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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

IN RE PERSONAL PETITION OF:

MARTIN A. JONES,

Petitioner.

**BRIEF OF THE INNOCENCE PROJECT AND WASHINGTON
DEFENDER ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF THE DEFENDANT MARTIN A. JONES**

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INTRODUCTION

“Expert evidence can be both powerful and quite misleading.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 595, 113 S. Ct. 2786 (1993). But not all evidence proffered as “scientific” merits being called science. The bunter mark comparison between a crime scene fired cartridge casing and an unfired cartridge casing taken from Mr. Jones’ house in this case is precisely that. A bunter is a tool used to stamp the head of a cartridge case, typically with the gun manufacturer’s logo on it. Comparisons are then made between these purportedly unique “bunter marks” on cartridge cases found at a crime scene to bunter marks on unfired cartridge cases found in possession of a suspect. The untested theory is that such a comparison is capable of identifying whether the two bunter marks were produced by the same tool, thus circumstantially linking a suspect to the crime scene.

Because a manufacturer places a bunter mark on all of the ammunition it produces, thousands of boxes of ammunition can share the same mark. Here, a novice crime laboratory analyst – who was given the imprimatur by the court of an “expert witness” and a “scientist” – testified that there was a definitive “match” between the bunter marks on the head of the shell casing found at the scene of the crime and those on the cartridges found in Mr. Jones’ home.

But as the record in this case reveals, despite the aura of science with which it was presented to the jury, the “association” between the crime scene casing and Mr. Jones’ casings was pure speculation. The analyst here was not only a novice at these comparisons, but he also took no measurements and applied no objective standards or guidelines. Rather, relying entirely on his subjective belief the analyst testified with absolute certainty that there was a “match.” Moreover, he did so under circumstances so rife with cognitive bias that permitting his testimony on that basis alone was error.

“[I]t is the Court’s role to ensure that a given discipline does not falsely lay claim to the mantle of science, cloaking itself with the aura of unassailability that the imprimatur of ‘science’ confers and thereby distorting the truth-finding process.” *Almeciga v. Ctr. for Investigative Reporting, Inc.*, 185 F. Supp. 3d 401, 415 (S.D.N.Y. 2016). Therefore, *amicus curiae*, asks that the Court vacate Mr. Jones’ conviction and remand for a new trial and an evidentiary hearing on the admissibility of the bunter mark evidence in this case.

RELEVANT FACTUAL BACKGROUND

A. Bunter Mark Evidence

A bunter is a piece of carbide that is used to stamp the head of a cartridge case. *See* Trial Tr. at 2298:2-6. An ammunition manufacturer

uses the bunter to impress its logo on the cartridge case. *Id.* at 2298:11-16. The goal of manufacturing ammunition with bunter marks is not to create individual or unique markings, but rather to make stamps as uniform as possible and to give the ammunition a consistent design. *Id.* at 2319:7-13. There is no set schedule on when a bunter is changed. *Id.* at 2299:22-2230:11. A bunter can “conceivably last forever,” but it can fail through “a wreck or crash” during the manufacturing process, or just wear out over time. *Id.* at 2299:22-5. If the bunter does not break or wreck, there is no set schedule of when a manufacturer will change it. *Id.* at 2300:6-11. Typically, a bunter will last for over six months before it has to be changed. *Id.* A bunter used for several months can be used to manufacture “millions” of cartridges. *Id.* at 2300:8-10.

B. Bunter Mark Evidence At Trial

The Washington State crime laboratory recovered a .22 caliber short shell casing from the pavement near the crime scene. *Id.* at 2234-35. Search warrants of Mr. Jones’ residence led to the discovery of a box containing cartridges of .22 caliber short cartridges made by Cascade Cartridge Incorporated (“CCI”). *See id.* at 2459-60. These were delivered to a crime laboratory analyst working for the Washington State Patrol Crime Lab, a branch of the greater Washington State Patrol, which also employed the victim in this case. *Id.* at 2476:14-25. Washington State Patrol Officers

advised the analyst that this investigation was a “top priority for the State Patrol.” *Id.* at 2476:22-2477:3. When the analyst received the crime scene evidence, he was told that the casing he received came from the crime scene, and the box of cartridges that he received from Mr. Jones’ home had “Martin Jones” clearly marked on it. *Id.* at 2506:2-4. He was provided with no other cartridges from any other box of cartridges or from any other source, apart from those taken from Mr. Jones’ home. The day after the analyst received this evidence, a State Patrol investigator sent an email to him with instructions that the Washington State Patrol wanted: “*to make a match any way possible.*” *Id.* at 2498:2-22. Because the analyst knew the case was a “top priority” for the Washington State Patrol, he “put all of [his] time and effort into this case.” *Id.* at 2477:4-8.

The analyst, however, had never conducted an analysis of bunter markings, never worked on any case pertaining to bunter marks, never conducted any research regarding bunter marks, never taken a proficiency test nor had he ever written any papers or materials regarding bunter marks. *Id.* at 2479:20-25; at 2478:23-2479:4; at 2479:5-10. Indeed, in January 2011, the analyst asked for a “timeout” during an interview with Mr. Jones’ defense attorney because he could not answer any of the attorney’s questions about his own report or the bunter mark evidence. *Id.* at 2480:15-19. The analyst admitted that due to his lack of experience with bunter

marks, he had to go back and familiarize himself prior to answering any additional questions. *Id.* at 2480:3-14.

At trial, the analyst testified that, when he performed a “side-by-side” microscopic comparison of the two bunter marks, his goal was: “to look for unique markings within that bunter mark to determine how many bunters [were] used first, and to see if that bunter marking [was] similar to the cartridge case that was picked up on the scene,” *id.* at 2462:3-8; 2464:6-11— in other words he was – as he had been urged by the Washington State Patrol – attempting to find similarities, *i.e.*, a “match”, not differences. Without specifying the number, the analyst claimed that “there [were] a lot of similarities.” *Id.* at 2569:2-5. And, while admitting that there were other marks on the shell casings that were “not similar,” he thought that “the number of similarities far exceed[ed] the number of differences.” *Id.* at 2469:6-10. Even though there were “differences,” the analyst nevertheless claimed in absolute terms based on his experience and training – which admittedly were nonexistent – that there was “sufficient agreement” to find a “positive identification; in other words, that these two were made by the same bunter.” *Id.* at 2469:17-20; 2475:20-23. Notably, the analyst failed to take into account the fact that the case mouth of the cartridge case was dented because it had been stepped on. *Id.* at 2445:20-2445:2. Although a novice, he claimed that the dent did not affect his ability to examine the

bunter mark, but failed to explain how his methodology accounted for the distortion that would have resulted from the damage. *Id.* at 2465:16-19.

Despite these serious deficiencies and his utter lack of experience, the analyst repeatedly testified to Mr. Jones' jury that he was a scientist and that bunter mark analysis was scientific evidence, and suggested there were "numerous studies" supporting the "uniqueness" of bunter marks. *See id.* at 2417:5-6 ("Q: And Mr. Schoeman, what is your occupation? A: Scientist with the Washington State Patrol Crime Lab"); *id.* at 2419-20 ("Q: And is toolmark examination or analysis based on scientific principles? A: That is correct, Yes. . . Scientific principles, there ha[ve] been various studies in the field of firearm and toolmarks over many, many years, over a hundred years, that make final toolmark, made it scientific, so that we can answer questions in the justice system or in a court of law."); *id.* at 2518: 2-10 ("Q: Is this type of analysis, although has a level of subjectivity, is it based on scientific principles? A: Yes, it is. Q. What do you mean by that? A: There has been numerous studies over the years pertaining to the uniqueness of markings. To say that the science behind firearm toolmark are sound, and can be used as evidence in court to answer questions from the Court.").

ARGUMENT

Admission of the evidence against Mr. Jones was in error for at least two reasons. First, despite the veneer of science under which it was

presented to the jury, and thus likely greatly overvalued by the jury, the procedure lacked even the basic hallmarks of reliable scientific evidence. Second, the procedure was seriously tainted by overt biasing information, rendering the analyst's conclusions unreliable.

I. The Bunter Mark Testimony Misled The Jury Through Its Veneer Of Science

A. The Bunter Mark Testimony Was Unscientific

The bunter mark analysis in this case was repeatedly presented to the jury as scientific fact. *See supra*. But that simply wasn't so. As an initial matter, the field of toolmarks generally consists of "unarticulated standards" with "no statistical foundation." Nat'l Research Council, Comm. on Identifying the Needs of the Foren. Sci. Cmty., *Strengthening Forensic Science in the United States: A Path Forward*, at 153-154 (Aug. 2009) (hereinafter "NAS Rep."). Even more fundamentally, despite the analyst's testimony to the contrary, the theory on which the bunter mark comparison rests is "not a scientific theory." President's Council of Advisors on Science and Technology, Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods, at 45 (Sept. 2016) ("PCAST Rep.") at 60; "Rather, it is a claim that examiners applying a subjective approach can accurately individualize the origin of a toolmark." *Id.*; *see United States v. Taylor*, 663 F. Supp. 2d 1170, 1177 (D.N.M. 2009) ("[T]he AFTE theory is circular. An

examiner may make an identification when there is sufficient agreement, and sufficient agreement is defined as enough agreement for an identification.”). However, a “theory” is “not what is needed.” Instead, “[w]hat is needed are empirical tests to see how well the method performs.” PCAST Rep. at 60. Such empirical tests were lacking here.

The analyst also took no measurements and produced no diagrams that might have provided an objective basis for another expert to verify his subjective conclusion of a “match”. *See, e.g., United States v. Green*, 405 F. Supp. 2d 104, 108 (2005) (noting with disapproval that the firearms expert “took no notes, recorded no measurements, made no photographs, and drew no diagrams.”). The analyst admitted that there are “no set number of markings” required to find a bunter mark match. Instead, the “theory of identification” involves assessing whether there is “sufficient agreement” of the markings present on a cartridge case. Trial Tr. at 2471:23-2472:17. In other words, the examiner made a subjective guess at a “match” with no measurements or standards to guide him or that another expert could use to try to duplicate his analysis. Indeed, the analyst admitted that there were marks he saw that were “not similar,” but he ignored them because he believed that “the number of similarities far exceed[ed] the number of differences.” *Id.* at 2469:6-10.

Finally, while “[n]othing—not training, personal experience nor professional practices—can substitute for adequate empirical demonstration of accuracy,” PCAST Rep. at 46, the examiner did not even have that minimal qualification in bunter marks. The extrapolation from an arguably established procedure, firearm analysis, to another procedure, which has no reliable basis in science was unjustified. *See United States v. Smallwood*, 5:08-cr-38, 2010 WL 4168823, at *10 (W.D. Ky. Oct. 12, 2010), *aff’d*, 456 F. App’x 563 (6th Cir. 2012) (not permitting a “likely . . . expert in firearm identification” to testify about other marks as “accuracy of [an examiner’s assessment] is *highly dependent*” on skill and training that the examiner lacked) (emphasis added); *see also General Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 519 (1997) (a trial court “may conclude that there is simply too great an analytical gap between the data and the opinion proffered”). And of course, just as the analyst had no training or experience in bunter marks, so, too, was he lacking in any objective data to inform his conclusions. He nevertheless urged the jury to accept his testimony as probative “scientific” evidence, not based on any data or empirical proof, but simply because he said so. *Cf. Joiner*, 522 U.S. at 146 (“nothing in either *Daubert* or the Federal Rules of Evidence require[d] a district court to admit the opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”).

Even others within the firearms community have rejected bunter marks as lacking probative value. As Brett Olin, a development engineer for the ammunition company at issue here, explained at trial, the same bunter is typically used for more than six months, and could be used to stamp “millions” of cartridges. Feb. 1, 2011 Trial Tr. at 2300:8-10. This industry practice clearly “reduces the probative value of microscopic examination comparing cartridge cases or cartridges.” Jason W. Crafton, *Bunter Toolmarks, Insignificant or Significant?* AFTE Journal, Vol. 36, No. 1 (Winter 2004). Moreover, “bunter toolmarks should not be used as 100% positive link between a cartridge case at a crime scene to a box of ammunition.” *Id.* “If an examiner uses bunter toolmarks, they could conclude that the cartridge case from the crime scene *could* have [come] from the suspect’s box of ammunition.” *Id.* (emphasis added). However, the examiner must also state the cartridge case could have been from *literally thousands of other boxes of ammunition produced at the same time.*” *Id.* (emphasis added).

One study concluded that “little significance or value” is gained in associating crime scene cartridge cases to cartridges from a suspect given the “large number of cartridge cases stamped and identifiable to a bunter tool in public distribution, and their prevalence in different lot numbers and at different locations.” Jordan M. Tidrick, *The Significance of Bunter*

Toolmark Association in a Limited Geographic Area, AFTE Journal, Vol. 40 No. 3, at 276 (Summer 2008). Cartridge cases found at a crime scene could as likely be connected to any customer who bought the same brand and caliber of ammunition at the same vendor as the suspect, or for that matter, even to customers at any number of other vendors and in a variety of locations in a given state. *Id.* at 280. As a result, many customers within the same region would be linked to the criminal evidence. *Id.* Others working in the field, thus, opine that “[n]either positive nor negative associations between bunter toolmarks bear significant information.” *Id.* Accordingly, “there is little value in performing bunter toolmark examinations for this purpose.” *Id.*

B. The Jury Was Likely To Have Overweighed The Bunter Marks As Evidence

As the Supreme Court itself recognized, “[e]xpert evidence can be both powerful and quite misleading.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 595, 113 S. Ct. 2786 (1993). So powerful, in fact, that “expert testimony may be assigned talismanic significance in the eyes of lay jurors” *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004); see also *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (expert scientific evidence may “assume a posture of mystic infallibility in the eyes of a jury of laymen”). Courts and scientists alike have thus “recognized that

jurors may give significant weight to scientific evidence.” *Arizona v. Krause*, No. 2 CA-CR 2015-0326-PR, 2015 WL 7301820, at *5 (Ariz. Ct. App. Nov. 19, 2015).

That is so even when that weight is not due. *See* PCAST Rep. at 45 (noting “testimony based on forensic feature-comparison methods poses unique dangers of misleading jurors” and the “potential prejudicial impact is unusually high . . . because jurors are likely to overestimate the probative value of a ‘match’ between samples”). A number of studies have shown that the average juror will give greater weight to such forensic evidence due to its perceived authority. *See People v. McKown*, 875 N.E.2d 1029, 1035, 226 Ill. 2d 245, 254-55 (Ill. 2007) (“Evidence labeled ‘scientific’ carries a greater weight in the eyes of the jury, which may accord it undue significance because ‘science’ is equated with truth.”) (quoting M. Udall & J. Livemore, *Law of Evidence* § 102 (2d. ed 1982))); *see also* Jonathan J. Koehler, et al., *Science, Technology, or the Expert Witness: What Influences Juror’s Judgments about Forensic Science Testimony?*, 22 *Psychology, Public Policy & the Law* 401 (2016). Research has also revealed that the “vast majority of jurors have no independent ability to interpret the probative value of results based on the detection, comparison, and frequency of scientific evidence.” PCAST Rep. at 45. Instead, jurors are

“completely dependent on expert statements garbed in the mantle of science.” *Id.*

Indeed, troubling examples include studies that show that regardless of error rate or unreliability, jurors still have given scientific evidence more weight than might be justified. *See* John W. Wesley, *Scientific Evidence and the Question of Judicial Capacity*, 25 *William & Mary L. Rev.* 675 (1984). In fact, in one online experiment researchers asked mock jurors to estimate the frequency that a qualified, experienced forensic scientist would mistakenly conclude that two samples came from the same person when they actually did not. Alarming, the mock jurors believed that such errors are likely to occur only in about 1 in 5.5 million for fingerprint analysis comparison and 1 in 1 million for bitemark and hair comparisons. PCAST Rep. at 45 (citing Koehler, J.J. *Intuitive error rate estimates for the forensic sciences*, August 2, 2016). Furthermore, jurors also often lack the level of scientific comprehension required for carefully weighing evidence. *Id.* This dynamic underscores just how critical it is to shield the jury from being misled by claims of experts assuming the mantle of science where it is not warranted.

In this case, the analyst claimed that he was a “scientist,” Trial Tr. at 2417:5-7, and described his work repeatedly (and erroneously) as being scientific. In addition, he repeatedly and unfairly bolstered the alleged

probative value of his opinion by peppering his testimony with terms such as “unique” and “individual characteristics,” which telegraphed to the jurors that the claimed “perfect match” was highly probative evidence that the crime scene bullet originated from Mr. Jones. *Id.* at 2472:13; 2436:18-19. The “potential prejudicial impact” of this testimony was “unusually high because jurors are likely to overestimate the probative value of a ‘match’ between samples.” PCAST Rep. at 45.

In sum, the analyst’s finding of a purported match was non-scientific evidence, proffered by a novice examiner, whose subjective conclusions, could not be quantified, reproduced or verified by another analyst. His claim of a “match” stemmed entirely from subjective guesswork based on zero prior experience with bunter mark comparisons. Thus, allowing the Prosecution to present the analyst’s testimony as science was in error. *See, e.g., State v. Bridges*, No. 90 CRS 23102-04, 2015 WL 12670468, at *2 (N.C. Super. Oct. 1, 2015) (consent order) (“The admission of the testimony containing the identified error types at trial violated Defendant’s right to due process because it exceeded the limits of the science and overstated the significance of the hair analysis to the jury.”); *Han Tak Lee v. Glunt*, 667 F.3d 397, 407 (3d Cir. 2012) (habeas relief would be required on due process grounds if “the admission of [expert testimony] undermined the

fundamental fairness of Lee’s entire trial because the testimony was premised on unreliable science and was therefore itself unreliable”).

At best, the analyst was able to testify to little more than what the jury could see with their non-expert eyes – that casings from Mr. Jones’ house and the casing found at the scene *could* have been manufactured by the same bunter. *See Missouri v. Scott Goodwin-Bey*, No. 1531-CR00555-01, at 7 (Mo. Dec. 16, 2016) (“Based on this standard and that Missouri Courts have for decades allowed ballistics experts to testify, this Court very reluctantly will allow the State’s lab person to testify, but only to the point this gun could not be eliminated as the source of the bullet”). Anything more ran an unacceptable risk of unfairly prejudicing the jury. In effect, the analyst’s testimony unfairly transformed simple lay observations – that two bullets had been manufactured by the same company – into “scientific” evidence, telegraphing to the jury that it should give this modestly relevant information great weight.

II. The Potential For Cognitive Bias Renders The Bunter Mark Comparison In This Case Inherently Unreliable.

Bunter mark comparisons’ wholly subjective methodology renders such technique even more susceptible to the pernicious effect of cognitive bias. Cognitive bias refers to ways in which human perceptions and judgments can be shaped by irrelevant factors, including “contextual bias,”

where individuals are influenced by irrelevant background information and “confirmation bias,” where individuals interpret information, or look for new evidence, in a manner that conforms to their pre-existing beliefs. PCAST Rep. at 31. Indeed, this *post-hac* analysis is rife with the potential for cognitive bias that could improperly influence a forensic analyst’s conclusions.

Cognitive bias is not merely theoretical: rather, “[a] wealth of evidence indicates that an observer’s expectations can impact visual and auditory perception.” Kassin, Saul M. et al., *The Forensic Confirmation Bias: Problems, Perspectives and Proposed Solutions*, 2 J. of Applied Research in Memory & Cognition 42, 44 (2013). These effects can be profound. In one study, highly experienced fingerprint examiners were given sets of prints from actual case work that they had previously declared to be a match, along with contextual information that suggested the prints were actually not a match. The study found that most examiners changed their conclusions about the source of the print once they were given this biasing contextual information. See Dror, I.E. et al., *Contextual information renders experts vulnerable to making erroneous identifications*, 156 Forensic Science Intl., 74-78 (2006). “Similar studies have replicated these findings in other forensic domains, including DNA mixture interpretation, microscopic hair analysis, and fire investigation.” PCAST Rep. at 31.

Moreover, these studies involved firmly established forensic techniques and experienced experts both untrue here.

In light of this research, the forensic science community has concluded that “given the genuine dangers of cognitive bias, the better practice is to protect examiners from inadvertent bias by shielding them from information that is clearly unnecessary and not relevant to their assessment.” Taylor, Melissa K. et al., Expert Working Group on Human Factors in Latent Print Analysis, Nat’l Institute of Standards and Technology, *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (2012), available at [//www.nist.gov/publications/latent-print-examination-and-human-factors-improving-practice-through-systems-approach](http://www.nist.gov/publications/latent-print-examination-and-human-factors-improving-practice-through-systems-approach) (update last accessed December 12, 2017); *see also* National Commission on Forensic Science, *Ensuring That Forensic Analysis Is Based Upon Task-Relevant Information*, available at <https://www.justice.gov/ncfs/file/795286/download> (update last accessed December 12, 2017) (examiners “should rely solely on task-relevant information when performing forensic analyses”); Peterson, Peter E. et al., FBI, *Latent Prints: A Perspective on the State of the Science*, 11 Forensic Science Communications 14 (October 2009) (discussing problem of cognitive bias and efforts to mitigate its influence.).

This case is a paradigmatic example of the influence cognitive bias can have on the reliability of an analyst's conclusions: This was an extremely high-profile case. The victim of the dramatic shooting was a police officer, and the analyst was put under explicit pressure by the police officer's colleagues to make a match to the limited evidence before him and to match it fast. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318, 129 S. Ct. 2527, 2536 (2009) ("A forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution."). Because the victim was a police officer from the Washington State Patrol, the Washington State Patrol – which indirectly employed the analyst himself—insisted that the analyst give this case his "top priority." Trial Tr. at 2477:1-3. Even before the analysis of bunter marks began, all scientific objectivity was stripped away from the process. The analyst knew the origin of his subject casings: one set from the crime scene and one set from the target suspect, and was provided with no alternative sources. Indeed, the Washington State Police marked the comparison cartridges with the identifier "Martin Jones." Therefore, the analyst knew he was comparing the cartridge found at the crime scene with the box of shells found in Mr. Jones' home. *Id.* at 2506:2-4. And, most troublingly, a Washington State Patrol investigator emailed the analyst that the Washington State Police

were “looking to make a match *any way possible.*” *Id.* at 2498:2-22 (emphasis added). Thus, despite what Mr. Jones’ jury was lead to believe, objective scientific evidence played no part in its deliberations or guilty verdict. Instead, the analyst, with his complete lack of experience in bunter mark comparisons, was tasked to *look* for and to *find* a match of the casing found at the crime scene with the box of shells from Mr. Jones’ home. Put simply, the analyst was asked for his help to convict Mr. Jones, and he did just that. Such inherently biased and therefore unreliable testimony cannot be used to uphold Mr. Jones’ conviction and life sentence.

CONCLUSION

For all of the above reasons, the Innocence Project and Washington Defender Association urge this Court to vacate Mr. Jones' conviction, grant him a new trial, and instruct the trial court to reconsider the validity, reliability and limitations of any bunter mark evidence that can be used at Mr. Jones' retrial.

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DECLARATION OF SERVICE

I, Ian D. Saling, declare as follows:

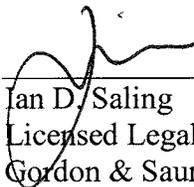
On December 14, 2017, I served a true and correct copy of Brief of the Innocence Project and Washington Defender Association as Amicus Curiae in Support of the Defendant Martin A. Jones of and Declaration of Service via electronic mail, addressed as follows:

Lenell R. Nussbaum
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully submitted this 14th day of December, 2017.

By: 

Ian D. Saling
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GORDON & SAUNDERS PLLC

December 14, 2017 - 10:04 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50262-3
Appellate Court Case Title: Personal Restraint Petition of Martin A Jones
Superior Court Case Number: 10-1-03735-9

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