at least one investigator reported being uncomfortable with that conclusion.
>
> Then in 2001, several facts came to light that caused authorities to take a second look. Sandra Glass approached investigators and reported that she had an affair with Nicholas Hacheney during the summer and fall of 1997. A couple of weeks after Dawn's death, Hacheney confessed to Glass that on Christmas night he had given

> Dawn some Benadryl and then lain awake until God told him to " 'Take the land,' " a biblical phrase interpreted by members of his church to be an admonition to act. Glass told authorities that Hacheney confessed to having held a plastic bag over Dawn's head until she stopped breathing; he then set the fire. Hacheney also told Glass that Dawn knew what was happening to her. Further investigation revealed that in the few months after Dawn's death, Nicholas Hacheney developed ongoing sexual relationships with at least three additional church members.
>
> In September 2001, the Kitsap County prosecutor charged Nicholas Hacheney with first degree premeditated murder and/or first degree felony murder committed in the course of, in furtherance of, or in flight from first degree arson. The prosecutor then filed an amended information elevating the premeditated murder charge to aggravated first degree murder based on two alternative aggravating circumstances. The State alleged that Hacheney committed the murder to conceal the commission of a crime and/or he committed the murder in the course of, in furtherance of, or in immediate flight from arson in the first degree.
>
> Hacheney challenged whether there was probable cause to support the amended charges. The trial court agreed that there was *not* probable cause to charge him with felony murder, with committing the murder to conceal a crime, or with committing the murder "in furtherance of" or "in immediate flight from" arson. However, the court concluded that there was probable cause to charge Hacheney with aggravated premeditated first degree murder committed "in the course" of first degree arson.
>
> Before trial, it became apparent that three witnesses were going to be out of the country at the time of trial. Two were parishioners at Hacheney's church and the third was an electrical engineer who had consulted with Safeco Insurance as a fire investigator. All three witnesses were subpoenaed and all three notified prosecutors that they would be out of the country and unable to return for trial. All three were deposed and videotapes of their deposition testimony were shown at trial over defense objection. The videotaped depositions were redacted to delete deposition objections and testimony that had been ruled inadmissible.
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> . . .
>
> On December 26, 2002, the jury found Nicholas Hacheney guilty of first degree premeditated murder. By special verdict, it also found that he committed the murder in the course of arson in the first degree. Having been convicted of aggravated first degree murder, Hacheney was sentenced to life in prison without the possibility of release.

State v. Hacheney, 160 Wash. 2d 503, 506-11, 158 P.3d 1152, 1154-56 (2007) (record citations and footnotes omitted); Dkt. 21, Exhibit 16.

II. Procedural Background

Petitioner challenged his Pierce County Superior Court convictions and sentence on direct appeal raising numerous grounds. Dkt. 21, Exhibits 4-8. The Court of Appeals of the State of Washington affirmed Petitioner's conviction and sentence. Dkt. 21, Exhibit 8. Petitioner filed a motion to reconsider, which was denied. Dkt. 21, Exhibits 9, 10. On May 31, 2007, the Supreme Court of Washington concluded Petitioner did not commit the murder in the course of arson and remanded for resentencing without consideration of the improper aggravating circumstance. Dkt. 21, Exhibit16. The Washington State Supreme Court denied Petitioner's motion for reconsideration and Petitioner petitioned for writ of certiorari in the United States Supreme Court. The United States Supreme Court denied the petition on January 14, 2008. Dkt. 21, Exhibits 17, 18, 21.

Petitioner was resentenced to 320 months of confinement and 24 to 48 months of community custody. Dkt. 21, Exhibit 1. Petitioner challenged the resentencing on direct appeal. Dkt. 21, Exhibits 22, 23. The court denied the appeal, but remanded to correct the community custody term.[1] Dkt. 21, Exhibit 26. Petitioner petitioned for review, and the Washington State Supreme Court denied review on April 28, 2010. Dkt. 21, Exhibits 27, 28.

Petitioner filed a state collateral attack –a personal restraint petition ("PRP") – on June 22, 2009. Dkt. 21, Exhibit 30. The state court denied Petitioner's PRP, and the Supreme Court of Washington State denied review of the lower court's decision. Dkt. 21, Exhibit 3, 38.

On July 16, 2015, Petitioner, through counsel, filed his Petition raising six grounds for relief. Dkt. 1. Respondent served Petitioner's counsel with a copy of the Answer on November 25, 2015, and Petitioner, through counsel, filed a Reply on April 11, 2016. Dkt. 20, p. 52; 33. On May

[1] Community custody is a portion of an offender's confinement served in the community while the offender is monitored by the Department of Corrections.

11, 2016, the Court ordered Petitioner to file supplemental briefing showing cause why Ground 5 should not be denied based on a failure to exhaust and procedural default. Dkt. 34. In response to the Court's Order, Petitioner moved to amend his Petition, which the Court granted. Dkt. 35, 36. Petitioner filed the Amended Petition, which is a complete substitute for the original Petition, on June 15, 2016. Dkt. 37.

In the Amended Petition, Petitioner raised the following six grounds for relief: (1) Petitioner was denied his Sixth Amendment right to effective assistance of counsel where counsel failed to investigate and present an accurate timeline which would have been compelling proof that Petitioner did not murder his wife; (2) Petitioner's Sixth Amendment right to confrontation was violated by the admission of documents and testimony describing the results of several scientific examinations where the persons who conducted those tests were not subject to cross-examination; (3) the State failed to disclose material information regarding the performance standards of the Washington State Patrol Crime Laboratory in violation of the Fifth and Fourteenth Amendments; (4) Petitioner was denied his Sixth Amendment right to effective assistance of counsel when counsel failed to competently investigate the Washington State Patrol Crime Laboratory; (5) Petitioner's Sixth Amendment right to confrontation was violated when three witnesses who were not "unavailable" testified through video deposition; and (6) the "consciousness of guilt" instruction violated due process because Petitioner's sex life had no probative value to that issue, the instruction was not clearly phrased as a permissive inference, and no cautionary language was included in the instruction. Dkt. 37.

On July 1, 2016, Respondent filed a Supplemental Answer. Dkt. 38. Respondent concedes Petitioner exhausted each ground for relief, but maintains the state court's adjudication of the six

grounds for relief was not contrary to, or an unreasonable application of, clearly established federal law. Dkt. 20, 38. Petitioner did not file a supplemental response.[2]

EVIDENTIARY HEARING

The decision to hold an evidentiary hearing is committed to the Court's discretion. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "[A] federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 474. In determining whether relief is available under 28 U.S.C. § 2254(d)(1), the Court's review is limited to the record before the state court. *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011). A hearing is not required if the allegations would not entitle Petitioner to relief under §2254(d). *Landrigan*, 550 U.S. at 474. "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.*; *see Cullen*, 131 S.Ct. 1388. The Court finds it is not necessary to hold an evidentiary hearing in this case because Petitioner's claims may be resolved on the existing state court record.

DISCUSSION

I. Standard of Review

Pursuant to 28 U.S.C. § 2254(d)(1), a federal court may not grant habeas relief on the basis of a claim adjudicated on the merits in state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In interpreting this portion of the federal habeas rules, the Supreme Court has ruled a state decision is "contrary to" clearly established

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[2] As the Court directed the parties to file *supplemental* pleadings after the Amended Petition was filed, the Court considers Respondent's original Answer (Dkt. 20) and Petitioner's Reply (Dkt. 33) when considering the Amended Petition.

Supreme Court precedent if the state court either (1) arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or (2) confronts facts "materially indistinguishable" from relevant Supreme Court precedent and arrives at an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

Moreover, under § 2254(d)(1), "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id*. at 411; *see Lockyer v. Andrade*, 538 U.S. 63, 69 (2003). An unreasonable application of Supreme Court precedent occurs "if the state court identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 407. In addition, a state court decision involves an unreasonable application of Supreme Court precedent "'if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" *Walker v. Martel*, 709 F.3d 925, 939 (9th Cir. 2013) (*quoting Williams*, 529 U.S. at 407).

The Anti-Terrorism Effective Death Penalty Act ("AEDPA") requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Further, review of state court decisions under §2254(d)(1) is "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen*, 131 S.Ct. at 1398.

II. Ineffective Assistance of Counsel

In Grounds 1 and 4, Petitioner contends his trial counsel was ineffective when he failed to: (A) investigate and present evidence regarding the timeline of events on the day Petitioner's wife died and (B) investigate the Washington State Patrol Crime Laboratory. Dkt. 37.

In *Strickland v. Washington,* 466 U.S. 668 (1984), the Supreme Court created a two-part test for determining whether a defendant received ineffective assistance of counsel. First, a defendant must demonstrate his attorney's performance was deficient, which requires showing "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. Second, a defendant must demonstrate the deficient performance prejudiced the defense to such a degree the results of the trial cannot be trusted. *Id.*

Under the first prong, the reasonableness of an attorney's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Id.* at 690. A petitioner must carry a heavy burden, as "reviewing courts must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (citation omitted).

Under the prejudice prong, a petitioner must establish there is a reasonable probability the results would have been different but for counsel's deficient performance. *Kimmelman v. Morrison,* 477 U.S. 365, 375 (1986); *Strickland,* 466 U.S. at 696. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

In regard to failure to investigate, defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. Counsel has a duty to investigate the defendant's "most important defense," *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994)[3], "and a duty adequately to investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that

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[3] Although Supreme Court precedent provides the only relevant source of clearly established federal law for AEDPA purposes, circuit precedent can be "persuasive authority for purposes of determining whether particular state court decision is an 'unreasonable application' of Supreme court law," and in ascertaining "what law is 'clearly established.'" *Duhaime v. Ducharme,* 200 F.3d 597, 600–01 (9th Cir. 2000).

question to undermine confidence in the verdict." *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001) (*citing Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999). The Ninth Circuit has found, however, "the duty to investigate and prepare a defense is not limitless: it does not necessarily require that every conceivable witness be interviewed." *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995) (citations and quotations omitted). "When the record clearly shows that the lawyer was well-informed, and the defendant fails to state what additional information would be gained by the discovery she or he now claims was necessary, an ineffective assistance claim fails." *Bragg*, 242 F.3d at 1088. Additionally, "ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case." *Eggleston v. U.S.*, 798 F.2d 374, 376 (9th Cir. 1986).

A. Evidence of Timeline [Ground 1]

In Ground 1, Petitioner alleges his trial counsel failed to properly investigate the timeline of events on the day his wife died. Dkt. 37, pp. 28-32. Specifically, Petitioner contends his counsel should have investigated and presented evidence showing he was at the hunting location when the fire started. *Id.*

In determining Petitioner's trial counsel was not ineffective regarding the failure to investigate and present evidence of the timeline of events, the state court of appeals applied the *Strickland* standard and found:

> Hacheney argues that he received ineffective assistance of counsel when defense counsel "failed to investigate and present an accurate timeline." PRP at 46 (capitalization omitted). The timeline was disputed at trial, with both the State and Hacheney producing evidence on the time he must have left his home, when the fire started, and whether Hacheney could have been where he claimed to be when the fire started.
>
> The trial testimony showed that on December 26, 1997, Hacheney went duck hunting with Latsbaugh and Martini; he met the two at the Hood Canal Bridge. At trial, Detective Robert Davis testified that before trial, he drove, following the

speed limit, from the Hacheney house to Indian Island. The drive took him 28 minutes from the house to the Hood Canal Bridge. It then took him 23 minutes to travel from the bridge to Indian Island. Davis did not drive to the hunting site or walk to the duck blinds.

At trial, Latsbaugh stated that the hunting party met at the Hood Canal Bridge between 7:00 a.m. and 7:15 a.m. According to Latsbaugh, the ensuing drive from the bridge to Indian Island took approximately 25 minutes. Latsbaugh testified that when she, Martini, and Hacheney arrived at the hunting blinds, it was light enough that they did not need flashlights. Latsbaugh testified that she and Hacheney usually tried to arrive at their hunting spots a couple minutes before daylight, when it was visible to shoot. She testified that they usually arrived by actual sunrise and seldom arrived at the site by legal shooting time because, at legal shooting time, it was too dark to see the birds. On that date, legal shooting time was at 7:28 a.m. Latsbaugh testified that sunrise occurs when the sun peeks over the horizon. At trial, Martini, a witness for the State, testified that he arrived at the hunting blinds with Hacheney and Latsbaugh a few minutes before dawn. Martini testified that the hunters planned to meet at the bridge between 45 and 60 minutes before daylight, and the drive to the island was between 30 and 45 minutes. Martini testified that, when they arrived at the blinds, "It was still a little bit dark but you could see the beginnings of dawn." RP at 514.

Defense counsel impeached Latsbaugh with a defense investigator's testimony. The defense investigator testified that Latsbaugh had stated in a pretrial interview that she was in the shooting blinds between 5 and 10 minutes before "shooting light"; however, the two did not discuss the difference between shooting light and legal shooting time. RP at 4808. Further, defense counsel criticized the State's timeline during closing argument.

Defense expert Jim White testified that the fire began around 7:00 a.m. and lasted for approximately 20 minutes. Hacheney asserts, "[I]t was impossible for Hacheney to have started the fire" because the fire began at 7:00 a.m. and by then "[Hacheney] had been gone from the house for over an hour." PRP at 55 (emphasis omitted).

According to the State's expert witness, fire investigator Scott Roberts, the fire could have smoldered for hours, but burst into open flame, burned, and caused the heaviest amount of damage to the Hacheneys' bedroom for an hour or less. Hacheney's neighbors reported the fire at 7:13 a.m., and fire fighters extinguished the fire at approximately 7:25 a.m. Thus, according to the State, the fire burst into open flame, at the earliest, around 6:25 a.m. The State argued, during closing argument, that Hacheney departed his home at 6:45 a.m.

Now, in raising the issue of ineffective counsel with regard to a timeline of his actions on the day Dawn died, Hacheney first asks us to review images from a webcam on December 24, 25, and 26, 2009. This particular webcam did not exist

until July 2006, so counsel could not have been deficient by failing to introduce the photographs into evidence. Additionally, the State asserts that

> the camera is on a tower some 200 feet above sea level, while the hunters were on a beach some 10 miles to the south. Plainly at an altitude of 200 feet, the horizon would appear further to the east, and dawn would be perceived earlier. As such, these photographs cannot be considered to be relevant to the issue of the lighting conditions on the beach at Indian Island.

Br. of Resp't at 49. We reject Hacheney's invitation to view evidence bearing on this disputed point when that evidence was not available to his counsel when his trial occurred. His late-produced evidence does not suggest that his trial counsel in 2002 was ineffective for failing to use a webcam showing the dawn of the day.

Hacheney also now alleges that on December 26, "[t]he first signs of daylight breaking over the horizon ... took place between 6:45 and 7:00 am. Civil twilight, where you can distinguish objects, ... took place at 7:22 am and sunrise ... took place at 7:58 am." PRP at 52. Hacheney also attaches other data relating to sunrise and the travel time from the house and the hunting site: a photograph of the hunting site, taken on December 29, 2003, at 7:31 a.m.; a Google map, showing that the distance between Hacheney's house and Indian Island is 41 miles, with a driving time of one hour and thirteen minutes; and a digital video disc recording of the drive from the Hacheney home to the hunting blinds.

Hacheney argues,

> The images presented [from the webcam] plainly show that from 6:45–7:00 am it is still dark but you can see the cracks of dawn on the horizon. There is absolutely no possible way for the hunters to have arrived at the hunting blinds when it was dark and a few minutes later see the cracks of dawn cover over the horizon any later than 7:00 am.

PRP at 51. According to Hacheney, an investigation would have revealed that he "left home at 5:56 a.m.—at the latest." PRP at 55 (emphasis omitted).

But the additional evidence Hacheney presents with his PRP only demonstrates that, as at his trial, conflicting evidence exists about the timeline and his whereabouts when the fire started, but it does not conclusively demonstrate, as Hacheney asserts, that "[i]t was impossible for Hacheney to have started the fire." PRP at 55 (emphasis omitted).

Further, on January 2, 1998, Hacheney told a representative of the Safeco Insurance Company that he had left his house on December 26, 1997, at 5:10 a.m. Even using Hacheney's newly submitted information and considering his current argument, if

> Hacheney had left his home at 5:10 a.m., he would have arrived at the hunting blinds around 6:30 a.m. when it would have been too dark to walk to the blinds without flashlights. As the State points out, "Counsel could well have determined that making too much of the time issue would only have served to prove that his statements to the insurance company and the police at the time of the murder had to have been false. He would have then only reinforced the State's theme of guilty knowledge." Br. of Resp't at 55.
>
> We hold that Hacheney's defense counsel's decision not to emphasize the timeline on the morning of Dawn's death can be characterized as a legitimate trial tactic, thus it did not constitute ineffective assistance of counsel.

In re Hacheney, 169 Wash. App. 1, 23 (2012) (footnote omitted, brackets in original); Dkt. 21, Exhibit 3, pp. 35-39.

To support his claim trial counsel was ineffective regarding the investigation of the timeline of events, Petitioner attached evidence to his PRP. *See* Dkt. 21, Exhibit 30. The evidence included: (1) the declaration of John A. Gunn stating the length of time it took him to travel from Petitioner's home to the hunting location on January 16, 2009; (2) the declaration of Daniel M. Hacheney stating he presented evidence to the trial attorneys showing the prosecution's timeline was impossible, but the attorneys declined to use the evidence; (3) internet maps and turn-by-turn directions from Petitioner's home to the hunting location, breakfast location, and return trip to Petitioner's home; and (4) time-stamped pictures of the hunting location taken December 29, 2003. Dkt. 21, Exhibit 30, Appendix D.

The State's theory was, on December 26, 1997, Petitioner killed his wife, set his house on fire, and then left his home between 6:30 a.m. and 6:45 a.m. to go hunting with two friends, Mr. Phil Martini and Mrs. Lindsey Latsbaugh. *See* Dkt. 21, Ehxibit 52, pp. 39-40, Exhibit 78, pp. 5024-53. Evidence presented at trial showed it took 28 minutes to travel from Petitioner's home to the Hood Canal Bridge. Dkt. 21, Exhibit 64, p. 2584. Mrs. Latsbaugh testified she and Mr. Martini met

Petitioner at the Hood Canal Bridge between 7:00 a.m. and 7:15 a.m. on the morning in question. Dkt. 21, Exhibit 54, p. 582.

Mr. Martini testified he and Mrs. Latsbaugh met Petitioner about 45 minutes to an hour before daylight and barely made it to the hunting location before first light. Dkt. 21, Exhibit 54, pp. 513-14. Mrs. Latsbaugh testified she believed sunrise was at 8:00 a.m. on December 26, 1997. *Id.* at p. 582. The hunting group arrived at the duck blind[4] (the hunting location) five to ten minutes before sunrise. *Id.* at p. 583. Mrs. Latsbaugh also testified it was dark when she met Petitioner at the Hood Canal Bridge, and they did not need flashlights when they reached the hunting location. Dkt. 21, Exhibit 56, p. 796. Mrs. Latsbaugh testified she would normally hunt at sunrise, not legal shooting time.[5] *Id.* at 698, 702-04. She also testified the hunting group would look up the time of the sunrise to determine what time to begin hunting. *See* Dkt. 21, Exhibit 54, pp. 581-82. The parties stipulated sunrise occurred at 7:58 a.m. on December 26, 1997 and evidence showed the legal hunting time occurred at 7:28 a.m. Dkt. 27, Exhibit 91, Exhibit 54, p. 535.

On cross-examination, defense counsel elicited testimony regarding the time Mr. Martini awoke on December 26, 1997, and questioned what time the group would be in position to hunt and how long they spent in the duck blind on the day in question. Dkt. 21, Exhibit 54, pp. 535-38. Defense counsel challenged Mrs. Latsbaugh's testimony regarding shooting light, sunrise, and the legal shooting time, and emphasized she made prior inconsistent statements about the time the group met to hunt. Dkt. 21, Exhibit 55, pp. 694-704. He also elicited testimony about the length of time it took to get from Hood Canal Bridge to the hunting location. *Id.* at p. 705.

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[4] A duck blind is a shelter designed to conceal a hunter.

[5] The legal shooting time is the time set by the state when a hunter may begin hunting for the day. It is illegal to hunt before the legal shooting time. On the date in question, legal shooting time was 30 minutes before the recorded sunrise.

In addition to the cross-examinations, to support Petitioner's timeline of events, Petitioner's counsel presented a fire scientist, James White, who testified regarding the type of fire that occurred at Petitioner's home on December 26, 1997 and estimated the length of time the fire burned. Dkt 21, Exhibits 75-76. Mr. White opined the fire started only five to seven minutes prior to the time the fire department was alerted. Dkt. 21, Exhibit 75, p. 4598. He believed the fire department was alerted at 7:13 a.m. *Id*. He also opined the fire only burned for 20 minutes. *Id.* at p. 4599.

During closing, counsel for Petitioner argued the evidence showed Petitioner was not home and could not have been home when the fire started. Dkt. 21, Exhibit 78, p. 5097. He challenged the State's reliance on Mrs. Latsbaugh's testimony and argued the testimony showed Petitioner was at the hunting location by 6:58 a.m. *Id*. at pp. 5098-99. Counsel also addressed any perceived inconsistencies in Petitioner's testimony regarding the time he left home on the morning in question. *Id*. at p. 5101. He further emphasized the weaknesses in the State's evidence regarding the time it took to drive from Petitioner's home to the hunting location. *Id.* at pp. 5101-02. Counsel argued the State's failure to provide specific evidence as to the amount of time it took Petitioner to reach the Hood Canal Bridge and the hunting location show the State failed to prove its timeline beyond a reasonable doubt. *See id*. at pp. 5102-04.

Defense counsel's strategic decisions are largely shielded from second-guessing by a reviewing court, and to the extent decisions can be second-guessed, Petitioner failed to show his counsels' decision to not further investigate or present different evidence regarding the timeline of events on the day of his wife's death fell outside "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The record shows counsel was aware of the conflicting timelines, impeached State witnesses, and presented their own expert to establish a timeline

consistent with Petitioner's claim that he was hunting when the fire started. Counsel also argued the State's timeline was unreasonable during closing argument and reminded the jury the burden was on the State to prove its case beyond a reasonable doubt. There is no evidence showing trial counsels' strategy was unreasonable.

Further, Petitioner fails to show any prejudice resulted by counsels' failure to further investigate the timeline of events in the manner now chosen by Petitioner. Counsel submitted evidence which questioned the veracity of the State's witnesses. Counsel emphasized the lack of specific evidence the State presented regarding the timeline of events and the time it took to drive from Petitioner's home to the hunting location. Petitioner's counsel was well-informed regarding the timeline of events, and there is no evidence showing there is a reasonable probability the outcome of the trial would have changed if counsel further investigated and presented additional evidence regarding the timeline of events on the day Petitioner's wife died.

In his PRP, Petitioner merely provided different evidence he claims defense counsel could have used to challenge the State's timeline of events on the date in question. While defense counsel may not have used the specific evidence Petitioner attached to his PRP, defense counsel cross-examined witnesses using similar information. For example, defense counsel questioned Mr. Martini and Mrs. Lastbaugh on their timeline of the hunting trip, including how light it was when the hunting group met and reached the duck blinds. Counsel also questioned the method used to determine the length of time it took to travel from Petitioner's home to the hunting location. Further, defense counsel presented evidence showing the fire started at the same time the State's evidence showed Petitioner was with Mr. Martini and Mrs. Latsbaugh.

The evidence shows Petitioner's counsel investigated and placed evidence into the record refuting the State's version of the timeline of events surrounding Petitioner's wife's death. The

Court finds Petitioner has failed to show his counsels' performance was deficient or Petitioner was prejudiced by any alleged deficient performance. As Petitioner has not shown his defense counsel failed to investigate and present evidence regarding the timeline of events, Petitioner fails to demonstrate the state court's conclusion regarding Petitioner's counsels' performance was contrary to, or was an unreasonable application of, clearly established federal law. Accordingly, Ground 1 should be denied.

B. Investigation of Crime Laboratory [Ground 4]

In Ground 4, Petitioner argues his trial counsels' failure to investigate the Washington State Patrol Crime Laboratory ("Crime Lab") resulted in ineffective assistance. Dkt. 37, pp. 33-35. Specifically, Petitioner maintains he discovered evidence after the trial showing Dr. Barry Logan, director of the Forensic Laboratory Services Bureau for the State Patrol, failed to properly supervise the Crime Lab. Dkt. 33, p. 23; Dkt. 37. He asserts his counsel was ineffective for failing to discover evidence of the Crime Lab deficiencies prior to the trial. *See* Dkt. 37.

In finding counsel was not ineffective for failing to investigate the Crime Lab, the state court of appeals applied the *Strickland* standard and found:

> Hacheney argues that he received ineffective assistance of counsel when his defense counsel failed to investigate "the performance standards" of the WSTL [Washington State Toxicology Laboratory]. PRP at 29 (capitalization omitted). We disagree.
>
> An attorney breaches his duty to a client if he fails "'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Davis,* 152 Wash.2d at 721, 101 P.3d 1 (quoting *Strickland*, 466 U.S. at 690–91, 104 S.Ct. 2052). "Not conducting a reasonable investigation is especially egregious when a defense attorney fails to consider potentially exculpatory evidence." *Davis,* 152 Wash.2d at 721, 101 P.3d 1. "'An attorney's action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices.' " *Davis,* 152 Wash.2d at 722, 101 P.3d 1 (quoting *Hendricks v. Calderon,* 70 F.3d 1032, 1036 (9th Cir.1995)).

> Defense counsel did not fail to conduct a reasonable investigation based on the documents Hacheney attaches in Appendix B because the attachments would not have been potentially exculpatory in the present case. Here, many of the documents Hacheney attaches in his Appendix B, specifically the state audits or reports and the writings of Dr. Logan, did not exist when defense counsel represented Hacheney at trial; thus his counsel was not deficient for failing to uncover those documents.
>
> Furthermore, Hacheney himself argues that the documents in his Appendix B are "newly discovered evidence." PRP at 29 (capitalization omitted). Finally, the criticisms of individual crime laboratory employees or general criticisms of crime laboratories and the criticisms of the state's breath testing program attached in Hacheney's Appendix B that were known at the time of Hacheney's trial were not relevant to his case. None of the employees cited in the articles or in the motion to suppress evidence handled evidence presented at Hacheney's trial. We hold that his defense counsel cannot be deemed ineffective for failing to investigate these unrelated incidents.

In re Hacheney, 169 Wash. App. at 23; Dkt. 21, Exhibit 3, pp. 34-35.

To support his allegation counsel was ineffective for failing to investigate the Crime Lab, in his PRP, Petitioner provided articles and reports showing the Crime Lab's deficiencies. *See* Dkt. 21, Exhibit 30, Appendix B.[6] The documents, however, were created well after trial and the oldest document related to the Crime Lab's deficiencies is from 2004, which is more than one year after the trial.[7] *See id*. Petitioner admits the evidence he submitted is "new" and was not available at the

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[6] Petitioner submitted: (1) a newspaper article dated July 23, 2004 titled "Oversight of crime-lab staff has often been lax;" (2) a newspaper article dated March 24, 2004 titled "State Patrol fires crime lab scientist;" (3) a newspaper article dated July 22, 2004 titled "Produce crime lab error tests, some urge;" (4) a newspaper article dated July 23, 2004 titled "Crime labs too beholden to prosecutors, critics say;" (5) an October 16, 2007 article from the Washington Association of Criminal Defense Lawyers; (6) a January 30, 2008 order granting a motion to suppress filed in the District Court of King County for the State of Washington; (7) an April 17, 2008 article titled "Forensic Investigations Council Report on the Washington State Toxicology Laboratory and the Washington State Crime Laboratory;" (8) a September 4, 2007 Evidence Audit of the Toxicology Lab; (9) "Issue Paper Prepared by Dr. Barry Logan," which is undated but references 2007 dates; (10) Dr. Barry Logan's resignation letter dated February 12, 2008; (11) an article titled "Test Anxiety: Scandal at the state's DUI lab has defendants lathered" by Bob Geballe, published in Spring 2008; (12) a February 7, 2008 Washington State Patrol Media Release titled "State Patrol Accepts All Findings in Audits of State Toxicology Lab;" (13) July 31 and August 1, 2000 emails showing Dr. Logan was aware an employee retired after an argument with coworkers regarding a minor scheduling conflict; and (14) the Declaration of Dr. Barry K. Logan dated June 26, 2009.

[7] The Court notes the documents submitted by Petitioner contain one email correspondence from 2000 showing Dr. Logan was informed Glenn Case retired after engaging in an argument over a minor scheduling conflict with fellow coworkers. *See* Dkt. 21, Exhibit 30, Appendix B. This email does not contain any information showing the Crime Lab was operating in a deficient manner at the time the Crime Lab performed its work in Petitioner's case or at the time of Petitioner's trial.

time of trial. *See* Dkt. 37, 33, 21, Exhibits 3, 30. Therefore, Petitioner has not shown counsel was ineffective for failing to discover non-existent evidence regarding the Crime Lab's deficiencies through an investigation before the trial.

Petitioner asserts Dr. Logan was aware of a pattern of noncompliance within the Crime Lab as early as 2000, and therefore a reasonably competent investigation would have uncovered a pattern of noncompliance. Dkt. 33, p. 27. However, the only evidence from 2000 is an email indicating an employee retired after an argument with coworkers over a scheduling conflict. Dkt. 21, Exhibit 30, Appendix B. The duty to investigate is not limitless. *Hendricks*, 70 F.3d at 1040. Petitioner merely speculates that a "reasonably competent investigation" would have uncovered a pattern of noncompliance. He provides no evidence showing an investigation into the Crime Lab prior to the trial would have uncovered evidence relevant to Petitioner's case. *See* Dkt. 37.

Additionally, as the state court of appeals concluded, the new evidence presented by Petitioner is not exculpatory and does not relate to his case. The investigation into the Crime Lab did not uncover any evidence showing Ms. Egle Wiess, the scientist responsible for the toxicology testing done in Petitioner's case, or Dr. Logan, were noncompliant, committed fraud, or otherwise performed their duties in this case in an unethical or illegal manner. *See* Dkt. 21, Exhibit 30, Appendix B. Dr. Logan was Ms. Wiess's supervisor when Mrs. Dawn Hacheney's blood and lung tissue was tested and, at that time, Dr. Logan personally reviewed the work of the scientists he supervised. *See* Dkt. 21, Exhibit 59, p. 1528. Petitioner fails to show a correlation between the Crime Lab's deficiencies and his case, and has not shown an investigation into the Crime Lab would have uncovered any evidence which would have been exculpatory or relevant to Petitioner's case. *See Hendricks v. Calderon*, 70 F.3d 1032, 1042 (9th Cir. 1995) (finding the relationship between the discoverable evidence and the petitioner's defense was so tenuous and the benefit to

the defense so small counsel's failure to investigate could not constitute ineffective assistance of counsel).

Petitioner has not shown his counsels' failure to investigate the Crime Lab resulted in deficient performance or prejudice to Petitioner. Therefore, Petitioner fails to demonstrate the state court's conclusion that Petitioner's right to effective assistance of counsel was not denied when his counsel did not investigate the Crime Lab was contrary to, or an unreasonable application of, clearly established federal law. Accordingly, Ground 4 should be denied.

III. Confrontation Clause Violation

In Grounds 2 and 5, Petitioner contends his Sixth Amendment Confrontation Clause right was violated when: (A) documents and testimony describing the results of several scientific examinations were admitted when the person who conducted the tests was not subject to cross-examination; and (B) testimony of three witnesses was admitted through video deposition when the witnesses were not "unavailable." Dkt. 37, pp. 33-35, 38-43.

A. Admission of Scientific Examinations [Ground 2]

In Ground 2, Petitioner contends his Sixth Amendment right to confrontation was violated when a toxicology report completed by Ms. Egle Weiss was admitted as evidence at trial. Dkt. 37, p. 33. [8] Specifically, Petitioner contends the trial court erred by admitting trial exhibit 323,[9] the

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[8] In his Petition, Petitioner states "Hacheney also complained, as he does here, about a second examination from Olympic Medical Laboratories that indicated revealed (sic) a lack of carbon monoxide in Dawn Hacheney's blood. Hacheney asserted a confrontation violation because the personnel conducting that test was also not present and was not subject to cross-examination. RP 901 The state court did not reach that violation." Dkt. 37, pp. 33-34. Petitioner makes no other argument regarding this evidence. He does not allege he was harmed by the introduction of this report, does not cite to the report, and only cites to one page of the trial transcript wherein Dr. Lacsina, the pathologist who performed the autopsy, relied on a report from Olympic Medical Laboratory and was allowed to testify about the results he relied upon in reaching his opinion. *See* Dkt. 21, Exhibit 56, p. 901. Petitioner failed to sufficiently plead facts to develop this argument for the Court. Further, Petitioner has not shown his Confrontation Clause right was violated or that he was prejudiced when Dr. Lacsina testified about information he relied to reach his opinion. Therefore, the Court finds Petitioner's vague assertion that his Confrontation Clause right was violated when the Olympic Medical Laboratories report was admitted should be denied. *See Orozco v. Kramer*, 2008 WL 6089860, *12 (C.D. Cal. Dec. 3, 2008) ("A witness testifying in the form of an opinion may state on direct

Death Investigation Toxicology Report ("the Report"), into evidence. Dkt. 33, p. 19. In support of Ground 2, Petitioner relies on *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez-Diaz v. Massachuesetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

"The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor,* 529 U.S. 362, 390 (2000). Petitioner was resentenced as a result of a remand from his direct appeal on June 20, 2008. *See* Dkt. 21, Exhibit 1. Petitioner's state court case became final on June 27, 2010, the date his time to file a petition for certiorari to the United States Supreme Court expired after he appealed his resentencing. *See* Dkt. 21, Exhibit 3, pp. 7-8. At the time his state court case became final only *Crawford* and *Melendez-Diaz* had been decided; therefore, only these two cases constitute "clearly established federal law" for purposes of review in this habeas case.

The Sixth Amendment's Confrontation Clause confers upon the accused "[i]n all criminal prosecutions, ... the right ... to be confronted with the witnesses against him." In *Crawford*, the Supreme Court held the Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." 541 U.S. at 54-55. However, the Supreme Court did not delineate precisely what statements qualify as "testimonial," nor did it consider laboratory tests and reports to be "testimonial." *See Meras v. Sisto*, 676 F.3d 1184, 1188-90 (9th Cir. 2012); *Flournoy v. Small*, 681 F.3d 1000, 1004-05 (9th Cir. 2012). Five years after its decision in *Crawford*, the Supreme Court held a forensic laboratory report was considered "testimonial" for purposes of the Confrontation Clause. *Melendez-Diaz*, 557 U.S. 305. Specifically, "*Melendez-Diaz* held only that a

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examination the reasons for his opinion and the matter ... upon which it is based, unless he is precluded by law; from using such reasons or matter as a basis for his opinion." (*quoting* Evid.Code § 802)).

[9] The Death Investigation Toxicology Report was marked as trial exhibit 323. It is included in this Court's record at Dkt. 21, Exhibit 31, Appendix B.

lab report could not be admitted without a witness appearing to testify in person." *Flournoy*, 681 F.3d at 1005. The Ninth Circuit noted in 2012 there does not appear to be clearly established federal law regarding the degree of proximity the testifying witness must have to the scientific test. *Id.*; *Bullcoming*, 564 U.S. at 672-73 (Sotomayor, J. concurring) (stating the Court's opinion does not address a scenario "in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue").

Ms. Weiss, the toxicologist who completed the Report, died unexpectedly a few months before Petitioner's trial. Dkt. 21, Exhibit 59, pp. 1531-32. At trial, Dr. Logan testified about the contents of the Report, including Ms. Weiss's toxicology testing and findings. *Id.* at pp. 1529, 1532. Dr. Logan supervised Ms. Weiss at the time the toxicology testing was conducted on Mrs. Hacheney's tissue and blood samples. *See id.* at pp. 1528-29. During his testimony, Dr. Logan explained the general lab testing techniques and chain of custody protocol. *Id.* at pp. 1532-35. He also testified he personally reviewed the work of the scientists he supervised before the year 2000 and reviewed Ms. Weiss's work in this case. *Id.* at pp. 1528, 1545-50, 1559-1603. In fact, Dr. Logan signed the Report. Dkt. 21, Exhibit 31, Appendix B. Dr. Logan stated, in reaching his opinion that Ms. Wiess's testing was properly conducted in compliance with Crime Lab protocols, he relied on reports, notes of results, machine printouts, and Ms. Weiss's statements made during a defense interview wherein Dr. Logan was present. *Id.* at pp. 1545-50, 1559-1603. After Dr. Logan testified to the above facts, the trial court admitted the Report, trial exhibit 323, into evidence. *Id.* at p. 1603.

In determining Petitioner's Confrontation Clause right was not violated when the trial court admitted the Report into evidence, the state court of appeals correctly applied *Crawford*, which was the clearly established law when Petitioner raised this argument, and the holding found in

Melendez-Diaz. Dkt. 21, Exhibit 8, pp. 21-22. The state court of appeals found the Report was properly admitted and stated:

> The next question is whether the admission of Weiss' report under RCW 5.45.020 violated Hacheney's Sixth Amendment right to confront the witnesses against him. In general, the Sixth Amendment insures that every accused shall enjoy the right to confront the witnesses against him. In *Crawford v. Washington,* the United States Supreme Court held that the Sixth Amendment's confrontation clause applies only when a witness' statement is 'testimonial.' The Court declined 'to spell out a comprehensive definition of 'testimonial,'" but it said that the term at least applies 'to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.' The Court also said that the term does not apply to most of the common law's hearsay exceptions 'for example, business records or statements in furtherance of a conspiracy.'
>
> Assuming without holding that an employee of Washington's toxicology laboratory can sometimes make a 'testimonial' statement within the meaning of *Crawford*, Weiss did not do so here. She made her statements while she, the investigating officers, and the medical examiner all thought the fire was accidental. She made her statements more than two years before any criminal suspicion arose and before any criminal investigation was started. As she was merely performing her duty to her employer in the course of the lab's regular routine, her report was not 'testimonial,' and its admission did not violate Hacheney's right to confront witnesses.

State v. Hacheney, 128 Wash. App. 1061 (2005), *aff'd in part, rev'd in part*, 160 Wash. 2d 503, 158 P.3d 1152 (2007) (citations omitted); Dkt. 21, Exhibit 8, pp. 21-22. After reviewing the record, the Court concludes Petitioner has failed to show (1) the Report was testimonial evidence and (2) there is clearly established federal law stating a testifying supervisor who signed a forensic laboratory report does not meet the Confrontation Clause requirements.

First, Petitioner has not shown the state court's conclusion that the Report was not testimonial evidence was contrary to or an unreasonable application of clearly established federal law. "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because –having been created for administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial –they are not testimonial." *Melendez-Diaz*, 557 U.S. at 309. "The [Supreme] Court

summarized the holding in *Melendez–Diaz* as applying to '[a] document created *solely* for an evidentiary purpose ... made in aid of a police investigation.'" *United States v. Berry*, 683 F.3d 1015, 1023 (9th Cir. 2012) (*quoting Bullcoming*, 564 U.S. at 664) (emphasis in original).

Here, the evidence shows Ms. Weiss did not create the Report solely for an evidentiary purpose to aid in a police investigation. At the time of the testing, January 9, 1998, a criminal investigation had not been initiated. *See* Dkt. 21, Exhibits 8, p.1, 56, p. 858; 59, p. 1564. The Report was completed at the request of the Kitsap County Coroner's office, who was performing an autopsy on the presumed accidental death of Mrs. Hacheney. *See* Dkt. 21, Exhibits 56, pp.858-59; 59, p. 1564. After completing the autopsy, the coroner opined the death was accidental and there was no suspicion of foul play. Dkt. 21, Exhibit 56, p. 934. Detective Daniel Trudeau and Fire Marshal Scott Rappleye interviewed Petitioner on January 26, 1998 –a month after the fire – and Detective Trudeau told Petitioner he believed the fire was an accident. Dkt. 21, Exhibit 72, pp. 3881-82. The case was closed shortly after the interview with Detective Trudeau. *Id*. at p. 3887. In 2001, the case was reopened because new information had been provided to the police. *Id.* at pp. 3887, 3980. Ms. Weiss completed her testing and the Report more than two years before police suspected the death was not accidental and before any criminal investigation was initiated. Based on the evidence, Petitioner has not shown the Report was created solely for an evidentiary purpose to aid in a police investigation, and therefore has failed to show *Melendez-Diaz* applies in this case. *See Bae Hyuk Shin v. Sullivan*, 2014 WL 683766 (C.D. Cal. Feb. 14, 2014) (finding an autopsy report was not "testimonial" in part because it did not necessarily pertain to a criminal prosecution).

Second, even if the Report was testimonial, Petitioner has not shown the state court's conclusion that his Confrontation Clause right was not violated was contrary to clearly established

federal law. When Petitioner's case became final, there was no clearly established federal law stating what degree of proximity the testifying witness must have to the scientific test to meet the Confrontation Clause requirements. *Flournoy*, 681 F.3d at 1005. In *Bullcoming*, which was issued a year after Petitioner's case became final, Justice Sotomayor, in a concurring opinion, stated the Supreme Court did not determine "what degree of involvement is sufficient" when "the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." 564 U.S. at 672-73.[10] Dr. Logan was Ms. Weiss's supervisor. He testified he reviewed the work of all the scientists he supervised during the period in question, and he signed the Report. Thus, even if the Report was testimonial evidence, because Dr. Logan had a personal connection to the report, there is no clearly established federal law showing Petitioner's Confrontation Clause right was violated when the Report was admitted through Dr. Logan's testimony. *See Bullcoming*, 564 U.S. at 672-73; *Flournoy*, 681 F.3d at 1005.

In conclusion, Petitioner has not shown the toxicology report is testimonial evidence under *Melendez-Diaz*. Further, Petitioner has not shown, at the time his conviction became final, there was clearly established federal law stating a testifying supervisor who signed a forensic laboratory report does not meet the Confrontation Clause requirements. Therefore, Petitioner fails to demonstrate the state court's conclusion that Petitioner's right to confront a witness was not violated when the Report was admitted as evidence was contrary to, or an unreasonable application of, clearly established federal law. Accordingly, Ground 2 should be denied.

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[10] In *Bullcoming*, the Supreme Court held a defendant's Sixth Amendment Confrontation Clause right was violated when the prosecution did not call as a witness the analyst who certified the forensic laboratory report, and instead called another analyst who was familiar with the laboratory's testing procedures but had not participated or observed the testing in the defendant's case. 564 U.S. 647. While *Bullcoming* is not "clearly established federal law" in this case, the Court finds the holding and analysis instructive to show there is no clearly established federal law establishing Petitioner's Confrontation Clause right was violated.

B. Unavailable Witnesses [Ground 5]

In Ground 5, Petitioner asserts his Sixth Amendment Confrontation Clause right was violated when the pre-recorded depositions of David Olson, Michael DeLashmutt, and Julia DeLashmutt were admitted at trial when the three witnesses were not "unavailable." Dkt. 37. The Confrontation Clause "permits the introduction of out-of-court statements if they are both necessary and reliable." *Barker v. Norris*, 761 F.2d 1396, 1399 (9th Cir. 1985). Necessity is proven by showing a witness is unavailable to testify at trial. *United States v. Monaco*, 735 F.2d 1173, 1175 (9th Cir.1984) (*citing Ohio v. Roberts*, 448 U.S. 56, 65, 100 S.Ct. 2531, 2538–39, 65 L.Ed.2d 597 (1980)). "A witness is not 'unavailable' unless the prosecutor makes a good faith effort to obtain the witness's presence." *United States v. Winn,* 767 F.2d 527, 530 (9th Cir.1985). "The lengths to which a prosecutor must go to establish good faith is a question of reasonableness." *Christian v. Rhode*, 41 F.3d 461, 467 (9th Cir. 1994). "[T]he deferential standard of review set out in 28 U.S.C. § 2254(d) does not permit a federal court to overturn a state court's decision on the question of unavailability merely because the federal court identifies additional steps that might have been taken. Under AEDPA, if the state-court decision was reasonable, it cannot be disturbed." *Hardy v. Cross*, __ U.S. __, 132 S.Ct. 490, 495 (2011).

In concluding Petitioner's Sixth Amendment right to confront Mr. Olson and Mr. and Mrs. DeLashmutt was not violated, the state supreme court stated:

> The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Pursuant to the Sixth Amendment, a prosecutor must show that a witness is unavailable to testify before he or she can resort to presenting the witness's prior testimony. *See, e.g., Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In this case, Hacheney contends that the State did not establish the unavailability of three witnesses sufficiently to support admission of their videotaped depositions at trial.

Prior to trial it became clear that three of the State's witnesses would be out of the country at the time of trial, despite the fact that all three were under subpoena. CP at 617–19; RP at 3829–30. Two witnesses, a husband and wife, planned to move to Scotland in early September 2002 so that the husband could begin a graduate program there. CP at 618. They did not plan to return to the United States for at least three years. CP at 912. A third witness, an electrical engineer, planned to be in a remote area of Bolivia for six to nine months to assist in construction of a radio network. CP at 619, 1022. The project involved complex scheduling with a construction team. CP at 619.

The State moved to conduct videotaped perpetuation depositions of these witnesses. CP at 617. In part, the State argued that it would be burdensome for the witnesses and financially burdensome for the State to bring these witnesses back for trial. CP at 617–18. The trial judge granted the motions, and videotaped depositions were taken. CP at 623, 630, 633. Hacheney was present at each deposition and his attorney cross-examined each witness with the knowledge that the witnesses would be out of the country when the trial occurred. CP at 1018, 1089, 1199, 1264.

At the time of trial, the State submitted letters from all three witnesses confirming that they were indeed out of the country. CP at 912–13. The State sought to show the video depositions in lieu of their live testimony. The defense objected, arguing that the State had not taken adequate steps to show that the witnesses were truly unavailable and the State had done nothing to secure the witnesses' presence at trial. CP at 999–1002. The trial court ruled that the videotaped depositions would be shown to the jury but that they would be redacted to exclude objections and testimony that the court had ruled inadmissible. CP at 1007–13.

A witness's absence from the jurisdiction, without more, is not enough to satisfy the confrontation clause's unavailability requirement. *Barber v. Page,* 390 U.S. 719, 723, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). "[A] witness is not 'unavailable' ... unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Id.* at 724–25, 88 S.Ct. 1318. The length to which the prosecution must go to procure a witness's presence is a question of reasonableness. *Ohio v. Roberts,* 448 U.S. 56, 74, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *overruled on other grounds by Crawford,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177. The question of unavailability is "one of fact to be determined by the trial judge," *State v. Allen,* 94 Wash.2d 860, 866, 621 P.2d 143 (1980). Because the trial court is in the best position to evaluate witness unavailability, we do not easily overturn a trial court's factual unavailability determination. *State v. DeSantiago,* 149 Wash.2d 402, 411, 68 P.3d 1065 (2003) (reviewing unavailability determination for abuse of discretion).

In this case, all three witnesses were subpoenaed and they made themselves available until they had to leave the country. There is nothing in the record to suggest that the prosecutor indicated to any witness that he or she need not appear to testify in person. *Hacheney,* 2005 WL 1847160 at *6, 2005 Wash.App. LEXIS

> 1940, at *23. No witness was released from his or her subpoena. Two witnesses stated in their letter to the court that they would not be leaving Scotland anytime during the remainder of 2002. CP at 912. Similarly, the third explained that his work in Bolivia involved complex scheduling with a construction team, so his trip could not be rescheduled. CP at 619. The trial court could have legitimately concluded that it would have been a hardship for any of the three to return to Washington to testify at trial. Hacheney argues that the State should have had to show that it offered to pay travel expenses for the witnesses to return, but as the Court of Appeals explained, the trial court could have reasonably inferred from the record that even then, the witnesses would have remained in Scotland and Bolivia. *Hacheney,* 2005 WL 1847160 at *6, 2005 Wash.App. LEXIS 1940, at *22.
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> Hacheney was present at the depositions, and because they were videotaped, the jury was able to observe each witness's demeanor. *See State v. Hewett,* 86 Wash.2d 487, 492–93, 545 P.2d 1201 (1976). Hacheney's attorneys were aware at the time of the depositions that the witnesses would be out of the country at the time of trial. *See State v. Hobson,* 61 Wash.App. 330, 335, 810 P.2d 70 (1991). This trial lasted almost two months and the State presented numerous witnesses, including several experts. A second fire investigator was able to testify about the joint examination of the possible electrical causes of the fire. RP at 3482. The two parishioners of Hacheney's church spoke to Hacheney's proclivity for extramarital sex, but this fact was also established by other witnesses, including the church women with whom he had sexual relationships. RP at 606, 642, 2897–98, 3734. Hacheney's conviction did not rest entirely on the testimony of any of the three deposed witnesses. *Cf. State v. Rivera,* 51 Wash.App. 556, 559–60, 754 P.2d 701 (1988). In light of the hardship involved and the testimony supplied by other witnesses, it was reasonable for the trial court to admit the videotaped depositions.
>
> Hacheney relies primarily on *State v. Aaron,* 49 Wash.App. 735, 745 P.2d 1316 (1987), a case discussing unavailability under ER 804, where the Court of Appeals reversed a burglary conviction because the State's primary witness was teaching in England at the time of trial. But in that case, the witness was not subpoenaed, there was no evidence in the record as to whether she had ever been asked to return voluntarily for trial, and the absent witness was crucial. *Id.* at 743, 745 P.2d 1316. The *Aaron* court emphasized that the State made "no effort" to procure the witness's testimony at trial. *Id.* at 745, 745 P.2d 1316. *Aaron* is easily distinguishable and does not undermine the unavailability finding in this case. We conclude that the trial court reasonably found that all three witnesses were unavailable at the time of trial. We find no violation of Hacheney's confrontation clause rights.

Hacheney, 160 Wash. 2d at 520–23 (footnotes omitted); Dkt. 21, Exhibit 16, pp. 19-23. Petitioner also raised this ground in his PRP, wherein the state court of appeals found:

Hacheney also argues that the trial court violated his Sixth Amendment right to confront witnesses by admitting the videotaped depositions of three witnesses at trial. He asserts that newly discovered evidence shows that the State did not make a good faith effort to secure the presence of these witnesses at trial, thus the witnesses were not unavailable to testify. We disagree.

Before trial, the State moved to perpetuate the depositions of the three witnesses, who were under subpoena but scheduled to be out of the country at the time of trial. *Hacheney,* 160 Wash.2d at 520–21, 158 P.3d 1152. At trial, the State submitted letters from each of the three witnesses confirming that they were out of the country. *Hacheney,* 160 Wash.2d at 521, 158 P.3d 1152. The State sought to show the videotaped depositions in lieu of live testimony; defense counsel unsuccessfully objected, arguing that the State had not taken steps to show that the witnesses were truly unavailable and had done nothing to secure the three witnesses' presence at trial. *Hacheney,* 160 Wash.2d at 521, 158 P.3d 1152.

In his direct appeal, Hacheney argued that the State did not establish the witnesses' unavailability. *Hacheney,* 160 Wash.2d at 520, 158 P.3d 1152. Our Supreme Court concluded that the trial court could have reasonably inferred from the record that even if the State had offered to pay for the witnesses' travel expenses, they would have remained out of the country. *Hacheney,* 160 Wash.2d at 522, 158 P.3d 1152. The Supreme Court reasoned that Hacheney was present at the depositions, the jury was able to observe the demeanor of the witnesses on videotape, and Hacheney's attorneys knew that the witnesses would be out of the country at the time of the two-month trial. *Hacheney,* 160 Wash.2d at 522–23, 158 P.3d 1152.

Now Hacheney submits an e-mail from a witness, stating that he and his wife would have testified if the State had paid their travel expenses; a declaration, signed by an attorney who spoke with the third witness, which declares, "I asked [the witness] what prosecutors told him with respect to his responsibility to return and testify at the trial. [The witness] said, 'as far as I knew, I was done'"; and e-mails from the State to the witnesses discussing the necessity of unavailability letters and the language the witnesses were to include in their letters. PRP, App. C. Hacheney argues that these demonstrate that the State did not act in good faith to secure the witnesses at trial.

That the State did not offer to pay for the witnesses' travel expenses is not newly discovered evidence and was a fact already considered in Hacheney's direct appeal. *See Hacheney,* 160 Wash.2d at 522, 158 P.3d 1152. Further, with regard to the State's proposed language for the unavailability letters, the State persuasively asserts, "It is not at all uncommon for an attorney to explain to a lay person what facts are relevant and needed in a statement to be submitted to the court. This hardly raises an inference that [the] attorney is dictating the witness's conduct." Br. of Resp't at 39. The ends of justice do not require us to reconsider Hacheney's claim relating to the videotaped depositions of three witnesses at his trial.

In re Hacheney, 169 Wash. App. at 23 (footnotes omitted).

Prior to the trial, Mr. Olson and Mr. and Mrs. DeLashmutt appeared for video depositions. *See* Dkt. 21, Exhibits 87-89. Petitioner was present during the depositions and his counsel cross-examined each witness. *Id.*; *see also* Dkt. 21, Exhibit 71, p. 3811. At trial, the prosecution sought admission of the video depositions because all three witnesses were unavailable. *See* Dkt. 21, Exhibit 71, p. 3800. Defense counsel objected to the use of the video depositions, arguing the State had not made a good faith effort to have the witnesses appear for trial. *Id.* at pp. 3800-07. The prosecutor stated all three witnesses were under subpoena at the time of the trial, were aware of the trial date, and each stated they would be out of the country and not returning for the trial. *See id.* at pp. 3807-11; *see also* Dkt. 21, Exhibits 87-89.

After hearing argument and reviewing case law and the depositions, the trial court found the witnesses were not present at the trial and the State had made a good faith effort to secure their presence at trial. Dkt. 21, Exhibit 71, pp. 3827-33. The trial court admitted the depositions. *Id.* at p. 3833. In making her decision, the trial court judge found the "State issued the subpoena. The witnesses were not released from [the] subpoena. The witnesses indicated that they would not be available during the time of trial. Great efforts were taken to arrange their deposition. And they are, in fact, not available for trial." *Id.* at p. 3833. During his argument, defense counsel stated Petitioner's Confrontation Clause right had been protected. *Id.* at p. 3823.

In his PRP, Petitioner submitted additional evidence regarding the availability of the three witnesses. *See* Dkt. 21, Exhibit 30, Appendix C. Petitioner submitted email correspondence between the three witnesses and the Kitsap County Prosecuting Attorney's Office. *See* Dkt. 21, Exhibit 30, Appendix C. The emails indicate the three witnesses would be out of the country during the trial and the prosecutor's office requested letters on the day of trial stating each witness

was out of the country. *Id.* The prosecutor's office provided sample language to Mr. Olson for use in his letter. *Id.* On October 16, 2002, the date Petitioner's trial began, Mr. Olson submitted a letter stating he was in Bolivia and unable to return to Kitsap County to testify in Petitioner's trial. *Id.* Mr. and Mrs. DeLashmutt also submitted a letter on October 16, 2002 stating they were residing in Glasgow, Scotland and would not be leaving the United Kingdom during the remainder of 2002; therefore, they were unable to return to Kitsap County to testify in Petitioner's trial. *Id.*

Petitioner also submitted emails from 2009 between Mr. DeLashmutt, Jeffery Ellis, Petitioner's attorney, and John A. Gunn, a private investigator. *Id.* Mr. DeLashmutt indicated he and Mrs. DeLashmutt would have been willing to testify at trial if the State paid for their expenses. *Id.* Mr. DeLashmutt, however, was not willing to sign a declaration regarding his availability. *Id.* Additionally, in his PRP, Petitioner submitted a Declaration from Mr. Gunn stating Mr. Gunn asked Mr. Olson what prosecutors told him with respect to his responsibility to return and testify at the trial. *Id.* Mr. Olson's belief was that he "was done" after the video deposition. *Id.* This is consistent with information presented by the prosecutor at the trial. *See* Dkt. 21, Exhibit 71, pp. 3808-09 (prosecutor stated Mr. Olson would not honor the subpoena and thought that is why he appeared for the video deposition).

Petitioner argues the evidence in his PRP shows the State did not make a good faith effort to secure the witnesses' presence at trial. The evidence shows the three witnesses were under subpoena at the time of the trial. The three witnesses testified they would be out of the country and would not be returning to Washington in October of 2002, the date of the trial. On the date the trial began, each witness submitted a letter stating they were unable to return to Washington for the trial. There is no evidence the prosecutor's office failed to make a good faith effort to secure the

three witnesses' presence at trial. For example, the three witnesses remained under subpoena after the video depositions and throughout the trial.

Petitioner maintains the State was required to offer to pay the witnesses' expenses to return to Washington to show good faith. The Ninth Circuit has held the prosecution is not required to offer to reimburse a witness for their travel expenses in order to establish good faith. *Christian*, 41 F.3d at 467-68. Rather, "'[g]ood faith' and 'reasonableness' are terms that demand fact-intensive, case-by-case analysis, not rigid rules." *Id.* at 467. While the State may have been able to do more to ensure the appearance of Mr. and Mrs. DeLashmutt by offering to pay for their travel expenses, Petitioner has not shown the failure to do so was unreasonable in this case. Mr. and Mrs. DeLashmutt provided similar evidence as other live witnesses. *See* Dkt. 21, Exhibit 71, pp. 3815-16. Petitioner was present during the depositions and defense counsel had an opportunity to cross-examine each witness and the jury was able to view the video depositions to see and hear each witness. *See id*. at pp. 3811-12. Additionally, defense counsel conceded Petitioner's Confrontation Clause right had been protected. *Id*. at 3823.

Further, Petitioner has not shown, at the time of the trial, Mr. and Mrs. DeLashmutt would have returned to testify if the State had offered to pay. The DeLashmutts had been in Scotland for only a month at the start of the trial and Mr. DeLashmutt was just starting a Ph.D. program. Petitioner has provided a portion of a series of emails from 2009, seven years after the trial, stating Mr. and Mrs. DeLashmutt would have been willing to testify at trial if the State paid their expenses because on a number of occasions Mrs. DeLashmutt mentioned it would have been nice to get a free trip home. Dkt. 21, Exhibit 30, Appendix C. Mr. DeLashmutt does not state they were willing to travel to the State of Washington in October of 2002 and, in the letter submitted to the trial court at the time of the trial, Mr. and Mrs. DeLashmutt stated they would not be leaving the United

Kingdom in 2002. *Id.* The Court also notes Mr. DeLashmutt declined to sign a declaration stating he would have returned for the trial. *Id.*

Petitioner has not shown the prosecution failed to make a good faith effort to obtain Mr. Olson's and Mr. and Mrs. DeLashmutt's presence at trial. Therefore, Petitioner fails to demonstrate the state court's conclusion finding Petitioner's right to confront a witness was not violated when video depositions were admitted in lieu of live testimony for three unavailable witnesses was contrary to, or was an unreasonable application of, clearly established federal law, or was an unreasonable determination of the facts in light of the evidence presented in this case. Accordingly, Ground 5 should be denied.

IV. Brady Violation [Ground 3]

In Ground 3, Petitioner asserts the State committed violations under *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose material information regarding the performance standards of the Crime Lab. Dkt. 37. A prosecutor has an affirmative duty to disclose evidence favorable to a defendant. *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). In *Brady*, the Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. "There are three components of a *Brady* violation: 'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" *United States v. Price*, 566 F.3d 900, 907 (9th Cir. 2009) (*quoting Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

To determine if the suppressed evidence is material, "the question is whether admission of the suppressed evidence would have created a reasonable probability of a different result, so the

defendant must show only that the government's evidentiary suppression undermines confidence in the outcome of the trial." *United States v. Stinson*, 647 F.3d 1196, 1208 (9th Cir. 2011), *as amended* (citation and internal quotation marks omitted). "To determine whether prejudice exists, we look to the materiality of the suppressed evidence." *Id.* The duty to disclose is limited to material evidence favorable to the defense which is deemed to be in the prosecutor's possession, custody, or control. *Kyles*, 514 U.S. at 437-38. However, "the prosecutor's duty to disclose under *Brady* is limited to evidence a reasonable prosecutor would perceive at the time as being material and favorable to the defense. *Woods v. Sinclair*, 764 F.3d 1109, 1127 (9th Cir. 2014).

In finding the State did not violate *Brady*, the state court of appeals applied the appropriate legal standard and found:

> Under *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a defendant's right to due process is violated when the prosecution suppresses material evidence favorable to the defendant. *In re Pers. Restraint of Sherwood,* 118 Wash.App. 267, 270, 76 P.3d 269 (2003). A *Brady* violation occurs when (1) there is exculpatory or impeaching evidence, (2) the State willfully or inadvertently suppresses the evidence, and (3) prejudice results. *Delmarter,* 124 Wash.App. at 167, 101 P.3d 111. The prosecution has no duty to independently search for exculpatory evidence. *In re Pers. Restraint of Gentry,* 137 Wash.2d 378, 399, 972 P.2d 1250 (1999).
>
> To support his argument, Hacheney attaches "Appendix B" to his PRP. This appendix generally contains various writings about the WSP Crime Laboratory, pointing out deficiencies or concerns. The writings contained in Appendix B fall into four categories: (1) criticisms of individual crime laboratory employees or general criticisms of crime laboratories, (2) criticisms of the state's breath testing program for driving while under the influence (DUI) evidence, (3) state audits or reports regarding the WSP toxicology and crime laboratories, and (4) the writings of Dr. Logan. We hold that Hacheney's restraint was not unlawful given the various writings in Appendix B, nor did the State commit a *Brady* violation.
>
> . . .
>
> Hacheney's *Brady* claim fails because he cannot show that employee misconduct prejudiced him because the employees and programs detailed in petitioner's Appendix B did not process the evidence in his case. *Delmarter*, 124 Wash.App. at 167, 101 P.3d 111. Hacheney was not prejudiced by his inability to present

> problems with employees unrelated to Hacheney's case and problems in the breath testing program.
>
> Further, Hacheney cannot show that the State willfully or inadvertently suppressed the evidence contained in his Appendix B, given that the State has no independent duty to search for exculpatory evidence. *Delmarter*, 124 Wash.App. at 167, 101 P.3d 111; *Gentry,* 137 Wash.2d at 399, 972 P.2d 1250. It was not until 2007, five years after Hacheney's trial, that Dr. Logan became aware that Gordon, the laboratory manager at the Washington State Toxicology Laboratory (WSTL), was falsely certifying that she had prepared and tested simulator solution on breath test analyses in DUI cases. Other problem employees mentioned in the attachments of Appendix B were dealt with as the state became aware of their transgressions. Therefore, we also hold that no *Brady* violation occurred.

In re Hacheney, 169 Wash. App. at 23 (footnotes omitted); Dkt. 21, Exhibit 3, pp. 23-26.

Petitioner asserts the state court's determination was unreasonable because the *Brady* obligation continues after trial and almost all the information presented in the PRP was available during the pendency of Petitioner's appeal. Dkt. 33, p. 26. However, Petitioner has failed to show the prosecution team had possession, custody, or control of any material evidence related to the Crime Lab's performance standards and favorable to Petitioner before, during, or after the trial. *See* Dkt. 37, 33.

Further, Petitioner fails to show how the evidence submitted in his PRP is material or prejudicial to the outcome of Petitioner's trial or appeals. *See* Dkt. 37, 33. As discussed above, *see* Section II, B *supra*, the investigation into the Crime Lab did not uncover any evidence showing the scientists performing the testing and reports in Petitioner's case were noncompliant, committed fraud, or otherwise performed their duties in an unethical or illegal manner. *See* Dkt. 21, Exhibit 30, Appendix B. Dr. Logan, who testified at Petitioner's trial, supervised the scientist who tested the samples in this case and he personally reviewed the work of the scientists he supervised at the time the testing occurred. *See* Dkt. 21, Exhibit 59, p. 1528. Petitioner fails to show a correlation

between the Crime Lab performance standards and his case or identify any evidence which would have been material to Petitioner's case.

Petitioner has not shown the prosecution failed to disclose evidence related to the Crime Lab's performance standards. Further, Petitioner fails to show any material evidence favorable to Petitioner existed or the alleged failure to disclose any evidence regarding the Crime Lab prejudiced or would have changed the outcome of his case. As such, Petitioner fails to demonstrate the state court's conclusion that the State did not commit a *Brady* violation was contrary to, or an unreasonable application of, clearly established federal law. *See Butsch v Fraker*, 2013 WL 1331114, *16-17 (W.D. Wash. Feb. 27, 2013) (finding no *Brady* violation when the prosecution did not disclose the Crime Lab manuals because there was no reason at that time to question the scientist's methods or conclusions). Accordingly, Ground 3 should be denied.

V. Jury Instruction [Ground 6]

In Ground 6, Petitioner alleges the "consciousness of guilt" jury instruction violated his due process rights. Dkt. 37, p. 43-44. In a habeas case, the question before the Court is "whether the ailing [jury] instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (*citing Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). "Where, for example, a jury instruction relieves the prosecution of its burden in proving every element of the offense beyond a reasonable doubt, the jury instruction violates due process." *Roettgen v. Ryan*, 639 F. Supp. 2d 1053, 1066 (C.D. Cal. 2009) (*citing Middleton v. McNeil,* 541 U.S. 433, 437 (2004)). If the Court is reviewing an ambiguous instruction, the inquiry is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Id*. (*quoting Boyde v. California*, 494 U.S. 370, 380 (1990)). The

challenged jury instruction "must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72.

During the trial, evidence of Petitioner's sexual relationships with several women was introduced under Washington State Evidence Rule ("ER") 404(b) to show proof of motive, opportunity, intent, plan, preparation, or knowledge. *See* Dkt. 20, p. 48; *see also* Dkt. 21, Exhibit 78, pp. 4977-78. The trial court provided a limiting jury instruction regarding the evidence admitted under ER 404(b). *See* Dkt. 21, Exhibit 78, pp. 4971-80. During the charge conference, defense counsel conceded the term "consciousness of guilt" was a specific legal concept the defense could "get [their] arms around" to be included in the jury instruction. *Id.* at p. 4975. The trial court concluded the limiting jury instruction would state:

> Evidence has been introduced in this case on the subject of the defendant's relationship with several women solely for the question of whether the defendant acted with motive, intent, premeditation, or consciousness of guilt. You must not consider this evidence for any other purpose.

Id. at p. 4978. The trial court also held the instruction would include language stating the evidence was admitted for only a limited purpose and the phrase "or as evidenced by consciousness of guilt" would be set as an independent clause. *Id.* at 4980. The parties do not cite, nor did the Court find, the final jury instructions in the state court record. *See* Dkt. 37, 20, 33.

In determining Ground 6, the state court of appeals found:

> On direct appeal, Hacheney unsuccessfully argued that the trial court erred by including the phrase "consciousness of guilt" in its ER 404(b) limiting instruction. *Hacheney*, 2005 WL 1847160, at *7. We held that even if the trial court erred, the jury would not have understood consciousness of guilt to mean anything different from motive, thus any error was harmless within reasonable probabilities. *Hacheney*, 2005 WL 1847160, at *7. Here, we consider whether the trial court improperly commented on the evidence and whether the instruction violated Hacheney's due process rights.
>
> . . .

> Hacheney asserts that the trial court violated his constitutional right to due process by giving the limiting jury instruction because "Hacheney's sex life had no probative value to [the issue of consciousness of guilt]," "the instruction was not clearly phrased as a permissive inference," "no cautionary language was included in the instruction," the trial court "did not further give an instruction on 'multiple hypothesis,'" the trial court "did not require the State to prove the inference beyond a reasonable doubt," and the trial court "failed to give a corresponding 'consciousness of innocence' instruction." PRP at 68 (some capitalization omitted).
>
> To prevail on a PRP, the petitioner must show that there was a constitutional error that resulted in actual and substantial prejudice to the petitioner. [*In re*] *Woods*, 154 Wash.2d [400,] 409, 114 P.3d 607 [(2005)]. We already held that, even if the trial court erred, the jury would not have understood "consciousness of guilt" to mean anything different from motive, thus any error was harmless within reasonable probabilities. [*State v.*] *Hacheney*, 2005 WL 1847160, at *7 [(2005)]. Hacheney fails to show that even if there was a constitutional error, it resulted in actual and substantial prejudice.

In re Hacheney, 169 Wash. App. at 23; Dkt. 21, Exhibit 3, p. 32.

Petitioner argues the jury instruction created a permissive inference that violated his due process rights. Dkt. 37, 33. During the trial, defense counsel conceded the term "consciousness of guilt" was an appropriate legal concept to use in relationship to the evidence admitted under ER 404(b). The trial court also specified to which evidence the limiting instruction applied and how the jury was allowed to consider the evidence.

"If the trial judge concludes that the balancing weighs in favor of admitting [404(b)] evidence, he should ordinarily instruct the jury carefully as to the limited purpose for which the evidence is admitted." *U.S. v. Sangrey*, 586 F.3d 1312, 1314 (9th Cir. 1978); *see State v. Saltarelli*, 98 Wash.2d 358, 362 (1982). The trial court judge admitted the evidence regarding Petitioner's sexual relationships, which Petitioner does not challenge, and then provided a limiting instruction as directed by law. The jury was instructed to consider Petitioner's sexual relationships solely for the question of whether the defendant acted with motive, intent, premeditation, or evidence of

consciousness of guilt; not consciousness of guilt alone. Petitioner fails to show the jury instruction created an impermissible inference prejudicing Petitioner.

Based on the trial record, Petitioner has not shown, nor does the Court find, the instruction limiting the jurors to view evidence regarding Petitioner's sexual relationships for the limited purpose of motive, intent, premeditation, or as evidence of consciousness of guilt changed the outcome of the trial or infected the entire trial resulting in a conviction which violates due process. *See Estelle*, 502 U.S. at 72. As the jury instruction did not create an impermissible inference that prejudiced Petitioner and as Petitioner has not shown the entire trial was infected, Petitioner fails to demonstrate the state court's conclusion regarding the jury instruction limiting the jury's consideration of Petitioner's sexual relationships was contrary to, or an unreasonable application of, clearly established federal law. *See Franklin v. Warden, Mule Creek State Prison*, 2014 WL 7433752, * 91-92 (E.D. Cal. Dec. 31, 2014) (finding evidence of an extramarital affair was probative of both motive and consciousness of guilt and finding the petitioner did not show the admission of the evidence violated clearly established federal law). Accordingly, Ground 6 should be denied.

CERTIFICATE OF APPEALABILITY

A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district court's dismissal of the federal habeas petition only after obtaining a certificate of appealability (COA) from a district or circuit judge. *See* 28 U.S.C. § 2253(c). "A certificate of appealability may issue . . . only if the [petitioner] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (*citing Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

No jurist of reason could disagree with this Court's evaluation of Petitioner's claims or would conclude the issues presented in the Petition should proceed further. Therefore, the Court concludes Petitioner is not entitled to a certificate of appealability with respect to this Petition.

CONCLUSION

The Court recommends the Petition be denied. No evidentiary hearing is necessary and a certificate of appealability should be denied. Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on September 16, 2016, as noted in the caption.

Dated this 31st day of August, 2016.

David W. Christel
United States Magistrate Judge

Appendix D

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of NICHOLAS DANIEL HACHENEY, Petitioner.	)	NO. 87664-9 **ORDER** C/A NO. 39448-1-II

Department II of the Court, composed of Chief Justice Madsen and Justices Owens, Stephens, González and Yu, considered this matter at its March 31, 2015, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion for Discretionary Review is denied.

DATED at Olympia, Washington this 2nd day of April, 2015.

For the Court

Madsen, C.J.
CHIEF JUSTICE

EXHIBIT 38

709/18

Appendix E

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Personal Restraint Petition of NICHOLAS DANIEL HACHENEY, Petitioner.	No. 39448-1-II AMENDED PART PUBLISHED OPINION[1]

Van Deren, J. — A jury convicted Nicholas Daniel Hacheney of first degree premeditated murder. In this personal restraint petition (PRP), Hacheney first argues that the trial court violated his Sixth Amendment right to confront witnesses when it admitted a toxicology laboratory report from the Washington State Patrol (WSP) Crime Laboratory and allowed testimony regarding the report without the forensic analyst testifying at trial and being subject to cross-examination. He also asserts that newly discovered evidence of problems at the WSP Crime Laboratory requires vacation of his conviction.

Hacheney also argues that the trial court (1) violated his confrontation clause rights when

[1] Hacheney filed a motion for reconsideration with this court on February 17, 2012, arguing that we improperly addressed the retroactivity of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) and improperly concluded that Hacheney's direct appeals were final for purposes of retroactivity analysis; he also argues that we improperly applied the personal restraint petition (PRP) standards of review in addressing his ineffective assistance of counsel claims. We grant his motion for reconsideration solely to address whether, even if a determination that his direct appeals were final before the United States Supreme Court issued *Melendez-Diaz* was erroneous in resolving his PRP issue, such a determination is harmless in this case. We include additional facts to elucidate our opinion in response to Hacheney's reconsideration motion.

EXHIBIT 3

it admitted the videotaped depositions of three witnesses at trial and violated his constitutional right to a public trial[2] when it excluded his father from these witnesses' depositions, (2) improperly commented on the evidence by including the phrase "consciousness of guilt" in its ER 404(b) limiting instruction, and (3) violated his due process rights[3] by giving the jury the limiting instruction. Finally, Hacheney argues that both his trial and appellate counsel were ineffective and that cumulative error requires reversal of his conviction. We deny his request for relief.

FACTS

On December 26, 1997, Hacheney left his home early in the morning to go hunting with Phil Martini and Lindsey Latsbaugh. After Hacheney left, his neighbors noticed that the Hacheney home was on fire. The fire damaged the bedroom. Fire fighters found Hacheney's wife's body in bed as well as propane canisters and an electric space heater in the bedroom.

Hacheney told investigators that he and his wife, Dawn Hacheney,[4] had opened Christmas presents, including the propane canisters, the night before and had left the gifts in the room with the wrapping paper in front of the space heater. He said that he had turned on the space heater when he woke up that morning and that Dawn may have failed to escape the fire because she had taken Benadryl during the night.

When Dr. Emmanuel Lacsina, a Kitsap County medical examiner, performed an autopsy on Dawn's body, he found that she did not have soot in her trachea or lungs and that she had

[2] U.S. Const. Amend. VI; Wash. Const. art. I, § 22.

[3] U.S. Const. Amend. XIV.

[4] We refer to Dawn Hacheney by her first name and Nicholas Hacheney as "Hacheney" to avoid confusion. No disrespect is intended.

pulmonary edema, a condition that can result from congestive heart failure, drowning, a drug overdose, head injury, or suffocation. He also collected blood and lung samples. Dr. Lascina requested a toxicology report after the autopsy results made him "suspicious" that Dawn may have been dead before the fire consumed the Hacheneys' home based on his autopsy results. Report of Proceedings (RP) at 943.

Egle Weiss, a WSP Crime Laboratory toxicologist, tested the blood and tissue samples Dr. Lacsina provided. These tests revealed no carbon monoxide in Dawn's blood and lungs and no propane in her lungs, indicating that Dawn did not inhale after the fire began. Weiss's tests also revealed an elevated level of Benadryl in Dawn's body. But the original police and insurance investigations concluded that Dawn's death was accidental. Based on Weiss's toxicology report, the lack of suspicion of foul play, and other information available at the time, Dr. Lascina concluded that Dawn's larynx had spasmed reflexively during the fire, causing her to suffocate.

In 2001, new facts came to light, causing investigators to take a second look at the circumstances surrounding Dawn's death. Sandra Glass told investigators that she had an affair with Hacheney during the summer and fall of 1997. Glass told investigators that a few weeks after Dawn's death, Hacheney had told her that God had told him to "[t]ake the land,"[5] that he had held a plastic bag over Dawn's head until she stopped breathing, and that he had then started the fire. RP at 2334. Investigators also discovered that in the months following Dawn's death, Hacheney had sexual relationships with at least three other women. The State charged Hacheney with first degree premeditated murder, alleging that he had committed the murder in the course of

[5] This is a biblical phrase that members of his church interpreted as a command to act. *State v. Hacheney*, 160 Wn.2d 503, 508, 158 P.3d 1152 (2007).

first degree arson.[6]

Three months before trial, the trial court granted the State's request to take the preservation videotaped depositions of three witnesses who were planning to be out of the country during the scheduled trial, to be used in place of live testimony at trial. The State had all three witnesses under subpoena for trial, but two of the witnesses, a married couple, were moving to Scotland for three years, and the third witness, an electrical engineer, was moving to Bolivia for six months. The State argued, in part, that it would be burdensome for the witnesses to return for trial and that it would be financially burdensome for the State to bring them back for trial. The trial court denied Hacheney's father's request to attend these depositions.

By the time this matter came to trial, Weiss had died unexpectedly and was unavailable to testify about her laboratory analyses, but Dr. Barry Logan and Weiss had both signed her report. Dr. Logan was Weiss's supervisor in 1997, and he testified about the WSP Crime Laboratory's testing procedures for blood and tissue samples. The trial court admitted Weiss's "Death Investigation Toxicology Report" over Hacheney's objections. Ex. 323. Dr. Lacsina, Dr. Daniel Selove, and Dr. Logan testified at trial. Drs. Lacsina and Selove testified that Dawn had died from suffocation before the fire started and both doctors based their opinions, in part, on Weiss's laboratory report.

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[6] The State initially charged Hacheney with first degree premeditated murder and/or first degree felony murder committed in the course of, in furtherance of, or in flight from first degree arson. *Hacheney*, 160 Wn.2d at 508. The State amended the information to charge Hacheney with aggravated first degree murder, alleging that Hacheney committed the murder to conceal the commission of a crime and/or he committed the murder in the course of, in furtherance of, or in immediate flight from the crime of first degree arson. *Hacheney*, 160 Wn.2d at 508. Hacheney successfully challenged the probable cause basis for charges of felony murder, murder to conceal a crime, or murder in furtherance of or in immediate flight from arson and those charges were dismissed, thus the case went to trial on the charge of aggravated premeditated first degree murder committed in the course of first degree arson. *Hacheney*, 160 Wn.2d at 508.

At the close of trial, the trial court gave the following limiting instruction with regard to evidence of Hacheney's sexual relationships shortly after Dawn died in the fire:

> Evidence has been introduced in this case on the subject of the Defendant's relationships with several women for the limited purposes of whether the Defendant acted with motive, intent or premeditation, or as evidence of consciousness of guilt. You must not consider this evidence for any other purpose.

Clerk's Papers at 1355. The jury found Hacheney guilty of first degree premeditated murder and found, by special verdict, that he had committed the murder in the course of first degree arson.

On direct appeal, Hacheney raised 29 issues. *State v. Hacheney*, noted at 128 Wn. App. 1061, 2005 WL 1847160, at *1, *aff'd in part and rev'd in part*, 160 Wn.2d 503, 158 P.3d 1152 (2007). Hacheney's arguments included assertions that (1) the evidence was insufficient to support the jury's finding that he committed the murder in the course of first degree arson; (2) the trial court violated his right to confrontation by allowing Drs. Lacsina, Logan, and Selove to rely on Weiss's written laboratory report; (3) the trial court violated his Sixth Amendment right to confront witnesses against him when it admitted the pretrial depositions of three witnesses; (4) the trial court violated his constitutional right to a public trial by not allowing his father to attend the State's depositions of witnesses who were expected to be out of the country during the trial; and (5) the trial court erred by including the phrase "consciousness of guilt" in the limiting jury instruction. *Hacheney*, 2005 WL 1847160, at *3, 5-7.

We rejected Hacheney's confrontation clause challenge to the trial court's admission of Weiss's toxicology report and the experts' testimony based on it.[7] *Hacheney*, 2005 WL 1847160,

[7] Hacheney did not raise any ineffective assistance of counsel claims during any of his previous appeals. Because he raises them for the first time in his PRP, those claims do not implicate finality concerns.

at *3, *7-10. We affirmed his conviction, rejecting his remaining arguments as well. *Hacheney*, 2005 WL 1847160, at *15.

Our Supreme Court reviewed two of the arguments Hacheney raised in his first direct appeal: whether (1) the evidence supported the jury's finding that Hacheney had committed the murder in the course of first degree arson and (2) the trial court violated his Sixth Amendment right to confront witnesses by admitting the videotaped depositions of the three witnesses at trial. *Hacheney*, 160 Wn.2d at 506. Our Supreme Court, however, did not review the confrontation clause challenge to Weiss's toxicology report and its contents. It held that, as a matter of law, Hacheney did not murder his wife in the course of arson and vacated the aggravating factor. *Hacheney*, 160 Wn.2d at 506, 520. Our Supreme Court also held that Hacheney's rights under the confrontation clause were not violated by admission of the videotaped depositions of the three witnesses because the witnesses were unavailable. *Hacheney*, 160 Wn.2d at 506.

On remand from our Supreme Court for resentencing without the aggravating factor, on June 20, 2008, the trial court resentenced Hacheney. A year later, on June 25, 2009, the United States Supreme Court issued its opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). On October 27, 2009, we rejected Hacheney's challenge to the standard range sentence imposed on remand but again remanded to the trial court to impose the correct community custody term pursuant to the statutes applicable when Hacheney committed his crime. *State v. Hacheney*, noted at 152 Wn. App. 1052, 2009 WL 3439962, at *4 (Wash. Ct. App. 2009). On April 28, 2010, our Supreme Court denied his petition for review of our second opinion addressing his resentencing and, on May 6, we issued our mandate. Hacheney's time to file a petition for certiorari to the United States Supreme Court expired on

June 27, 2010.

In his motion for reconsideration of our opinion issued in this PRP, Hacheney failed to identify any statute or court rule allowing him to raise in the *resentencing* proceedings on remand a confrontation clause challenge to the trial court's admission of Weiss's toxicology report and the experts' testimony, an issue that he raised and we decided in his first appeal in 2005, and which issue our Supreme Court did not review. *Hacheney*, 2005 WL 1847160, at *3, 5-7. Nor does the record indicate that he attempted to raise the confrontation clause issue during any resentencing proceeding or his second appeal. *Hacheney*, 2009 WL 3439962, at *4. Nevertheless, on reconsideration, Hacheney now argues that for purposes of retroactivity and finality analysis of the confrontation clause issue raised in his first direct appeal decided in 2005, we look to the finality of his second direct appeal of the sentence imposed on remand, which he asserts became final on June 27, 2010, when his time for filing a petition for certiorari to the United States Supreme Court expired. We disagree and further hold that any error in the finality determination is harmless in this case.

ANALYSIS

Retroactivity of Confrontation Rights Re Toxicology Report

Hacheney argues that *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) and *Melendez-Diaz*, establish that the trial court's admission of Weiss's toxicology report and expert testimony relying on it to explain the basis of the experts' opinions violated his confrontation clause rights. Although reexamination of the merits of Hacheney's claim in light of the rapidly-evolving area of confrontation clause jurisprudence in a direct appeal may well reach a different conclusion,[8] and that emerging law may change the outcome,[9] we hold

[8] *See People v. Dendel*, 289 Mich. App. 445, 458-68, 471, 473, 797 N.W.2d 645 (2010) (holding that statements in toxicology report requested by medical examiner, who had not yet ruled death was a homicide but had become suspicious of the manner of death, were testimonial and subject to confrontation).

[9] We note that Justice Sotomayor, a member of the *Bullcoming* majority, concurred to expressly state that the majority was not reaching the issue of whether the confrontation clause bars expert witnesses from testifying about out-of-court, testimonial statements on which they based their independent opinions. 131 S. Ct. at 2722 (Sotomayor, J., concurring in part). Thus, neither *Bullcoming* nor *Melendez-Diaz* reached that issue. Accordingly, under current federal case law, the admission of out-of-court statements "for purposes other than establishing the truth of the matter asserted" does not violate the confrontation clause. *Crawford v. Washington*, 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Further, under current Washington law, out-of-court statements on which experts base their opinions are not offered at trial as substantive proof, i.e., the truth of the matter asserted. *See Grp. Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986) (citing *State v. Wineberg*, 74 Wn.2d 372, 382, 444 P.2d 787 (1968)). Rather, they are offered "only for the limited purpose of explaining the expert's opinion." 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence Rule 703 author's cmt. at 387, Rule 705 author's cmt. 7, at 400 (2011-2012 ed.); *see also State v. Lui*, 153 Wn. App. 304, 322-23, 221 P.3d 948 (2009), *review granted*, 168 Wn.2d 1018 (2010) (stating that admission of out-of-court statements did not implicate the confrontation clause because they were admitted to explain the bases for experts' opinions, not for the truth of the matter asserted); *State v. Anderson*, 44 Wn. App. 644, 652-53, 723 P.2d 464 (1986) (stating that trial court did not abuse its discretion in allowing the State's experts to testify about Anderson's out-of-court statements to them because the statements were not offered to prove the truth of the matter asserted); *State v. Fullen*, 7 Wn. App. 369, 379, 499 P.2d 893 (1972) ("'The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements.'" (quoting *Dutton v. Evans*, 400 U.S. 74, 88, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970))).

Thus, Hacheney fails to demonstrate a change in law regarding the interaction between the confrontation clause and out-of-court statements offered at trial to explain the basis of an expert's opinion under our existing law. Accordingly, the interests of justice do not require us to reconsider Hacheney's confrontation clause claim with respect to Drs. Lacsina's, Selove's, and Logan's testimony about out-of-court statements in Weiss's report on which they based their independent opinions. *See* p. 10 *infra*.

But we further note that the United States Supreme Court recently issued its opinion in *Williams v. Illinois*, No. 10-8505, 2012 WL 2202981 (U.S. June 18, 2012). The Court held under different rationales that an expert's testimony about the basis of her opinion, including out-of-court statements in another laboratory's report not admitted into evidence,did not violate the confrontation clause. *Williams*, 2012 WL 2202981 at *5-6 (plurality opinion), *31 (Thomas, J., concurring).

We also note that the Washington State Supreme Court granted review in *Lui* and on September 19, 2011, stayed review pending the United States Supreme Court's decision in

that Washington law precludes retroactive application of *Bullcoming* and *Melendez-Diaz* with regard to the admission of Weiss's toxicology report and the expert testimony relying on it in this PRP collateral attack on Hacheney's conviction.

A. Standard of Review

A petitioner may request relief through a PRP when he is under unlawful restraint. RAP 16.4(a)-(c). In order to prevail on a PRP, the petitioner must show that there was a "constitutional error that resulted in actual and substantial prejudice to the petitioner or that there was a nonconstitutional error that resulted in a fundamental defect which inherently results in a complete miscarriage of justice." *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). The petitioner must show by a preponderance of the evidence that the error was prejudicial. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

B. Intervening Change in Law

Kitsap County medical examiner Lascina requested the toxicology report after autopsy results made him "suspicious" that Dawn may have been dead before a fire consumed the Hacheneys' home. RP at 943. Weiss was not available to testify about her laboratory tests and

Williams. We, therefore, continue to rely on existing case law about the purpose for which trial courts admit facts and out-of-court statements forming the basis of expert opinions, we note the uncertainty currently surrounding this area of law.

the results because she had died before trial. Thus, Drs. Lacsina, Selove, and Logan testified at trial, relying in part on Weiss's report. Hacheney appeals the admission of Weiss's report and the testimony relying on it, arguing that his confrontation rights were denied due to his inability to cross-examine the laboratory technician responsible for the reports relied upon that suggest that Dawn was dead before the fire in the bedroom started.

We previously rejected Hacheney's confrontation clause challenge in his direct appeal to the admission of Weiss's toxicology report at trial. *Hacheney*, 2005 WL 1847160, at *9-10. Hacheney now argues that the United States Supreme Court's subsequent decisions in *Bullcoming* and *Melendez-Diaz* warrant reversal of his convictions and remand for a new trial. But *Bullcoming* and *Melendez-Diaz* were direct appeals.

In contrast, a PRP is a collateral attack on a judgment. RCW 10.73.090(2). A collateral attack may not renew an issue "raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004) (footnotes omitted). Reexamination of an issue serves the interests of justice if there was "an intervening change in law or some other justification for having failed to raise a crucial point or argument in the prior application." *Davis*, 152 Wn.2d at 671 n.15.

The United States Supreme Court characterized *Melendez-Diaz* as a "rather straightforward application of [its] holding in *Crawford* [*v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)]." *Melendez-Diaz*, 129 S. Ct. at 2533. But our Supreme Court has stated that despite the United States Supreme Court's characterization of its own cases, those cases may still constitute a change to settled interpretations of the law in Washington. *State v. Robinson*, 171 Wn.2d 292, 301-03, 253 P.3d 84 (2011).

Indeed, one panel of Division One of this court has recognized *Melendez-Diaz* as superseding our Supreme Court's decisions in *State v. Kirkpatrick*, 160 Wn.2d 873, 161 P.3d 990 (2007) and *State v. Kronich*, 160 Wn.2d 893, 161 P.3d 982 (2007) on the issue of whether public or business records may nonetheless contain testimonial statements. *State v. Jasper*, 158 Wn. App. 518, 529-30, 532 n.6, 245 P.3d 228 (2010), *aff'd*, 174 Wn.2d 96, 271 P.3d 876 (2012). Our Supreme Court confirmed this observation and, based on *Bullcoming* and *Melendez-Diaz*, overruled its opinions in *Kirkpatrick* and *Kronich* on this issue. *Jasper*, 174 Wn.2d at 116. Further, another Division One panel observed that it is unclear whether *Bullcoming*, *Melendez-Diaz*, and *Michigan v. Bryant*, ___ U.S. ___, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) may signal a departure from *Crawford*'s tenets. *See State v. Dash*, 163 Wn. App. 63, 72-74, 259 P.3d 319 (2011). We agree with our Supreme Court and Division One and hold, on this record, that *Bullcoming* and *Melendez-Diaz* constituted a change in Washington law regarding the characterization of out-of-court statements contained in Weiss's report as testimonial. The issue in this PRP, then, is whether this change in law can be retroactively applied to grant Hacheney's request for a new trial.

C. Retroactivity of Collateral Attacks

Washington courts attempt to maintain congruence with the United States Supreme Court in our retroactivity analysis. *In re Pers. Restraint of Markel*, 154 Wn.2d 262, 268, 111 P.3d 249 (2005). Under our retroactivity analysis:

> A new rule will not be given retroactive application to cases on collateral review except where either: (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures implicit in the concept of ordered liberty.

In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992)).

A rule is "'new'" under retroactivity analysis if it "'breaks new ground'" or "'was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *Markel*, 154 Wn.2d at 270 (quoting *Teague v. Lane*, 489 U.S. 288, 301, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (plurality opinion)).

Under our retroactivity analysis, we will not retroactively apply a new rule of criminal procedure on collateral attack, subject to two exceptions: (1) the rule places "certain kinds of primary, private individual conduct beyond the State's power to prohibit" or (2) the rule requires "observance of procedures that are implicit in the concept of ordered liberty." *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 666, 260 P.3d 874 (2011). The first exception does not apply here, as neither *Bullcoming* nor *Melendez-Diaz* decriminalized the conduct for which Hacheney was punished. *See Rhome*, 172 Wn.2d at 666. Thus, we turn to the second exception.

The second retroactivity exception applies to only a "'small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Markel*, 154 Wn.2d at 269 (internal quotation marks omitted) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)). "'That a new procedural rule is fundamental in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is *seriously* diminished.'" *Rhome*, 172 Wn.2d at 667 (internal quotation marks omitted) (quoting *Summerlin*, 542 U.S. at 352). "'[T]his class of rules is extremely narrow, and it is unlikely that any . . . ha[s] yet to emerge.'"[10] *Markel*, 154

[10] Indeed, at the time of the *Markel* decision, the United States Supreme Court had yet to hold that any rule fell within this exception. 154 Wn.2d at 269 n.2.

Wn.2d at 269 (internal quotation marks omitted) (alterations in original) (quoting *Summerlin*, 542 U.S. at 352). It would appear that the "'small set'" is, in fact, an empty set of rules that "'implicat[e] the fundamental fairness and accuracy of . . . criminal proceeding[s]'" sufficiently to warrant retroactive application and, thus, the second exception may better be called a barrier to retroactivity. *Markel*, 154 Wn.2d at 269-70 (internal quotation marks omitted) (quoting *Summerlin*, 542 U.S. at 352).

In *Markel*, our Supreme Court considered whether the United States Supreme Court's decision in *Crawford*, 541 U.S. at 68, holding "testimonial" hearsay inadmissible at trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant, was retroactively applicable on collateral attack. 154 Wn.2d at 264-65. Our court first rejected the argument that *Crawford* did not constitute a "new" rule of criminal procedure to which retroactivity analysis applied, observing that *Crawford* broke from previous United States Supreme Court precedent. *Markel*, 154 Wn.2d at 270. It then reasoned that "*Crawford* is plainly seen as a new definition of the confrontation clause requirements, intended to more accurately reflect the constitutional framers' intent" and, thus, "[c]riminal defendants who were denied *Crawford*'s procedural requirements by reason of timing were not dispossessed of all meaningful opportunity to challenge the admission of" testimony. *Markel*, 154 Wn.2d at 273. Accordingly, it rejected the argument that *Crawford* announced a "'watershed rule[ ] of criminal procedure,'" "'without which the likelihood of an accurate conviction is *seriously* diminished,'" that warranted retroactive application on collateral review. *Markel*, 154 Wn.2d at 273 (internal quotation marks omitted) (alteration in original) (quoting *Summerlin*, 542 U.S. at 352).

Here, it seems axiomatic that by demonstrating a change in the law, Hacheney has

demonstrated a "new" rule of criminal procedure for purposes of retroactivity analysis. Furthermore, Division One's recent opinions establish that *Melendez-Diaz* has superseded two Washington State Supreme Court decisions and has called into question *Crawford*'s tenets. *Dash*, 163 Wn. App. at 72-74; *Jasper*, 158 Wn. App. at 529-30. Accordingly, we hold that Hacheney has demonstrated a "new" rule of criminal procedure for purposes of retroactivity analysis.

But under the *Markel* court's reasoning, *Bullcoming* and *Melendez-Diaz* represent even less of a watershed moment in criminal procedure than did *Crawford*. Where *Crawford* completely redefined the confrontation clause's requirements, *Melendez-Diaz* further explored the characteristics of testimonial statements under *Crawford* and, in turn, *Bullcoming* expanded upon *Crawford*'s and *Melendez-Diaz*'s rationales. *Bullcoming*, 131 S. Ct. at 2713-14, 2716-17; *Melendez-Diaz*, 129 S. Ct. at 2532. Furthermore, in his direct appeal, Hacheney challenged the admissibility of Weiss's report under previous confrontation clause jurisprudence, namely, *Crawford*. *Hacheney*, 2005 WL 1847160, at *9-10. Thus, the *Markel* court's rationales barring retroactive application of *Crawford* on collateral review apply with greater force to *Crawford*'s progeny, *Bullcoming* and *Melendez-Diaz*.

In sum, for us to reexamine Hacheney's confrontation clause challenge on collateral review, Hacheney must demonstrate a change in law.[11] We hold that Hacheney has demonstrated

[11] We note further that RCW 10.73.100(6) allows for collateral relief from judgment based on a "significant change in the law . . . which is material to the conviction . . . and . . . a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard." We have applied this statutory language consistent with the United States Supreme Court's retroactivity analysis, although that analysis does not limit the scope of relief we may provide under the statute. *Markel*, 154 Wn.2d at 268 n.1; *see also State v. Abrams*, 163 Wn.2d 277, 291-92, 178 P.3d 1021 (2008); *State v. Evans*, 154 Wn.2d 438, 448-49, 114

a change in law and a new rule of criminal procedure regarding the out-of-court statements in Weiss's report. But that rule cannot be applied by us retroactively in this collateral attack on Hacheney's conviction unless it constitutes a "'watershed rule,'" a class of rules from which "'it is unlikely that any . . . ha[s] yet to emerge.'" *Markel*, 154 Wn.2d at 269 (internal quotation marks omitted) (alterations in original) (quoting *Summerlin*, 542 U.S. at 352). Thus, our corollary holding is that the "watershed rule" constitutes a barrier to collateral attack based on new rules of criminal procedure, including the right to subject Weiss, whose report the State used during Hacheney's prosecution, to cross-examination. *Markel*, 154 Wn.2d at 269.

Therefore, Hacheney cannot show that the change in the law wrought by *Bullcoming* and *Melendez-Diaz* and the resulting criminal procedure rule support a legal finding that we now have a "watershed rule" that allows relief when collaterally attacking a conviction. And here, the admission of Weiss's report and the reliance placed on it by the testifying doctors cannot be reviewed in Hacheney's PRP and we deny Hacheney's request for relief.

Moreover, were we to assume, without so deciding, that (1) Hacheney's direct appeals were not final[12] before the Supreme Court issued *Melendez-Diaz* and (2) the admission of the toxicology report violated the confrontation clause under *Melendez-Diaz*, the ultimate result does not change. We review confrontation clause errors for constitutional harmless error. *Jasper*, 174

P.3d 627 (2005). We find no sufficient reason in this case to depart from the federal analysis and to require retroactive application of this new rule on collateral attack. *Accord Markel*, 154 Wn.2d at 268 n.1.

[12] Under our retroactivity analysis, we may retroactively apply "[a] new rule for the conduct of criminal prosecutions . . . to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past." *St. Pierre*, 118 Wn.2d at 326.

Wn.2d at 117. Whether such an error is harmless depends on a number of factors, including whether the evidence was cumulative. *Jasper*, 174 Wn.2d at 117; *see also State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970) (the admission of cumulative evidence is not prejudicial error); *State v. Saunders*, 132 Wn. App. 592, 604, 132 P.3d 743 (2006) (admission of "entirely cumulative" evidence was harmless violation of the confrontation clause). Here, the experts properly testified to the bases of their opinions, including the toxicology report's contents. *See State v. Lucas*, 167 Wn. App. 100, 109-10, 271 P.3d 394 (2012). Accordingly, we hold that the report itself was merely cumulative and its admission at trial was harmless.

D. Status of Confrontation Clause Testimonial Analysis

We write further to address the general lack of clarity in current confrontation clause jurisprudence were we to consider Hacheney's claim for relief under the confrontation clause in light of the emerging law on the issue. In *Bryant*, the United States Supreme Court considered whether statements given in response to police interrogation during an ongoing emergency were testimonial statements triggering the confrontation clause. 131 S. Ct. at 1166-67. In doing so, it applied the "primary purpose" test:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Bryant, 131 S. Ct. at 1154, 1156 (quoting *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

In his dissent, Justice Scalia sharply criticized the *Bryant* majority's "'amorphous, if not

entirely subjective'" application of the test:

> Where the prosecution cries "emergency," the admissibility of a statement now turns on "a highly context-dependent inquiry[ ]" into the type of weapon the defendant wielded; the type of crime the defendant committed; the medical condition of the declarant; if the declarant is injured, whether paramedics have arrived on the scene; whether the encounter takes place in an "exposed public area"; whether the encounter appears disorganized; whether the declarant is capable of forming a purpose; whether the police have secured the scene of the crime; the formality of the statement; and finally, whether the statement strikes us as reliable. This is no better than the nine-factor balancing test we rejected in *Crawford*, 541 U.S., at 63, 124 S. Ct. 1354. I do not look forward to resolving conflicts in the future over whether knives and poison are more like guns or fists for [c]onfrontation [c]lause purposes, or whether rape and armed robbery are more like murder or domestic violence.

Bryant, 131 S. Ct. at 1175-76 (Scalia, J., dissenting) (citations omitted) (quoting *Crawford*, 541 U.S. at 63). But he then acknowledged, "It can be said, of course, that under *Crawford* analysis of whether a statement is testimonial requires consideration of all the circumstances, and so is also something of a multifactor balancing test." *Bryant*, 131 S. Ct. at 1176 (Scalia, J., dissenting).

We write out of concern that the *Crawford* test is, at a minimum, "something of a multifactor balancing test" and, at most, an "'amorphous, if not entirely subjective'" test when applied to autopsy reports and derivative forensic reports offered as evidence in criminal trials. *Bryant*, 131 S. Ct. at 1175-76 (Scalia, J., dissenting) (quoting *Crawford*, 541 U.S. at 63). In *Crawford*, the Supreme Court articulated three formulations of the "core class" of testimonial statements but did not endorse a "comprehensive" definition:

> Various formulations of this core class of testimonial statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; [and] "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be

available for use at a later trial."

541 U.S. at 51-52, 68 (internal quotation marks and citations omitted) (quoting *White v. Illinois*, 502 U.S. 346, 365, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992)). These formulations are more easily applied to forensic reports in cases such as *Bullcoming* and *Melendez-Diaz*, where the reports were analogous to affidavits, than to Weiss's forensic report. 131 S. Ct. at 2717; 129 S. Ct. at 2532.

Weiss's forensic report does not resemble the reports in *Bullcoming* and *Melendez-Diaz*. Accordingly, were we to reach the merits of Hacheney's claim, we would necessarily apply *Crawford*'s other formulations, i.e., whether the challenged statements "were made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial," an amorphous and, we suggest, problematic subjective analytic framework. 541 U.S. at 52.

Hacheney's claim is that Weiss's forensic laboratory report, requested by Kitsap County medical examiner Lascina, detailing the results of toxicology tests performed by Weiss on blood and tissue samples from Dawn's body, contained testimonial statements that should have been subjected to cross-examination. To evaluate this claim under *Crawford*'s subjective analytic framework, we would likely have to consider many factors, including (1) law enforcement's involvement, if any, in the investigation of Dawn's death; (2) the nature of law enforcement's involvement; (3) the facts resulting from that investigation; (4) the nature and purpose of the medical examiner's investigation into her death; (5) facts, if any, made available to the medical examiner by law enforcement in the course of the medical examiner's investigation; (6) questions arising from the medical examiner's investigation; (7) the nature and purpose of Weiss's

toxicology testing in general, e.g., whether it was normally requested by law enforcement or another state actor and whether the testing was performed pursuant to a statutory duty, as part of a criminal investigation, or both; (8) issues or facts, if any, made available to Weiss by the medical examiner; (9) the results of Weiss's tests; and (10) whether an objective witness in Weiss's position would reasonably believe that her forensic laboratory report would be available for use at a later trial. *See* 541 U.S. at 52; *see also People v. Dendel*, 289 Mich. App. 445, 458-68, 797 N.W.2d 645 (2010) (discussing numerous confrontation clause cases involving forensic reports and holding that statements in analyst's report of glucose tests requested by medical examiner were testimonial); *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 28-35, 241 P.3d 214, *cert. denied*, 132 S. Ct. 259 (2011) (discussing numerous cases and holding statements in autopsy report were testimonial).

Under *Crawford*'s analysis, our legal inquiry begins to resemble the old-fashioned game of "telephone," as we must attempt to reconstruct the investigation, chain of custody, and sequence of testing from beginning to end, asking who knew what and when. We would suggest that courts should not be forced to allow a defendant's constitutional right to confront witnesses to be determined by something resembling a game, especially in the context of scientific forensic evidence.

In *Melendez-Diaz*, the State of Massachusetts argued that the reliability of "'neutral, scientific testing'" might warrant an exception from the confrontation clause's requirements. 129 S. Ct. at 2536 (quoting *Melendez-Diaz* Br. of Resp't at 29). The Supreme Court rejected this argument, observing that it is not evident that scientific testing is as neutral or as reliable as the State claimed and illustrating how cross-examination of analysts serves to weed out fraudulent or

erroneous analysis. *Melendez-Diaz*, 129 S. Ct. at 2536-38. Given a not uncommon perception of scientific evidence as neutral, reliable, and possibly nigh-infallible, perhaps a more stringent confrontation clause analysis is required for forensic analyses performed at state crime laboratories.

Furthermore, it may be true that Washington medical examiners perform autopsies and that toxicologists perform requested derivative tests pursuant to their duties under state law. But due to the nature of their duties, i.e., investigating the cause and manner of an individual's death, every autopsy and derivative test has "the potential to lead to criminal prosecution." *State v. Hopkins*, 137 Wn. App. 441, 456, 154 P.3d 250 (2007). And, as in this case, a medical examiner's "investigatory role overlap[s] with and aid[s] law enforcement." *Hopkins*, 137 Wn. App. at 457.

Here also, we have Hacheney's evidence of problems within the WSP Crime Laboratory, issues that may form the core of cross-examination of a forensic scientist whose report is relied upon by the State. *See infra* p.p. 21-25. In this instance and others, accordingly, it would seem that an objective witness in the position of a medical examiner investigating a death or an analyst performing tests at the examiner's request would reasonably believe that their statements would be available for use at a later trial, thus satisfying the *Crawford* formulations, even within their limitations. 541 U.S. at 51-52.

As the Supreme Court stated in *Crawford*, "By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to [the framers'] design. Vague standards are manipulable." 541 U.S. at 67-68. We suggest that perhaps the better rule would be to subject the authors of any autopsy report or derivative report to confrontation clause

requirements for testimonial statements.[13] Such a categorical rule would serve as a bulwark against the "unpardonable vice" of amorphous, multifactor tests with the "demonstrated capacity to admit core testimonial statements that the [c]onfrontation [c]lause plainly meant to exclude." *Crawford*, 541 U.S. at 63.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Newly Discovered Evidence

Hacheney also argues in this PRP that "newly discovered evidence regarding the performance standards of the [WSP] Crime Lab[oratory] justifies a new trial" and that the State committed a *Brady*[14] violation by failing to disclose "material information regarding the performance standards of the [WSP] Crime Lab[oratory]." PRP at 29, 36 (some capitalization omitted).

Restraint is unlawful under RAP 16.4(c)(3) "where material facts exist that have not been

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[13] Such a rule would be preferable even in cases where *Bryant*'s "'primary purpose'" test may apply to the admissibility of autopsy reports and other derivative forensic reports. 131 S. Ct. at 1154 (quoting *Davis*, 547 U.S. at 822). Both the United States Supreme Court and our Supreme Court have noted that this test applies in the context of police interrogations. *Davis*, 547 U.S. at 822; *State v. Beadle*, 173 Wn.2d 97, 108-110, 265 P.3d 863 (2011). The United States Supreme Court has suggested that a police request for a forensic report is similar to a police interrogation and, according to some of the Court's members, warrants application of the primary purpose test. *See Bullcoming*, 131 S. Ct. at 2714 n.6, 2717 (majority opinion), 2720-21 (Sotomayor, J., concurring in part); *Melendez-Diaz*, 129 S. Ct. at 2535. Although the record reflects no police request for Dawn's autopsy or derivative tests, application of the amorphous primary purpose test in this and other cases would suffer the same failings as *Crawford*'s formulations. *See Bryant*, 131 S. Ct. at 1175-76 (Scalia, J., dissenting).

[14] *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

previously presented and heard, which in the interest of justice require vacation of the conviction." *In re Pers. Restraint of Delmarter*, 124 Wn. App. 154, 162, 101 P.3d 111 (2004). A petitioner must prove that (1) the results will probably change if a new trial is granted, (2) the evidence was discovered after trial, (3) the evidence could not have been discovered before trial through due diligence, (4) the evidence is material, and (5) the evidence is not merely cumulative or impeaching. *Delmarter*, 124 Wn. App. at 162 (citing *State v. Roche*, 114 Wn. App. 424, 444, 59 P.3d 682 (2002)). Evidence is material if there is a reasonable probability that the result of the proceeding would have differed if the evidence had been disclosed. *See In re Pers. Restraint of Stenson*, 150 Wn.2d 207, 218, 76 P.3d 241 (2003) (citing *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 887, 828 P.2d 1086 (1992)).

Under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), a defendant's right to due process is violated when the prosecution suppresses material evidence favorable to the defendant. *In re Pers. Restraint of Sherwood*, 118 Wn. App. 267, 270, 76 P.3d 269 (2003). A *Brady* violation occurs when (1) there is exculpatory or impeaching evidence, (2) the State willfully or inadvertently suppresses the evidence, and (3) prejudice results. *Delmarter*, 124 Wn. App. at 167. The prosecution has no duty to independently search for exculpatory evidence. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 399, 972 P.2d 1250 (1999).

To support his argument, Hacheney attaches "Appendix B" to his PRP. This appendix generally contains various writings about the WSP Crime Laboratory, pointing out deficiencies or concerns. The writings contained in Appendix B fall into four categories: (1) criticisms of individual crime laboratory employees or general criticisms of crime laboratories,[15] (2) criticisms

[15] Hacheney includes four articles from the *Seattle Post-Intelligencer*, all of which were written in 2004, in his Appendix B, to outline criticisms of individual crime laboratory employees or general

of the state's breath testing program for driving while under the influence (DUI) evidence,[16] (3) state audits or reports regarding the WSP toxicology and crime laboratories,[17] and (4) the writings

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criticisms of crime laboratories. One article discusses oversights at the WSP Crime Laboratory, citing problems with individual employees unrelated to the Hacheney investigation. PRP, App. B at 1; Ruth Teichroeb, *Oversight of Crime-Lab Staff Has Often Been Lax*, Seattle Post-Intelligencer, July 23, 2004. Another article discusses the termination of Arnold Melnikoff, a forensic scientist who did not work on Hacheney's case, after an internal audit raised questions about his drug analyses. PRP, App. B at 14; Ruth Teichroeb, *State Patrol Fires Crime Lab Scientist*, Seattle Post-Intelligencer, March 24, 2004. A third article raises concerns regarding whether crime labs should be required to produce error rates for deoxyribonucleic acid (DNA) testing to help courts weigh the importance of DNA evidence. PRP, App. B at 17; Ruth Teichroeb, *Produce Crime Lab Error Rates, Some Urge*, Seattle Post-Intelligencer, July 22, 2004. The final article offers general criticisms of crime labs and proposes some solutions including removing crime laboratories from the WSP, blind testing of laboratory work, licensing for forensic scientists, and increased funding for crime labs. PRP, App. B at 18; Ruth Teichroeb, *Crime Labs Too Beholden to Prosecutors, Critics Say*, Seattle Post-Intelligencer, July 23, 2004.

[16] Criticism of the state's breath testing program for DUI evidence includes a press release, an article, and an order granting the defendants' motion to suppress evidence in *State v. Ahmach, Sanafim, et al*, No. C00627921 (King County Dist. Ct., Redmond, Wash. Jan. 30, 2008). The Washington Association of Criminal Defense Lawyers sent out a press release on October 16, 2007, titled *State Forensics Council Asked to Instigate Crime Lab* that details their request to have the state's forensic investigations council investigate alleged negligence and misconduct in the WSP's crime laboratory system stemming from the conduct of two employees unrelated to Hacheney's case, Ann Marie Gordon and Evan Thompson. Hacheney also attaches an article which focuses on problems with the laboratory's breath testing program. PRP, App. B at 89; Bob Geballe, *Test Anxiety: Scandal at the State's DUI Lab Has Defendants Lathered*, Wash. L. & Pols., Spring 2008 ed., at 39-40. Finally, the order granting defendant's motion to suppress evidence from *Ahmach* pertained only to breath tests in the named defendants' cases and concerned only the simulator solutions prepared and tested by the Washington State Toxicology Laboratory (WSTL); the order specifically did not relate to any of the other work of the WSTL.

[17] Hacheney includes the following state audits or reports regarding the WSP toxicology and crime laboratories in his Appendix B: a report from the forensic investigations council, a report from the forensic lab services bureau to the chief of the WSP, and a media release from the WSP. None of the audits or reports covered time periods, employees, or programs relevant to Hacheney's case. The report from the forensic investigations counsel reviewed one crime laboratory employee, Thompson; the toxicology laboratory's evidence audits from 2004-2007; problems with the breath testing program and its manager, Gordon; and a data quality audit from 2007 which audited toxicology files signed or co-signed by Gordon for the period of time from July 2005 through June 2007. PRP, App. B at 50, *Forensic Investigations Council Report on the Washington State Toxicology Laboratory and the Washington State Crime Laboratory*,

of Dr. Logan.[18] We hold that Hacheney's restraint was not unlawful given the various writings in Appendix B, nor did the State commit a *Brady* violation.

Hacheney's unlawful restraint claim under RAP 16.4(c)(3) fails because his attachments do not show that information about the WSP Crime Laboratory is material, rather than merely impeaching. *Delmarter*, 124 Wn. App. at 162. There is no reasonable probability that the attachments in Hacheney's Appendix B would have changed the result of Hacheney's trial because the attachments largely cover crime laboratory issues that occurred several years after Hacheney's trial relating to DUI cases or problems pertaining to individual employees unrelated to Hacheney's case. Only the attachments categorized as writings of Dr. Logan contain evidence relating to laboratory employees relevant to Hacheney's case. None of those writings, however, contain new evidence that would have been reasonably likely to change the result of Hacheney's trial because they do not allege any facts damaging to Weiss's performance or to her report's accuracy. Had the information in Hacheney's Appendix B been available during Hacheney's trial,

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Washington State Forensics Investigations Council, at 2-7, April 17, 2008. The report from the forensic lab services bureau was based on an audit of the evidence system at the WSTL in Seattle conducted in August 2007. PRP, App. B at 64; *Washington State Patrol: Report to the Chief*, Washington State Forensic Lab Services Bureau, at 1, September 4, 2007. Finally, the media release announced that the WSP accepts all findings from audits of the WSTL. PRP, App. B at 91; *State Patrol Accepts All Findings in Audits of State Toxicology Lab*, Washington State Patrol, February 7, 2008. These audits were also reviewed in the aforementioned forensic investigations counsel report.

[18] The writings of Dr. Logan from petitioner's Appendix B include (1) an issue paper prepared by Logan regarding the WSP Crime Laboratory's breath testing program; (2) Logan's resignation letter dated February 12, 2008, which was addressed to Chief John R. Batiste of the WSP, outlining Logan's retirement schedule; (3) an e-mail chain from July and August 2000 detailing Glenn Case's announced retirement after Case responded "angrily" to a minor scheduling conflict with some coworkers, PRP, App. B at 93; and, finally, (4) Logan's signed declaration, dated June 26, 2009, which is consistent with Logan's testimony at trial.

evidence of the conduct at the WSP Crime Laboratory could, at best, have been used to attempt to impeach Dr. Logan's testimony. Therefore, we hold that Hacheney has failed to establish that material facts exist that require vacation of his conviction in the interest of justice.

Hacheney's *Brady* claim fails because he cannot show that employee misconduct prejudiced him because the employees and programs detailed in petitioner's Appendix B did not process the evidence in his case. *Delmarter*, 124 Wn. App. at 167. Hacheney was not prejudiced by his inability to present problems with employees unrelated to Hacheney's case and problems in the breath testing program.

Further, Hacheney cannot show that the State willfully or inadvertently suppressed the evidence contained in his Appendix B, given that the State has no independent duty to search for exculpatory evidence. *Delmarter*, 124 Wn. App. at 167; *Gentry*, 137 Wn.2d at 399. It was not until 2007, five years after Hacheney's trial, that Dr. Logan became aware that Gordon, the laboratory manager at the Washington State Toxicology Laboratory (WSTL), was falsely certifying that she had prepared and tested simulator solution on breath test analyses in DUI cases.[19] Other problem employees mentioned in the attachments of Appendix B were dealt with as the state became aware of their transgressions. Therefore, we also hold that no *Brady* violation occurred.

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[19] Hacheney relies on a King County District Court order which found that "Dr. Logan testified that he had been told in 2000 by Ms. Gordon that her predecessor in the WSTL had fraudulently signed CrRLJ 6.13 certificates when he was the manager of the WSTL." PRP, App. B at 21 (Order Granting Defs.' Mot. To Suppress, *Ahmach*, No. C00627921 at 22. But the King County District Court found that Gordon began engaging in this practice in 2003, which was after Hacheney's trial. PRP, App. B at 21 (Order Granting Defs.' Mot. To Suppress, *Ahmach*, No. C00627921 at 3. Further, the false certifications affected breath tests, which were not conducted in the Hacheney case.

Videotaped Depositions of Unavailable Witnesses

Hacheney also argues that the trial court violated his Sixth Amendment right to confront witnesses by admitting the videotaped depositions of three witnesses at trial. He asserts that newly discovered evidence shows that the State did not make a good faith effort to secure the presence of these witnesses at trial, thus the witnesses were not unavailable to testify. We disagree.

Before trial, the State moved to perpetuate the depositions of the three witnesses, who were under subpoena but scheduled to be out of the country at the time of trial. *Hacheney*, 160 Wn.2d at 520-21. At trial, the State submitted letters from each of the three witnesses confirming that they were out of the country. *Hacheney*, 160 Wn.2d at 521. The State sought to show the videotaped depositions in lieu of live testimony; defense counsel unsuccessfully objected, arguing that the State had not taken steps to show that the witnesses were truly unavailable and had done nothing to secure the three witnesses' presence at trial. *Hacheney*, 160 Wn.2d at 521.

In his direct appeal, Hacheney argued that the State did not establish the witnesses' unavailability. *Hacheney*, 160 Wn.2d at 520. Our Supreme Court concluded that the trial court could have reasonably inferred from the record that even if the State had offered to pay for the witnesses' travel expenses, they would have remained out of the country. *Hacheney*, 160 Wn.2d at 522. The Supreme Court reasoned that Hacheney was present at the depositions, the jury was able to observe the demeanor of the witnesses on videotape, and Hacheney's attorneys knew that the witnesses would be out of the country at the time of the two-month trial. *Hacheney*, 160 Wn.2d at 522-23.[20]

[20] Further, the Supreme Court noted, "Hacheney's conviction did not rest entirely on the testimony of any of the three deposed witnesses." *Hacheney*, 160 Wn.2d at 523.

Now Hacheney submits an e-mail from a witness, stating that he and his wife would have testified if the State had paid their travel expenses; a declaration, signed by an attorney who spoke with the third witness, which declares, "I asked [the witness] what prosecutors told him with respect to his responsibility to return and testify at the trial. [The witness] said, 'as far as I knew, I was done'"; and e-mails from the State to the witnesses discussing the necessity of unavailability letters and the language the witnesses were to include in their letters. PRP, App. C. Hacheney argues that these demonstrate that the State did not act in good faith to secure the witnesses at trial.

That the State did not offer to pay for the witnesses' travel expenses is not newly discovered evidence and was a fact already considered in Hacheney's direct appeal. *See Hacheney*, 160 Wn.2d at 522. Further, with regard to the State's proposed language for the unavailability letters, the State persuasively asserts, "It is not at all uncommon for an attorney to explain to a lay person what facts are relevant and needed in a statement to be submitted to the court. This hardly raises an inference that [the] attorney is dictating the witness's conduct." Br. of Resp't at 39. The ends of justice do not require us to reconsider Hacheney's claim relating to the videotaped depositions of three witnesses at his trial.

Public Trial

Hacheney also argues that because new evidence demonstrates that the three witnesses were available, their depositions constituted part of the trial. Thus, he contends that the trial court violated his right to a public trial when it did not allow his father to attend these depositions. Hacheney argued in his direct appeal that "the trial court violated his constitutional right to a

public trial by not allowing his father to attend the depositions." *Hacheney*, 2005 WL 1847160, at *6. We held that Hacheney's right to a public trial was not violated because the depositions were later used in a public trial that his father had every right to attend. *Hacheney*, 2005 WL 1847160, at *7.[21]

Our Supreme Court recently held in *Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 79-80, 256 P.3d 1179 (2011), that article I, section 10 of the Washington State Constitution and the First Amendment to the United States Constitution do not provide a constitutional right of access to a pretrial deposition until the deposition is ruled admissible for trial. Moreover, our Supreme Court has already resolved this issue on whether the depositions were properly admitted and its decision is binding on us. *Hacheney*, 160 Wn.2d at 506. Hacheney fails to establish that the ends of justice require us to reconsider this issue.

Limiting Jury Instruction

Next, Hacheney argues that (1) the trial court improperly commented on the evidence by including the phrase "consciousness of guilt" in its limiting jury instruction on the jury's use of evidence of Hacheney's sexual relationships following his wife's death and (2) the limiting instruction violated his right to due process. Although we already considered the issue of whether the trial court should be reversed for giving the limiting jury instruction and held that it should not, Hacheney contests the jury instruction on different grounds in this petition.

On direct appeal, Hacheney unsuccessfully argued that the trial court erred by including

[21] As we discussed above, Hacheney fails to prove that the State did not make a good faith effort to secure the presence of witnesses at trial. Thus, the State did not "mis[lead] the trial court and this [c]ourt to conclude that the closed court hearing was merely a discovery deposition and not part of the trial." PRP at 45.

the phrase "consciousness of guilt" in its ER 404(b) limiting instruction. *Hacheney*, 2005 WL 1847160, at *7. We held that even if the trial court erred, the jury would not have understood consciousness of guilt to mean anything different from motive, thus any error was harmless within reasonable probabilities. *Hacheney*, 2005 WL 1847160, at *7. Here, we consider whether the trial court improperly commented on the evidence and whether the instruction violated Hacheney's due process rights.

A. Comment on the Evidence

First, Hacheney asserts that the limiting jury instruction constituted a comment on the evidence in violation of article IV, section 16 of the Washington State Constitution. He asserts that the instruction "allows the jury to draw an impermissible and unwarranted inference. It fails to contain necessary limiting language." PRP at 69.

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. IV, § 16. "It is error for a judge to instruct the jury 'that matters of fact have been established as a matter of law.'" *State v. Boss*, 167 Wn.2d 710, 720, 223 P.3d 506 (2009) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). "[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment." *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Whether an instruction constitutes a comment on the evidence depends on the facts and circumstances of each case. *State v. Stearns*, 61 Wn. App. 224, 231, 810 P.2d 41 (1991). Judicial comments on jury instructions are presumed prejudicial and the State has the burden to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *Levy*, 156 Wn.2d at 725.

The trial court gave the limiting jury instruction for the express purpose of limiting the jury's use of testimony regarding Hacheney's sexual relationships with other women following Dawn's death, and the limiting instruction does not indicate the trial court's opinion concerning the evidence presented at trial.

Further, the jury also received the following instruction:

> The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a

> personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

Clerk's Papers at 1342. We presume that the jury follows the trial court's instructions. *State v. Sivins*, 138 Wn. App. 52, 61, 155 P.3d 982 (2007). We hold that the limiting jury instruction was not an impermissible comment on the evidence.

B. Due Process

Next, Hacheney asserts that the trial court violated his constitutional right to due process by giving the limiting jury instruction because "Hacheney's sex life had no probative value to [the issue of consciousness of guilt]," "the instruction was not clearly phrased as a permissive inference," "no cautionary language was included in the instruction," the trial court "did not further give an instruction on 'multiple hypothesis,'" the trial court "did not require the State to prove the inference beyond a reasonable doubt," and the trial court "failed to give a corresponding 'consciousness of innocence' instruction." PRP at 68 (some capitalization omitted).

To prevail on a PRP, the petitioner must show that there was a constitutional error that resulted in actual and substantial prejudice to the petitioner. *Woods*, 154 Wn.2d at 409. We already held that, even if the trial court erred, the jury would not have understood "consciousness of guilt" to mean anything different from motive, thus any error was harmless within reasonable probabilities. *Hacheney*, 2005 WL 1847160, at *7. Hacheney fails to show that even if there was a constitutional error, it resulted in actual and substantial prejudice.

Ineffective Assistance of Counsel

Hacheney now argues that both his trial and his appellate counsel rendered ineffective

assistance of counsel. Hacheney contends that his trial counsel (1) failed to investigate "the performance standards of the W[SP] Crime Lab[oratory]," PRP at 29 (some capitalization omitted); (2) "failed to investigate and present an accurate timeline," PRP at 46 (capitalization omitted); (3) failed to object to Dr. Selove's testimony that Dawn died when she was suffocated with a plastic bag; (4) "failed to cross-examine Ms. Glass regarding her plan to kill her husband,"[22] PRP at 63 (some capitalization omitted); (5) "failed to request that the 'consciousness of guilt' instruction include language stating that the inference was not mandatory, and that where the evidence was susceptible of two equally valid constructions the jury must draw the inference consistent with innocence," PRP at 68 (capitalization omitted); and (6) "failed to request a corresponding 'consciousness of innocence' instruction," PRP at 68 (capitalization omitted). Hacheney also asserts that his appellate counsel was ineffective for failing to assign error to Dr. Selove's comment on direct appeal.

A. Standard of Review

In a PRP, the petitioner must satisfy the *Strickland* two-part test to succeed on a claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A petitioner "must show that '(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Davis*, 152

[22] Apparently, Glass planned to drive her car into a tree, causing the death of her husband, while she and her children would survive the crash. Glass later told Hacheney that she was unable to kill her husband.

Wn.2d at 672-73 (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). "Failure to raise all possible nonfrivolous issues on appeal is not ineffective assistance." *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 314, 868 P.2d 835 (1994).

B. Failure to Investigate WSTL

Hacheney argues that he received ineffective assistance of counsel when his defense counsel failed to investigate "the performance standards" of the WSTL. PRP at 29 (capitalization omitted). We disagree.

An attorney breaches his duty to a client if he fails "'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Davis*, 152 Wn.2d at 721 (quoting *Strickland*, 466 U.S. at 690-91). "Not conducting a reasonable investigation is especially egregious when a defense attorney fails to consider potentially exculpatory evidence." *Davis*, 152 Wn.2d at 721. "'An attorney's action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices.'" *Davis*, 152 Wn.2d at 722 (quoting *Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995)).

Defense counsel did not fail to conduct a reasonable investigation based on the documents Hacheney attaches in Appendix B because the attachments would not have been potentially exculpatory in the present case. Here, many of the documents Hacheney attaches in his Appendix B, specifically the state audits or reports and the writings of Dr. Logan, did not exist when defense counsel represented Hacheney at trial; thus his counsel was not deficient for failing to uncover those documents.

Furthermore, Hacheney himself argues that the documents in his Appendix B are "newly

discovered evidence." PRP at 29 (capitalization omitted). Finally, the criticisms of individual crime laboratory employees or general criticisms of crime laboratories and the criticisms of the state's breath testing program attached in Hacheney's Appendix B that were known at the time of Hacheney's trial were not relevant to his case. None of the employees cited in the articles or in the motion to suppress evidence handled evidence presented at Hacheney's trial. We hold that his defense counsel cannot be deemed ineffective for failing to investigate these unrelated incidents.

C. Failure To Investigate Timeline

Hacheney argues that he received ineffective assistance of counsel when defense counsel "failed to investigate and present an accurate timeline." PRP at 46 (capitalization omitted). The timeline was disputed at trial, with both the State and Hacheney producing evidence on the time he must have left his home, when the fire started, and whether Hacheney could have been where he claimed to be when the fire started.

The trial testimony showed that on December 26, 1997, Hacheney went duck hunting with Latsbaugh and Martini; he met the two at the Hood Canal Bridge. At trial, Detective Robert Davis testified that before trial, he drove, following the speed limit, from the Hacheney house to Indian Island. The drive took him 28 minutes from the house to the Hood Canal Bridge. It then took him 23 minutes to travel from the bridge to Indian Island. Davis did not drive to the hunting site or walk to the duck blinds.

At trial, Latsbaugh stated that the hunting party met at the Hood Canal Bridge between 7:00 a.m. and 7:15 a.m. According to Latsbaugh, the ensuing drive from the bridge to Indian Island took approximately 25 minutes. Latsbaugh testified that when she, Martini, and Hacheney arrived at the hunting blinds, it was light enough that they did not need flashlights. Latsbaugh

testified that she and Hacheney usually tried to arrive at their hunting spots a couple minutes before daylight, when it was visible to shoot. She testified that they usually arrived by actual sunrise and seldom arrived at the site by legal shooting time because, at legal shooting time, it was too dark to see the birds. On that date, legal shooting time was at 7:28 a.m. Latsbaugh testified that sunrise occurs when the sun peeks over the horizon. At trial, Martini, a witness for the State, testified that he arrived at the hunting blinds with Hacheney and Latsbaugh a few minutes before dawn. Martini testified that the hunters planned to meet at the bridge between 45 and 60 minutes before daylight, and the drive to the island was between 30 and 45 minutes. Martini testified that, when they arrived at the blinds, "It was still a little bit dark but you could see the beginnings of dawn." RP at 514.

Defense counsel impeached Latsbaugh with a defense investigator's testimony.[23] The defense investigator testified that Latsbaugh had stated in a pretrial interview that she was in the shooting blinds between 5 and 10 minutes before "shooting light"; however, the two did not discuss the difference between shooting light and legal shooting time. RP at 4808. Further, defense counsel criticized the State's timeline during closing argument.

Defense expert Jim White testified that the fire began around 7:00 a.m. and lasted for approximately 20 minutes. Hacheney asserts, "[I]t was impossible for Hacheney to have started the fire" because the fire began at 7:00 a.m. and by then "[Hacheney] had been gone from the house for over an hour." PRP at 55 (emphasis omitted).

According to the State's expert witness, fire investigator Scott Roberts, the fire could

[23] This portion of the record refers to Lindsey Smith, but the record establishes that Lindsey Smith is Lindsey Latsbaugh.

have smoldered for hours, but burst into open flame, burned, and caused the heaviest amount of damage to the Hacheneys' bedroom for an hour or less. Hacheney's neighbors reported the fire at 7:13 a.m., and fire fighters extinguished the fire at approximately 7:25 a.m.[24] Thus, according to the State, the fire burst into open flame, at the earliest, around 6:25 a.m. The State argued, during closing argument, that Hacheney departed his home at 6:45 a.m.

Now, in raising the issue of ineffective counsel with regard to a timeline of his actions on the day Dawn died, Hacheney first asks us to review images from a webcam on December 24, 25, and 26, 2009. This particular webcam did not exist until July 2006, so counsel could not have been deficient by failing to introduce the photographs into evidence. Additionally, the State asserts that

> the camera is on a tower some 200 feet above sea level, while the hunters were on a beach some 10 miles to the south. Plainly at an altitude of 200 feet, the horizon would appear further to the east, and dawn would be perceived earlier. As such, these photographs cannot be considered to be relevant to the issue of the lighting conditions on the beach at Indian Island.

Br. of Resp't at 49. We reject Hacheney's invitation to view evidence bearing on this disputed point when that evidence was not available to his counsel when his trial occurred. His late-produced evidence does not suggest that his trial counsel in 2002 was ineffective for failing to use a webcam showing the dawn of the day.

Hacheney also now alleges that on December 26, "[t]he first signs of daylight breaking over the horizon . . . took place between 6:45 and 7:00 am. Civil twilight, where you can

[24] First responders arrived on the scene at 7:18 a.m. According to Joel Wulf, a responding fire fighter, suppression of the bedroom fire took seven to eight minutes. Dana Normandy, another responding fire fighter, also testified that he arrived "[w]ithin a couple minutes" of the first responders, spent "no more than a couple minutes" conducting a primary search of the residence, and entered the bedroom where "[t]he fire had been extinguished." RP at 984, 989, 990.

distinguish objects, . . . took place at 7:22 am and sunrise . . . took place at 7:58 am." PRP at 52. Hacheney also attaches other data relating to sunrise and the travel time from the house and the hunting site: a photograph of the hunting site, taken on December 29, 2003, at 7:31 a.m.; a Google map, showing that the distance between Hacheney's house and Indian Island is 41 miles, with a driving time of one hour and thirteen minutes; and a digital video disc recording of the drive from the Hacheney home to the hunting blinds.[25]

Hacheney argues,

> The images presented [from the webcam] plainly show that from 6:45-7:00 am it is still dark but you can see the cracks of dawn on the horizon. There is absolutely no possible way for the hunters to have arrived at the hunting blinds when it was dark and a few minutes later see the cracks of dawn cover over the horizon any later than 7:00 am.

PRP at 51. According to Hacheney, an investigation would have revealed that he "left home at 5:56 a.m.—at the latest." PRP at 55 (emphasis omitted).

But the additional evidence Hacheney presents with his PRP only demonstrates that, as at his trial, conflicting evidence exists about the timeline and his whereabouts when the fire started, but it does not conclusively demonstrate, as Hacheney asserts, that "[i]t was impossible for Hacheney to have started the fire." PRP at 55 (emphasis omitted).

Further, on January 2, 1998, Hacheney told a representative of the Safeco Insurance

[25] The digital video disc (DVD) reenacts the alleged timeline of the events that occurred on the morning of December 26, 1997. In the video, two men and a videographer travel in a car from the Hacheney home to Indian Island, leaving at 6:45 a.m., according to the car's clock. The car makes several stops: (1) at the location where Hacheney allegedly purchased coffee; (2) at the Hood Canal Bridge, where Latsbaugh got into Hacheney's car; and (3) at the location where Hacheney and Martini parked at the hunting blinds. According to the DVD, the drive and the walk to the hunting blinds took one hour and fourteen minutes. However, the DVD assumes that Hacheney drove at or below the speed limit. Further, at points in the video, the driver is "slowed by a school bus and traffic moving below the speed limit." Br. of Resp't at 53.

Company that he had left his house on December 26, 1997, at 5:10 a.m. Even using Hacheney's newly submitted information and considering his current argument, if Hacheney had left his home at 5:10 a.m., he would have arrived at the hunting blinds around 6:30 a.m. when it would have been too dark to walk to the blinds without flashlights. As the State points out, "Counsel could well have determined that making too much of the time issue would only have served to prove that his statements to the insurance company and the police at the time of the murder had to have been false. He would have then only reinforced the State's theme of guilty knowledge." Br. of Resp't at 55.

We hold that Hacheney's defense counsel's decision not to emphasize the timeline on the morning of Dawn's death can be characterized as a legitimate trial tactic, thus it did not constitute ineffective assistance of counsel.

D. Failure To Object to Dr. Selove's Testimony

Hacheney also argues that his trial and appellate counsel were ineffective because they failed to object or assign error to Dr. Selove's testimony that Dawn died when she was suffocated with a plastic bag. Hacheney asserts that Dr. Selove's expert testimony included an opinion that Glass, the woman who told investigators that Hacheney had suffocated his wife, was credible.

"Because issues of credibility are reserved strictly for the trier of fact, testimony regarding the credibility of a key witness may also be improper." *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). But testimony that is not a direct comment on the defendant's guilt or on a witness's credibility, that is helpful to the jury, and that is based on inferences from the evidence, is not improper opinion testimony. *Heatley*, 70 Wn. App. at 578. Hacheney mischaracterizes Dr. Selove's testimony and his counsel's performance. At trial, Dr. Selove

testified that Dawn died by suffocation with a plastic bag because

> [t]he conditions of the fire scene were described as not one of a flash fire. I am speaking of the fire investigative reports that I have reviewed. They are reports that are stating an apparent arson occurred.
>
> I am also considering alleged statements by Nicholas Hacheney made to Sandra Glass about how he killed Dawn Hacheney. I am finding pulmonary edema foam, that might be the only finding from a plastic bag asphyxia. I am finding evidence of death before the fire began. These are the foundations for my opinion and the reason I believe asphyxia by plastic bag suffocation occurred rather than laryngospasm.

RP at 1417.

On cross-examination, defense counsel asked Dr. Selove, "So you've never been in [Glass's] presence to try and judge her credibility about her version of events?" RP at 1444. Dr. Selove responded, "No, I have not." RP at 1444. Defense counsel also asked Dr. Selove, "Now, concerning the suffocation by a plastic bag, your basis for that opinion relies completely and solely on the statements of Sandy Glass, is that right?" RP at 1467. Dr. Selove responded, "That's right." RP at 1467. Defense counsel then asked, "So if you made a determination that Sandy Glass was not credible, the statements about the plastic bag, would that change your opinion concerning the mode of suffocation?" RP at 1467. Dr. Selove responded,

> Yes. Then I would say asphyxia, not knowing if there had been initially strangulation, a gag, what had caused the asphyxia. The use, in my opinion of plastic bag, I have no independent way of knowing that from the autopsy report or photographs. The only basis is the statement by Sandra Glass.
>
> So I would generically just say asphyxia, if I did not have that statement concerning the bag.

RP at 1467-68.

Dr. Selove did not make a direct comment on Hacheney's guilt or on Glass's credibility. He admitted that if Glass was not credible, his opinion would change concerning the mode of

suffocation. The jury had the role of deciding whether Glass was a credible witness and whether Hacheney committed the offense. Even without Glass's statement, Dr. Selove testified that his opinion remained that Dawn's death was caused by asphyxiation. Defense counsel did not perform deficiently when he failed to object to Dr. Selove's proper testimony accordingly and even if Hacheney's trial counsel erred in failing to object, Hacheney cannot show that the failure to object affected the verdict given that Hacheney's defense counsel elicited clarifying responses from Selove that indicate he has no knowledge of Glass's credibility. *Davis*, 152 Wn.2d at 672-73.

We also hold that Hacheney's appellate counsel was not ineffective for failing to raise this issue on direct appeal because (1) the legal issue that Hacheney's appellate counsel failed to raise lacked merit, as discussed previously, and (2) Hacheney fails to show he was actually prejudiced by appellate counsel's failure to raise the issue. *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 344, 945 P.2d 196 (1997).

E. Failure To Cross-Examine Glass

Hacheney next argues that his counsel was ineffective because he "failed to cross-examine Glass regarding her plan to kill her husband." PRP at 63 (some capitalization omitted). We disagree.

When Glass told Hacheney of her plan, he indicated that he wanted to tell her what to do, but that she should not expect him to help. During the same conversation, Hacheney commented that he now "felt like a man who just got his life back," a comment that could be interpreted unfavorably by a jury. RP (Mar. 27, 2002) at 67. Hacheney was successful in suppressing these statements before trial under ER 403. When his defense counsel referenced Glass's plan in its

opening statement, the State objected. Defense counsel argued that the pretrial ruling did not cover Glass's plan; the trial court agreed, but ruled that no further reference to Glass's plan should be made without another offer of proof. Hacheney now argues that his counsel was ineffective for failing to cross-examine Glass regarding her plan.

Decisions about questions to ask witnesses are tactical. At one point during trial, defense counsel stated:

> I think it certainly does tarnish her as a witness. It was more than just a thought. She actually had a specific plan in which to kill her husband, and on one specific day was actually, was contemplating taking that step to actually do it.
>
> I would say at this point in time, though, I would agree with the [S]tate to leave that out. Just obviously again I would raise the issue again depending on what her testimony might be on direct, on whether or not I thought that was a necessary area to go into.

RP at 2157. Clearly, the issue was discussed and defense counsel made a strategic decision not to question Glass about her plan to murder her husband after her direct examination. One possible reason for the defense counsel's decision is that cross-examining Glass about her plan could have supported the State's theory of the case that Hacheney killed his wife so that he would be free to pursue relationships with other women, including Glass. Furthermore, eliciting this information about Glass's plan could have opened the door to Hacheney's own incriminating statements that he successfully moved to suppress under ER 403. Finally, defense counsel did attack Glass's credibility during cross-examination, including questioning Glass about another prior prophecy in 1992 that her husband would die and questioning her extensively about whether she can distinguish between statements from God and her general thoughts.

Therefore, we conclude that defense counsel's failure to cross-examine Glass on her alleged plan to kill her husband did not constitute ineffective assistance.

F. Failure To Object to ER 404(b) Instruction

Hacheney also argues that his counsel should have requested "that the 'consciousness of guilt' instruction include language stating that the inference was not mandatory, and that where the evidence was susceptible of two equally valid constructions the jury must draw the inference consistent with innocence." PRP at 68 (capitalization omitted). We held in Hacheney's direct appeal that, even if the trial court erred by including the phrase "consciousness of guilt" in its jury instruction, any error was harmless within reasonable probabilities. *Hacheney*, 2005 WL 1847160, at *7. Accordingly, Hacheney's ineffective assistance of counsel claim on this issue fails for lack of prejudice.

G. Failure To Request "Consciousness of Innocence" Instruction

Finally, Hacheney argues that his counsel was ineffective for failing "to request a corresponding 'consciousness of innocence' instruction" to accompany the "consciousness of guilt" instruction. PRP at 68 (capitalization omitted). Hacheney cites *Commonwealth v. Porter*, 384 Mass. 647, 654 n.10, 429 N.E.2d 14 (1981) in support of this proposition. *Porter*, however, does not support his proposition that counsel should request a "consciousness of innocence" instruction to accompany a "consciousness of guilt" instruction. Instead, *Porter* merely transcribes a trial court judge's discussion with the jury regarding the "consciousness of guilt" instruction; the trial judge said in relevant part, "So it is for you to determine upon the evidence whether this defendant was conscious of guilt of a crime with which he is now charged, or whether his conduct was indicative of innocence or at least consistent with innocence." 384 Mass. at 654 n.10. Because *Porter* does not support Hacheney's proposition that counsel erred in failing to request an accompanying "consciousness of innocence" instruction, and because he fails

to cite to any other supporting authority, we decline to consider Hacheney's ineffective assistance of counsel claim on this issue. RAP 10.3(a)(6).

Cumulative Error

Finally, Hacheney argues that he is entitled to a new trial under the cumulative error doctrine. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless, when the errors combined denied the defendant a fair trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009).

We hold that Hacheney's claims fail to satisfy his burden to prove that he was denied a fair trial and that the interests of justice demand remand for trial, thus we deny his petition.

VAN DEREN, J.

I concur:

JOHANSON, A.C.J.

Penoyar, C.J. (concurrence) — I write separately only in relation to our dicta on the confrontation clause. I agree with the majority's conclusion that exactly what is "testimonial" is far from clear, and I find the majority's discussion of how that issue might be clarified to be very insightful and persuasive. But, in recent years, I have been surprised enough by developments in this area of the law that I am not comfortable saying where this boat might be headed.

Penoyar, J.

Appendix F

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICHOLAS HACHENEY, Petitioner-Appellant, v. MIKE OBENLAND, Respondent-Appellee.	No. 16-35810 D.C. No. 3:15-cv-05492-RBL Western District of Washington, Tacoma ORDER

Before: RAWLINSON and CLIFTON, Circuit Judges, and FREUDENTHAL,* Chief District Judge.

The panel has unanimously voted to deny Petitioner-Appellant's petition for rehearing. Judge Rawlinson has voted to deny the petition for rehearing en banc, and Judge Clifton and Judge Freudenthal so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

* The Honorable Nancy Freudenthal, Chief United States District Judge for the District of Wyoming, sitting by designation.