68429-9

NO. 68429-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD HAROLD,

Appellant.

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

The Honorable Michael Hayden, Judge

BRIEF OF APPELLANT

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his right to present a complete defense when the trial court excluded his proffered reverse 404(b) evidence.[1]

2. Appellant was denied his right to present a complete defense when the trial court excluded evidence relevant to his "other suspect" defense.

3. Appellant was denied his right to a jury trial where the "to-convict" instructions erroneously stated the jury had a "duty to return a verdict of guilty" if it found each element proven beyond a reasonable doubt.

Issues Pertaining to Assignments of Error

1. Does the accused have a constitutional right to present reverse 404(b) evidence in support of his "other suspect" defense, where that evidence is relevant under ER 401 and is more probative than prejudicial under ER 403?

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[1] "Reverse 404(b) evidence" is evidence offered by a defendant regarding a third-party's misconduct. It is most often introduced to establish that someone other than the defendant has committed the offense. United States v. Stevens, 935 F.2d 1380, 1383, 1402 (3d Cir.1991).

2. Does a defendant charged with first degree assault have a constitutional right to present evidence that the "other suspect" in the case reported hearing voices commanding him to hurt and kill people, where that evidence was relevant and more probative than prejudicial?

3. In a criminal trial, does a "to-convict" instruction, which informs the jury it has a duty to return a verdict of guilty if it finds the elements have been proven beyond a reasonable doubt, violate a defendant's right to a jury trial when there is no such duty under the state and federal Constitutions?

B. STATEMENT OF THE CASE

1. Procedural History

On January 12, 2011, the King County prosecutor charged appellant Harold Donald with one count of first degree assault, one count of attempted robbery in the first degree, and one count of possession of a stolen vehicle. CP 1-7. On January 18, 2011, the information was amended to add co-defendant Leonard Leon.[2] CP 8-14. Due to competency issues, the case was not brought to trial until January 23,

[2] Pursuant to a plea deal, however, Leon pled guilty to attempted robbery prior to trial. 3RP 11.

2012. CP 17-23, 24-45; 1RP.[3] On January 23, 2012, the information was amended again with the State adding a rapid recidivism aggravator. CP 69-71. A jury found Donald guilty as charged. CP120-24. He was sentenced to an exceptional sentence of 397 months. CP 130-39.

2. Substantive Facts

At 3:15 a.m. on December 17, 2010, King County Sheriff deputies responded to a 911 call from the Autumn Ridge Apartments in Shoreline, Washington. 6RP 11-13, 56. Officers observed a naked, bloody man lying in the grass. 6RP 13, 16, 20. Medics responded and took the man to the hospital where it was determined that he had a lacerated spleen, several fractured ribs, fractured orbital and facial bones, a serious head injury, and a fractured foot. 6RP 21; 8RP 49-62.

Officers investigated a blood trail that led to a Jeep Cherokee parked under the apartment carport. 6RP 23. There was evidence the car had been broken into. 6RP 37. Officers determined the car belonged to Gordon McWhirter. 6RP 67-68. They went to McWhirter's apartment and awoke his wife, Sandra McWhirter (Sandra). 6RP 88-89; 10 RP 12.

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[3] The transcripts are referred to as follows: 1RP – January 23, 2012; 2RP – January 24; 3RP – January 25; 4RP – January 26; 5RP – January 30; 6RP – January 31; 7RP – February 1; 8RP – February 2; 9RP – February 6; 10RP – February 7;11RP – February 8; 12RP – February 9; 13RP – February 9; 14RP – February 24.

From Sandra, officers learned McWhirter had woken up at approximately 1:30 a.m. and said he was going to pay a dental bill online and then go out to the patio to smoke a cigarette because he could not sleep. 10RP 13, 15.[4] From the patio, the McWhirters could see their covered parking spot. 10RP 16. McWhirter was wearing a distinctive robe. 10RP 14. When Sandra and an officer checked the computer, they saw it was showed only a screen saver with no internet connection having been made. 10RP 17.

Officers processed the Jeep for fingerprints and blood evidence. 7RP 13-14. Fingerprint analysis showed both Leon's and Donald's prints were on the passenger side exterior door and doorframe. 7RP 143-48. Leon's prints were found on the passenger window. RP 149-50. Additionally, an ignition part had a blood drop that belonged to Leon. 7RP 96; 8RP 144.

Detective Christina Bartlett contacted Donald's mother Cheryl Skillings who eventually turned over a robe matching that worn by McWhirter. 7RP 100-02; 9RP 171. She said Donald had given it to her. 7RP 100-02; 9RP 171.

After locating Donald in jail, Bartlett took his clothes (which had

[4] McWhirter never remembered what happened to him. 10RP 6.

been stored together in a mesh bag during booking), and had them and the robe tested for DNA. 7RP 81-88. These items were all photographed on the detective's desk before being submitted for testing. 9RP 63. A small amount of DNA matching that of McWhirter was found on Donald's boot and jeans. 10RP 53, 63.

At trial, Donald's sister, Shakesha Donald (Shakesha), testified Donald and Leon came to her Sea-Tac hotel room at 4:00 p.m. on December 16, 2010. 9RP 147. Shakesha was with her friend Donnie, who lived in the same complex as the McWhirters. 9RP 148-49. She asked Leon for a ride. 9RP 151, 153. Leon drove them all to Shoreline, where Shakesha was dropped off and Donnie driven home. 9RP 154, 156.

Jade Jahmorris, Leon's girlfriend, testified that she met Leon at 10:30 a.m. on December 17, 2010. 9RP 96. He was driving a white car. 9RP 102. She noted his pants were very dirty. 9RP 103. She said Leon gave Donald the keys to the white car. [5]

Shirley Skillings (Shirley), Donald's grandmother, told officers that Donald had came to visit her on the evening of December 17, 2010. 9RP 127. She said he asked for spray and wash for his pants. 9RP 132. She also said Donald told her that he had blood on his pants because he

[5] Jahmorris testified that Leon had previously assaulted her and she was afraid of him retaliating against her for testifying. 9RP 104.

had stomped someone. 9RP 133. However, Shirley did not make this statement until after she was questioned by Bartlett for a period of time, prior to the tape-recorded interview. 10 RP 140. Shirley felt Bartlett was trying to confuse her and cause her to say things that were not true. 10RP 140.

On December 20, 2010, officers located a white Dodge Dynasty that had been abandoned. 8RP 10; 9RP 117. It had been reported stolen on December 16, 2010. 8RP 13. Reportedly, Donald was seen driving a car that matched the description of that car on the evening of December 17, 2010. 9RP 135, 166-68. Donald told his mother Leon sold the car to him. 9RP 168.

3. Facts Pertaining to "Other Suspect" Defense

Prior to trial, the defense moved to put forth an "other suspect" defense that would establish Leon alone perpetrated the crimes against McWhirter. Supp. CP __ (sub no. 115 – "Motion to Admit Prior Bad Acts, Mental Health Status, and Statements of Lorenzo Leon").[6] The defense argued Leon had motive, opportunity, and the ability to have committed the crime. Appendix A at 2-13. In support of his "other suspect" defense, Donald sought to introduce Leon's criminal history, his mental health status, and his statement that he was experiencing command

[6] The motion is attached as appendix A.

hallucinations. Appendix A.

As for Leon's prior criminal convictions – which included numerous assaults and an attempted robbery – the defense argued they should be admitted as reverse 404(b) evidence. Appendix A 4-10. The defense explained that ER 404(b) does not apply to such evidence; instead the court should apply a relevance/prejudice balancing test under ER 401 and ER 403. Appendix A at 4-8. Despite the fact that this was propensity evidence, the defense argued it was still relevant and not overly prejudicial to the State. Appendix A at 4-8; 2RP 160-163.

The defense also sought to admit evidence suggesting Leon was faking mental illness to avoid being fully punished for his crime. The defense proffered jail calls and Leon's statements to jail staff, which suggested Leon strategized about faking a mental illness to avoid a lengthy sentence. Appendix A at 18-20. The defense also offered an opinion from Dr. Brian Judd that there was ample evidence from which one could conclude Leon was faking his mental illness for personal benefit. Appendix A at 20. Defense counsel argued this was relevant to show Leon's consciousness of guilt. Appendix A at 21-22.

Finally, the defense sought to introduce evidence that Leon reported experiencing hallucinations that compel him to hurt and kill others. Appendix A at 23-24. The defense wanted the opportunity to

argue that Leon was either faking his mental illness (showing consciousness of guilt) or was indeed experiencing hallucinations compelling him to commit violent acts. 2RP 177.

The trial court permitted the defense to raise an "other suspect defense." 3RP 12. However, it denied the defense's request to introduce Leon's criminal history on the ground that it was unfairly prejudicial to the State, because the State was barred under ER 404(b) from introducing Donald's criminal history. 2RP 164, 193. The trial court concluded 404(b) applies, regardless of which party is introducing the evidence. 2RP 171.

The trial court permitted the defense to present some mental health evidence establishing Leon was faking his mental illness. However, the trial court excluded evidence that Leon was experiencing command hallucinations under ER 403, reasoning it did not want to get into a mini-competency trial to determine whether Leon was faking his mental illness when he talked about his hallucinations. 2RP 194; 3RP 12-14, 19.

C. ARGUMENT

I. DONALD WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT EXCLUDED REVERSE 404(b) EVIDENCE THAT CONSISTED OF LEON'S PRIOR ASSAULTS AGAINST OTHERS.[7]

Donald sought to introduce reverse 404(b) evidence in support of his defense, arguing the proper inquiry to determine its admissibility is to apply a relevancy/prejudice balancing test under ER 401 and ER 403, rather than the traditional ER 404(b) inquiry.[8] The trial court excluded the evidence under ER 404(b). 2RP 171, 193. Thus, the essential question here is whether ER 404(b) applies when evidence is offered by a defendant In support of his "other suspect" defense or whether a straightforward relevancy/prejudice inquiry applies. This is an issue of first impression in Washington.

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[7] Constitutional violations are reviewed *de novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011).

[8] A traditional 404(b) inquiry requires the trial court to: (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect. State v. Gresham, 173 Wn.2d 405, 422, 269 P.3d 207 (2012). Additionally, it requires the exclusion of all propensity evidence. State v. Fuller, __ Wn. App. __, 282 P.3d 126, 142-43 (2012).

The Sixth and Fourteenth Amendments to the United States Constitution,[9] and article 1, § 22 of the Washington Constitution,[10] guarantee a defendant the right to defend against the State's allegations. This is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); Washington v. Texas, 338 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967).

The constitutional right to present a defense permits a criminal defendant "to advance any evidence that, first, rationally tends to disprove

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[9] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

[10] Article 1, § 22 provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases…

his guilt, and second, passes the Rule 403 balancing test." Stevens, 935 F.2d at 1406. Thus, this constitutional right is subject only to the following: (1) the evidence sought to be admitted must be relevant; and (2) the relevant evidence must be balanced against the State's compelling interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. See Washington v. Texas, 388 U.S. at 16; State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Gallegos, 65 Wn. App. 230, 236-37, 828 P.2d 37.

At least one Washington Court has held the defendant's right to present a defense includes the right to present reverse 404(b) evidence when it is relevant to show someone other than the defendant was responsible for the crime.[11] State v. Young, 48 Wn. App. 406, 412-13, 739 P.2d 1170 (1987). Because Young framed the issue as a traditional ER 404(b) question, however, that court never reached the issue presented here: whether reverse 404(b) evidence is subject to a relaxed standard of admissibility and, if so, what is that standard?

Although the issue presented here is one of first impression in Washington, there is a substantial body of case law from federal circuit courts and other state courts addressing the issue. Because Washington's

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[11] The case never used the term "reverse 404(b)." However, it involved evidence of a third party's prior bad acts proffered by the defendant.

404(b) rule is substantially the same as the federal version, interpretation of FRE 404(b) is instructive.[12] State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (1994).

Federal circuit courts have developed two approaches for determining the admissibility of reverse 404(b) evidence. The majority of circuits hold ER 404(b) does not apply when the evidence is offered by a defendant in support of his defense; instead a straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues is applied.[13] These courts find the

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[12] Reliance on federal decisions is also appropriate since Donald is raising an issue pertaining to his right to present a defense under both the federal and state constitutions.

[13] This approach is adhered to by the First, Second, Fifth, Seventh, Tenth and Eleventh Circuits. United States v. Seals, 419 F.3d 600, 606–07 (7th Cir.2005) (holding courts must balance the evidence's probative value under FRE 401 against considerations such as prejudice, undue waste of time, and confusion of the issues under FRE 403)*; U.S. v. Montelongo, 420 F.3d 1169 (10th Cir. 2005) (same); U.S. v. Gonzalez-Sanchez, 825 F.2d 572, 583 (1st Cir.1987) (same); Glados, Inc. v. Reliance Ins. Co., 888 F.2d 1309, 1311 (11th Cir. 1987) (holding that Rule 404(b) did not apply and instead applying a relevance/prejudice balancing approach); U.S. v. Aboumoussallem, 726 F.2d 906 (2d Cir.1984) (same); United States v. Krezdorn, 639 F.2d 1327 (5th Cir.1981) (concluding that 404(b)'s prohibition on propensity evidence does not apply when the evidence will not impugn the defendant's character); see also, Wynne v. Renico, 606 F.3d 867, 874 (6th Circuit 2010) (Martin, J. concurring) (departing from the majority on grounds that reverse 404(b) evidence is not subject to 404(b)'s exclusion of propensity evidence); United States v. Lucas, 357 F.3d 599, 605 (6th Cir. 2004) (Rosen J. concurring) (same).

traditional 404(b) analysis does not apply because the policy reasons behind the rule are considerably weakened when the defense seeks to submit this type of evidence. Consequently, they hold the defendant's right to present a defense trumps the evidence rule. In contrast, a minority of circuits hold FRE 404(b) applies to all parties regardless of whether the evidence is being offered to support an accused's defense.[14]

The constitutional rights of the defendant and the policy reasons behind ER 404(b) strongly support applying a straightforward relevance/prejudice analysis. Rule 404(b)'s prohibition finds its source in the common-law protection of the criminal defendant from the risk of conviction on the basis of evidence of his character. See C. Wright & K. Miller, Federal Practice and Procedure: Evidence § 5239, at 428, 436–37, and 439 (1991); Charles Wigmore, Wigmore's Code of the Rules of

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*Seals represents a departure from the Seventh Circuit's earlier ruling in Agushi v. Duerr, 196 F.3d 754, 759–761 (7th Cir.1999), where the Court called for a traditional 404(b) analysis regardless of who was offering the evidence.

[14] This approach is adhered to by the Third, Sixth, and Ninth Circuits. See, United States v. Williams, 458 F.3d 312, 315-17 (3d Cir.2006) (holding FRE 404(b) applies to all regardless of whether evidence is offered by the government or the defendant)*; United States v. Lucas, 357 F.3d 599, 605 (6th Cir.2004) (same); U.S. v. McCourt, 925 F.2d 1229 (9th Cir. 1991) (same).

*This represents a narrowing of the Third Circuit's prior holding which appeared only to call for a relevancy/prejudice balancing. See, Stevens, 935 F.2d 1380.

Evidence in Trials at Law §§ 355-56, p. 81 (3d ed.1942). The rule addresses two main policy concerns:

> (1) that the jury may convict a "bad man" who deserves to be punished not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and (2) that the jury will infer that because the accused committed other crimes he probably committed the crime charged.

U.S. v. Phillips, 599 F.2d 134, 136 (6th Cir.1979).

Rule 404(b)'s prejudice concern does not apply equally to a defendant and a third party who is not being tried for a crime. Concern with the poisonous effect on the jury of misconduct evidence is minimal in reverse 404(b) situations. Aboumoussallem, 726 F.2d at 912. Because the jury is not being asked to judge the third party's guilt, "the primary evil that may result from admitting such evidence against a defendant – by tainting his character – is not present." U.S. v. Murray, 474 F.3d 938, 939 (7th Cir. 2007) (citations omitted).

Specifically, a third party who is not on trial for a crime is in no danger whatsoever that the jury will convict him for being a "bad man." Wynne, 606 F.3d at 874 (Martin, J. concurring) (citations omitted). Even if the evidence causes the defendant to be acquitted and the third party is then put on trial, the third party's guilt or innocence will be determined on the basis of the evidence in his case, not on the basis of the other crimes he committed. Id. For these reasons, "the standard of admissibility when a

criminal defendant offers [reverse 404(b)] evidence as a shield need not be as restrictive as when the prosecution uses such evidence as a sword." Aboumoussallem, 726 F.2d at 911-12.

The Fifth Circuit aptly summed up the reasoning behind adopting a less stringent admissibility standard for reverse 404(b) evidence as follows:

> The extrinsic acts rule is based on the fear that the jury will use evidence that the defendant has, at other times, committed bad acts to convict him of the charged offense. Consequently, where the only purpose served by extrinsic offense evidence is to demonstrate the propensity of the defendant to act in a certain way, the evidence must be excluded. When, however, the extrinsic offense was not committed by the defendant, the evidence will not tend to show that the defendant has a criminal disposition and that he can be expected to act in conformity therewith. When the evidence will not impugn the defendant's character, the policies underlying Rule 404(b) are inapplicable.

Krezdorn, 639 F.2d at 1332–1333 (citations omitted).

Among the majority of circuits adhering to the balancing test, there is not yet a clear consensus as to whether a defendant might offer reverse 404(b) evidence to prove propensity. Some courts have held that even under the relaxed standard applied to reverse 404(b) evidence, such evidence may not be admitted if its sole purpose is to prove a third party's criminal propensity. See, Murray, 474 F.3d at 941 (7th Cir. 2007) (citations omitted); United States v. McClure, 546 F.2d 670 (5th

Cir.1977); United States v. Cohen, 888 F.2d 770, 776 (11th Cir.1989). Others have reasoned propensity evidence should be admitted if it passes the relevancy/prejudice inquiry. Krezdorn, 639 F.2d at 1332 (explaining that where the only purpose served by misconduct evidence is to demonstrate the propensity of the defendant to act in a certain way, the evidence must be excluded; however, when the misconduct was not committed by defendant, 404(b)'s rules prohibition on propensity evidence is not triggered); Aboumoussallem, 726 F.2d at 911-12; Lucas, 357 F.3d at 614 (Rosen J. concurring); see also, Wynne, 606 F.3d at 874 (Martin, J. concurring) (same).

A straightforward application of the relevancy/prejudice analysis under ER 401 and 403 is appropriate even when propensity evidence is offered. These rules will ensure that there is some tangible connection between the third party and the charged offense. Thus, "there is simply no evidentiary policy or purpose served by precluding a propensity consideration by the jury that is not already addressed by the traditional Rule 401/403 evidentiary analysis." Lucas, 357 F.3d at 614 (Rosen J. concurring); see also, Wynne, 606 F.3d at 874 (Martin, J. concurring) (same). Applying these rules, the true determinative factor is whether the third-party's propensity to commit misconduct is material "to prove some fact pertinent to the defense." Aboumoussallem, 726 F.2d at 91; see also,

State v. Hedge, 297 Conn. 621, 652, 1 A.3d 1051 (2010) (finding reverse 404(b) evidence regarding a third party's prior drug use was material because the defendant showed that the third-party recently had been in the car where the drugs supporting the charge against the defendant were found).

Reverse 404(b) evidence is relevant and has high probative value if it rationally links the third party to the charged crime.[15] As Dean Wigmore points out, propensity evidence "is objectionable not because it has no appreciable probative value but because it has too much." 1A Wigmore, Evidence § 58.2 at 1212 (Tillers rev. 1983); see also, Michelson v. United States, 335 U.S. 469, 475–76, 69 S.Ct. 213, 218–19, 93 L.Ed. 168 (1948) (same). Unless the reverse 404(b) evidence being offered merely amounts to nothing more than pointing a finger at person whose only logical connection to the case is that he has a criminal record showing he is a bad person, such evidence will tend to disprove a fact of consequence (i.e. the defendant's guilt) and is, therefore, relevant.

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[15] Under ER 401:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Specifically, if reverse 404(b) evidence is offered in support of an "other suspect" defense, it is generally relevant because the defense will have already proven a rational connection between the other suspect and the crime at issue.[16] E.g., Hedge, 297 Conn, at 636-37 (holding third party's history of prior drug distribution was material to defense's other suspect defense against drug charges); Wynne, 606 F.3d at 869, 875 (Martin, J. concurring) (explaining that evidence showing a third-party's eight year history of threatening to kill and abuse others was admissible to support "other suspect" defense in murder case).

Even when relevant, reverse 404(b) evidence also will be subjected to ER 403 analysis.[17] However, "[i]n the vast run of [reverse 404(b)] cases, the only serious objection to the evidence is that its probative value is slight...." Murray, 474 F.3d at 940. This is because prejudice from the

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[16] Before the defense may pursue an "other suspect" defense, the trial court must be convinced there exists a train of facts or circumstances that clearly point to another suspect as the guilty party. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) (quoting State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932)).

[17] ER 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

introduction of such evidence against the State is paltry. As one court has explained:

> "Unfair prejudice against the government [in this context] is rather rare. Unfair prejudice [to the government] means an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one.... Thus, the only possible unfair prejudice against the government occurs when ... evidence [of other crimes, wrongs or acts] tends to make the jury more likely to find a defendant not guilty despite the proof beyond a reasonable doubt.... By proving that someone else committed the crime, [however] reverse 404(b) evidence is not likely to generate that risk of jury infidelity, and thus does not generate unfair prejudice. Only in the rarest circumstances will the [trial] court be presented with unfair prejudice to the State in [the context] ... of reverse 404(b) evidence."

Hedge, 297 Conn. at 652 (quoting State v. Clifford, 328 Mont. 300, 311, 121 P.3d 489 (2005)).

Perhaps the most instructive case in pulling all these concepts together is the Connecticut Supreme Court's decision in State v. Hedge, 297 Conn. at 652. Kareem Hedge was driving a car belonging to his girlfriend, Regina Lathrop, when he was stopped for failing to use a turn signal. Id. at 627. Hedge was driving in area "known for heavy narcotics trafficking." Id. Once stopped, the officers observed money strewn inside the vehicle and saw what looked to be a bag of narcotics. Id. After arresting the defendant and searching the vehicle, officers discovered 88 Ziploc bags of cocaine, 100 "slabs" of cocaine, and 15 "folds" of heroin in

a hidden compartment in the car. Id. at 628. Hedge was charged with transporting narcotics with intent to sell. Id. at 625.

Hedge sought to put forth an "other-suspect" defense. He proffered evidence that Kim Jackson had driven Lathrop's car within twenty-four hours of Hedge's arrest and, on previous occasions, had left drugs and money in that car. Id. at 629, 33. He also sought to introduce Jackson's criminal record establishing he had prior convictions for manufacturing, distributing, and dispensing narcotics. Id. at 633. In response, the State pointed out that Hedge also had a criminal history involving the sale of drugs. Id. Ultimately, the trial court excluded the evidence because Hedge could not show a "direct connection" between Jackson and the charged crime. Id. at 632.

Hedge**Error! Bookmark not defined.** appealed, arguing he was denied his right to present a defense. Id. In response, the State argued the trial court had correctly excluded the "other suspect" evidence as irrelevant. Id. at 630. The State also claimed the trial court had not abused its discretion because the evidence was inadmissible under §§ 4-4(a) and 4-5(a) of the Connecticut Code of evidence (the propensity rule).[18] Id. at 630.

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[18] This code is substantively equivalent to FRE 404(b). Hedge, 297 Conn. at 630, nn. 6 and 7.

The Connecticut Supreme Court rejected the State's argument. First, it turned to the question of whether the propensity evidence was relevant. It explained: while evidence raising "only a bare suspicion" that a third party, rather than the defendant, committed the charged offense would not be relevant; evidence that establishes "a direct connection" between a third party and the charged offense is relevant to whether the defendant committed the offense. Id. at 635. It found that there was a "direct connection" between Jackson and the crime because the proffered "other suspect" evidence placed Jackson at the scene of the crime – in Lathrop's vehicle – within twenty four hours of Hedge's arrest. Id. at 636. This gave Jackson an opportunity to place the drugs inside the compartment. Id. Thus, the Court concluded Hedge should have been permitted to raise an "other suspect" defense pointing to Jackson.

Turning next to the State's objection under the propensity rule, the Connecticut Supreme Court looked to federal case law pertaining to reverse 404(b) evidence. Recognizing the split of authority among the circuits, it concluded:

> [C]onsistent with the view of the majority of courts that have considered the issue, we conclude that the policies underlying [the propensity rule] have extremely limited applicability when the defendant offers evidence of a character trait or other crimes, wrongs or acts to prove that someone else committed the crime charged. We are persuaded that the rules pertaining to the admission of third

> party culpability evidence are sufficiently stringent to protect against any unfair prejudice to the state or confusion of the issues that might arise when such evidence is offered to support a third party culpability defense.

Id. at 652-53. Thus, the Court adopted the straightforward relevance/prejudice balancing analysis.

The Connecticut Supreme Court concluded that Jackson's criminal history was relevant to this defense. It found Jackson's prior convictions and drug possession provided "a substantial basis" for inferring Jackson may have been responsible for leaving the drugs in the car. Id. Given the connection between Jackson and the scene of the crime, it concluded the reverse 404(b) evidence was relevant to Hedge's "other suspect" defense. Id. at 636-37.

Having found the evidence probative, the Court addressed potential prejudice to the State. Despite the fact Hedge also had a criminal history of drugs that could not be used by the State to prove he acted in conformity with that history, the Court held that any prejudice to the State resulting from the introduction of Jackson's criminal history was outweighed by the probative value of this evidence. Id.

In sum, applying the relevance/prejudice balancing test, the Connecticut Supreme Court held Hedge's right to present a complete defense had been violated when he was precluded from presenting "other

The trial court erred, however, when it did not permit the defense to introduce Leon's criminal history, which consisted of six convictions for assault and one conviction for attempted robbery in the second degree. 2RP 193; Appendix A at 9-10. Although Leon's history of assaults shows a pattern of criminal conduct and violence, this is not the only connection between Leon and the charged crime. Leon's presence at the scene made the proffered evidence more material than random propensity evidence. Thus, as in Hedge, Leon's assaultive history was sufficiently linked to McWhirter's assault through his presence at the scene to make the evidence both relevant and material, despite the propensity inference it invoked. See, Hedge, 297 Conn. at 636-37; see also, Lucas, 357 F.3d at 614 (Rosen J. concurring) (explaining why the "propensity inference" is acceptable in determining the relevance of reverse 404(b) evidence).

Additionally, Leon's prior conviction for attempted robbery involved facts that were sufficiently similar to the charged crime to make it relevant. The defense made the following offer of proof:

> 2005 – Convicted of Attempted Robbery Second Degree – Alleged that Mr. Leon demanded money from the victim in an aggressive manner, threw the victim into a fence, and

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L.Ed.2d 503 (2006) (rejecting a rule which permitted the trial court to exclude proffered evidence of a third party's alleged guilt even where there is strong evidence of a defendant's guilt, including strong forensic evidence).

> then along with others, threw the victim onto the ground and punched, kicked and stomped on the victim's face. Mr. Leon pled guilty to attempting to rob the victim.

Appendix A at 10. The State's theory in this case was that McWhirter was assaulted after he confronted a person attempting to steal his car. 11 RP 6. McWhirter's injuries were consistent with being punched, kicked, and stomped. 2RP 20-21; 8RP 56. Given the relaxed standard for assessing the similarity of reverse 404(b) evidence and given Leon's proven connection to the incident, the defense minimally should have been permitted to introduce this conviction. See, e.g., Montelongo, 420 F.3d at 1172-76 (applying a relaxed degree of similarity and holding the reverse 404(b) evidence regarding a single incident admissible due to its similarity with the charged offense).

Finally, applying ER 403, the probative value of the proffered evidence substantial outweighed any unfair prejudice. The "unfair prejudice" with which ER 403 is concerned is prejudice caused by evidence of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." United States v. Roark, 753 F.2d 991, 994; see also, 5 K. Tegland, Wash.Prac., Evidence § 106, at 349 (3d ed. 1989). Evidence may be unfairly prejudicial under ER 403 if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or "triggers other mainsprings of human action." 1 J.

Weinstein & M. Berger, Evidence § 403, at 403-36 (1985). Reverse 404(b) evidence generally does not unfairly prejudice the State because "[a] jury is unlikely to acquit a defendant even if it thinks there's someone else out there who has a propensity to commit such crimes...." Murray, 474 F.3d at 939; see also, Hedge, 297 Conn. at 652; Clifford, 328 Mont. at 311.

None of the prejudice concerns embodied in ER 403 exist here. As explained above, the probative force of the evidence is not scant and the defense was not seeking its admission solely for the sake of prejudicing the State. The evidence was not cumulative and would not have caused considerable delay or waste. Although the trial court was concerned that permitting the defense to use Leon's prior criminal history while excluding Donald's history was unfair, this circumstance was not sufficiently prejudicial to outweigh the probative value of the evidence. See, Hedge, 297 Conn. at 636-37, 652-54.

For the reasons shown above, under the facts of this case, the relevance/prejudice test weighs in favor of admitting of the proffered reverse 404(b) evidence. See, Young, 48 Wn. App. at 413 (explaining that the general rule under ER 403 requires the balance be struck in favor of admissibility). Consequently, the trial court erred when it prohibited the defense from introducing it in support of his "other suspect" defense.

In sum, a defendant's right to present a defense includes the right to present reverse 404(b) evidence. The admission of this evidence is not subject to a traditional 404(b) analysis. Instead, its admission is governed by a straightforward balancing of relevancy and prejudice under ER 401 and 403. Applying this standard to the reverse 404(b) evidence proffered by the defense, the trial court erred when it did not permit Donald to support his other-suspect defense with evidence of Leon's prior misconduct. Reversal is, therefore, required.

II. DONALD WAS DENIED HIS RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT EXCLUDED EVIDENCE THAT LEON REPORTED HAVING COMMAND HALLUCINATIONS TELLING HIM TO HURT AND KILL OTHERS.

In support of his "other suspect" defense, Donald moved to introduce evidence revealing Leon had reported experiencing command hallucinations that ordered him to hurt and kill others. The defense wanted to argue either Leon was faking his mental illness (which showed consciousness of guilt), or he was indeed mentally ill and experiencing command hallucinations (thus providing a motive for the assault against McWhirter). 2RP 177. The trial court denied the defense's motion under ER 403, concerned that the evidence would prompt a battle of medical experts to determine whether Leon was indeed experiencing command hallucinations or just faking. 3RP 13, 19. The trial court did not want to

get sidetracked into a mini-competency hearing about whether Leon was faking his mental illness. 2RP 186. Given the defense's constitutional right to present a complete defense, however, this was error.

As discussed above, an accused has a constitutional right to present even minimally relevant evidence where no compelling interest of the State mandates its exclusion. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Consequently, "ER 403 does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense." Young, 48 Wn. App. at 413 (citing 5K Tegland, Wash. Prac., at § 105). This is because there exists no State interest compelling enough to preclude evidence with high probative value. Hudlow, 99 Wn.2d at 16; State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

The fact that Leon was experiencing hallucinations commanding him to hurt or kill others was highly probative and crucial to Donald's defense theory that Leon alone committed the assault. It gave the jury evidence of a plausible motive for the brutal assault against McWhirter by exposing Leon's state of mind.

The probative value of this evidence was not outweighed by the dangers enumerated in ER 403. There was no risk of confusion of the issues given defense counsel's planned argument regarding the either/or prospects of the mental health evidence – either Leon was faking his

illness or he was responding to command hallucinations. The evidence would not mislead the jury, which it was free to weigh like any other evidence. And it was not cumulative.

Most importantly, contrary to the trial court's concerns, there was not an overwhelming prospect of undue delay or confusion. Defense counsel said he could present the evidence through one evaluator who could also be cross-examined by the State as to whether there was evidence from which one could conclude Leon was faking the hallucinations. 2RP 183. The State did not show otherwise. Moreover, the trial court had already admitted evidence from which the parties could argue Leon was faking his mental illness. 3RP 12, 19. Thus, the subject could have been addressed without considerably more trial time.

Given the high probative value of this evidence to the defense and the minimal risk of prejudice, confusion, or delay, the balance should have been struck in favor admissibility. See, Young, Wn. App. at 413. Accordingly, this Court should find Donald was denied his constitutional right to present a defense when the trial court excluded evidence that Leon suffered from command hallucinations.

III. DONALD'S CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS VIOLATED BY THE COURT'S INSTRUCTIONS, WHICH AFFIRMATIVELY MISLED THE JURY ABOUT ITS POWER TO ACQUIT.

As part of the "to-convict" instructions used to convict Donald, the trial court instructed the jury as follows: "If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty." CP 89, 96, 107. Donald contends the jury has no constitutional "duty to convict" and that the instruction misstates the law. Accordingly, the instruction violated Donald's right, under both the federal and state constitutions, to a properly instructed jury.[20]

The right to a jury trial in a criminal case was one of the few guarantees of individual rights enumerated in the United States Constitution of 1789. It was the only guarantee to appear in both the original document and the Bill of Rights. U.S. Const. art. 3, § 2, ¶ 3; U. S. Const. amend. 6; U.S. Const. amend. 7.

In criminal trials, the right to a jury trial is fundamental to the American scheme of justice. It is thus further guaranteed by the due

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[20] This Court rejected the arguments raised here in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). Counsel respectfully contends Meggyesy was incorrectly decided.

process clauses of the Fifth and Fourteenth Amendments. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982).

Trial by jury was not only a valued right of persons accused of a crime, but was also an allocation of political power to the citizenry.

> [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power-- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan, 391 U.S. at 156.

In Washington, citizens enjoy an even stronger guarantee to a jury trial as is evidence by the by the analysis below. Under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), appellate courts are guided in deciding whether to conduct independent analysis under the state constitution based on six factors: 1) the language of the Washington Constitution; 2) differences between the state and federal language; 3) constitutional history; 4) preexisting state law; 5) structural differences; and 6) matters of particular state or local concern.

The first Gunwall factor supports independent analysis because the textual language of Washington's constitution is significantly different

than the federal constitution, and these differences in language suggest the drafters meant something different from the federal Bill of Rights. See Hon. Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984) (Utter).

The sixth amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...." In comparison, the drafters of our state constitution not only granted the right to a jury trial, Const. art. 1, § 22,[21] they expressly declared it "shall remain inviolate." Const. art. 1, § 21. The term "inviolate" has been interpreted to mean:

> deserving of the highest protection . . . Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assault to its essential guarantees.

Sofie, 112 Wn.2d at 656.

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[21] Rights of Accused Persons. In criminal prosecutions, the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed ... .

Article 1, section 21 also "preserves the right [to jury trial] as it existed in the territory at the time of its adoption." Pasco v. Mace, 98 Wn.2d at 96; State v. Strasburg, 60 Wash. 106, 115, 110 P. 1020 (1910). As such, the right to trial by jury "should be continued unimpaired and inviolate." Strasburg, 60 Wash. at 115.

Additionally, the framers added other constitutional protections to this right. The right to jury trial also is protected by the due process clause of article I, section 3. Also, a court is not permitted to convey to the jury its own impression of the evidence. Const. art. 4, § 16.[22] Even a witness may not invade the province of the jury. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987).

While Meggyesy[23] may have been correct when it found there is no specific constitutional language that addresses this precise issue, the language that is there indicates the right to a jury trial is so fundamental that any infringement violates the constitution. Given this, the textual language favors independent application of the State constitutional provisions.

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[22] "Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law."

[23] 90 Wn. App. at 701.

Turning to the next Gunwall factor, the state constitutional history favors an independent application of Article I, Sections 21 and 22. In 1889 (when the constitution was adopted), the Sixth Amendment did not apply to the states. Instead, Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal constitution. State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001) (citing Utter, 7 U. Puget Sound Law Review at 497). This difference supports an independent reading of the Washington Constitution.

State common law history also favors an independent application. Article I, Section 21 "preserves the right as it existed at common law in the territory at the time of its adoption." Sofie, 112 Wn.2d at 645; Pasco v. Mace, 98 Wn.2d at 96; see also, State v. Hobble, 126 Wn.2d 283, 299, 892 P.2d 85 (1995). Under the common law, juries were instructed in such a way as to allow them to acquit even where the prosecution proved guilt beyond a reasonable doubt. Leonard v. Territory, 2 Wash.Terr. 381, 7 Pac. 872 (Wash.Terr.1885). In Leonard, the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. The court instructed the jurors that they "should" convict and "may find [the defendant] guilty" if the prosecution proved its case, but

that they "must" acquit in the absence of such proof.[24] Leonard, 2 Wash. Terr. at 398-399. Thus the common law practice required the jury to acquit upon a failure of proof, and allowed the jury to acquit even if the proof was sufficient.[25] Id.

Meggyesy attempted to distinguish Leonard on the basis that the Leonard court "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. However, at the time the Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of requiring the jury to make a finding of guilt. The current practice does not comport with the scope of the right to jury trial existing at that time, and should now be re-examined.

Preexisting state law establishes that an accused person's guilt has always been the sole province of the jury. State v. Kitchen, 46 Wn. App. 232, 238, 730 P.2d 103(1986); see also, State v. Christiansen, 161 Wash. 530, 297 P. 151 (1931); State v. Holmes, 68 Wash. 7, 122 P. 345 (1912). This rule applies even where the jury ignores applicable law. See, e.g.,

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[24] The trial court's instructions were found erroneous on other grounds.

[25] Furthermore, the territorial court reversed all criminal convictions that resulted from erroneous jury instructions (unless the instructions favored the defense). See, e.g., Miller v. Territory, 3 Wash.Terr. 554, 19 P. 50 (Wash.Terr.1888); White v. Territory, 3 Wash.Terr. 397, 19 P. 37 (Wash.Terr.1888); Leonard, *supra.*

Hartigan v. Washington Territory, 1 Wash.Terr. 447, 449 (1874) (holding "the jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy.")[26]

Turning to the next Gunwall factor, the differences in federal and state constitutions structures support independent review. State constitutions were originally intended to be the primary devices to protect individual rights, with the United States Constitution a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, "Presenting a State Constitutional Argument: Comment on Theory and Technique," 20 Ind. L. Rev. 637, 636 (1987). Accordingly, state constitutions were intended to give broader protection than the federal constitution. This is why Gunwall indicates that this factor will always support an independent interpretation of the state constitution because the difference in structure is a constant. Gunwall, 106 Wn.2d at 62, 66; see also, State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

Finally under the sixth Gunwall factor, this issue involves matters of particular state interest or local concern at issue. The manner of conducting criminal trials in state court is of particular local concern, and

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[26] This is likewise true in the federal system. See, e.g., United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

does not require adherence to a national standard. See, e.g., State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 934 (2003); State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994). Gunwall factor number six thus also requires an independent application of the state constitutional provision in this case.

As shown above, all six Gunwall factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution in this case. The state constitution provides greater protection than the federal constitution, and prohibits a trial court from affirmatively misleading a jury about its power to acquit.

The jury's power to acquit is substantial and the jury has no duty to return a verdict of guilty. As shown below, there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, so there can be no "duty to return a verdict of guilty."

A court may never direct a verdict of guilty in a criminal case. United States v. Garaway, 425 F.2d 185 (9th Cir. 1970) (directed verdict of guilty improper even where no issues of fact are in dispute); Holmes, 68 Wash. at 12-13. If a court improperly withdraws a particular issue from the jury's consideration, it may deny the defendant the right to jury trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct.2310, 132 L. Ed. 2d 444

(1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration); Neder v. United States, 527 U.S. 1, 8, 15-16, 119 S. Ct. 1827, 144 L.Ed.2d 35(1999) (omission of element in jury instruction subject to harmless error analysis).

The constitutional protections against double jeopardy also protect the right to a jury trial by prohibiting a retrial after a verdict of acquittal. U.S. Const. amend. 5; Const. art. I, § 9.10. A jury verdict of not guilty is thus non-reviewable.

Also well-established is "the principle of noncoercion of jurors," established in Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. See generally, Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

Under Washington law, juries have always had the ability to deliver a verdict of acquittal that is against the evidence. Hartigan, supra. A judge cannot direct a verdict for the State because this would ignore

"the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power." State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 714 (1982); see also, State v. Salazar, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence). An instruction telling jurors that they may not acquit if the elements have been established affirmatively misstates the law, and deceives the jury as to its own power. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

This is not to say there is a right to instruct a jury that it may disregard the law in reaching its verdict. See, e.g., United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other grounds). However, if the court may not tell the jury it may disregard the law, it is at least equally wrong for the court to direct the jury that it has a duty to return a verdict of guilty if it finds certain facts to be proved.

Moreover, if such a "duty" to convict exists, the law lacks any method of enforcing it. If a jury acquits, the case is over, the charge dismissed, and there is no further review. In contrast, if a jury convicts when the evidence is insufficient, the court has a legally enforceable duty to reverse the conviction or enter a judgment of acquittal notwithstanding

the verdict. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). Thus, a legal "threshold" exists before a jury may convict. A guilty verdict in a case that does not meet this evidentiary threshold is contrary to law and will be reversed. The "duty" to return a verdict of not guilty, therefore, is genuine and enforceable by law. A jury must return a verdict of not guilty if there is a reasonable doubt; however, it may return a verdict of guilty if, and only if, it finds every element proven beyond a reasonable doubt.

The duty to acquit and permission to convict is well-reflected in the instruction in Leonard:

> If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you *may* find him guilty of such a degree of the crime as the facts so found show him to have committed; but if you do not find such facts so proven, then you *must* acquit.

Leonard, 2 Wash.Terr. at 399 (emphasis added). This was the law as given to the jury in murder trials in 1885, just four years before the adoption of the Washington Constitution. This allocation of the power of the jury "shall remain inviolate." The Washington Pattern Jury Instruction Committee has adopted accurate language consistent with Leonard for considering a special verdict:

> ... In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. ... If you unanimously

> have a reasonable doubt as to this question, you must answer "no".

WPIC 160.00. The due process requirements to return a special verdict – that the jury must find each element of the special verdict proven beyond a reasonable doubt – are exactly the same as for the elements of the general verdict. This language in no way instructs the jury on "jury nullification." However, it at no time imposes a "duty to return a verdict of guilty."

In contrast, the "to convict" instruction at issue here does not reflect this legal asymmetry. It is not a correct statement of the law. As such, it provides a level of coercion, not supported by law, for the jury to return a guilty verdict. Such coercion is prohibited by the right to a jury trial. Leonard, *supra*; State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978).

This court's decision in Meggyesy does analyze the issue presented here. In State v. Meggyesy, this court held the federal and state constitutions did not "preclude" this language, and so it affirmed. Meggyesy, 90 Wn. App. at 696. In its analysis, this Court of Appeals characterized the alternative language proposed by the appellants – "you may return a verdict of guilty" – as "an instruction notifying the jury of its power to acquit against the evidence." 90 Wn. App. at 699. This Court spent much of its opinion concluding there was no legal authority

requiring the trial court to instruct a jury it had the power to acquit against the evidence.

Appellant respectfully submits Meggyesy's analysis addressed a different aspect of the issue than is presented here. "Duty" is the challenged language herein. By focusing on the proposed remedy, Meggyesy side-stepped the underlying issue raised by its appellants: the instructions violated their right to trial by jury because the "duty to return a verdict of guilty" language required the juries to convict if they found that the State proved all of the elements of the charged crimes.

However, portions of the Meggyesy decision are relevant. The opinion acknowledged the Supreme Court has never considered this issue. 90 Wn. App. at 698. It recognized that the jury has the power to acquit against the evidence: "This is an inherent feature of the use of general verdict. But the power to acquit does not require any instruction telling the jury that it may do so." Id. at 700 (foot notes omitted). The court also relied in part upon federal cases in which the approved "to-convict" instructions did not instruct the jury it had a "duty to return a verdict of guilty" if it found every element proven. Id. at 698 fn. 5.12, 13. These concepts support Donald's position and do not contradict the arguments set forth herein.

However, Meggyesy ultimately looked at the issue through the wrong lens. The question is not whether the court is required to tell the jury it can acquit despite finding each element has been proven beyond a reasonable doubt. The question is whether the law ever requires the jury to return a verdict of guilty. If the law never requires the jury to return a verdict of guilty, it is an incorrect statement of the law to instruct the jury it does. And an instruction that says it has such a duty impermissibly directs a verdict. Sullivan v. Louisiana, 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993).

Unlike the appellant in Meggyesy, Donald does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, he argues that jurors should not be affirmatively misled. This question was not addressed in Meggyesy; thus the holding of Meggyesy should not govern here.

The court's instructions in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt. The instruction given in Donald's case did not contain a correct statement of the law. The court instructed the jurors that it was their "duty" to accept the law, and that it was their "duty" to convict the defendant if the elements were proved beyond a reasonable doubt. CP 89, 96, 107. A duty is "[a]n act or a course of action that is required of one

by...law." The American Heritage Dictionary (Fourth Ed., 2000, Houghton Mifflin Company). The court's use of the word "duty" in the "to-convict" instruction conveyed to the jury that it could not acquit if the elements had been established. This misstatement of the law provided a level of coercion for the jury to return a guilty verdict, deceived the jurors about their power to acquit in the face of sufficient evidence, Leonard, *supra*, and failed to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

By instructing the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts to reach its general verdict. The instruction creating a "duty" to return a verdict of guilty was an incorrect statement of law. The error violated Donald's state and federal constitutional right to a jury trial. Accordingly, his convictions must be reversed and the case remanded for a new trial.

D. CONCLUSION

For the reasons stated above, this Court should reverse Donald's convictions.

DATED this 28th day of September, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

Dana M Nelson for
JENNIFER L. DOBSON
WSBA No. 30487

Dana M Nelson
DANA M. NELSON
WSBA No. 28239

Office ID No. 91051
Attorneys for Appellant

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. HAROLD CLAYTON DONALD, Defendant.	No. 11-1-00174-8 SEA MOTION TO ADMIT PRIOR BAD ACTS, MENTAL HEALTH STATUS AND STATEMENTS OF LORENZO LEON

FACTS

Defendant Harold Donald is charged with the crimes of Assault in the First Degree, Attempted Robbery in the First Degree, and Possession of a Stolen Vehicle. It is alleged that Mr. Donald committed a violent assault against the victim, Gordon McWhirter, when Mr. McWhirter attempted to stop Mr. Donald and Mr. Lorenzo Leon from stealing his Jeep. The state originally charged Mr. Leon as a co-defendant with Mr. Donald, but subsequently agreed to a plea deal with Mr. Leon which included Mr. Leon agreeing to testify against Mr. Donald. In exchange for his testimony, Mr. Leon agreed to plead guilty to one count of Attempted Robbery in the First Degree. As part of his plea deal, the state agreed not to file any additional charges against Mr. Leon stemming from this incident. In addition, the state has agreed to ask for a low-end sentence of 57.75 months at Mr. Leon's sentencing. Mr. Leon's sentencing will not take place until after he testifies against Mr. Donald.

Law Office of Daniel Norman
100 W. Harrison St., Suite N440
Seattle, WA 98119
206-734-7969
dannormanlaw@gmail.com

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At multiple points during his incarceration for this charge, Mr. Leon allegedly was suffering from mental health issues. Mr. Leon was sent to Western State Hospital (WSH) on multiple occasions for evaluations and also sought mental health assistance while at the King County Jail (KCJ). Since the onset of this case, Mr. Leon's behavior has been extremely erratic. Multiple reports from mental health professionals from both KCJ and WSH have opined that Mr. Leon is possibly or even likely faking his symptoms, as Mr. Leon tended to only act mentally ill when it benefitted him in some manner.

As part of Mr. Leon's plea agreement with the state, Mr. Leon agreed to submit to a defense interview prior to Mr. Donald's trial. Defense counsel first attempted to interview Mr. Leon on October 17th, 2011. However, after both the defense and state arrived for the interview, Mr. Leon's attorney cancelled the interview stating that Mr. Leon's mental health issues prevented him from participating in the interview. On December 8th, 2012, counsel for Mr. Donald again attempted to interview Mr. Leon, this time at the jail with his attorney present. Unfortunately, the interview did not happen as Mr. Leon simply sat in a border-line comatose state, repeatedly muttering, "she is gonna kill me" while looking at his attorney. Therefore, to date, defense counsel has been unable to interview Mr. Leon.

A. Harold Donald has a Constitutional Right to Argue that Lorenzo Leon is Guilty of This Crime and to Present Evidence to Support this Contention

At Mr. Donald's trial, the defense intends to argue that Mr. Leon, not Mr. Donald, is guilty of assaulting Mr. McWhirter. In support of this argument, the defense seeks to admit evidence of Lorenzo Leon's extremely violent past, how his mental health conditions fuel this violence behavior, and his lack of credibility and history of dishonest acts. Regardless of whether Mr. Leon is mentally ill or faking symptoms, defense counsel is entitled to make the jurors aware of Mr. Leon's violent and erratic behavior.

Defense counsel plans on eliciting evidence relevant to the defense by asking Mr. Leon and others about specific instances of his history during cross-examination, during the defense case in chief, and/or by submitting court documents detailing this history. Mr. Leon's violent history, as well as his violent temperament, mental health issues, and dishonest history are all

relevant to Mr. Donald's defense that Mr. Leon committed the violent assault against Mr. McWhirter.

A bedrock tenet of our criminal justice system is a defendant's right to defend the charges brought against him. As the U.S. Supreme Court has held, "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 (1986). The same is true pursuant to the Washington State Constitution. See, State v. Tracy, 128 Wash. App. 388, 397-98, 115 P.3d 381 (2005). See, also, State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996)(A criminal defendant has the right to present a defense under the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution.)

Along with this foundational principle is the idea that a defendant carries no burden in a criminal trial; it is the government that must prove every element of the offense beyond a reasonable doubt. In fact, a defense strategy may be merely to raise reasonable doubt as to the existence of one or more elements of the charged offense. If a defendant has the constitutional right to an opportunity to present a complete defense, then it follows that he has the constitutional right to offer evidence that a third party committed the crime, in order to raise a reasonable doubt in the jury's mind whether the defendant is guilty.

The defense in the present case has the right to present the defense that Mr. Leon committed the assault against Mr. McWhirter. For a defendant to introduce what is commonly referred to as "other suspect evidence" such evidence must be relevant and there must be some nexus between the third-party and the crime. See, State v. Condon, 72 Wn.App. 638, 865 P.2d 521 (1993). This rule prevents the defense from muddying the proverbial waters by pointing the finger at an individual when there is simply no evidence to substantiate this claim.

As will be discussed, Mr. Leon's violent history, lack of credibility, and mental health issues are clearly relevant to the defense that Mr. Leon committed this crime. Pursuant to Evidence Rule 401, "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

In addition, there is more than sufficient evidence to establish the nexus between Mr. Leon and the assault of Mr. McWhirter. The state does not dispute that Mr. Leon was at the scene and at a minimum, was an active participant in the attempted theft of the victim's car. Mr. Leon's fingerprints were found on the victim's car and his blood was found inside of the victim's car on the ignition switch. Mr. Leon has repeatedly admitted to being present at the crime scene which is potentially admissible as a statement contrary to penal interest, even if Mr. Leon does not testify. These facts are more than sufficient for the defense to create a nexus between Mr. Leon and this crime. It is clear that the defense is not simply selecting an individual with a tainted history in order to point the finger and raise the claim that Mr. Leon committed this crime. He was present, he had motive, and there is absolutely no evidence other than Mr. Leon's self-serving statements that he was not involved in the assault of the victim.

The defense has a constitutional right to present a defense and argue that Mr. Leon committed this crime. Inherent in this constitutional right is the right to present relevant evidence to support this defense. Not allowing the defense to question Mr. Leon about his violent history, temperament, and mental health issues, would deny Mr. Donald his constitutional right to present a complete defense. "[I]f the evidence [that the crime was committed by someone else] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt." John Henry Wigmore, Evidence in Trials at Common Law § 139 (Tiller's rev. 1983). See, also, Pettijohn v. Hall, 599 F.2d 476, 483 (1st Cir. 1979)(No matter how credible the defense, our system of justice guarantees the right to present it and be judged by it.)

1. Mr. Leon's Violent History and other Bad Acts are Admissible Pursuant to ER 404(b). Otherwise Known as "Reverse 404(b) Evidence".

The state may argue that Evidence Rule (ER) 404(b) prevents the defense from introducing evidence of Lorenzo Leon's violent history and other "bad acts". Generally speaking, ER 404(b) lays out the groundwork for admitting, at trial, evidence of other crimes of an individual.

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The impetus of the ER 404(b) rule is to protect the right of a criminal defendant to have a fair trial, and to have a jury decide the case based upon the facts of the instant case, not upon a defendant's past conduct. Because of this, ER 404(b) is used almost exclusively to prevent the state from using a defendant's past history to show that he must have acted similarly relating to the crime charged.

Rule 404(b)'s prohibition finds its source in the common-law protection of the criminal defendant from risking conviction on the basis of evidence of his character. See, 22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5239, at 428, 436-37 & 439 (1991). In United States v. Phillips,599 F.2d 134 (6th Cir.1979), the United States Court of Appeals for the Sixth Circuit noted, in addressing rule 404(b)'s precepts, that the rule addresses two main policy concerns:

> (1) that the jury may convict a "bad man" who deserves to be punished not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and (2) that the jury will infer that because the accused committed other crimes he probably committed the crime charged.
>
> United States v. Phillips, 599 F.2d at 136.

On its face, ER 404(b) makes no distinction about to whom the rule applies. Washington case law is replete with examples of when and how ER 404(b) "other crimes" evidence may be used by the state against a criminal defendant. There are clear differences when "other crimes" evidence is admitted by the defendant against a state's witness instead of the opposite. A criminal defendant has many constitutional rights which a state's witness simply does not have, including the right to confrontation, the constitutional right to a fair trial, and the right to present a complete defense. A state's witness or even a non-testifying individual who is not being charged with a crime has no such rights. Therefore, when it is the defense attempting to introduce evidence of a state's witness' "bad acts", there is no need to protect this individual

from potential prejudice or a violation of their constitutional rights. In short, the purpose of ER 404(b) is not met by applying the same stringent standards when it is the defense attempting to introduce such evidence, not the state.

Because of these distinctions, a burgeoning number of states and federal courts have begun to decide the admissibility of ER 404(b) evidence based upon which party is attempting to introduce the "prior bad acts" evidence. A number of federal courts have approved use of a lower standard of admissibility when it is a defendant attempting to introduce this so-called "bad-acts" evidence, holding that a defendant's constitutional rights trump a strict interpretation of the rules of evidence. This evidence is commonly referred to as "reverse 404(b) evidence." Instead of applying the rigid standard required by ER 404(b), many courts now base admissibility on a relaxed standard of relevance balanced against undue waste of time or confusion.

The United States Court of Appeals for the Second Circuit, in United States v. Aboumoussallem,726 F.2d 906 (2d Cir. 1984), undertook an early analysis of the admissibility of prior-crimes evidence that the defendant proffered. The Second Circuit noted:

> [W]e believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when the prosecution uses such evidence as a sword. The prosecution, in the Anglo-American tradition, may not ordinarily offer evidence of a defendant's prior wrongdoing for the purpose of persuading the jury that the defendant has a propensity for crime and is therefore likely to have committed the offense for which he stands trial... However, the risks of prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense. In such cases the only issue arising under Rule 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense.

In US v. Stevens, 935 F.2d 1380 (3rd cir. 1991), the Third Circuit Court of Appeals also approved a trial court's use of a lower standard for admission of "reverse 404(b) evidence" because prejudice to a defendant is not an issue. The Court determined that trial courts should employ a straightforward balancing of the evidence's probative value against considerations of undue waste of time and confusion of issues, and the defendant must demonstrate that "reverse 404(b) evidence has a tendency to negate his guilt, and that it passes the Rule 403 balancing test".

> Our resolution of this issue is informed by our general belief that a criminal defendant should be able to advance any evidence that, first, rationally tends to disprove his guilt, and second, passes the Rule 403 balancing test. To garner an acquittal, the defendant need only plant in the jury's mind a reasonable doubt. Had Stevens been allowed to adduce at trial evidence of the similarities between the Mitchell robbery and the Smith and McCormack robbery/sexual assault--including the Fort Meade connection--the jury might have determined that it was possible that another person had committed both crimes, thereby giving rise to a reasonable doubt. We do not know, of course, how a jury would weigh this evidence, but we do think that, at the very least, Stevens was entitled to have the jury consider the evidence and draw its own conclusions.
>
> U.S. v. Stevens, at 1402.

Similarly, in US v. Montelongo, 420 F.3d 1169 (10th cir. 2005), the Tenth Circuit reversed a trial court's refusal to admit reverse 404(B) evidence on both evidentiary grounds as well as that fact that the preclusion violated the defendant's right to confrontation. The Court concluded that the trial court erred in preventing the defendant from using this evidence during their cross-examination. The Court noted that the "reverse 404(b) other act evidence "is admissible 'for defensive purposes if it tends, alone or with other evidence, to negate the defendant's guilt of the crime charged against him.'" Montelongo, 420 F.3d at 1174, (quoting Agushi v. Duerr, 196 F.3d 754, 760 (7th Cir. 1999). Reverse 404(b) evidence may be admitted after balancing the probative value of the evidence against any "danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," under FRE 403. Montelongo, 420 F.3d at 1174. "This error, we conclude, undermined the protections afforded by the Sixth Amendment's Confrontation Clause....Nonetheless, we underscore that a constitutional violation occurs when "the defendant is prohibited from engaging in 'otherwise appropriate cross-examination'" that, as a result, precludes him from eliciting information from which jurors could draw vital inferences in his favor." US v. Ellzey, 936 F.2d 492, 496 (10th cir. 1991). In 2005, the Seventh Circuit disagreed with a district court's evidentiary ruling that held the [criminal] defense to as rigorous a 404(b) standard as the United States. See, United States v. Seals, 419 F.3d 600, 607 (7th Cir. 2005)("Contrary to the district court's statement, the defense is not held to as rigorous of a standard as the government in introducing reverse 404(b) evidence.")....

In addition to the Second and Fifth Circuits, the United States Courts of Appeals for the First, Third, Seventh, and Eleventh Circuits have determined that rule 404(b) is inapplicable to admissibility of evidence of acts of third parties. See United States v. Reed, 259 F.3d 631, 634 (7th Cir.2001)("In deciding whether to admit such evidence, a district court should balance the evidence's probative value under Rule 401 against considerations such as prejudice, undue waste of time and confusion of the issues under Rule 403."); United States v. Morano,697 F.2d 923, 926 (11th Cir.1983)("But although Rule 404(b) does not control this situation, the exceptions listed in the Rule should be considered in weighing the balance between the relevancy of this evidence and its prejudice under Rule 403."); United States v. Stevens, 935 F.2d 1380, 1401-1406 (3d Cir.1991)("[A] defendant may introduce "reverse 404(b)" evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations."); United States v. Gonzalez-Sanchez, 825 F.2d 572, 582 n. 25 (1st Cir.1987)("Inasmuch as this evidence does not concern past criminal activity of [the defendant], Rule 404(b) is inapplicable."), cert. denied, 484 U.S. 989, 108 S.Ct. 510, 98 L.Ed.2d 508 (1987). In United States v. Stevens, the Third Circuit also held that a lowered standard of similarity between the crime before the federal court and the "other crimes evidence" governed "reverse 404(b)" evidence because prejudice to the defendant is not a factor. United States v. Stevens, 935 F.2d at 1403.

a. Applying the Proper Standard, Reverse 404(b) Makes Mr. Leon's Criminal History Admissible in the Present Case.

In the present case, the defense intends to argue that former co-defendant Lorenzo Leon is responsible for the injuries sustained by the victim in this case, Gordon McWhirter, and is shifting blame to Mr. Donald to avoid a lengthy prison sentence. As shown above, many courts have applied the standard that when a defendant seeks to introduce reverse 404(b) evidence, the court should employ a straightforward balancing of the evidence's probative value against considerations of undue waste of time and confusion of issues.

The court need not determine if the "bad acts" evidence offered by the defendant seek to prove a "general propensity" by Lorenzo Leon to commit assaultive acts. As previously stated, this court should not employ a traditional 404(b) test to determine whether the proffered

evidence is admissible. Rather, to protect Mr. Donald's constitutional rights to a fair trial, to present a complete defense, and to confrontation of witnesses, this court should utilize a more lenient standard and simply determine if the evidence is relevant and if so, are there issues of time or confusion which overcome the probative value.

It is clear that this evidence is probative. Evidence is relevant and thus probative if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. There must be a logical nexus between the evidence and the fact to be established. State v. Burkins, 94 Wash. App. 677, 692, 973 P.2d 15, review denied, 138 Wash.2d 1014, 989 P.2d 1142 (1999).

The evidence in this case is uncontroverted that Mr. Leon was present at the scene when Mr. McWhirter was assaulted. He admits to being present and his blood was found inside of Mr. McWhirter's vehicle. He has told multiple contradictory versions of what happened during this incident. The victim does not remember anything from the date of the assault and the state will be presenting no eyewitnesses to this incident other than Mr. Leon. Therefore, the argument the Mr. Leon committed this assault is not contradicted by any evidence of the state. In fact, Mr. Leon was charged as a co-defendant of Mr. Leon's and would potentially have been facing the same charges as Mr. Donald at trial if he had not agreed to testify against Mr. Donald.

In order to support his defense, Mr. Donald seeks to introduce the following evidence of Lorenzo Leon's past violent acts and his history of threats towards individuals.

2001- Charged with Assault 4, dismissed pursuant to a diversion.

2002- Convicted of Assault 4

2002- Convicted of Assault 4

2002- Convicted of Malicious Mischief 2- Alleged that "Suspect Leon then began throwing rocks at witness Simpson and was getting close enough with the rocks that witness Simpson was in fear of his life and ran back into the building to get away from suspect Leon."

2002- Convicted of Assault 4, Felony Harassment- Mr. Leon pled guilty to assaulting a female and threatening to kill her.

2002- Convicted of Assault 4

2003- Convicted of Malicious Mischief 2, Assault 4

2005- Convicted of Attempted Robbery Second Degree- Alleged that Mr. Leon demanded money from the victim in an aggressive manner, threw the victim into a fence, and then along with others, threw the victim onto the ground and punched, kicked and stomped on the victim's face. Mr. Leon pled guilty to attempting to rob the victim.

2005- Convicted of Harassment- Allegation that Mr. Leon threatened to kill a staff member at JRA, stated he would do it himself on the outs, or have his mom or "set" do it. Mr. Leon pled guilty to Harassment.

2008- Convicted of Residential Burglary- Mr. Leon was charged with breaking into a home, pointing a gun at several occupants, and threatening to kill them over a drug deal gone bad. Mr. Leon pled guilty to Residential Burglary and admitted entering the home with the intention of threatening persons inside of the home.

The defense seeks to introduce evidence of all of the above incidents to support the defense that Mr. Leon committed the assault against Mr. McWhirter, not Mr. Donald. The defense is aware that not all of the above charged criminal incidents resulted in Mr. Leon being convicted as charged, and that all but one of the above criminal charges were handled in juvenile court. However, unlike ER 609, ER 404(b) has no constraints whatsoever on the legal outcome of the alleged criminal conduct nor on the age of the individual at the time the bad acts were committed. The defense clearly has a good faith basis for raising these criminal incidents as each of these criminal allegations was supported by a sworn probable cause statement and Mr. Leon ended up pleading guilty to each of these cases save for the diversion, a case in which a guilty finding was entered when Mr. Leon failed to live up to the terms of his diversion. The defense seeks to show that Mr. Leon has been a volatile and violent individual at least since the age of 11. As will be argued below, Mr. Leon's violent behavior was not confined to a short time frame when he was a young troubled juvenile. Instead, Mr. Leon has been committing assaults and violent crimes since originally documented as an eleven year old. These crimes have continued unabated until the present time, even when Mr. Leon has been incarcerated or hospitalized. These facts are clearly relevant to the theory that Mr. Leon committed the assault against Mr. McWhirter. Mr. Leon's extensive criminal history, including a home invasion, a robbery, and other assaultive acts, clearly tends to make the assertion that Mr. Leon is guilty of

the assault against Mr. McWhirter more probable than not. The fact that Mr. Leon was violent as an eleven year-old and remains so today, even during his recent incarceration only strengthens this argument.

The defense also seeks to introduce uncharged criminal acts of Mr. Leon, which again, are not precluded by ER 404(b). The defense seeks to introduce this evidence through cross-examination of Mr. Leon, Mr. Leon's girlfriend, Jade Jahmorris and through mental health professionals. According to a tape recorded statement provided by Ms. Jahmorris, Mr. Leon is a mentally ill individual who is quick to become violent and who has repeatedly acted violently and assaultive towards her. In addition, according to Ms. Jahmorris, Mr. Leon has repeatedly threatened harm against her and her family. Ms. Jahmorris did not start dating Mr. Leon until the end of 2009, so all of the violent and threatening incidents perpetrated against Ms. Jahmorris by Mr. Leon occurred within a one year period, and within roughly one year of the assault against Mr. McWhirter, further cementing the argument that Mr. Leon was dangerous as a juvenile, and remains dangerous as an adult. In fact, Mr. Leon had only been released from jail a matter of days prior to being arrested on the current charge.

According to Ms. Jahmorris, Mr Leon committed the following violent acts:

April 2010- Mr. Leon grabbed Ms. Jahmorris by the head and punched her multiple times in the face. According to Ms. Jahmorris, Mr. Leon "busted my head open". She went to the hospital and was diagnosed with fractured bones.

Nov 2010- Mr. Leon hit Ms. Jahmorris and threatened her.

Dec 2010: Mr. Leon accosted Ms. Jahmorris at her Ob/Gyn appointment and he refused to leave when asked. Security had to be called. This behavior occurred in violation of a court ordered No-Contact Order between Mr. Leon and Ms. Jahmorris.

Unknown: Mr. Leon placed his hands around Ms. Jahmorris' throat and choked her until she could not breathe. He tried to punch her in the face but missed. He bit her in the face causing teeth marks all over Ms. Jahmorris' face.

Unknown: Mr. Leon assaulted Ms. Jahmorris in a Safeway bathroom. This assault left a bruise bigger than a basketball. He hit her over and over again.

In addition, Mr. Leon has committed multiple acts of violence while incarcerated during the pendency of this case. Reports from Western State Hospital detail at least three such incidents:

> April 13th 2011- Mr. Leon was talking to a peer when he suddenly attacked the peer, yelling nonsensically and hitting and scratching the peer." "Pt. was already actively and vigorously assaulting the peer, such that a code was called and mult. (?) staff AND one helpful pt had to physically intervene."
>
> April 17th, 2011- Mr. Leon looked in the direction of a nurse, stood up from his table and began yelling, "What are you going to do about it. Think you can do anything bitch?" He then clenched his fists and ran at the nurse. Staff stopped Mr. Leon and took him to the floor where he continued to struggle while screaming "Sylvia, I going to kill you."
>
> April 18th, 2011- Mr. Leon was standing in his doorway when a peer called out to him. He ran out the door, grabbed peer, threw him to the ground and kept punching him in the face.

In addition to his charged and uncharged criminal acts, Mr. Leon, during one of his mental health evaluations, told the evaluator that "I rob drug dealers". See Report of Dr. Joanna Johnson, May 18th, 2011. Mr. Leon's admission that he has a history of robbing people is relevant to Mr. Donald's defense, just as his criminal acts are. If Mr. Leon is an admitted robber, that fact clearly has a tendency to support the argument that Mr. Leon committed the assault and attempted robbery in the present case. This statement is not only relevant, but admissible as a statement against interest pursuant to ER 804(b)(3).

In sum, it is the defense theory that Lorenzo Leon, nor Harold Donald, who committed this assault. Mr. Leon's criminal history and admissions are relevant to demonstrate that Mr. Leon, who had access to the victim at the time of the assault, had a history of committing assaults and robberies, and had the intent, opportunity, and ability to commit this crime. See, State v. Clark, 78 Wash.App. 471, 898 P.2d 854 (1995)(other crimes evidence admissible when the defendant presented evidence of the other suspect's motive, opportunity, and ability to commit the arson for which Clark had been charged.)

The correct inquiry for this court is not whether this is propensity evidence, but whether it is relevant and overly prejudicial to the state. The assault against Mr. McWhirter allegedly

happened in a blink of an eye; Mr. McWhirter allegedly confronted an individual trying to steal his Jeep, and was assaulted. The fact is that Lorenzo Leon's history shows that he is the type of person that would commit such a crime. He has repeatedly exhibited extremely violent behavior and shown an inability to control his violent temper. Therefore, Mr. Leon's violent criminal past is extremely relevant to the defense that Lorenzo Leon committed this crime, and this evidence is not outweighed by prejudice to the state. And as will be discussed below, this evidence is even more relevant when coupled with Mr. Leon's admissions that his violent behavior is driven by command hallucinations which he cannot resist.

2. The Criminal Behavior of Mr. Leon is Admissible to Impeach the Credibility of Mr. Leon If He Testifies.

In addition to the admissibility of Mr. Leon's violent past pursuant to ER 404(b), it is also admissible pursuant to ER 607. Any witness may have their credibility attacked pursuant to ER 607. It is clear that the defense has the right to present a defense and argue Mr. Leon's culpability and seek to attack the credibility of Mr. Leon on the basis that he is responsible for the crime charged. Mr. Leon is benefitting from his plea in that he is not being charged with First Degree Assault and is guaranteed a roughly five year prison sentence instead of a potential life sentence. Mr. Leon is not simply a "jail-house snitch" or someone providing information with no involvement in the actual case. Rather, the defense is prepared to argue that Mr. Leon committed the crime against Mr. McWhirter.

Mr. Leon has already opened the door to his violent history by giving self-serving statements to the police and state insisting that he had nothing to do with this incident and was horrified by what happened to Mr. McWhirter. If Mr. Leon had admitted participation in this assault, the probative value of Mr. Leon's violent history would clearly be minimized as his likelihood of committing the crime wouldn't be an issue. However, Mr. Leon has convinced the state to give him an incredibly lenient plea deal based upon his assertion that he had nothing to do with this assault, that he tried to stop it, and that he was very upset by the injuries incurred by Mr. McWhirter. In short, Mr. Leon got his deal by feigning righteous indignation at what happened to Mr. McWhirter. However, as his criminal history clearly shows, Mr. Leon is

exactly the type of individual that would carry out such an assault. To argue otherwise would be disingenuous at best.

Every aspect of Mr. Leon's plea deal is admissible to challenge the credibility of Mr. Leon. State v. Jessup, 31 Wn.App.304, 641 P.2d 1185 (1982). Therefore, the defense should be allowed to impeach Mr. Leon's bias based upon his interest in receiving a vastly reduced prison sentence. Introducing Mr. Leon's violent history will allow the defense to impeach Mr. Leon by showing that his entire plea deal was based upon biased and inconsistent statements by Mr. Leon that simply defy logic.

3. The Court Should Allow the Defense to Impeach Mr. Leon Pursuant to ER 609 if he Testifies

Pursuant to ER 609, any witness may be impeached with prior convictions as long as certain conditions are met. ER 609 (b) holds

> (a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

Mr. Leon has multiple convictions involving dishonesty that have occurred within the past ten years. The defense seeks to impeach Mr. Leon with the following convictions pursuant to ER 609.

02-8-04876-7	Theft 3	date of conviction 12/02
02-8-05097-4	Theft 3	date of conviction 01/03
03-8-01305-8	Burglary 2	date of conviction 04/03
03-8-04451-4	TMV 2	date of conviction 11/03

Each of the listed convictions of Mr. Leon was adjudicated in juvenile court. ER 609 (d) addresses the use of such adjudications.

609(d) Juvenile Adjudications.

> Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Pursuant to ER 609(d), juvenile adjudications are never admissible against a criminal defendant. However, they are admissible against any other witness if the court determines it is necessary for a fair determination on the issue of guilt or innocence. In the present case, the defense asks this court to allow the introduction of Mr. Leon's juvenile criminal history involving dishonesty as it is vital to Mr. Donald's right to a fair trial for a jury to hear such information. As previously stated, the state is presenting one witness to testify first-hand about what allegedly happened to Mr. McWhirter; Lorenzo Leon. Mr. Leon was admittedly on the scene of the assault. He has given multiple contradictory accounts of what happened. At trial he will be testifying only after being promised extreme leniency by the state. In addition, Mr. Leon is still a very young man. All of these convictions occurred within the past nine years. And as discussed previously, Mr. Leon was unbelievably active in the criminal justice system his entire life, starting at the age of 11. These convictions were not one or two mistakes made decades ago by an innocent child making foolish, impulsive decisions. They were criminal acts made by a young man who continued to make these same decisions until the day he was arrested on this cause. Based upon this, every bit of information relating to Mr. Leon's credibility is vital to a fair determination of Mr. Donald's guilt or innocence. As such, the defense should be allowed to inquire into these past convictions during its cross-examination of Mr. Leon.

4. <u>Mr. Leon's Residential Burglary Conviction is Admissible Pursuant to ER 609 if he Testifies</u>.

As has been argued, the defense believes that Mr. Leon's Residential Burglary conviction should be admissible pursuant to ER 404(b). In addition, the defense believes it is also admissible pursuant to ER 609, even though it is not a crime of dishonesty. ER 609 allows a party to introduce a felony conviction of a witness, even if it does not involve dishonesty, as long

as it is no more than ten years old and a judge determines that the probative value outweighs the prejudice to the opposing party.

Mr. Leon's Residential Burglary charge carried a maximum sentence of ten years in prison and he was convicted in 2008. Therefore, this crime meets the standards for admissibility so long as the court finds the probative value outweighs any prejudice to the state.

In this case, Mr. Leon was convicted of breaking into a home and threatening to kill the inhabitants after a "drug deal gone bad". The defense has already argued at length why Mr. Leon's criminal history is relevant. This case is no different. The facts of this case show that Mr. Leon is an impulsive, violent, threatening individual, all factors relevant to the defense theory that Mr. Leon assaulted Mr. McWhirter. Therefore, the court should find that the probative value of this conviction far outweighs any prejudice to the state.

5. Mr. Leon's Reputation for Violence is Admissible if he Testifies

The defense not only seeks to admit the prior acts previously asserted, but also the violent nature of Mr. Leon. The defense seeks to ask Ms. Jahmorris about the violent reputation of Mr. Leon. There does not appear to be any Washington case law which addresses the issue of attacking the credibility of a non-victim with character evidence of violent nature.

While this case appears to be one of first impression in Washington, an analogous situation is one in which a defendant claims self-defense. Even if a decedent victim's reputation for violence was unknown to the defendant at the time of the crime, it is admissible nonetheless to corroborate a defendant's claim that the deceased was the aggressor. Thus the deceased's reputation for violence can be admitted to assist the jury in evaluating the deceased's acts at the time of the homicide even if the defendant was unaware of this reputation. Evans v. United States, 107 U.S.App.D.C. 324, 277 F.2d 354, 1 A.L.R.3d 566 (1960); State v. Adamo, 120 Wash. 268, 207 P. 7 (1922); 1 J. Wigmore, Evidence § 63 (3d ed. 1940).

Likewise, regardless of Mr. Donald's knowledge, the issue is the violent nature of Mr. Leon and whether Mr. Leon's reputation for violence would corroborate Mr. Donald's claim that he was the violent party in the present case. Just as a homicide victim's acts are relevant to determining the defendant's role, Mr. Leon's violent reputation is relevant to Mr. Leon's behavior at the time Mr. McWhirter was assaulted.

6. Mr. Leon's Uncharged Criminal History is Admissible to Show Bias on the Part of Mr. Leon if he Testifies

As stated, the state has entered into a formal plea agreement with Mr. Leon in which he will receive a recommendation for a 57 month sentence in exchange for his testimony against Mr. Leon. No mention is made in the plea deal about other outstanding criminal acts of Mr. Leon.

Yet at the time this plea deal was reached, Mr. Leon had engaged in literally dozens of obvious criminal activities, well known to the state, that the state had shown no interest in pursuing. For example, as previously discussed, Ms. Jahmorris was interviewed by Det. Bartlett about this case. Ms. Jahmorris told Det. Bartlett about five separate assaults committed against her by Mr. Leon, two of which could easily have been verified by independent witness and/or medical records. Each of these crimes likely could have been charged as Second Degree Assaults, given the facts as alleged by Ms. Jahmorris. Ms. Jahmorris' statement was provided to Mr. Leon's counsel well before the plea deal with the state was reached. One would be hard pressed to believe that Mr. Leon was not familiar with the statement of his girlfriend provided to his attorney during discovery. Yet surprisingly, not one of these incidents has been investigated by the state.

In addition to the assaults against Ms. Jahmorris, since being incarcerated on this case in January of 2010, Mr. Leon has made close to a hundred phone calls to Ms. Jahmorris, despite there being an active no-contact order (check to see if allows phone) between the two of them, with Ms. Jahmorris being the protected party. The state provided copies of recordings of these phone calls to defense counsel and to Mr. Leon's counsel well before any plea deal was reached between the state and Mr. Leon. Therefore, similar to Ms. Jahmorris' statement regarding Mr. Leon's violence towards her, it would be difficult to imagine that Mr. Leon was not aware that the state had dozens of recordings of him violating his no-contact order. In fact, Mr. Leon discusses the no-contact order on many of the jail recordings, so no argument can be made that he was not aware of the Order. Yet again, to date, no charges have been filed relating to these calls, which is very curious given the King County Prosecuting Attorney's policy on

aggressively prosecuting domestic violence crimes. It is especially odd given the fact that these cases are iron-clad, given that the phone calls have all been recorded. Even more curiously, after the recordings were disclosed to the defense attorneys, and the plea deal was reached, the phone calls continued. Mr. Leon was not only not prosecuted for these calls, but the state did not even attempt to revoke Mr. Leon's jail phone privileges as is routine in domestic violence cases, and Mr. Leon remains free to violate the court order to this date.

In short, Mr. Leon is well aware that the state could prosecute him for assaulting Ms. Jahmorris and for violating his no-contact order. He is also fully aware that they are unlikely to do so as long as he continues to assist in the prosecution of Harold Donald. If the state were to now file multiple criminal charges against Mr. Leon, it is almost certain that his participation would be in jeopardy. As such, it is clearly relevant to Mr. Leon's credibility and to his bias that he needs to place blame on Harold Donald or risk facing multitudes of additional criminal charges. It would clearly serve Mr. Leon's interests to continue cooperating with the state to ensure that none of these cases is ever filed. A jury should have the opportunity to hear about the special treatment afforded to Mr. Donald and to weigh this evidence when deciding Mr. Leon's credibility and bias.

7. <u>The Mental Health History of Mr. Leon is Relevant to Mr. Donald's Defense</u>

Defense counsel has reason to believe that Lorenzo Leon has some history with mental health issues, but it is unclear to what extent. During his incarceration in the present case, Mr. Leon has had extensive contacts with the mental health system, both at the King County Jail (KCJ) and at Western State Hospital (WSH).

Mr. Leon was first sent to WSH for a competency evaluation in March of 2011, at the request of his defense attorney. The evaluation for competency was not completed as WSH determined that Mr. Leon was not fully assisting in the evaluation process. Shortly after his return to the KCJ, his attorney withdrew her request for competency.

In April of 2011, Mr. Leon was sent to WSH again, apparently this time for a competency evaluation and an assessment under the civil commitment laws of RCW 10.77. Mr. Leon remained at WSH until he was sent back to the KCJ on May 18th, 2010. During his time at WSH, Mr. Leon assaulted two patients, and attacked and threatened to kill a nurse. Mr. Leon

also made numerous comments about hearing voices, and how these voices command him to "fight this person, kill this person". WSH did not come to a conclusive opinion regarding Mr. Leon's mental state. Rather, mental health professionals at WSH reached the opinion that Mr. Leon was competent and appeared to be faking many of his mental illness symptoms.

While incarcerated at the jail, Mr. Leon also had regular contacts with the KCJ mental health staff. Mr. Leon made numerous statements regarding his desire to harm himself, usually followed by admissions that he made up the threats to harm himself so that he could get his housing changed. Over the past year, Mr. Leon's mental state has changed dramatically. Initially Mr. Leon's odd behavior occurred sporadically and seemingly only when speaking with mental health personnel. Yet more recently, Mr. Leon has apparently been nearly non-responsive, refusing to come to court, and refusing to engage in any meaningful conversation. However, the jail mental health staff seems to agree that Mr. Leon is not really mentally ill, but has been faking his mental illness for personal gain. The records from the KCJ are replete with examples of jail health staff questioning Mr. Leon's odd behavior, and noting instances such as Mr. Leon mining jail staff for examples of how a mentally ill person would act.

Defense counsel listened to jail recordings of phone calls that Mr. Leon made to family and friends while incarcerated at the KCJ. During these calls, Mr. Leon repeatedly discusses the meaning of incompetency. On March 30th, 2011, Mr. Leon called his mother and discussed with her incompetency. During the conversation, Mr. Leon stated to his mother

Lorenzo:	Got me in the hole, I think. Oh, well. So how did—did you talk to Western State?
Mom:	No, I haven't did that yet. I've been so busy. But I tried calling your lawyer.
Lorenzo:	Okay. When you—when you talk to him, just tell him that I have—that I hear things, I see things, I can't hold a job, I hear voices.
Mom:	Oh, I know—I know what to tell him.
Lorenzo:	All right. Cool. Lay it—lay it on him thick.

In addition, Mr. Leon makes repeated phone calls to his family and friends discussing what would happen if he were found to be mentally ill or incompetent. Mr. Leon discusses the benefits of mental health court or an incompetency finding and how they would possibly keep him out of prison.

Based upon these same concerns, the state and counsel for Mr. Leon agreed upon a competency evaluation to determine whether Mr. Leon was competent to be sentenced. On January 9th, 2012, Defense counsel received a report from Dr. Brian Judd. Dr. Judd noted that while Mr. Leon refused to participate in the evaluation process, there was ample evidence from previous sources to conclude that Mr. Leon is faking his mental illness for personal benefit.

In short, it is unclear whether Mr. Leon is truly mentally ill or is faking mental illness to avoid a lengthy prison sentence. Regardless, defense counsel should be free to argue to a jury either version, both, or anywhere in between. While these theories may be inconsistent, that is an issue of strategy for the defense, not an issue of admissibility. It is clear that whether Mr. Leon is faking mental illness or really does hear command hallucinations, Mr. Leon's behavior and his statements made while at WSH and the KCJ are relevant and admissible, as will be discussed below.

a. Admissibility of Mr. Leon Faking Mental Health Illness

If Mr. Leon is faking mental health illness, any evidence relating to this issue is relevant and admissible for several reasons. If Mr. Leon testifies in the present case, his effort to continually lie to mental health professionals, his attorney, and the court, is clearly evidence which is relevant to the credibility of Mr. Leon pursuant to ER 608. The credibility of the witness and the weight to be afforded that testimony are matters for the jury's determination. State v. Cox, 17 Wash.App. 896, 566 P.2d 935 (1977). Mr. Leon's actions, especially in light of his admonition to his mother over the telephone that she should "lay it on thick" are directly probative of Mr. Leon's "truthfulness or untruthfulness" as required by ER 608.

Even if Mr. Leon does not testify, his long, drawn out, concerted effort to trick mental health professionals is admissible to support Mr. Donald's defense that Mr. Leon committed this crime. As previously shown, Mr. Donald has a constitutional right to present a defense, which in the present case is that Mr. Leon committed this crime. Mr. Leon's actions in engaging in a

pattern of behavior to appear mentally ill in order to avoid going to prison is evidence of Mr. Leon's guilty conscience.

Evidence which creates a reasonable inference that the defendant's actions are a reaction to a consciousness of guilt is admissible. See, State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965)(evidence of flight is admissible as tending to show guilt.); and, State v. Sanders, 66 Wn.App. 878, 885-86, 833 P.2d 452 (1992), review denied, 120 Wn.2d 1027 (1993)(evidence of witness tampering is admissible as evidence of consciousness of guilt in the trial of the charge to which the witness's testimony pertains.) Giving a false name has also been found to be admissible as consciousness of guilt. When determining whether evidence of giving a false name is admissible to show consciousness of guilt, the inquiry is whether the defendant gave the false name to feign detection for the crime charged. State v. Freeburg, 105 Wn.App. 492, 497-498, 20 P.3d 984 (2001).

While this type of guilty conscience evidence is virtually admitted exclusively against a criminal defendant, there is no reason why it would be inadmissible in an "other suspect" situation. As shown above, the state is generally allowed to introduce evidence that the defendant engaged in behavior after the crime, when it appeared that this behavior was intended to avoid responsibility or cover up the crime, such as flight from the scene, providing a false name, tampering with a witness, etc...

Mr. Leon has done nothing but actively engage in behavior to avoid responsibility in the present case. He has incessantly acknowledged the situation he is facing, stating on the phone, and to mental health professionals that if he goes to trial on this case, he would get anywhere between 25 years to life in prison. Mr. Leon repeatedly discussed with family, friends and mental health professionals the substantial amount of time in prison that he would receive if he went to trial. He also repeatedly discussed how being found mentally ill would shield him from a substantial amount of prison time, and told his mother that she should "lay it on thick" when speaking with a mental health professional.

Mr. Leon's feigning mental illness is no different than fleeing the scene, providing a false name, tampering with a witness, etc... As long as the court finds that this behavior is geared towards avoiding responsibility for the crime charged, it is admissible as consciousness of guilt

by Mr. Leon. This is clearly the case given Mr. Leon's admissions that he believed he was looking at life in prison and being found incompetent would avoid this. Mr. Leon's comments on the phone and to mental health professionals concretely tie his plan to the crime charged. In fact Dr. Judd came to this very conclusion.

> Presentation of psychotic symptoms appeared to be instrumental for purposes of obtaining preferred in-custody housing or housing at Western State Hospital. Review of phone records revealed frequent discussions of possible dispositional outcomes to Cause #11-C-00206-0 SEA were Mr. Leon found incompetent to stand trial and civilly committed. *More generally, it appears that presentation of psychotic symptoms constituted Mr. Leon's strategy to mitigate the duration of incarceration and was predicated on the erroneous beliefs that being found incompetent to stand trial and civilly committed would result in earlier release, the capacity to retract his 1/12/11 statement to Det. Bartlett, or the partially erroneous belief that the charge would either be dismissed or possibly reduced to a misdemeanor.* (italics added)
> Dr. Judd report dated 01/08/12, p. 3-4.

If Mr. Leon did not feel that he was guilty of this crime, he would have no reason to continually assert that he was looking at anywhere from 25 years to life if he went to trial, and would have no reason to continually feign mental illness. In addition, in the present case, the court need not weight the usual prejudice against the defendant if the evidence is admitted. Mr. Leon is not a defendant in Mr. Donald's trial and therefore faces no adverse consequences regardless of what evidence is admitted. The defense has subpoenaed Dr. Judd and will seek to call Dr. Judd as an expert witness to give his opinion that Mr. Leon is feigning mental illness. Dr. Judd should be allowed to give his opinion and to testify to any of Mr. Leon's relevant mental health evidence from KCJ as well as WSH which helped form his opinion, as well as any statements Mr. Leon made in furtherance of his apparent plan.

Any statements Mr. Leon made in furtherance of this plan are admissible not only as a basis for Dr. Judd's opinion, but also pursuant to ER 803(a)(3), as statements of Mr. Leon's state of mind and motive to fabricate his mental health illness. For instance, Mr. Leon's statement to his mother that she should "lay it on thick", directly relates to Mr. Leon's plan to feign mental illness. This type of plan or motive evidence is specifically allowed pursuant to ER 803(a)(3). In addition, any statements about the amount of prison time Mr. Leon is facing are also relevant to Mr. Leon's state of mind and are not offered to prove the truth of the matter asserted, but

rather to show why Mr. Leon acted the way he did. (As it shows he was anticipating a lengthy prison term, regardless of whether this was truly the case.)

b. Mr. Leon's Statements re: his Mental Health Issues are Admissible

While accessing mental health services during his incarceration, Mr. Leon has made repeated statements acknowledging his violent nature and the role his mental health issues play in this violence. For instance, when asked why he assaulted a peer at Western State Hospital on April 18th, Mr. Leon reported "I heard a voice say "go", I could not control myself." During a mental health evaluation on May 17th, 2011, Mr. Leon reported that he sometimes experiences voices. The evaluator wrote, "(Leon) stating, 'they talk to me like my friends', however, he indicated that the voices command him to do things and that it 'happens all of the time'. Mr. Leon reported that the voices 'tell me to fight this person, to kill this person.' He subsequently added that he has to follow the commands and when asked what happens if he does not, he said "I don't know."

While at the King County Jail, Mr. Leon reported to jail mental health staff that he hears voices that say to harm self and others. In addition, while at the King County Jail, Mr. Leon was provided a questionnaire about his mood. The possible answers were 0 to 5, with 0 being the least accurate, and 5 being the most typical of the person answering the question. Mr. Leon answered the statement, "My anger builds to an uncontrollable rage, and then I feel deep regret when I calm back down", with a 5. He also answered "The voices I hear command me to hurt myself or others" with a 5.

As shown above, Mr. Leon has made many statements about how his mental health illness impacts his violent behavior. It is clear that all of the above statements are relevant to Mr. Donald's defense that Mr. Leon committed the assault against Mr. McWhirter. If Mr. Leon suffers from mental health issues which compel him to commit acts of violence, Mr. Donald surely should be able to raise this issue in front of a jury as it makes the contention that Mr. Leon committed this crime much more likely. Evidence that Mr. Leon is driven to violence by voices in his head that he cannot resist is clearly relevant pursuant to ER 401 to the claim that Mr. Leon committed the assault against Mr. McWhirter.

Any statements made by Mr. Leon are not only relevant but are admissible and not excludable under any evidence rules. Because the above statements were given by Mr. Leon to mental health professionals while they were assessing him for his mental health needs, they are not excluded as hearsay. Evidence Rule 803 holds

> (a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> 4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

This exception has been extended to psychological diagnosis and treatment, as well as statements made to therapists, counselors, etc... See, In Re Welfare of J.K., 49 Wn.App. 670, (1987)(statements made to a hospital social worker admissible.)

In the present case, all of Mr. Leon' statements were made when he was in a therapeutic mental health setting, either at the jail or at WSH, giving information so that his mental condition could be assessed. These statements were not made to other inmates or guards, but to trained mental health professionals who were assessing Mr. Leon so that a diagnosis could be made and proper treatment such as medication could be determined. Therefore, all relevant statements made by Mr. Leon to qualified medical or mental health treatment personnel are not excludable as hearsay.

CONCLUSION

In sum, Mr. Donald has a constitutional right to present a defense, and has a right to present "other suspect" evidence. The court should not prejudge Mr. Donald's defense and determine what evidence may be allowed at trial based upon the perceived viability of the defense. In the present case, Mr. Leon had the motive, opportunity, and clear ability to commit the crimes with which Mr. Donald is charged. The evidence sought to be introduced by the defense is relevant to the defense that Mr. Leon, and not Mr. Donald, committed the crimes

against Mr. McWhirter.

DATE: 1/10, 2012.

Respectfully Submitted,

Daniel Norman, WSBA #28786
Attorney for Defendant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68429-9-I
	)	
DONALD HAROLD,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF SEPTEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DONALD HAROLD
DOC NO. 322028
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF SEPTEMBER, 2012.

x Patrick Mayovsky