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IN THE _____ COURT FOR THE _____
IN AND FOR THE STATE OF WASHINGTON

_____,
vs.
XXX
Plaintiff,
Defendant.

NO:
MOTION TO DISMISS

MOTION

COMES NOW the Defendant, by and through counsel of record, YYY, and moves the court to dismiss this case, or in the alternative, to suppress the breath test result. This motion is pursuant to the authorities presented below, and is based on the testimony of employees of the state toxicology lab, and the facts as presented below.

FACTS

On March 15, 2007, the Washington State Patrol received an anonymous report that "simulator solution certifications are being falsified as far as the certification." Ex. 1. Ann Marie Gordon, then manager of the WSP Toxicology Lab, and her subordinate, Quality Assurance Manager, Ed Formoso, "investigated" the allegation. On April 11, 2007, they reported to the State Toxicologist, Dr. Barry Logan, "we found the current process to be well defined in the SOP and no changes are necessary." Ex. 2. Their

1 report did not address “falsification” of certifications, even though this was the focus of
2 the anonymous tip. Apparently, Dr. Logan required no further investigation.

3 On July 9, 2007, WSP received a second, more specific anonymous report:

4 “Ann Marie Gordon doesn’t really certify all those simulator solutions. If you look
5 in the file, you’ll find a grammatigram with her name on it, but if you also check
6 over the years of where she really was on the days that those things were
7 certified you’ll find once in a while she was in DC or Alaska, or somewhere else.
8 She had somebody else do it and then she’ll sign the forms that says, under
9 penalty of perjury I analyzed this. If you don’t think that’s a big deal just think
10 what Francisco Duarte would think of that.”¹

11 Ex. 3. On July 20, 2007, Gordon tendered her resignation. Ex. 4.

12 On July 26, 2007, the Washington State Patrol Toxicology Laboratory posted an
13 announcement on its webpage www.breathtest.wsp.wa.gov, stating:

14 July 26, 2007 - The Washington State Patrol Toxicology
15 Laboratory prepares and tests simulator solutions used in the
16 DataMaster breath testing instruments. Each batch of
17 solution is prepared by a single analyst. Each batch of
18 solution is then examined and tested by multiple analysts and
19 each analyst signs a certificate for use in lieu of live testimony
20 pursuant to CrRLJ 6.13(c)(1).

21 All certificates signed by Ann Marie Gordon have been
22 removed from this Web Based Discovery Materials Site
23 (WebDMS) as of July 21, 2007, because Ms. Gordon did not
personally examine and test the solutions. This applies only
to Ms. Gordon’s certificates. All other certificates remain on
the website.

24 Exhibit 5 (Statement from WSP Web Site).

25 On August 16, 2007, counsel interviewed eight of the lab’s toxicologists (also
26 called analysts) by telephone. During his interview, Formoso admitted that it was he
27 who had tested Gordon’s simulator solutions. Ex. 6. Another lab analyst, Christopher

28 1. Mr. Duarte is a prominent DUI defense attorney with offices in Bellevue and Bellingham, WA.

1 Johnston, stated that Formoso had “mentioned” to him that Gordon asked Formoso to
2 test her solutions. Ex. 7. Thus, at least three lab employees other than Gordon,
3 (Formoso, Johnston, and the whistleblower), knew she had signed certifications under
4 penalty of perjury that she had “examined and tested” the solutions, when in fact, she
5 had not.

6 In addition, at least three analysts signed certifications under penalty of perjury
7 that they had “examined and tested” quality assurance solution batch numbers 07002,
8 07003, 07004 and 07005, and that the mean concentration of alcohol was a specific
9 number, which number turned out to be incorrect. A May 4, 2007, memorandum from
10 Gordon states that the “mean solution concentration was incorrectly annotated for
11 these solutions on the certification letters.” Ex. 8. The erroneous certifications have
12 been removed from the WSP website, the corrected certification for 07003, as an
13 exemplar, is attached. Ex. 9.

14 Furthermore, analysts were “testing and examining” solutions before the
15 solutions were even prepared, an impossibility. Quality assurance solution batch
16 numbers 07019, 07020, 07021 and 07022, certified to have been prepared on July 12,
17 2007, were miraculously tested by analysts the day before. Ex. 10. Errors and
18 discrepancies continue to be discovered on an almost daily basis.

19 On August 9, 2007, the WSP website posted a letter concerning “error recently
20 discovered in the calculation of external standard solution reference values.” Ex. 11.
21 This widespread error involved all .08 simulator solutions prepared and tested between
22 August 2005, and August 2007. According to the letter, a software program used by
23 the state toxicology lab to calculate the mean and standard deviation of the simulator

1 solution results was not calculating the results of “all” analysts. The program
2 calculated the results of only 12 analysts, although all 16 analysts’ results should have
3 been included in the calculation.

4 According to the “*Procedure for the Preparation of 0.08 Simulator External*
5 *Standard Solution for use with a Breath Test Instrument,*” the method approved by the
6 State Toxicologist, it is necessary that:

7 “[t]he average of the results from **all** of the analysts are computed (rounded to
8 four decimal places). The standard deviation and relative standard deviation
(CV) on all results are computed...**The solution is acceptable for use and**
9 **therefore certified** if it meets the following criteria:

- 10 (i.) The average solution concentration is between 0.098 and 0.108 g/100
mL inclusive and
(ii.) The CV is 5% or less.”

11 Ex. 12. (emphasis added). The simulator solution used in the defendant’s case was
12 identified in the letter as one for which the average was miscalculated. It should be
13 noted that the August 9th letter is unsigned, and although it indicates calculations were
14 redone to include all analysts, no analyst with the requisite permits certified these
15 recalculations, let alone three analysts—as required.² Ex. 11, 12. Thus, the simulator
16 solution used in this breath test has never been shown to be “acceptable for use and
17 therefore certified” because the original certifications did not include the results of all
18 analysts, and the results stated in the August 9th letter are not certified.

19 On September 10, 2007, Ted Vosk, of counsel to Callahan Law, cross examined
20 lab analysts Jayne Clarkson (Thatcher) and Melissa Pemberton during a Department
21 of Licensing suspension hearing. During the hearing, Thatcher admitted that she
22

23
2. The letter also disclosed that eight breath test results were overstated because of the calculation error.

1 relied on the computer's calculations without independently checking the statistics
2 before certifying the results:

3 Q. Okay. And the statistics are pretty important, right?

A. Yes.

4 Q. Because they are – they give you the numbers you need to know in order
to comply with Step 5 in the certification, don't they?

5 A. Yes, they do.

6 Q. And I guess Step 6 as well. And so without those numbers you can't sign
– at the very least, you can't sign the declaration.

A. Correct.

7 Q. Did you ever go back through and check the numbers by hand?

A. Did I do the math on these?

8 Q. Yeah.

A. No, I didn't.

9 Q. Do you know how to do the math?

A. Yeah.

10 Ex. 13, (DOL Transcript), p. 42-43.

11 Melissa Pemberton, lab supervisor, also admitted that when signing simulator
12 solution certifications, she relies on the statistics on the results form to ensure the CV
13 is within 5% or less, and that the average is between .098 and .108. Ex. 13, p. 98-99.
14 Further, she indicated that she has never double-checked the calculations, yet she has
15 testified in court with respect to them. Ex. 13, p. 98-99. Upon further questioning, she
16 admitted to making an unqualified statement of fact:

17 Q. Okay. And you're pretty much in your declaration, when your [sic] testify,
18 you're making an unqualified statement of fact? You're not saying, well maybe,
well this, your saying this is what's happening?

19 A. Yes.

20 Q. Because you didn't double-check the calculations by the computer, in fact
you didn't actually know whether that was the case?

A. In that regards, yes.

21 Q. Do you know how the – do you know how to do the calculations that
would be required?

22 A. No, I do not. I've not seen those calculations. I would be able to guess,
but I would not – I've never done them.

1 Ex. 13, 99-100. Thus, the lab supervisor admitted she didn't even know how to perform
2 the very calculations she was certifying under penalty of perjury.

3 Public disclosure responses from the WSP reveal that Gordon ruled the lab with
4 an iron fist. According to WSP documents, she had been admonished for being moody,
5 dismissive and demeaning to her staff, creating an environment "verging on hostile." Ex.
6 14. She allegedly called a member of her staff a "drug addict" on several occasions, and
7 was told that her "inappropriate use of profanity" was unacceptable. Ex. 14. The
8 documents indicate she was reprimanded in writing for favoritism of some, while others
9 were "ridiculed," and the target of "derisive comments." Ex. 14. Reportedly, when angry,
10 she would "invade their personal space" and threaten new employees on probation that
11 "their jobs were in her hands." Ex. 14.

12 According to a September 20, 2007, Spokesman-Review article, a 2004 audit of
13 the lab revealed that "WSP policies and required procedures appear to be of secondary
14 concern to lab personnel," and that "[a]ccurate record-keeping and quarterly auditing as
15 required by Patrol policies and CALEA standards is severely deficient."³ Auditors also
16 noted that Gordon had not filed proper forms for destruction of blood evidence, had
17 failed to track public records requests, was "resistant to change", and that she was
18 supposedly too "busy" to follow the lab procedures the WSP required. *Id.*

19 ARGUMENT

20 A. INTRODUCTION

21 All toxicologists employed by the state lab swore under penalty of perjury,
22 pursuant to CrRLJ 6.13(b) and RCW 9A.72.085, that:

23 _____
3. http://www.spokesmanreview.com/tools/story_breakingnews_pf.asp?ID=11606

1 "I examined and tested this solution. It was found to conform to those standards
2 established by the state toxicologist for the certification of simulator solution."

3 According to the August 9th letter, these solutions were later found NOT to conform to
4 the standards established by the state toxicologist. Under our law, when a person
5 swears something to be true, the person must have knowledge that what they swear to
6 is actually true.

7 "Every unqualified statement of that which one does not know to be true *is*
8 ***equivalent to a statement of that which he knows to be false.***"

9 RCW 9A.72.080 (emphasis added.) Like DUI, this is a strict liability offense; no intent
10 to deceive is required. This law serves to deter carelessness on the part of a witness.
11 The purpose behind making a witness swear under penalty of perjury is to impress
12 upon the witness the seriousness of the oath and the care that must be given with
13 regard to the statements they are about to make. Failing to take the oath seriously,
14 out of carelessness, is an offense, just as much as intentionally lying under oath.

15 The simulator solution calculation errors were not discovered for two years.
16 Thus, all .08 simulator solutions, prepared over a two year period, did not meet the
17 standards required by the state toxicologist. ***For more than two years, tens of***
18 ***thousands of persons have been convicted of DUI, Physical Control, or have***
19 ***pled to reduced charges, based on unqualified statements, sworn under penalty***
20 ***of perjury, by government witnesses who had no personal knowledge of that***
21 ***which they testified or swore.*** In addition, we have found that toxicology lab
22 analysts have certified solutions before they were even prepared. Ex. 10. They have
23 also certified Quality Assurance solutions with incorrect calculations. Ex 8, 9.

1 The carelessness, sloppiness and negligence of the analysts at the toxicology
2 lab rob the lab of any credibility whatsoever, regardless of intent. Perjury isn't the only
3 illness here, it is the symptom of a much more sinister disease. The lab wears a public
4 face that presents an aura of scientific authority and credibility. Behind that mask is
5 sloppiness, carelessness, incompetence, the failure to adhere to the most basic
6 scientific methods and principles, and the willingness to cut corners where the liberty
7 of our citizens is at stake.

8 B. DUE PROCESS

9 "A citizen has the right to expect fair dealing from his government." *S & E*
10 *Contractors, Inc. v. U. S.*, 406 U.S. 1, 10 (1972). "Preservation of the individual
11 citizen's confidence in government is [of the highest] important[ce]." *First Nat. Bank of*
12 *Boston v. Bellotti*, 435 U.S. 765, 789 (1978). Accordingly, strict safeguards govern
13 both knowing and unknowing use of perjured testimony. Due Process,

14 "is a requirement that cannot be deemed to be satisfied by mere notice and
15 hearing if a state has contrived a conviction through the pretense of a trial which in
16 truth is but used as a means of depriving a defendant of liberty through a
17 deliberate deception of court and jury by the presentation of testimony known to be
18 perjured. Such a contrivance by a state to procure the conviction and
19 imprisonment of a defendant is inconsistent with the rudimentary demands of
20 justice as is the obtaining of a like result by intimidation. And the action of
21 prosecuting officers on behalf of the state, like that of administrative officers in the
22 execution of its laws, may constitute state action within the purview of the
23 Fourteenth Amendment."

19 *Mooney v. Holohan*, 294 U.S. 103, 112-3, 55 S. Ct. 340 (1935). Furthermore,

20 "The ultimate mission of the system upon which we rely to protect the liberty of the
21 accused as well as the welfare of society is to ascertain the factual truth, and to do
22 so in a manner that comports with due process of law as defined by our
23 Constitution. ***This important mission is utterly derailed by unchecked lying
witnesses, and by any law enforcement officer or prosecutor who finds it
tactically advantageous to turn a blind eye to the manifest potential for
malevolent disinformation...The prosecuting attorney represents a
sovereign whose obligation is to govern impartially and whose interest in a***

1 **particular case is not necessarily to win, but to do justice.** It is the sworn duty
2 of the prosecutor to assure that the defendant has a fair and impartial trial.”

3 *Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1114-6 (9th Cir.
4 2001) (emphasis added.)

5 Due process is not satisfied “when the State, although not soliciting false
6 evidence, allows it to go uncorrected when it appears.” *Napue v. Illinois*, 360 U.S. 264,
7 269, 79 S. Ct. 1173 (1959). It is well “established that the fourteenth amendment
8 forbids ‘fundamental unfairness in the use of evidence whether true or false.’” *Blackburn*
9 *v. State of Ala.*, 361 U.S. 199, 206 (1960) (citing, *Lisenba v. People of State of*
10 *California*, 314 U.S. 219, 236, 62 S. Ct. 280 (1941)). Due process is violated where a
11 practice fails to adhere to those “fundamental conceptions of justice which lie at the base
12 of our civil and political institutions and which define the community’s sense of fair play
13 and decency.” *U. S. v. Lovasco*, 431 U.S. 783, 790 (1977) (citations omitted); *Brown v.*
14 *State of Mississippi*, 297 U.S. 278, 286 (1936).

15 Our United States Supreme Court spoke strongly against the use of false
16 testimony:

17 False testimony in a formal proceeding is intolerable. We must neither reward nor
18 condone such a “flagrant affront” to the truth-seeking function of adversary
19 proceedings. See *United States v. Mandujano*, 425 U.S. 564, 576-577, 96 S.Ct.
20 1768, 1776, 48 L.Ed.2d 212 (1976). See also *United States v. Knox*, 396 U.S. 77,
21 90 S.Ct. 363, 24 L.Ed.2d 275 (1969); *Bryson v. United States*, 396 U.S. 64, 90
22 S.Ct. 355, 24 L.Ed.2d 264 (1969); *Dennis v. United States*, 384 U.S. 855, 86 S.Ct.
23 1840, 16 L.Ed.2d 973 (1966); *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468, 82
L.Ed. 607 (1938); *United States v. Kapp*, 302 U.S. 214, 58 S.Ct. 182, 82 L.Ed. 205
(1937); *Glickstein v. United States*, 222 U.S. 139, 141-142, 32 S.Ct. 71, 72-73, 56
L.Ed. 128 (1911). **If knowingly exploited by a criminal prosecutor, such
wrongdoing is so “inconsistent with the rudimentary demands of justice”
that it can vitiate a judgment even after it has become final.** *Mooney v.*
Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 341, 79 L.Ed. 791 (1935). In any
proceeding, whether judicial or administrative, deliberate falsehoods “well may

1 affect the dearest concerns of the parties before a tribunal," *United States v.*
2 *Norris*, 300 U.S. 564, 574, 57 S.Ct. 535, 539, 81 L.Ed. 808 (1937), and may put
3 the factfinder and parties 'to the disadvantage, hindrance, and delay of ultimately
4 extracting the truth by cross examination, by extraneous investigation or other
5 collateral means.' *Ibid.* Perjury should be severely sanctioned in appropriate
6 cases.

7 *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 323, 114 S. Ct. 835, (1994)
8 (emphasis added).

9 Moreover, "the gravest consequence of lying under oath is the affront to the law
10 itself." *Id.* 510 U.S. at 326, J. Kennedy, concurring. When government witnesses are
11 given license to swear to unqualified statements, the citizens can have no confidence
12 whatsoever in their courts:

13 Agency action or inaction that undermines and dishonors that process
14 undermines and dishonors the legal system--undermines and dishonors the
15 courts. Judges may properly protest, no matter how lawful (and hence
16 unreversible) the agency action or inaction may be. Such a protest is called for
17 in the present case, in which the Board has displayed--from its initial decision
18 through its defense of that decision in this Court--an unseemly toleration of
19 perjury in the course of adjudicative proceedings.

20 *Id.* 510 U.S. at 326-27, J. Kennedy, concurring. Because of this "grave consequence
21 to the law" and to the very legitimacy of the courts, courts must exercise their power to
22 deter false testimony.

23 The principle that a perjurer should not be rewarded with a judgment--even a
judgment otherwise deserved--where there is discretion to deny it, has a long
and sensible tradition in the common law. The "unclean hands" doctrine "closes
the door of a court of equity to one tainted with inequitableness or bad faith
relative to the matter in which he seeks relief, however improper may have been
the behavior of the defendant." *Precision Instrument Mfg. Co. v. Automotive
Maintenance Machinery Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 997, 89 L.Ed.
1381 (1945) (denying relief because of perjury). See H. McClintock, *Principles of
Equity* § 26, p. 63, and n. 75 (2d ed. 1948).

1 *Id.* at 329-330, J. Scalia, concurring. Thus, the appropriate response is dismissal of
2 this case.

3 Gordon, as lab manager, set the example for her subordinates and created the
4 culture in which they operated. She had no respect for the solemn oath that we, as
5 citizens, court officers and judges, rely upon. Her leadership created a culture of
6 disrespect for scientific precision and for the law in the toxicology lab. Combine this
7 culture of carelessness with the overt message to lab employees that it is acceptable to
8 sign, under oath, that you tested something when you didn't, along with the apparent
9 hostile environment that kept the analysts in fear of their jobs, and a very sinister
10 situation emerges.

11 The gravest consequence of lying under oath is the affront to the law itself. A
12 perjurer should not be rewarded with a judgment—even a judgment otherwise
13 deserved. The court must not present an unseemly toleration of perjury. Accordingly,
14 this case must be dismissed; if not, false testimony will not be deterred and the very
15 legitimacy of our system of justice will be lost.

16 C. PROSECUTORIAL MISCONDUCT

17 A prosecutor is more than a mere advocate for the state. A prosecutor is a
18 representative of the government. As such, a prosecutor is obligated to ensure that
19 the accused receives a fair trial.

20 The question is not whether the defendant would more likely have received a
21 different verdict with the evidence, but whether, in its absence he received a fair
22 trial, understood as a trial resulting in a verdict worthy of confidence.

23 *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 629, 79 L. Ed. 2d, 490 (1995). The
prosecutor's duty is not that he or she should win the case, but that justice should be

1 done. *Berger v. U.S.*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). “The duty
2 of the prosecutor is to seek justice, not merely to convict.” See ABA Standards for
3 Criminal Justice § 3-1.2(c) (3d Ed. 1993). “A trial is not a sporting contest, and the
4 defendant is not a pawn in a game of chess.” *Prosecutorial Misconduct*, 2d. Ed.,
5 Bennett L. Gershman (2007) (citing *Giles v. State of Md.*, 386 U.S. 66, 100, 87 S. Ct.
6 793, 17 L. Ed. 2d 737 (1967)).

7 Deputy prosecutors may believe they are shielded from the rule because they
8 are acting in accord with their supervisor’s instructions. Such is inadvisable. The
9 disciplinary rule providing that a subordinate lawyer does not violate the Rules of
10 Professional Conduct, if that lawyer acts in accordance with a supervisory lawyer’s
11 reasonable resolution of an arguable question of professional duty, must be read in
12 connection with the rule which directs that a lawyer is bound by the Rules,
13 notwithstanding that the lawyer acted at the direction of another person; the rule is not
14 meant to immunize attorneys from accountability for their misconduct. *Matter of*
15 *Howes*, 123 N.M. 311, 940 P.2d 159 (1997).

16 1. Discovery Obligations

17 A prosecutor’s duty extends even to the obligation to assist a defendant in
18 obtaining exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.
19 Ed. 2d 215 (1963). This includes impeachment evidence, such as prior false
20 testimony. *Bennett v. U.S.*, 797 A.2d 1251 (D.C. Cir. 2002); *U.S. v. Cuffie*, 80 F.3d
21 514 (D.C. Cir. 1996).

22 The jury’s estimate of truthfulness and reliability of a given witness may well be
23 determinative of guilt or innocence.

1 *Napue*, 360 U.S. at 265. A prosecutor is held to “know” of evidence in the possession
2 of other government agencies involved in the investigation, and this imputed
3 knowledge extends to materials “in the possession of some arm of the state.” *U.S. v.*
4 *Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991); *U.S. v. Risha*, 445 F.3d 298 (3d. Cir.
5 2006); *U.S. v. Wood*, 57 F.3d 733 (9th Cir. 1995). Thus, statewide, in every DUI case,
6 prosecutors should be providing defense counsel, and pro-se defendants, materials
7 related to the alleged perjury of Ann Marie Gordon, and the analysts at the toxicology
8 lab, who signed unqualified statements of fact, in violation of RCW 9A.72.080.
9 Prosecutors in few, but not all jurisdictions are doing this.

10 2. Use of False Testimony at Trial

11 A prosecutor’s deliberate use of perjured testimony to obtain a conviction
12 violates due process and denies the defendant a fair trial. *Mooney*, 294 U.S. 103. The
13 *Mooney* Court noted:

14 The deliberate deception of court and jury by the presentation of testimony
15 known to be perjured is inconsistent with the rudimentary demands of justice.

16 *Id.* 294 U.S. at 112. Due process is violated when a prosecutor fails to correct false
17 testimony, even when it relates solely to a witness’s credibility. *Napue*, 360 U.S. at
18 264. The *Napue* Court wrote:

19 The principle that a State may not knowingly use false evidence, including false
20 testimony, to obtain a tainted conviction, implicit in any concept of ordered
21 liberty, does not cease to apply merely because the false testimony goes only to
22 the credibility of the witness. The jury’s estimate of the truthfulness and reliability
23 of a given witness may well be determinative of guilt or innocence, and it is upon
such subtle factors as the possible interest of the witness in testifying falsely that
a defendant’s life or liberty may depend.

1 *Id.* 360 U.S at 269. A prosecutor has a “special duty” not to mislead. *Prosecutorial*
2 *Misconduct 2. Ed.*, at 416 (citing *U.S. v. Myerson*, 18 F.3d 153, 40 Fed. R. Evid Serv.
3 601 (2d Cir. 1994).

4 “The prosecutor, in the interest of justice, must act impartially, and his trial
5 behavior must be worthy of the position he holds...some prosecutors continue to
6 use improper, sometimes prejudicial means in an effort to obtain convictions...(i)f
7 prosecutors are permitted to convict guilty defendants by improper, unfair means,
8 then we are but a moment away from the time when prosecutors will convict
9 innocent defendants by unfair means...Such officers are reminded that a
10 fearless, impartial discharge of public duty, accompanied by a spirit of fairness
11 toward the accused, is the highest commendation they can hope for. Their
12 devotion to duty is not measured, like the prowess of the savage, by the number
13 of their victims.”

14 *State v. Charlton*, 90 Wn.2d 657, 664-665 (1978).

15 A prosecutor’s use of false evidence violates the Rules of Professional Conduct.

16 “A lawyer may not offer evidence that the lawyer knows to be false.” RPC 3.3(a)(4).

17 Violation of this rule has resulted in severe sanctions including suspension of the
18 lawyer’s license to practice. *In re Disciplinary Proceedings Against Dornay*, 160
19 Wash.2d 671, 161 P.3d 333 (2007); *In re Disciplinary Proceedings Against Bonet*, 144
20 Wash.2d 502, 29 P.3d 1242 (2001); *In re Disciplinary Proceeding Against Christopher*,
21 153 Wash.3d 669, 105 P.3d 976 (2005).

22 When a prosecutor suspects perjury, the prosecution must, at the very least,
23 investigate. The duty to act is not discharged by attempting to finesse the problem by
pressing ahead without a diligent and good faith attempt to resolve it. A prosecutor
cannot avoid this obligation by refusing to search for the truth and by remaining willfully
ignorant of the facts. *Northern Mariana Islands v. Bowie*, 243 F.3rd 1109, 118 (9th Cir.
2001). This principle is supported by *Mooney, supra*, and *Napue v. Illinois*, 360 U.S.

1 264, 79 S. Ct. 1173 (1959) (the prosecution has the responsibility and duty to correct
2 what he knows to be false and elicit the truth).

3 To prosecute a DUI case with the use of person's a breath test result, the
4 prosecution must either present testimony that the simulator solution was certified, or
5 pursuant to CrRLJ 6.13(c)(1), present a certification concerning the simulator solution.
6 However, we know that analysts at the lab signed certifications concerning the
7 solutions listed in the August 9th letter, stating that the solutions did "conform to the
8 standards established by the state toxicologist" when in fact, they did not. Thus, all the
9 analysts who certified the batches in question made unqualified statements in violation
10 of RCW 94.72.080. Accordingly, a prosecutor cannot proffer such testimony by the
11 analyst, or the certification, without suborning perjury. In any case where the
12 prosecutor even proposes to admit such evidence, the case must be dismissed for
13 violation of due process and the defendant's right to a fair trial, and the prosecutor is
14 subject to discipline.

15 D. DISMISSAL UNDER CrRLJ 8.3

16 1. Dismissal based on the fraud of the state toxicology lab.

17 CrRLJ 8.3 (b) authorizes a trial court to dismiss any criminal prosecution in the
18 furtherance of justice, and to ensure that an accused person is treated fairly. The rule
19 reads, in part, as follows:

20 The Court, in the furtherance of justice after notice and hearing, may
21 dismiss any criminal prosecution due to arbitrary action or government
22 misconduct when there has been prejudice to the rights off the accused
23 which materially affect the accused's right to a fair trial.

1 Thus, a court may require dismissal under CrRLJ 8.3 when the defendant
2 shows: (1) governmental misconduct; and (2) prejudice affecting the defendant's rights
3 to a fair trial. *State v. Michielli*, 132 Wn.2d 229 (1997).⁴

4 Courts have held that simple case mismanagement falls within the standard of
5 government misconduct. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017
6 (1993); *and, State v. Sulgrove*, 19 Wn. App. 860, 863, 578 P.2d 74 (1978). Moreover,
7 the misconduct need not be intentional, evil, or dishonest; simple mismanagement is
8 indeed sufficient. *State v. Sherman*, 59 Wn. App. 763, 801 P.2d 274 (1990); *and,*
9 *State v. Dailey*, 93 Wn.2d 454, 610 P.2d 357 (1980).

10 CrRLJ 8.3 (b) exists to ensure fairness to the defendant. *State v. Stephans*, 47
11 Wn. App. 600, 603, 736 P.2d 302 (1987). It provides a trial court with the authority to
12 dismiss any criminal prosecution in the furtherance of justice and to ensure that an
13 accused person is treated fairly. *State v. Wilke*, 28 Wn. App. 590, 624 P.2d 1176
14 (1981).

15 In *State v. Sulgrove*, 19 Wn. App. at 861, the defendant was charged under the
16 wrong statute and moved for dismissal. The State then moved to amend the charge,
17 prompting the defendant to seek additional discovery. *Id.* 28 Wn. App. at 862. The
18 appellate court affirmed the trial court's dismissal of the case pursuant to CrR 8.3 (b),
19 finding carelessness and misconduct on the part of the State in failing to allege the
20 offense properly and in failing to marshal admissible evidence. *Id.* 28 Wn. App. at 863.
21 *See also, State v. Stephans, supra* (1987) (misconduct element met where witnesses
22 disobeyed a court order, where there was no indication that the State was ready for
23

4. Cases discussing both CrRLJ 8.3 (b) and its superior court counterpart, CrR 8.3 (b) will be discussed

1 trial, and where no remedy would have served interests of justice short of a dismissal);
2 and *State v. Dailey, supra* (trial court's dismissal of negligent homicide charge due to
3 simple mismanagement by State affirmed).

4 Turning to the present case, the misconduct is egregious. First and foremost,
5 the prosecution intends to admit false evidence: testimony concerning the certification
6 of the simulator solution. Where a government agent in a case against a criminal
7 defendant has falsely declared under penalty of perjury that they faithfully administered
8 their duties, as a predicate to securing admissible evidence at trial, then the resulting
9 misconduct eviscerates the defendant's rights to due process and a fair trial. See,
10 *State v. Marks*, 114 Wn.2d 724, 730, 790 P.2d 138 (1990).

11 We know that the government agents in this case have also falsely declared
12 under penalty of perjury that they faithfully administered their duties, as a predicate to
13 securing admissible evidence at trial. Moreover, Gordon's and the rest of the
14 toxicology lab's conduct far exceeds simple mismanagement and is so egregious as to
15 taint the entire proceeding, making a fair trial impossible.

16 The prosecution cannot escape the taint of this misconduct under the guise that
17 it was initiated by someone outside the prosecutor's office. The government is not
18 excused from its obligations where the evidence or testimony emanates from a third
19 party, especially where that party is a government actor. See, *State v. Sherman*, 59
20 Wn. App. 763, 801 P.2d 274 (1990). Dismissal of charges is appropriate when the
21 potentially "credible" and "admissible" evidence is tainted by the governmental
22 misconduct. *Marks*, at 730.

23 here without further mention, as the two rules have, insofar as is pertinent here, comparable provisions.

1 The second element the defendant must show is prejudice that affects the
2 defendant's rights to a fair trial. *State v. Baker*, 78 Wn.2d 327, 332-33, 474 P.2d 254
3 (1970); *State v. Blackwell, supra*, 120 Wn.2d at 831. It has long been recognized that
4 a defendant has a valued right to a fair trial. *Michielli, supra*. The right to a fair trial
5 simply cannot be disputed without degrading over a hundred years of jurisprudence.
6 The denial of the right to a fair trial prejudices the defendant.

7 A fair trial cannot be had when the prosecution relies on evidence tainted by
8 governmental misconduct. *Mooney*, 294 U.S. 103. In *Mooney*, the United States
9 Supreme Court originated the rule that a conviction obtained through the use of
10 perjured testimony violates due process. The *Mooney* court reasoned that a
11 conviction obtained through "deliberate deception of court and jury...is...inconsistent
12 with the rudimentary demands of justice." *Id.* 294 U.S. at 112.

13 Similarly, our own state courts have held that is fundamental that the prosecution
14 should not present evidence which it knew or suspected to be perjury. *State v. Carr*,
15 13 Wn. App. 704, 706, 537 P.2d 844 (1975), *citing United States v. Hart*, 344 F. Supp.
16 522 (E.D.N.Y. 1971).

17 Gordon, and the other lab analysts' misconduct, accompanied by the
18 prosecutor's intention to present false testimony to obtain a conviction in this case, is
19 absolutely inconsistent with the most rudimentary demands of justice, in violation of
20 the defendant's right to a fair trial. Further, the carelessness, sloppiness and utter
21 disregard for scientific precision and the law by our government has prejudiced the
22 defendant's right to a fair trial. What other errors, scientific or otherwise have tainted
23

1 the prosecution's evidence? What will be discovered tomorrow that will be used to
2 convict someone today?

3 The court has an obligation to uphold the integrity of the judicial process and
4 protect our system of justice. Only the court can send the message that the toxicology
5 lab so needs to hear: misconduct and sloppy science will lead to dismissal of cases.
6 Only the court can send the message to all government witnesses: perjury and false
7 swearing will NOT be tolerated. Only if the court does, will the citizenry's faith be
8 restored. Dismissal under CrRLJ 8.3 should be granted.

9 E. RCW 46.61.506(4)(b) IS UNCONSTITUTIONAL AS APPLIED

10 In 2004, the legislature amended RCW 46.61.506(4)(b) to provide:

11 For purposes of this section, "prima facie evidence" is evidence of sufficient
12 circumstances that would support a logical and reasonable inference of the facts
13 sought to be proved. In assessing whether there is sufficient evidence of the
14 foundational facts, the court or administrative tribunal ***is to assume the truth of
the prosecution's or department's evidence and all reasonable inferences
from it in a light most favorable to the prosecution or department.***

15 (emphasis added.) Thus, the law requires the court to assume the truth of the
16 prosecution's evidence, in spite of the fact that we are certain of the falsity of the
17 evidence.

18 However, "a fair trial in a fair tribunal is a basic requirement of due process." *State*
19 *v. Moreno*, 147 Wn.2d 500, 507 (2002). "This applies to administrative agencies which
20 adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456
21 (1975). "The presentation of false evidence violates due process." *Phillips v. Woodford*,
22 267 F.3d 966, 984-5 (9th Cir. 2001).

23 "A statute constitutional on its face may violate constitutional rights in its
application." *Hontz v. State*, 105 Wn. 2d 302, 305 (1986). "An as-applied challenge to

1 the constitutional validity of a statute is characterized by a party's allegation that
2 application of the statute in the specific context of the party's actions...is
3 unconstitutional." *City of Redmond v. Moore*, 151 Wn.2d 664, 668-9 (2004); *Washington*
4 *State Republican Party v. Washington State Public Disclosure Com'n*, 141 Wn.2d 245,
5 282 n.14 (2000). Finding a statute unconstitutional as-applied does not render it
6 inoperable, it simply "prohibits...application of the statute in [that particular] context."
7 *Moore*, 151 Wn.2d at 669; *In re Detention of Turay*, 139 Wn.2d 379, 417 n.27 (1999).

8 RCW 46.61.506(4)(b) is clearly unconstitutional as applied, because it requires the
9 court to "assume the truth" of false evidence, in violation of due process, the defendant's
10 right to a fair trial, and in violation of even the most rudimentary demands of justice.

11 F. SCIENCE, ER 702, ER 703, RCW 46.61.506(3) AND THE WEIGHT OF THE
12 EVIDENCE

13 We know that the legislature delegated authority to the state toxicologist to
14 approve "satisfactory techniques or methods" for "valid" analysis of a person's breath
15 or blood. RCW 46.61.506(3). One of the methods approved is the "*Procedure for the*
16 *Preparation of 0.08 Simulator External Standard Solution for Use with a Breath Test*
17 *Instrument.*" Ex. 12. The method is scientific in nature. To certify the solution,
18 analysts are required to make computations of the average, standard deviation and
19 relative standard deviation of the results of all analysts. Ex. 12. These computations
20 serve to confirm the results of the other analysts.

21 Confirmation and the archiving of data are important precepts in science:

22 "Science is a social enterprise, and scientific work tends to be accepted by
23 the community when it has been confirmed. Crucially, experimental and
theoretical results must be reproduced by others within the science
community....To protect against bad science and fraudulent data,
government research granting agencies like NSF and science journals like

1 Nature and Science have a policy that researchers must archive their data
2 and methods so other researchers can access it, test the data and methods
3 and build on the research that has gone before.⁵

4 Thus, it is not surprising that the state toxicologist required that the results of **all**
5 analysts testing the solution be computed before the solution can be certified and valid
6 for use. And further, that the results of each analyst be recorded in the “solution
7 certification database,” before the solution can be certified, valid and “provided for use
8 to the BAC technicians for use with the breath test instruments.” Ex. 12.

9 In *City of Fircrest v. Jensen*, the court held that the weight of the breath test
10 result must be considered, if challenged, and the result may be suppressed under the
11 rules of evidence:

12 “...once reliability of the test is established by a prima facie showing from the
13 state, all other challenges concerning the accuracy or reliability of the test, the
14 testing instrument, or the maintenance procedures necessarily go to the weight
15 of the test result. The court may still utilize the rules of evidence, including ER
16 702, to determine if the BAC results should be admitted.

17 158 Wn.2d 384, 143 P.3d 776 (2006). Thus, even though the prosecution has made a
18 prima facie showing, the court must consider challenges to the weight of the breath
19 test evidence before such evidence is admitted under the rules of evidence. In this
20 case, the breath test result should be given no weight whatsoever. This is so because
21 ER 702 and 703, along with RCW 46.61.506(3), prohibit the testimony of analysts from
22 the toxicology lab who tested the simulator solution batch at issue.

23 5. http://en.wikipedia.org/wiki/Scientific_method#Testing_and_improvement

1 Concerning ER 702, we know that “[o]nce a methodology is accepted in the
2 scientific community, application of the science to a particular case is a matter of
3 weight and admissibility under ER 702.” *State v. Gregory*, 158 Wn.2d 759, 829 (2006)
4 (emphasis added). “If scientific, technical, or other specialized knowledge will assist
5 the trier of fact to understand the evidence or to determine a fact in issue, a witness
6 qualified as an expert...may testify thereto in the form of an opinion.” ER 702. “In the
7 case of scientific testimony, the expert (1) must qualify as an expert...[and] (3) the
8 testimony must be helpful to the trier of fact...[a]nd, of course, the testimony must be
9 relevant.” *State v. Cheatam*, 150 Wn.2d 626, 645 (2003) (*citations omitted*).

10 “When determining the admissibility of expert testimony...evidence is helpful if
11 the testimony concerns matters beyond the common knowledge of the average
12 layperson, and does not mislead the jury to the prejudice of the opposing party.” *State*
13 *v. Guilliot*, 106 Wn. App. 355, 363 (2001); *State v. Thomas*, 123 Wn. App. 771, 778
14 (2004). The determination “requires the trial court to assess whether the reasoning or
15 methodology underlying the testimony is scientifically valid and ... whether that
16 reasoning or methodology properly can be applied to the facts in issue.” *Reese v.*
17 *Stroh*, 74 Wn. App. 550, 560 (1994) *affirmed* 128 Wn.2d 300 (1995) (emphasis added).

18 Accordingly, “[a]n expert’s testimony should not exceed the limits of the
19 underlying science or art” upon which he is basing his testimony. *TEGLAND*, § 702.18, at
20 66. Moreover, the subject matter upon which an expert gives an opinion must lie within
21 his actual area of expertise. *Dobias v. Western Farmers Ass’n*, 6 Wn. App. 194, 197
22 (1971).

23 In addition, “[u]nder ER 703, expert testimony must be based on sufficient

1 foundational facts to support the expert's opinion." *State v. Pittman*, 88 Wn. App. 188,
2 198 (1997). "The closer the tie between an opinion and the ultimate issue of fact, the
3 stronger the supporting factual basis must be." *State v. Farr-Lenzini*, 93 Wn. App. 453,
4 460 (1999). This rule "permits the trial judge to assess the reliability of the underlying
5 facts or data upon which the expert's opinion is based." *State v. Maule*, 35 Wn. App.
6 287, 295 (1983). "Where there is no basis for the expert opinion other than theoretical
7 speculation, the expert testimony should be excluded." *Queen City Farms, Inc. v.*
8 *Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 103 (1994). "[W]hen ruling on
9 somewhat speculative testimony, the court should keep in mind the danger that the jury
10 may be overly impressed with a witness possessing the aura of an expert." *Miller v.*
11 *Likins*, 109 Wn. App. 140, 148 (2001)(*citations omitted*).

12 We know that, for two years, no analyst at the toxicology lab actually "confirmed"
13 the results of all the analysts, in violation of the approved method of the state
14 toxicologist, and in violation of basic and fundamental scientific practices. What is
15 even worse, the supervisor at the toxicology lab admitted, under oath, that she doesn't
16 even know how to perform the computations that would "confirm" these results. Ex.
17 13, p. 99-100. Testimony, or certifications, by this person, Melissa Pemberton, will
18 never meet the requirements of ER 702 or 703. Her testimony has no foundation in
19 knowledge and is merely speculative, because she does not even know how to
20 perform such computations. *Id.*

21 Moreover, any analyst from the toxicology lab certifying, or testifying concerning
22 the simulator solution lacks credibility, given their carelessness, sloppiness and failure
23 to follow the toxicologist's approved scientific procedure, not to mention their

1 willingness to sign, under penalty of perjury, statements that have been proven to be
2 false. Thus, the testimony of any analyst from the toxicology lab concerning the
3 certification of the simulator solution should be excluded under ER 702, because such
4 testimony will never, under any circumstance, assist the trier of fact. Further, such
5 testimony should be excluded under ER 703 because toxicology lab witnesses testify
6 with the aura of scientific authority, with the danger of over-impressing the jury, when
7 clearly, their knowledge is merely speculative. It is speculative because no analyst
8 actually confirmed that the results of all analysts were within the requirements of the
9 state toxicologist.

10 The breath test in this case is invalid, having not been performed according to
11 the methods of the state toxicologist. RCW 46.61.506(3). Further, the breath test
12 cannot be admitted because no expert can testify, pursuant to ER 702 and 703, that
13 the simulator solution was duly certified, because of carelessness and the failure to
14 adhere to the approved methods of the state toxicologist. For these reasons, the
15 breath test in this case carries no weight whatsoever, pursuant to the rules of evidence
16 and *Jensen*. The breath test result is inadmissible under ER 702, 703, irrelevant under
17 ER 402, prejudicial under ER 403, and invalid under 46.61.506(3), which provides:

18 “[a]nalysis of the person’s blood or breath *to be considered valid*...shall have
19 been performed according to the methods approved by the state toxicologist...”

20 RCW 46.61.506(3) (emphasis added.)

21 **CONCLUSION**

22 The prosecution may take the position that simply recalculating the testing results
23 remedies the problem and renders these cases viable for prosecution. This approach
merely ratifies Gordon and the remaining analyst’s misconduct, and creates an

1 environment that permits prosecutorial misconduct and government deception, as long
2 as it does not affect the accuracy of the results. This “so what” attitude sends a loud
3 message to all government witnesses: you can lie under oath when a conviction is at
4 stake and it won’t affect the outcome.

5 When government scientists become mere cops in white coats, our justice system
6 is not just flawed, it is broken. Perhaps this is to be expected when the forensic
7 scientists who work in our crime lab are conditioned to see prosecutors as “clients and
8 customers” and are commended for being “attentive to their needs.” Ex. 14.
9 Prosecutors are not our labs’ clients and customers. The citizens of the state of
10 Washington are, and as such, they deserve, and should demand, unerring honesty,
11 integrity, adherence to scientific methods, and professional responsibility from those who
12 serve them.

13 The carelessness, sloppy science and alleged perjury of all lab analysts, pursuant
14 to RCW 9A.72.080, are a wake-up call we cannot sleep through. The integrity of justice
15 is more important than drunk-driving convictions. If courts respond with a “wink and
16 nod” along with a “slap on the wrist” there will be no deterrence and government
17 witnesses will have a license to lie. Only this court can send the strongest message:
18 lying under oath is not acceptable. Only if the court does, will we recover from this
19 breach of trust.⁶

20 Dated this ____ of _____, 2007.

21 _____
22 YYY, WSBA #
23 Attorney for XXX

6. Credit to Linda Callahan, Ted Vosk and Bill Thayer as the original authors of this brief.