IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Personal Restraint of: NICHOLAS HACHENEY, Petitioner.	No. 39448-1-II ORDER WITHDRAWING OPINION IN RESPONSE TO MOTION FOR RECONSIDERATION AND FILING AMENDED OPINION

Petitioner Nicholas Hacheney filed a motion asking the court to reconsider its part published opinion filed February 1, 2012. It is hereby

ORDERED, that the part published opinion filed on February1, 2012, is withdrawn and the court's amended opinion is filed simultaneously with this order.

DATED this _____ day of _____, 2012.

_____
Van Deren, .J.

We concur:

_____
Penoyar, J.

_____
Johanson, A.C.J.

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.

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.

[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

[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.

[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.