

NO. 55217-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

ATIF RAFAY,

Appellant.

REC'D

JUN 29 2007

King County Prosecutor
Appellate Unit

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

The Honorable Charles W. Mertel, Judge

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2007 JUN 29 PM 4:03

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR	1
Issues Pertaining to Assignments of Error	2
B. STATEMENT OF THE CASE.....	5
1. Procedural Facts	5
2. Substantive Facts.....	7
a. <i>The Rafay family.</i>	7
b. <i>The murders.</i>	10
c. <i>The Bellevue Police investigation.</i>	19
d. <i>A key witness comes forward.</i>	31
e. <i>Forensic evidence.</i>	34
f. <i>RCMP assistance.</i>	42
g. <i>“Project Estate.”</i>	44
h. <i>The arrests.</i>	82
i. <i>Sebastian takes the stand.</i>	86
C. ARGUMENT.....	92
1. RAFAY’S ATTORNEYS WERE INEFFECTIVE FOR INFORMING JURORS THIS CASE DID NOT INVOLVE THE DEATH PENALTY.....	92
2. EXCLUSION OF ALL EVIDENCE PERTAINING TO DOUGLASS MOHAMMED AND FUQRA DENIED RAFAY HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND A FAIR TRIAL.....	101

TABLE OF CONTENTS (CONT'D)

	Page
a. Rafay Had A Constitutional Right To Present "Other Suspect" Evidence Casting Doubt On The State's Claim That He Murdered His Family.	104
b. The Evidence Was Also Admissible to Rebut The Prosecution's Claim That It Conducted An Exhaustive And Thorough Investigation.	117
3. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO EXCUSE JUROR 4 (DONNA PERRY).....	128
4. REPEATED AND FLAGRANT MISCONDUCT FROM BELLEVUE POLICE WITNESSES DENIED RAFAY A FAIR TRIAL.....	155
a. Comments on Guilt/Veracity	155
b. Violations of In Limine Orders.....	162
i. <i>Gomes and Thompson</i>	163
ii. <i>Officer Larry Overcast</i>	167
iii. <i>Inspector Lorne Schwartz</i>	168
iv. <i>Motion for Mistrial</i>	170
c. Detective Thompson violates another ruling....	171
5. PROSECUTORIAL MISCONDUCT DENIED RAFAY A FAIR TRIAL.....	177
a. Konat Compares Atif and Sebastian (Unfavorably) To Islamic Terrorists Who Cut People's Heads Off.	179

TABLE OF CONTENTS (CONT'D)

	Page
b. Konat Discredits Key Defense Witness By Telling Jurors He Knows She Was Intoxicated On The Stand Because He Smelled Her.....	182
c. Konat Shares Recent Death of His Father And Argues That Atif Did Not Act Like Someone Who Recently Lost His Parents.	184
6. THE CUMULATIVE EFFECT OF THE TRIAL ERRORS DENIED RAFAY HIS RIGHT TO A FAIR TRIAL.....	187
D. CONCLUSION.....	188

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
 <u>City of Seattle v. Heatley</u> , 70 Wn. App. 573, 854 P.2d 658 (1993), <u>review denied</u> , 123 Wn.2d 1011 (1994).....	155
 <u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	93
 <u>State v. Badda</u> , 63 Wn.2d 176, 385 P.2d 859 (1963)	187
 <u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	161, 163, 177, 179, 184
 <u>State v. Benn</u> , 120 Wn.2d 631, 845 P.2d 289, <u>cert. denied</u> , 510 U.S. 944 (1993)	94
 <u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	155
 <u>State v. Bowman</u> , 57 Wn.2d 266, 356 P.2d 999 (1960).....	92
 <u>State v. Burri</u> , 87 Wn.2d 175, 550 P.2d 507 (1976)	105
 <u>State v. Carlin</u> , 40 Wn. App. 698, 700 P.2d 323 (1985), <u>overruled on other grounds by</u> <u>City of Seattle v. Heatley</u> , 70 Wn. App. 573, 854 P.2d 658 (1993), <u>review denied</u> , 123 Wn.2d 1011 (1994)	155, 156, 162

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956)	179
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978)	177
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984)	187
<u>State v. Copeland</u> , 130 Wn.2d 244, 922 P.2d 1304 (1996)	161, 163, 179
<u>State v. Darden</u> , 145 Wn.2d 612, 41 P.3d 1189 (2002)	105, 111, 115
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984)	184
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001)	155, 156, 162
<u>State v. Doogan</u> , 82 Wn. App. 185, 917 P.2d 155 (1996)	93
<u>State v. Downs</u> , 168 Wash. 664, 13 P.2d 1 (1932)	107, 109-113, 115
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996)	162

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Elmore</u> , 155 Wn.2d 758, 123 P.3d 72 (2005)	129
<u>State v. Escalona</u> , 49 Wn. App. 251, 742 P.2d 190 (1987).....	163
<u>State v. Evans</u> , 96 Wn.2d 119, 634 P.2d 845 (1981)	163
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996), <u>review denied</u> , 131 Wn.2d 1018 (1997).....	186, 187
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105, <u>cert. denied</u> , 516 U.S. 843 (1995)	154
<u>State v. Gibson</u> , 75 Wn.2d 174, 449 P.2d 692 (1969), <u>cert. denied</u> , 396 U.S. 1019 (1970)	177
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <u>cert. denied</u> , 475 U.S. 1020 (1986)	115, 162
<u>State v. Haga</u> , 8 Wn. App. 481, 507 P.2d 159, <u>review denied</u> , 82 Wn.2d 1006 (1973)	155
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983)	105, 110, 115

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Huson</u> , 73 Wn.2d 660, 440 P.2d 192 (1968), <u>cert. denied</u> , 393 U.S. 1096 (1969)	177
<u>State v. Jorden</u> , 103 Wn. App. 221, 226, 11 P.3d 866 (2000), <u>review denied</u> , 143 Wn.2d 1015 (2001)	129, 146, 154
<u>State v. Kwan</u> , 174 Wash. 528, 25 P.2d 104 (1933)	113
<u>State v. Lewis</u> , 78 Wn. App. 739, 898 P.2d 874 (1995), <u>review denied</u> , 128 Wn.2d 1012 (1996)	178
<u>State v. Mak</u> , 105 Wn.2d 692, 718 P.2d 407, <u>cert. denied</u> , 479 U.S. 995 (1986)	112, 113
<u>State v. Mason</u> , 127 Wn. App. 554, 126 P.3d 34 (2005).....	95
<u>State v. Mason</u> , 157 Wn.2d 1007, 126 P.3d 34 (2006)	95
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996)	107, 109
<u>State v. Murphy</u> , 86 Wn. App. 667, 671, 937 P.2d 1173 (1997), <u>review denied</u> , 134 Wn.2d 1002 (1998)	92, 95
<u>State v. Noltie</u> , 116 Wn.2d 831, 809 P.2d 190 (1991)	146

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES</u> (CONT'D)	
<u>State v. Reed</u> , 101 Wn. App. 704, 6 P.3d 43 (2000).....	105
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	177, 186
<u>State v. Rehak</u> , 67 Wn. App. 157, 834 P.2d 651 (1992), <u>review denied</u> , 120 Wn.2d 1022 (1993).....	107
<u>State v. Smith</u> , 189 Wash. 422, 65 P.2d 1075 (1937)	163
<u>State v. Stith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993).....	163
<u>State v. Suarez-Bravo</u> , 72 Wn. App. 359, 864 P.2d 426 (1994).....	163
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	95
<u>State v. Thompson</u> , 90 Wn. App. 41, 950 P.2d 977, <u>review denied</u> , 136 Wn.2d 1002 (1998)	156, 162
<u>State v. Townsend</u> , 142 Wn.2d 838, 15 P.3d 145 (2001).....	92-95, 97

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>FEDERAL CASES</u>	
 <u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)	104
 <u>Crane v. Kentucky</u> , 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)	98, 105, 107, 115
 <u>Franks v. Delaware</u> , 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)	46
 <u>Holmes v. South Carolina</u> , 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)	106, 113-115
 <u>Krulewitch v. United States</u> , 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949)	162
 <u>Kyles v. Whitley</u> , 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)	118-120, 122
 <u>Mendez v. Artuz</u> , 303 F.3d 411 (2d Cir. 2002), cert. denied, 537 U.S. 1245 (2003)	119, 120, 122
 <u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)	98
 <u>Strickland v. Washington</u> , 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)	94, 95

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

<u>Thomas v. Hubbard</u> , 273 F.3d 1164 (9th Cir. 2001), <u>overruled on other grounds</u> , <u>Payton v. Woodford</u> , 299 F.3d 815 (9th Cir. 2002)	106
<u>United States v. Cronic</u> , 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)	105
<u>United States v. Crosby</u> , 75 F.3d 1343 (9th Cir. 1996)	111, 119, 122
<u>United States v. Patrick</u> , 248 F.3d 11 (1st Cir. 2001)	122
<u>United States v. Scheffer</u> , 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)	106
<u>United States v. Vallejo</u> , 237 F.3d 1008 (9th Cir. 2001)	106
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)	105

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>OTHER JURISDICTIONS</u>	
<u>Commonwealth v. Reynolds</u> , 429 Mass. 388, 708 N.E.2d 658 (1999)	121, 122
<u>Johnson v. U.S.</u> , 552 A.2d 513 (D.C. Ct. App. 1989).....	112
<u>People v. Hall</u> , 718 P.2d 99 (Cal. 1986).....	113
<u>People v. Mendez</u> , 193 Cal. 39, 223 P. 65 (Cal. 1924)), <u>cert. denied</u> , 479 U.S. 995 (1986)	112
<u>Smithart v. State</u> , 988 P.2d 583 (Alaska 1999).....	112
<u>RULES, STATUTES AND OTHERS</u>	
14 L. Orland & K. Tegland, Wash.Prac., <i>Trial Practice</i> (4th ed. 1986).....	146
16 C.J. § 1085.....	108
1A John Henry Wigmore, <i>Evidence in Trials at Common Law</i> (Tillers rev. ed. 1983)	106
American Bar Association, <i>Standards for Criminal Justice</i> (2nd Ed. 1982).....	163
ER 401	115

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS</u> (CONT'D)	
Gisli H. Gudjonsson, <i>The Psychology of Interrogations and Confessions</i> (2003).....	99
RCW 2.36.110.....	128
RPC 3.4(e)	163
U.S. Const. amend. 6	1, 2, 94, 104, 156
U.S. Const. amend. 14	104
Wash. Const. art. 1, § 21.....	1, 104
Wash. Const. art. 1, § 22.....	1, 2, 94, 156

A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to effective representation under the Sixth Amendment and article 1, § 22 of the Washington Constitution when, for no legitimate strategic reason, his attorneys agreed jurors would be told this was not a death penalty case.

2. The trial court violated appellant's constitutional rights under the Sixth Amendment and article 1, § 21 of the Washington Constitution when it excluded key evidence someone else had committed the charged crimes.

3. The trial court erred when, at the State's urging, it discharged a qualified juror during trial.

4. Appellant was denied his constitutional right to a fair trial under the Sixth Amendment and article 1, § 22 of the Washington Constitution where multiple witnesses expressed their opinions on his guilt.

5. The State's repeated violations of in limine rulings violated appellant's right to a fair trial under the Sixth Amendment and article 1, § 22 of the Washington Constitution.

6. Prosecutorial misconduct during closing argument denied appellant his constitutional right to a fair trial under the Sixth Amendment and article 1, § 22 of the Washington Constitution.

7. The cumulative effect of these errors denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. In a first-degree aggravated murder case, it is error to inform jurors the death penalty is not at issue. It makes jurors less careful during deliberations and more likely to convict. Here, appellant's own attorneys agreed jurors could be told this was not a death penalty case. Where there was no legitimate tactical reason for this costly mistake, did appellant receive ineffective assistance of counsel?

2. Appellant was charged with murdering his father, mother, and sister. He attempted to raise a two-pronged defense: (1) he had an alibi, and (2) someone else killed his family. Within days of the murders and before police had released information to the public identifying the murder weapon as a baseball bat, an FBI informant told police that a violent faction within the local Muslim community had sought the murder of appellant's father. In fact, a member of this group had nervously asked the informant whether he

had seen a baseball bat in a group member's car prior to the murders. At the State's request, however, the trial court refused the evidence. Did this deny appellant his constitutional right to present a defense and challenge the State's evidence?

3. Shortly after the FBI informant provided his information, Seattle Police informed Bellevue Police that a radical Islamic group called Fuqra may have been responsible for the Rafay murders. Fuqra was active in Seattle and assassinated individuals with whom it disagreed on interpretation of the Koran. At the State's urging, the trial court also refused this evidence. Did this further deny appellant his constitutional right to present a defense and challenge the State's evidence?

4. The constitutional right to present a defense requires the admission of any relevant defense evidence unless the State can demonstrate a compelling reason for its exclusion. To the extent Washington has adopted a more restrictive standard for the admission of "other suspect" evidence, does such a standard violate constitutional due process guarantees?

5. Although the FBI informant provided police with the names, addresses, and even phone numbers for members of the extremist group, police did not bother investigating any of these

individuals. In addition to offering the information to show that someone else committed the murders, the defense also attempted to introduce the evidence to rebut the State's claim that it conducted a thorough and complete investigation before prosecuting appellant. Where the evidence was also relevant for this purpose, did its exclusion violate appellant's state and constitutional right to present a defense and challenge the State's evidence?

6. Trial courts may not remove a sitting juror without first conducting an adequate investigation and only after determining that the juror is no longer fit to serve. During appellant's trial, the State repeatedly sought to remove a thoughtful, intelligent, and fully qualified juror from the panel. It finally succeeded. Did the trial court err where it failed to conduct an adequate investigation and the record fails to support its findings on unfitness?

7. Witnesses must never offer an opinion, even by inference, as to a defendant's guilt. At appellant's trial, multiple prosecution witnesses violated this prohibition. Did this violate appellant's constitutional right to a fair and impartial trial?

8. Multiple prosecution witnesses testified to matters that had been excluded by the court. As a result, these witnesses improperly suggested that appellant had a criminal history,

suggested prosecutors were being prevented from revealing important evidence to jurors, and permitted the State to undermine a key component of appellant's trial defense. Did this serious misconduct deny appellant his right to a fair trial?

9. Prosecutors must not urge a guilty verdict on improper grounds or refer to matters outside the record. During closing argument, the prosecutor violated these prohibitions when he (1) compared appellant to Islamic terrorists who behead Americans, (2) claimed that he personally sniffed a key defense witness and she smelled of alcohol, thereby suggesting she was not credible, and (3) shared with jurors that his father had died during trial, using his own reaction to the death to argue appellant's guilt. Was a mistrial required?

10. Assuming none of these errors, alone, warrant a new trial, does their combined effect warrant that result?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Atif Rafay and Sebastian Burns with three counts of aggravated murder in the first

degree for the deaths of Atif's father (Tariq), mother (Sultana), and sister (Basma).¹ CP 3376-3384.

The trial court appointed Society of Counsel Representing Accused Persons to represent Atif. CP 3663. Attorneys Mark Stenchever and Veronica Frietas were assigned the case for trial. CP 3663-3666. The law firm of Schroeter, Goldmark & Bender was appointed for Sebastian Burns. Attorneys Jeffery Robinson, Song Richardson, and Amanda Lee represented him. 7RP² 144; CP 3912. King County Senior Deputy Prosecuting Attorneys James Konat and Roger Davidheiser appeared for the State. 3RP 81.

The trial in this case was painfully long. Voir dire began on October 10, 2003, and closing arguments were not completed until May 20, 2004. 38RP 5; 150RP 191. After seven months of trial, a jury ultimately convicted both boys and the court imposed the mandatory sentences -- three consecutive life terms without the possibility of parole. CP 4181-4186, 4198, 4200. Atif timely filed his Notice of Appeal. CP 4207-08.

¹ Many witnesses in this case share the last name "Rafay." Therefore, this brief refers to them by first name.

² Attached to this brief as appendix A is an index to the verbatim report of proceedings.

2. Substantive Facts

a. *The Rafay family.*

Tariq Rafay was born in India but later became a Pakistani citizen. 98RP 17-18. He was a structural engineer and his wife Sultana was a nutritionist. Both were devout Muslims. 98RP 15, 18-19. Basma was the oldest Rafay child. 69RP 175-76. She was severely disabled, had not spoken since she was very young, and depended on others for her care. 69RP 174-75, 183-84.

Over the years, the family moved back and forth between Canada and Pakistan. By the late 1980s, the Rafays were living in British Columbia. 98RP 21-22, 104-05. In 1992, Tariq began work for Alpha Engineering in Tukwilla, Washington and moved to a Renton apartment. 98RP 27-28; exhibit 78, at 1. Initially, the rest of the family stayed in Vancouver. Atif graduated high school and was admitted to Cornell University's undergraduate program for the '93/'94 academic year. He left for school in August of 1993. Exhibit 78, at 1. Thereafter, Sultana and Basma joined Tariq in Renton. 98RP 30-31; exhibit 78, at 1.

Atif finished his freshman year in May of 1994 and then spent a majority of his time back in Canada. Exhibit 78, at 1. In the Spring of 1994, Tariq, Sultana, and Basma moved to a single

family home in Bellevue's Sommerset neighborhood. 69RP 172-73; 70RP 193; 71RP 37. Atif did not live in the home, but visited his family there. Exhibit 78, at 1.

Tariq was active in the Muslim community. He was co-founder and president of the Pakistan-Canada Friendship Association. 109RP 92. Tariq discovered that because of the Earth's curvature, North American mosques were facing the wrong direction -- they were not facing Mecca as required. 109RP 89. As a result of Tariq's published work on this issue, Muslims in North America changed their direction of prayer. 109RP 90-91. Because Muslim's had been praying in the original direction for centuries, there was some resistance to change. 109RP 91. Moreover, the Rafay family had strained relations with some members of the Shiite Muslim sect. Exhibit 72, at 87-88.

Around July 9th or 10th, 1994, a confidential informant for the Royal Canadian Mounted Police ("RCMP") learned that an organization known as the Dosanjh crime group had put out a murder contract on an East Indian family originally from Vancouver and now living in Bellevue, Washington. An individual named Jesse Brar was offered \$20,000.00 Canadian to execute the

contract. 138RP 64, 67. The informant did not immediately report to the RCMP what he had learned. 138RP 67.

About this same time, Atif decided to visit his family in Bellevue. He invited several people to join him, but ultimately was accompanied only by longtime friend Sebastian Burns. 143RP 104. Atif and Sebastian took a bus from Vancouver to Seattle on July 7, 1994. Exhibit 22, at 1; exhibit 78, at 1.

From the evening of July 7 through July 12, the boys stayed at the Rafays' Bellevue home, relaxed, slept in, and visited some of the attractions in the area. They also took a quick day trip to Vancouver and back in the Rafays' car. Exhibit 72, at 1-18; exhibit 76, at 1-15. Sebastian stayed in a guest bedroom located on the bottom floor of the Rafay home and used the bathroom and shower located on that same level. Exhibit 72, at 8; exhibit 76, at 3-4, 16.

Tariq, Sultana, and Basma were murdered the evening of July 12, 1994. And certain facts surrounding their deaths are undisputed. First, when Atif and Sebastian left the Rafay home to go out for the evening, the Rafays were alive. 75RP 41-46, 81-83, 89-93. Second, when the boys called 9-1-1 at 2:01 a.m., Tariq and Sultana were dead, and Basma lay dying in her bedroom. 66RP 119-123, 139; 101RP 51; 108RP 8. Third, if neighbors on both

sides of the Rafay home accurately reported the time frame in which they heard sounds associated with the murders, neither Atif nor Sebastian committed these crimes. Both boys were unquestionably at a movie theater and could not have returned home to kill the victims within this time frame. 70RP 101, 123-24; 71RP 107-08, 143, 147; 74RP 112-119, 125-131, 154-157 80RP 31-33; 102RP 87-91.

b. The murders.

Sometime on July 12, 1994, a resident of the Somerset neighborhood noted two suspicious cars on her street, about a block north of the Rafay home. 73RP 85; exhibit 8. One car was an older, white Volkswagen Bug. The second was a blue, green, or gray two-door American made car (Ford or Chrysler). 73RP 85-87, 108. This second car had British Columbia license plates. 73RP 105.

Neighbors saw Tariq leaving the neighborhood by car around 8:20 p.m. He was driving and Sultana and/or Basma were passengers. 75RP 41-46, 81-84, 93; 76RP 32-35, 49. It is not known where they went or when they arrived back home that evening. 75RP 46, 95-96; 76RP 38, 48; 95RP 73-75.

Atif and Sebastian went out for the evening around 8:30 p.m., driving the Rafays' Honda Accord. Exhibit 78, at 1-2; exhibit 22, at 2. The two ate a light dinner in Bellevue at the Factoria Keg Restaurant. Exhibit 78, at 1; 75RP 139. According to their waiter, the boys arrived at about 8:45 p.m. and left at 9:25 p.m. Before leaving, they asked about dance clubs in Seattle and the waiter mentioned one called The Weathered Wall. 75RP 143-44, 147. Both boys appeared relaxed and there was nothing unusual about their interactions with the waiter. 75RP 146-47.

Immediately following dinner, the boys went across the street to the Factoria Cinemas to see the Lion King, which had recently been released to North American theaters. Exhibit 78, at 1-2; exhibit 498; 75RP 138. The 9:50 p.m. showing was in auditorium number 5, the largest in the complex. 74RP 115. Theater employees saw Atif and Sebastian prior to the movie. They were seen purchasing tickets and acting goofy like "typical teenagers." 74RP 154-55, 190. They were seen buying snacks, and Sebastian had a conversation with a theater employee. 74RP 125-131. But it did not appear they were intentionally trying to stand out. 71RP 141-43, 194.

Employees also saw the boys after the movie started. Following the “coming attractions,” which typically last about ten minutes, the curtains closed and there was an equipment malfunction. The lights did not go down and the Lion King’s opening credits began to show on the curtain. 74RP 112-19. Patrons exited auditorium 5 to alert theater employees to the problem. Sebastian was confirmed to be one of those patrons. 74RP 156-57. The problem was fixed within two to three minutes while the movie continued to play. 74RP 117-119. One of the employees who saw Sebastian during the malfunction then went outside to water plants near the theater entrance. He did not see Sebastian or Atif leave through the front doors. It was “kind of light, but turning into night” and the parking lot lights had already come on. 74RP 184.

Meanwhile, back at the Rafays’ Sommerset neighborhood, Julie Rackley, the Rafays’ neighbor to the immediate north, had headed up to her bedroom shortly after 9:00 p.m. Exhibit 5; 69RP 178-79; 70RP 90. Rackley’s bedroom was only about 25 to 30 feet from the Rafay home. 69RP 174. Given the placement of the houses in the cul de sac, noise travels as if it were an amphitheater. 70RP 92; exhibit 5. On previous nights, Rackley

A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to effective representation under the Sixth Amendment and article 1, § 22 of the Washington Constitution when, for no legitimate strategic reason, his attorneys agreed jurors would be told this was not a death penalty case.

2. The trial court violated appellant's constitutional rights under the Sixth Amendment and article 1, § 21 of the Washington Constitution when it excluded key evidence someone else had committed the charged crimes.

3. The trial court erred when, at the State's urging, it discharged a qualified juror during trial.

4. Appellant was denied his constitutional right to a fair trial under the Sixth Amendment and article 1, § 22 of the Washington Constitution where multiple witnesses expressed their opinions on his guilt.

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2. Appellant was charged with murdering his father, mother, and sister. He attempted to raise a two-pronged defense: (1) he had an alibi, and (2) someone else killed his family. Within days of the murders and before police had released information to the public identifying the murder weapon as a baseball bat, an FBI informant told police that a violent faction within the local Muslim community had sought the murder of appellant's father. In fact, a member of this group had nervously asked the informant whether he

had seen a baseball bat in a group member's car prior to the murders. At the State's request, however, the trial court refused the evidence. Did this deny appellant his constitutional right to present a defense and challenge the State's evidence?

3. Shortly after the FBI informant provided his information, Seattle Police informed Bellevue Police that a radical Islamic group called Fuqra may have been responsible for the Rafay murders. Fuqra was active in Seattle and assassinated individuals with whom it disagreed on interpretation of the Koran. At the State's urging, the trial court also refused this evidence. Did this further deny appellant his constitutional right to present a defense and challenge the State's evidence?

4. The constitutional right to present a defense requires the admission of any relevant defense evidence unless the State can demonstrate a compelling reason for its exclusion. To the extent Washington has adopted a more restrictive standard for the admission of "other suspect" evidence, does such a standard violate constitutional due process guarantees?

5. Although the FBI informant provided police with the names, addresses, and even phone numbers for members of the extremist group, police did not bother investigating any of these

individuals. In addition to offering the information to show that someone else committed the murders, the defense also attempted to introduce the evidence to rebut the State's claim that it conducted a thorough and complete investigation before prosecuting appellant. Where the evidence was also relevant for this purpose, did its exclusion violate appellant's state and constitutional right to present a defense and challenge the State's evidence?

6. Trial courts may not remove a sitting juror without first conducting an adequate investigation and only after determining that the juror is no longer fit to serve. During appellant's trial, the State repeatedly sought to remove a thoughtful, intelligent, and fully qualified juror from the panel. It finally succeeded. Did the trial court err where it failed to conduct an adequate investigation and the record fails to support its findings on unfitness?

7. Witnesses must never offer an opinion, even by inference, as to a defendant's guilt. At appellant's trial, multiple prosecution witnesses violated this prohibition. Did this violate appellant's constitutional right to a fair and impartial trial?

8. Multiple prosecution witnesses testified to matters that had been excluded by the court. As a result, these witnesses improperly suggested that appellant had a criminal history,

suggested prosecutors were being prevented from revealing important evidence to jurors, and permitted the State to undermine a key component of appellant's trial defense. Did this serious misconduct deny appellant his right to a fair trial?

9. Prosecutors must not urge a guilty verdict on improper grounds or refer to matters outside the record. During closing argument, the prosecutor violated these prohibitions when he (1) compared appellant to Islamic terrorists who behead Americans, (2) claimed that he personally sniffed a key defense witness and she smelled of alcohol, thereby suggesting she was not credible, and (3) shared with jurors that his father had died during trial, using his own reaction to the death to argue appellant's guilt. Was a mistrial required?

10. Assuming none of these errors, alone, warrant a new trial, does their combined effect warrant that result?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Atif Rafay and Sebastian Burns with three counts of aggravated murder in the first

degree for the deaths of Atif's father (Tariq), mother (Sultana), and sister (Basma).¹ CP 3376-3384.

The trial court appointed Society of Counsel Representing Accused Persons to represent Atif. CP 3663. Attorneys Mark Stenchever and Veronica Frietas were assigned the case for trial. CP 3663-3666. The law firm of Schroeter, Goldmark & Bender was appointed for Sebastian Burns. Attorneys Jeffery Robinson, Song Richardson, and Amanda Lee represented him. 7RP² 144; CP 3912. King County Senior Deputy Prosecuting Attorneys James Konat and Roger Davidheiser appeared for the State. 3RP 81.

The trial in this case was painfully long. Voir dire began on October 10, 2003, and closing arguments were not completed until May 20, 2004. 38RP 5; 150RP 191. After seven months of trial, a jury ultimately convicted both boys and the court imposed the mandatory sentences -- three consecutive life terms without the possibility of parole. CP 4181-4186, 4198, 4200. Atif timely filed his Notice of Appeal. CP 4207-08.

¹ Many witnesses in this case share the last name "Rafay." Therefore, this brief refers to them by first name.

² Attached to this brief as appendix A is an index to the verbatim report of proceedings.

2. Substantive Facts

a. *The Rafay family.*

Tariq Rafay was born in India but later became a Pakistani citizen. 98RP 17-18. He was a structural engineer and his wife Sultana was a nutritionist. Both were devout Muslims. 98RP 15, 18-19. Basma was the oldest Rafay child. 69RP 175-76. She was severely disabled, had not spoken since she was very young, and depended on others for her care. 69RP 174-75, 183-84.

Over the years, the family moved back and forth between Canada and Pakistan. By the late 1980s, the Rafays were living in British Columbia. 98RP 21-22, 104-05. In 1992, Tariq began work for Alpha Engineering in Tukwilla, Washington and moved to a Renton apartment. 98RP 27-28; exhibit 78, at 1. Initially, the rest of the family stayed in Vancouver. Atif graduated high school and was admitted to Cornell University's undergraduate program for the '93/'94 academic year. He left for school in August of 1993. Exhibit 78, at 1. Thereafter, Sultana and Basma joined Tariq in Renton. 98RP 30-31; exhibit 78, at 1.

Atif finished his freshman year in May of 1994 and then spent a majority of his time back in Canada. Exhibit 78, at 1. In the Spring of 1994, Tariq, Sultana, and Basma moved to a single

family home in Bellevue's Sommerset neighborhood. 69RP 172-73; 70RP 193; 71RP 37. Atif did not live in the home, but visited his family there. Exhibit 78, at 1.

Tariq was active in the Muslim community. He was co-founder and president of the Pakistan-Canada Friendship Association. 109RP 92. Tariq discovered that because of the Earth's curvature, North American mosques were facing the wrong direction -- they were not facing Mecca as required. 109RP 89. As a result of Tariq's published work on this issue, Muslims in North America changed their direction of prayer. 109RP 90-91. Because Muslim's had been praying in the original direction for centuries, there was some resistance to change. 109RP 91. Moreover, the Rafay family had strained relations with some members of the Shiite Muslim sect. Exhibit 72, at 87-88.

Around July 9th or 10th, 1994, a confidential informant for the Royal Canadian Mounted Police ("RCMP") learned that an organization known as the Dosanjh crime group had put out a murder contract on an East Indian family originally from Vancouver and now living in Bellevue, Washington. An individual named Jesse Brar was offered \$20,000.00 Canadian to execute the

contract. 138RP 64, 67. The informant did not immediately report to the RCMP what he had learned. 138RP 67.

About this same time, Atif decided to visit his family in Bellevue. He invited several people to join him, but ultimately was accompanied only by longtime friend Sebastian Burns. 143RP 104. Atif and Sebastian took a bus from Vancouver to Seattle on July 7, 1994. Exhibit 22, at 1; exhibit 78, at 1.

From the evening of July 7 through July 12, the boys stayed at the Rafays' Bellevue home, relaxed, slept in, and visited some of the attractions in the area. They also took a quick day trip to Vancouver and back in the Rafays' car. Exhibit 72, at 1-18; exhibit 76, at 1-15. Sebastian stayed in a guest bedroom located on the bottom floor of the Rafay home and used the bathroom and shower located on that same level. Exhibit 72, at 8; exhibit 76, at 3-4, 16.

Tariq, Sultana, and Basma were murdered the evening of July 12, 1994. And certain facts surrounding their deaths are undisputed. First, when Atif and Sebastian left the Rafay home to go out for the evening, the Rafays were alive. 75RP 41-46, 81-83, 89-93. Second, when the boys called 9-1-1 at 2:01 a.m., Tariq and Sultana were dead, and Basma lay dying in her bedroom. 66RP 119-123, 139; 101RP 51; 108RP 8. Third, if neighbors on both

sides of the Rafay home accurately reported the time frame in which they heard sounds associated with the murders, neither Atif nor Sebastian committed these crimes. Both boys were unquestionably at a movie theater and could not have returned home to kill the victims within this time frame. 70RP 101, 123-24; 71RP 107-08, 143, 147; 74RP 112-119, 125-131, 154-157 80RP 31-33; 102RP 87-91.

b. The murders.

Sometime on July 12, 1994, a resident of the Sommerset neighborhood noted two suspicious cars on her street, about a block north of the Rafay home. 73RP 85; exhibit 8. One car was an older, white Volkswagen Bug. The second was a blue, green, or gray two-door American made car (Ford or Chrysler). 73RP 85-87, 108. This second car had British Columbia license plates. 73RP 105.

Neighbors saw Tariq leaving the neighborhood by car around 8:20 p.m. He was driving and Sultana and/or Basma were passengers. 75RP 41-46, 81-84, 93; 76RP 32-35, 49. It is not known where they went or when they arrived back home that evening. 75RP 46, 95-96; 76RP 38, 48; 95RP 73-75.

Atif and Sebastian went out for the evening around 8:30 p.m., driving the Rafays' Honda Accord. Exhibit 78, at 1-2; exhibit 22, at 2. The two ate a light dinner in Bellevue at the Factoria Keg Restaurant. Exhibit 78, at 1; 75RP 139. According to their waiter, the boys arrived at about 8:45 p.m. and left at 9:25 p.m. Before leaving, they asked about dance clubs in Seattle and the waiter mentioned one called The Weathered Wall. 75RP 143-44, 147. Both boys appeared relaxed and there was nothing unusual about their interactions with the waiter. 75RP 146-47.

Immediately following dinner, the boys went across the street to the Factoria Cinemas to see the Lion King, which had recently been released to North American theaters. Exhibit 78, at 1-2; exhibit 498; 75RP 138. The 9:50 p.m. showing was in auditorium number 5, the largest in the complex. 74RP 115. Theater employees saw Atif and Sebastian prior to the movie. They were seen purchasing tickets and acting goofy like "typical teenagers." 74RP 154-55, 190. They were seen buying snacks, and Sebastian had a conversation with a theater employee. 74RP 125-131. But it did not appear they were intentionally trying to stand out. 71RP 141-43, 194.

Employees also saw the boys after the movie started. Following the “coming attractions,” which typically last about ten minutes, the curtains closed and there was an equipment malfunction. The lights did not go down and the Lion King’s opening credits began to show on the curtain. 74RP 112-19. Patrons exited auditorium 5 to alert theater employees to the problem. Sebastian was confirmed to be one of those patrons. 74RP 156-57. The problem was fixed within two to three minutes while the movie continued to play. 74RP 117-119. One of the employees who saw Sebastian during the malfunction then went outside to water plants near the theater entrance. He did not see Sebastian or Atif leave through the front doors. It was “kind of light, but turning into night” and the parking lot lights had already come on. 74RP 184.

Meanwhile, back at the Rafays’ Somerset neighborhood, Julie Rackley, the Rafays’ neighbor to the immediate north, had headed up to her bedroom shortly after 9:00 p.m. Exhibit 5; 69RP 178-79; 70RP 90. Rackley’s bedroom was only about 25 to 30 feet from the Rafay home. 69RP 174. Given the placement of the houses in the cul de sac, noise travels as if it were an amphitheater. 70RP 92; exhibit 5. On previous nights, Rackley

could hear the Rafays' television set through the front windows of her home. 70RP 60-61, 65. On one occasion, she could also hear a woman's voice inside the Rafay home. 70RP 78-79.

On this particular night, once in her bedroom, Rackley took off her makeup, exercised, and began reading a book. 70RP 91. One bedroom window was open and it was after dusk. 70RP 91, 103. Rackley was disturbed by a repeated "hammering sound," as if someone were putting up pictures on a wall or "construction-type work." 70RP 91-93. The sounds were not sharp (like a hammer hitting a nail), but were muffled and had an odd resonance. 70RP 136. Rackley believes she heard these sounds sometime between 9:45 and 10:15 p.m. and when she attempted to pinpoint a precise time, she concluded she heard the sounds at 9:56 p.m. 70RP 101, 123-24.

Rackley's house, including her bedroom, faced east. Sommerset is built on a steep hill with each house "stair-stepping" above the last heading up the hill. 70RP 97, 162-63. Rackley's easterly view was darker that time of the evening than it would be if she were on the other side of the hill and facing west. 70RP 163-64. Rackley looked out her window to determine the source of the sounds. It was dark enough that she thought it too late to be

working outside, but it was still light enough to see her neighbor's house with some clarity. 70RP 182-84.

Rackley was not the only neighbor to hear these sounds. The Sidells lived immediately to the west of the Rafays. 70RP 194; exhibit 5. On the evening of July 12, Mark Sidell was standing in his driveway. 71RP 60, 65. According to Sidell, it was getting dark outside but not yet completely dark. 71RP 54, 60, 66.

Sidell saw motion in the windows at the Rafay home and heard noises from within the home -- crinkling of paper, someone walking around, and sounds similar to someone hanging pictures on walls, only at waist level rather than eye level. He heard "thuds against the wall" and "some hollow hitting type of sounds." 71RP 60, 65, 102-05, 146. There were breaks in these noises as if someone were pausing to move to a new area in the home. 71RP 103, 106. One blow sounded as if the individual had missed the target and penetrated a wall. 71RP 106, 146-47.

Sidell then heard the sound of running water, as if someone were in a fiberglass shower and the water was flowing down the drain. 71RP 71, 74. Thereafter, he heard what sounded like two individuals running across the Rafays' front lawn toward the driveway. 71RP 71, 109. He then heard two doors slam and a car

drive down the street. 71RP 72. After it was quiet, he heard moaning that sounded like it was coming from a female retarded person. 71RP 75, 107.

Consistent with Rackley's recollection, Sidell indicated he heard these sounds from the Rafay home between 9:40 and 9:50 p.m. 71RP 107-08, 143, 147; 80RP 31-33. The following month, however -- after reading that the boys attended the 9:50 p.m. showing of the Lion King, Sidell changed his estimate to 9:10 or 9:20 p.m. (a time when the boys were confirmed to be at the Keg). 71RP 66, 108-111, 131, 148, 152; 75RP 143-44. Nine years later, Sidell would add for the first time that he also heard what sounded like "kids' voices" inside the home.³ 71RP 139-140.

A third neighbor -- Janine Street -- lived in the house immediately across the cul-de-sac (directly east) from the Rafays. 89RP 103-05; exhibit 5. At about 8:15 or 8:20 p.m., Street, her

³ Sidell was far from the only witness to add new information. At trial, the defense was later confronted with several examples from various prosecution witnesses. See, e.g., 67RP 138, 145 (for first time at trial officer says Sebastian had a "wry smile" at scene); 67RP 200-01 and 68RP 31-32 (although not in officer's report, officer testifies boys switched off their emotions like a "light switch"); 69RP 133 (for first time at trial officer describes Sebastian as "impositioned" by questions at scene); 89RP 184 (for first time at trial officer says boys raised their voices at him).

husband, and their children walked past the Rafays' home on their way to a path immediately east of the Rackleys leading to an elementary school in the neighborhood. 89RP 113; exhibit 5. They did not hear or see anything suspicious. 89RP 113. After playing at the school, the family headed back down the path and into their cul-de-sac around 9:30 p.m. because it was getting dark. 89RP 114, 122. At about 10:30 or 10:45 p.m., Street took a phone call in her master bedroom, which faces the Rafay home, and was on the telephone for about an hour. 89RP 114-15. All of the bedroom windows were open. She heard no noises from the Rafay home while in her bedroom. 89RP 115, 120.

Back at the Factoria Cinemas, the Lion King ran for about one hour and 40 minutes, including the coming attractions, and ended around 11:30 p.m. 74RP 115-18. There were alarms on the exit doors in auditorium 5 that, when tripped, sounded in the lobby. They were not turned on this particular evening, however, because it was a slow night. 71RP 172-76. There is no indication that patrons knew the door alarms had been turned off. 72RP 145. Nor is there any indication the boys had ever been to the theater prior to the evening of July 12. 102RP 88.

While no cinema employee claimed to have seen the boys after the movie, employees were focused on other things -- including ensuring that the auditorium was empty, counting the day's receipts, and cleaning the projectors. 71RP 134, 146-47, 158. Moreover, of the two employees who remembered seeing the boys before the movie, one was not sure he was still on duty when the movie let out. The second recalled that he was definitely not in the lobby area when the movie let out and therefore not in a position to see them again after 11:30 p.m. 71RP 134, 158, 186.

Atif and Sebastian drove from Bellevue to downtown Seattle, arriving at Steve's Broiler, a 24-hour restaurant and popular local hangout. 74RP 198. The boys' time of arrival would become a source of contention at trial. One Steve's employee, Karen Lundquist, remembered the boys asking her about The Weathered Wall. 74RP 195, 205. Lundquist did not wait on the boys and indicated she was not in the best position to say when they arrived at Steve's. 74RP 220-24. She testified it was possible they arrived between midnight and 12:30 a.m. 74RP 211-12. But she left open the possibility the boys arrived as late as 12:45 a.m. 74RP 220.

Another Steve's employee, Christine Mars,⁴ waited on the boys. 75RP 17. Mars did not seat the boys. She thought she began waiting on them around 12:50 a.m., but also indicated they were already in the restaurant when she started her shift that night around midnight. 75RP 23, 30. They ordered hash browns, a sundae, and milkshake. Nothing whatsoever seemed unusual about their appearances. 75RP 18-20.

The boys asked Mars about The Weathered Wall -- where it was and when it closed -- and Mars asked fellow employee Jennifer Osteen⁵ to speak with them because Osteen was younger and more likely to know about the club. Osteen had a conversation with them. 75RP 22, 28, 31; 144RP 80. They discussed clubs that were open after 2:00 a.m. and Osteen told them that given the late hour, they should leave immediately if they hoped to enjoy any cocktails at a club. 144RP 95-96. Significantly, Osteen would later testify she first spoke to the boys in the restaurant between midnight and 12:30 a.m. and they did not look freshly showered.

⁴ By the time of trial, Ms. Mars had married and her last name was Kuykendall. 75RP 12-13.

⁵ Ms. Osteen had also married and her last name was Haslund by the time of trial. 144RP 77.

144RP 83, 96, 101. She last spoke to them between 1:15 and 1:30 a.m. 144RP 99.

By the time the boys had walked to The Weathered Wall, it was closing, so the boys returned to Steve's Broiler. Exhibit 78, at 2; exhibit 22, at 3; 72RP 89-91, 94-97. Mars saw the boys back at Steve's around 1:40 a.m. when they came inside, used the restroom, and left again. 75RP 25-26. With Sebastian driving, the boys headed back to Bellevue. Exhibit 78, at 2.

At 2:01 a.m., the boys called 911 from the Rafay home. 101RP 51.

c. The Bellevue Police investigation.

Bellevue Police Officer Gary Hromada was the first to respond to the home. He turned off his lights as he approached and initially could not find the address. 67RP 189-90. As he began to turn around in the cul-de-sac, he heard loud pounding on the outside of his car. The boys were yelling about "blood" and "bodies" and Hromada ordered them to "back off." 67RP 191-94; 68RP 11. They were shaking, on the verge of tears, and almost incoherent. Hromada ordered them to calm down and sit on the curb, and they complied. 67RP 194-200; 68RP 12-15.

Other officers arrived on the scene and entered the home through the front door. 66RP 78-84. The home has a split entry and, because officers heard "gasping" noises upstairs, they searched the upper floor first. 66RP 85-86, 108; 67RP 34-35; exhibits 9F-9H.

In the master bedroom, officers discovered Tariq's body. It was obvious he was dead. 66RP 115-19, 197; 67RP 45. There was "massive tissue lost" and his "head and face were unrecognizable." 66RP 119. There was blood all over the bed and the wall behind the bed. 66RP 195-97; exhibit 9P. One officer described the scene as "horrific." 66RP 180. So extensive were the injuries, officers initially believed Tariq may have died from a self-inflicted shotgun blast to the face. 66RP 146; 67RP 45, 59-60.

Officers then followed the noises to another bedroom, where they found Basma still alive, but close to death. She was on the floor and partially behind the bedroom door. 66RP 120-23; 67RP 169-171; exhibit 9T. Medics responded to the scene and transported her to a hospital. 67RP 171-72; 69RP 102. She remained alive for several hours, but was pronounced dead at 7:10 a.m. 108RP 8.

Officers found Sultana downstairs. 66RP 129-130; 67RP 50. Based on her color and the massive amount of blood loss, it appeared she was also dead. 66RP 131; 67RP 51, 92; 68RP 130-31; exhibits 9FF-9HH, 221G. Medics confirmed her death. 66RP 139; 68RP 202-204.

Officers interviewed both boys at the scene. Bellevue Officer David Deffenbaugh interviewed Sebastian. 69RP 12-13. Sebastian did not hesitate when asked to give a statement. He was cooperative and even agreed to give up his clothes to the Bellevue Police. 69RP 15, 35; exhibit 22, at 4.

Deffenbaugh asked Sebastian to recount the night's events in detail. 69RP 36-37. Sebastian explained where he and Atif had been that evening -- The Keg, Factoria Cinemas, a diner (he could not recall the name "Steve's" at the time), and The Weathered Wall. Exhibit 22, at 2-3. He estimated they arrived back at the Rafays' around 1:45 a.m., pulled into the garage, and then entered the house through a door that leads to the downstairs family room. The boys saw Sultana on the floor. Exhibit 7. She was not moving and there was a large amount of blood near her head. Horrified, the boys ran upstairs. Exhibit 22, at 3. Sebastian looked in the master bedroom, saw Tariq, and saw the large amount of blood on

the bed and wall behind his head. Sebastian then called 911 and informed the operator he and Atif would wait for police outside. Exhibit 22, at 4.

Officer Mark Lewis interviewed Atif, whom he described as subdued, stunned, and shocked, but cooperative. 77RP 15-16, 55; Exhibit 78, at 1. He had "a 1,000 yard stare." 77RP 58. Like Sebastian, Atif explained where they had been that evening. Exhibit 78, at 1-2. As they entered the house from the garage, he saw his mother lying on the floor in a pool of blood. He ran upstairs and into his father's bedroom, where he saw blood on the wall and at the head of the bed. He heard his sister moan and could tell by the sound that she was hurt. Sebastian called 911 and the two left the house together to wait by the driveway for police. Exhibit 78, at 2. Officer Lewis did not question Atif's failure to enter his sister's room. He assumed Atif was scared and did not want to see what he might find in there. 77RP 61-62.

Officer Lewis asked Atif if he had any local relatives. 77RP 58-59. Atif provided the name "Johnny Waqar," who Lewis understood to be a close family friend or an uncle. 77RP 59-60. Atif provided a description of where Waqar lived and told police

they could reach him through Tariq's employer, Alpha Engineering. Exhibit 78, at 3-4.

Atif noted it appeared someone had been in the house and moved some items around. In response to questioning on this point, he told Lewis that a VCR cabinet had been left open and the VCR was missing. He had briefly stepped into his own bedroom and did not recall seeing his stereo receiver or a portable CD player he left in there. 77RP 60-61; exhibit 78, at 3.

It took two to three hours to obtain the boys' statements at the scene and produce written summaries for their signatures. 69RP 51; 77RP 48. The boys were also subjected to gunshot residue testing. 83RP 105-107; 90RP 30, 37; exhibit 381E. Bellevue Police then transported them to the Bellevue police station. 69RP 39-40; 77RP 48-49. Once there, Atif also gave up his clothes. 98RP 191-92.

Officer Robert Thompson was assigned the role of lead detective; it was his turn based on the department's standard rotation. 72RP 177. This would be Thompson's first time as lead investigator on any case, much less a murder case. 98RP 175; 102RP 100. Detective Jeff Gomes was assigned to assist Thompson. 72RP 181.

It was now after 6:30 a.m. 90RP 38. The detectives interviewed the boys, separately, at the station. 90RP 38-41. Both boys were asked again about their whereabouts the evening of July 12 and what they had seen upon arriving home. They answered the detectives' questions. See exhibits 68-71. The boys also permitted police to check their clothing and skin for evidence, including blood spatter, using an alternate light source. 90RP 51-52; exhibit 68, at 6; exhibit 70. This process revealed nothing pertinent. 90RP 52, 54-55; 101RP 78-80.

A Bellevue officer purchased clothes and a meal for the boys. 72RP 37-39. The department then provided them a room at the Bellevue Motel on Bellevue Way. 72RP 43. Various police officers would later describe the motel as "older," "worn down," "the oldest motel in Bellevue," and "something of a dive." 72RP 43; 99RP 99; 102RP 15. By the time of trial, the motel no longer existed. 99RP 98. The room did not come with a telephone, and the motel did not provide one until the following day when the boys mentioned this to police. 72RP 191; 73RP 23-24; 95RP 19-20.

Around 4:00 p.m. on July 13, Detectives Thompson and Gomes visited the boys at the Bellevue Motel and drove them to the department for fingerprints and photographs. 90RP 75-89.

The detectives then returned the boys to their motel room. 90RP 90.

Sebastian's father, David Burns, called the Bellevue Police several times and asked them to have Sebastian call him. 72RP 188-190. Mr. Burns was not told where the boys were staying. 72RP 213; 73RP 12-13, 25. When two of the boys' friends drove down from Canada to see them on July 13, Bellevue police would not disclose the boys' location to them, either. Police wanted to avoid "outside interference." 72RP 221-23. Sebastian's parents were frustrated with the lack of information from the department and called the Seattle office of the Canadian Consulate for assistance. 73RP 21; 102RP 19-20; exhibit 532.

Cindy Taylor-Blakley, a representative from the Canadian Consulate, called police, asking if the boys were under arrest and whether they were free to leave. She was told they were not under arrest and were free to go. According to Taylor-Blakley, she told the detective to whom she spoke that Atif intended to return to British Columbia to stay with Sebastian's family. 72RP 194-95; 138RP 52-53; exhibit 532.

Bellevue police checked out the boys' alibi. They went to The Keg, Factoria Cinemas, Steve's Broiler, and The Weathered

Wall, confirming that the boys had been to each of these establishments. 72RP 56-83, 89-97, 149-150, 161-64. At the theater, employees could neither confirm nor deny that the boys sat through the entire movie. 72RP 165-67. Police searched the dumpsters around Steve's and The Weathered Wall and found nothing whatsoever associated with the homicides. 72RP 155-160.

Jennifer Osteen was among Steve's employees Bellevue Police interviewed. And they did not like what she had to say. Before taking a taped statement from her, police asked if the boys looked as though they had showered shortly before arriving at Steve's. She responded "no," and that they actually appeared kind of "grubby." 144RP 83. For Osteen's taped statement, police decided not to ask that question again. 144RP 84.

Osteen felt that officers were trying to shape her recollection concerning when the boys arrived at Steve's. 144RP 100. When police asked her about time in the non-recorded interview, she indicated she first spoke to the boys sometime between midnight and 12:30 a.m. 144RP 101. Police told her that was not possible and then went into detail about how the boys had killed three people. 144RP 101.

Based on the information Atif provided, officers also contacted Waqar Saiyed, who went by the name "Johnny" and had also worked at Alpha Engineering. 72RP 48-49, 52-53. Saiyed was a distant relative (his wife was Sultana's cousin). He had not spoken to any of the Rafays since May and had not seen Atif in one or two years. 72RP 49-51, 55; 98RP 64. His initial reaction to the news was one of fear -- that someone had targeted the entire family, including him. 98RP 99. Saiyed contacted family members in Canada and the Middle East, informing them of the murders. 98RP 39-42, 54-55. He also made funeral arrangements. 98RP 43-45. But he did not know where Atif was. Bellevue Police told him Atif was in a motel, but did not provide the motel's name or a phone number. It is unclear if Saiyed asked for this information. 98RP 113-14.

On the afternoon of July 14, Detectives Gomes and Thompson sought out the boys again, finding them at a bookstore near the motel. 90RP 96-98. One at a time, they took each boy to a nearby park for an additional interview focusing on their activities in the days leading up to the murders. 90RP 101-04.

The detectives took Atif first. 90RP 101-02. The tone of the questioning, however, was now quite different. Detectives asked

Atif if he and Sebastian were having a sexual relationship. Exhibit 72, at 3; exhibit 73. They asked Atif if he thought the blood on the wall behind Tariq came from Tariq or perhaps "somebody threw it on the wall." Exhibit 72, at 58; exhibit 73. They asked Atif why he left the master bedroom without attempting to help his father in some way. Exhibit 72, at 61; exhibit 73. When Atif explained why he did not enter his sister's room (he feared she had suffered similar injuries and he could not help her), the detectives suggested that he should have gone in because it was possible her moaning was simply the result of a stubbed toe. Exhibit 72, at 68; exhibit 73. The detectives suggested Atif knew ahead of time what would happen to his family and, later, expressly indicated their belief that he knew who had killed his family. Exhibit 72, at 71, 94; exhibit 73. They also questioned whether he had loved his family. Exhibit 72, at 92; exhibit 73. Atif felt mistreated and that the detectives were unduly harsh. 109RP 84-85.

The detectives then returned Atif to the motel and took Sebastian to the park. 90RP 110; 94RP 24. The detectives also asked Sebastian if he and Atif were gay lovers. Exhibit 76, at 4; exhibit 77. And when Sebastian responded to certain questions

with "I don't remember," he was told that "really isn't going to cut it." Exhibit 76, at 31; exhibit 77.

While Atif and Sebastian were being questioned in the park, several of Atif's relatives were arriving in town. Bellevue Police met with them at their Seattle hotel on the evening of July 14. 72RP 84-89; 109RP 71. Family members did not find out where police had placed Atif, however, until the following day -- the morning of July 15. 109RP 70-71.

By the time family members arrived at the Bellevue Motel, the boys were already heading back home to British Columbia. 77RP 148-49; 109RP 71. That morning, Taylor-Blakley (from the Canadian Consulate's office) met the boys at the bus station in Seattle and made sure they had all of the documentation and funds they would need to return to British Columbia. She confirmed that everything was in order and saw the boys off. Exhibit 532.

Detective Gomes returned to the motel around 11:30 a.m. on July 15 and discovered that the boys were gone. 95RP 44. Gomes obtained from the motel manager a list of the calls the boys had placed from the room and determined that they had been talking to Sebastian's parents in British Columbia. 95RP 35-38, 44, 171. Gomes had not been told that Taylor-Blakley had called

Bellevue Police to inquire whether the boys were free to go. 95RP 51-52, 177-78. But he knew the boys were in fact free to go back to Canada. 95RP 52.

Sebastian had provided police with contact information (address and telephone number) for his family in British Columbia. 95RP 103-04. Atif had provided the names of his relatives in Canada and the cities in which they lived. 95RP 165-68. He also told detectives that they could find an address book for his extended family inside the Bellevue house. 96RP 97.

Bellevue police called Canadian Customs to alert them to the boys' possible crossing. The boys arrived at the border on a Greyhound Bus at 1:40 p.m. on the afternoon of July 15. A supervisor told the inspector who ultimately spoke to the boys that they may have been involved in a homicide and should be checked thoroughly. 77RP 148-150. Both boys were pale and nervous. 77RP 153. The boys were questioned for five to seven minutes and allowed to enter Canada. 77RP 157.

The funeral took place without Atif that same afternoon.⁶ 77RP 153-57; 98RP 44-46, 70; 100RP 172-73. Shortly thereafter,

⁶ There is some indication Atif got word of the funeral. According to an uncle who spoke to Atif after the funeral, Atif felt

family members traveled to Vancouver and visited with Atif. 98RP 60-62, 115. He was “very quiet and scared.” 109RP 56. Atif’s uncle, Tahir Rafay, later reported that Atif was “crying very hard and sobbing” during their visit. 143RP 97.

d. A key witness comes forward.

Within days of the murders, an FBI informant -- Douglass Mohammed -- came forward with information on the case. 17RP 57; 63RP 13, 28. The FBI contacted Bellevue Police and, on July 18, 2004, Mohammed met with Detectives Thompson and Gomes. 17RP 52; 32RP 7; 63RP 13. Mohammed told the detectives there was an extremist faction within the local Muslim community advocating a violent interpretation of the Koran. This group took issue with Tariq Rafay’s beliefs and teachings and had specifically singled him out for death. 17RP 53-54, 56; 18RP 5; 31RP 73-74, 149-150; 63RP 29; 70RP 33.

According to Mohammed, a few days after the Rafays were murdered, a member of this militant faction came to his home

that Bellevue Police had mistreated him. Because of that mistreatment, he had been advised not to attend the funeral and to return to Canada. 109RP 48-50, 84-85. He had also been advised not to return to the United States once back in British Columbia. 109RP 51.

concerned and nervous about whether Mohammed had seen a baseball bat previously in a group member's car. When Mohammed indicated he had not, the individual told Mohammed "forget about it." 17RP 54-55; 31RP 74, 150-51; 32RP 8; 63RP 30; 70RP 33, 40. Mohammed suggested to detectives that this baseball bat may be the murder weapon in the Rafay homicides. 17RP 54; 31RP 151. Significantly, Mohammed provided this tip *before* Bellevue Police released information to the public that the Rafays had been killed with a baseball bat. 17RP 55-56; 18RP 5-6; 63RP 30. In fact, even the Bellevue Police had not yet definitively concluded the murder weapon was a baseball bat. 31RP 151; 32RP 8.

Mohammed provided Bellevue detectives with names, addresses, and phone numbers so that they could investigate members of this group. 31RP 73; 32RP 7; 63RP 30-31. Although detectives confirmed that Mohammed was in fact an FBI informant, they wrote him off as crazy and did not follow up on any of the specific information he provided. 17RP 121; 31RP 74, 153. Instead, because family members did not report "any kind of problems that [Tariq] had with anyone," detectives concluded the information was not worth investigating. 17RP 121-22; 31RP 75.

Although Mohammed told detectives he was willing to assist them and provide further information, they never contacted him again -- even after concluding the murder weapon was indeed a baseball bat. 32RP 8-9.

Shortly after Mohammed came forward, a detective from the Seattle Police Department Intelligence Unit also contacted Bellevue Police. The detective heard about the Rafay murders and believed they “were possibly associated with an Islamic Terrorist Group known as Fuqra.” Supp. CP ____ (sub no. 19, Motion To Enforce Subpoena Duces Tecum, appendix c (cause no. 95-1-05433-8)).

Based out of Toronto, Fuqra members “target Muslims who do not practice the faith or interpret the ‘Koran’ as they do.” Id. The group is very organized and involved in “contract assassinations.” Fuqra was active in the Seattle/Tacoma area, including murders, but never publicly took credit for its actions. Id. Members were often trained elsewhere and then assimilated into the local community. Id.

Instead of investigating any of this new information, which further suggested a religious motive for the murders, detectives continued to focus on Atif and Sebastian as their only suspects, believing their motive may have been financial -- proceeds from life

insurance policies and access to family assets. 31RP 75-78; 77RP 85-127.

As discussed later in this brief, jurors would never hear about Douglass Mohammed or his information. Nor would they hear anything about Fuqra.

e. Forensic evidence.

Back at the crime scene, police discovered that a sliding glass door and screen located at the rear of the house were about halfway open. 68RP 162-63; exhibits 20(A)-(D).

There were multiple dents in the drywall above Basma's bed where an object struck the wall. 74RP 48; 88RP 5-9. Small metal fragments were found embedded in the damaged areas. 88RP 9-11, 19-22. The Washington State Patrol Crime Lab would later conclude the damage was "most likely caused by a metal baseball bat." 88RP 28. Using a metal bat on the drywall from Basma's room, analysts were able to create damage that left behind similar fragments. 88RP 23-28.

The downstairs bedroom, in which Sebastian had been staying, appeared ransacked. 78RP 72; exhibits 14H-14I. The Rafays owned a Honda Accord and Toyota Corolla. Exhibits 220A-220I. Not a single item collected from inside the Accord -- used by

the boys on the night of the murders -- appeared to have any blood on it. 82RP 168-170.

Officers canvassed the neighborhood, asking if anyone had heard or seen anything unusual. 71RP 192. Initially, neighbor Julie Rackley indicated she had not heard anything because she assumed police were interested in sounds associated with a gun or screams, and she was focusing on any sounds she had heard after 11:00 p.m. 70RP 71-72, 136-37. But once she learned the Rafays had been bludgeoned, she recalled the pounding noises she had heard earlier that evening and contacted police again. 70RP 86-88, 137-38. At the request of Bellevue police, Rackley was careful to recreate exactly what she had done the evening of July 12 to determine when she had heard the sounds. 70RP 122-23, 128-130. It was then she concluded it was between 9:45 and 10:15 p.m., and her best estimate was 9:56 p.m. 70RP 88-101, 124, 131.

There was no accurate method to determine time of death for Tariq and Sultana other than to say it occurred sometime between 8:30 p.m. (when last seen alive) and 2:00 a.m. (when they were found dead in the home). 107RP 30-36; 108RP 16-21. However, nothing the medical examiner observed was inconsistent with an attack between 9:00 p.m. and 10:15 p.m. 108RP 28.

Based on the victims' injuries, the medical examiner could not determine how many individuals participated in the killings. 108RP 16. With one exception, all three of the victims' injuries were consistent with use of a baseball bat. 107RP 66-67, 69, 92, 98, 147; 108RP 13-14. But it was impossible to say how many weapons were used. 108RP 23.

Specifically, Sultana's injuries were consistent with two or more strikes to the head from behind and slightly above. 107RP 53-67. Her skull was fractured. 107RP 57. Sultana was still alive for at least several minutes following the attack, but it did not appear that she moved once on the floor. 107RP 76-80.

Tariq was struck repeatedly in the face and neck, possibly 20 or more times, causing severe brain injury. 107RP 89-91, 128-29. Tariq moved very little during the attack. His legs were still crossed as they had been while sleeping and he was probably unconscious immediately. 107RP 116-18, 133. The one injury inconsistent with an intact baseball bat was found on the right side of Tariq's neck. Although this injury also involved blunt force trauma, it was caused by a sharp-edged object. 107RP 104-116, 147; 108RP 42-46, 51, 69-72. The medical examiner used a tire

iron as an example of an object that could have caused this wound.

108RP 71-72.

Basma suffered multiple blunt force injuries to her arms and head, including a skull fracture similar to that suffered by her mother. 107RP 138-146, 154. Unlike her mother, however, Basma had significant defensive injuries to her arms and hands. 107RP 162-63; 108RP 9-14.

A prosecution crime scene expert concluded that Sultana was attacked first, then Tariq, and then Basma. 94RP 66. It appeared Sultana was hit from behind, fell to the ground, and was hit a second time. 92RP 199-200; 93RP 25-32. Tariq was completely unaware of the attack, and the individual wielding the bat would have been bloody. Moreover, based on blood spatter evidence, it appeared there were multiple participants (at least two) in the room during the attack. One assailant assisted another by moving a pillow off the bed while Tariq was being struck. 93RP 115-122, 183-194. The expert concluded Basma was first attacked in her bed. She then left the bed and may have been standing based on the height of the blows to the drywall. She collapsed behind the bedroom door. 94RP 59-61.

Bellevue police were convinced that Rackley and Sidell had heard the sounds of drywall being struck with a metal bat inside Basma's room. 72RP 202; 96RP 59. This was confirmed through a "sound recreation test" inside the Rafay home. 70RP 111; 72RP 199. While officers hit drywall in Basma's room with various implements (hammer, pipe, baseball bat, broom handle), neighbors Rackley and Sidell listened from their own homes. 70RP 112; 71RP 92; 72RP 201-03. Both Rackley and Sidell selected the noises made by the metal baseball bat as what they had heard the night of the murders. 70RP 114, 149; 71RP 93; 95RP 70-71. Officers then struck a mattress in the master bedroom using the different implements. Rackley did not hear this, but Sidell again indicated that strikes with the metal baseball bat sounded most like what he had heard the night of the murders. 95RP 71.

Inside the Rafay home, police lifted fingerprints. Not surprisingly, they found prints for everyone who had been staying in the home -- all three victims, Atif, and Sebastian. 84RP 94-183; 85RP 5-143. The source of certain prints within the home, however, could not be determined. One such print was found on the outside of Basma's bedroom doorframe. Police ran the print through the Automated Fingerprint Identification System ("AFIS"),

but it did not match any known print. 84RP 155-57; 85RP 186-87. The AFIS database only contains prints for individuals fingerprinted by United States authorities. It is not an international database. It does not include Canada. 84RP 152; 86RP 89.

The State's expert fingerprint examiner, Carl Nicoll, testified that there was nothing inside the Rafay home to indicate the killers wore gloves. Although he could not rule out the use of gloves, he found no "glove marks" or anything else indicating the presence of gloves. 86RP 83-85.

Consistent with their theory that the boys were the culprits, police focused on one set of prints in particular. In the downstairs bedroom where Sebastian had been staying, police found his prints on a box that had been tipped over on the floor. 85RP 60-66. The box was open when Sebastian touched it and there was some compression of the box in the area where the prints were found. 85RP 63, 66. It was also apparent that Sebastian was perspiring when he left the prints. 85RP 69-72. Although prosecutors theorized that Sebastian grabbed the box and knocked it over (while nervous) in an attempt to make it appear the room had been ransacked, in the end the State's expert conceded it was simply not possible to determine the circumstances under which Sebastian

touched the box. He could not tell the position of the box or even when it was touched. 85RP 62-63, 67. Sebastian could have left the prints any of the several days he stayed in the room. 85RP 164-65.

There was significant blood found in the downstairs bathroom shower, most of which was from Tariq Rafay. 87RP 107-120; 113RP 21-29. One sample, however, revealed someone else's blood mixed with Tariq's blood. The identity of the other contributor to this sample has never been determined. 113RP 24-25, 114-122. Sebastian and Atif have been ruled out as possible sources of this DNA. 113RP 119.

Police also collected hairs found inside the home. One such hair was found on the sheets of the bed where Tariq had been sleeping when murdered. DNA testing revealed that it did not come from any of the victims and it did not come from Atif or Sebastian. It came from an "unidentified male," whom the State's expert agreed could have been present for the murders. 89RP 74-76; 113RP 36-37, 109-112.

Sebastian's hair was found in the downstairs shower he had used during his visit. Other hairs were also found in the shower,

but DNA testing could not provide definitive results. 113RP 12-20, 105.

Police located what appeared to be shoe prints in bark located near the entrance to the Rafay home. 82RP 176-77. Plaster casts were made to preserve the prints for comparisons. 83RP 29-30, 41-42. Later, however, when the Washington State Patrol Crime Lab requested the casts for comparison purposes, they were never provided. 89RP 88.

Police also found bloodstains on the garage floor and several appeared to have been left by the same object. 87RP 49-57; 92RP 16-38, 122. Police could not rule out that the stains were partial shoe prints. 88RP 39-75; 92RP 121-22; 95RP 184-85. They found no blood on either Atif's or Sebastian's shoes, however, and their shoes were ruled out as the source of the garage prints. 87RP 91-96; 88RP 75; 95RP 186. There was no blood in the Honda the boys had been driving. 87RP 144.

Only two of the garage bloodstains produced extractable DNA. 113RP 60. The profile for one stain matched Tariq Rafay. The second stain contained a mixture of DNA from at least three individuals, including one male and one female. Some of the genetic traits of the mixture cannot be accounted for by any of the

individuals who stayed in the house, including Atif and Sebastian.

113RP 61, 122-23.

f. RCMP assistance.

On July 16, 2004, and without permission from the Canadian government, Bellevue Police detectives traveled to West Vancouver, British Columbia to continue their investigation of the boys. 100RP 179-180, 195-98. With the assistance of the West Vancouver Police Department, Bellevue Detectives attempted to gather information from the boys' friends, teachers, and acquaintances and determine whether the boys had any criminal history. 95RP 58-61; 100RP 181, 186. Detectives also contacted and briefly spoke to Sebastian's parents. 100RP 182-85.

The RCMP informant -- who had earlier received information about a possible hit on an East Indian family originally from Vancouver and now living in Bellevue -- saw television coverage of the Bellevue homicides and realized the information he had received prior to the crimes could be important. 138RP 64, 67. On July 19, 1994, he contacted the RCMP and shared his information about Jesse Brar with Corporal Patrice Gellinas. 138RP 57. Gellinas also felt this was important information, telephoned Bellevue Police, and shared what he had learned. 138RP 69, 73.

Detective Thompson and others met with Gellinas the next day. 96RP 41; 138RP 69-70. Gellinas told detectives about the tip and that this particular informant had proved reliable in the past. 96RP 42-43. But detectives did not attempt to contact Brar immediately. Rather, after waiting two more months, Bellevue detectives finally went to Brar's house twice in one day, but then abandoned their efforts to contact him when no one answered the door at his home. 96RP 50-51; 144RP 21-24. Although Gellinas offered further assistance, he would not hear from Bellevue Police again until the year 2000 and then only to let him know the boys' defense lawyers might contact him. 138RP 74-75; 144RP 38.

The RCMP learned that Bellevue Detectives were investigating in West Vancouver. Once it came to light that Bellevue Detectives did not have permission from the Canadian Government to do so, the detectives were ordered back to Bellevue. 95RP 62; 96RP 130; 100RP 193-98.

In August 1994, however, a corporal with the RCMP contacted the Bellevue Police and suggested that they file a formal request for RCMP assistance under the Mutual Legal Assistance Treaty ("MLAT"), thereby allowing the RCMP to help Bellevue Police. 95RP 78-79.

On January 11, 1995, Bellevue Detectives met with high-ranking RCMP officers in Vancouver to discuss ways in which the RCMP could assist in the Bellevue investigation. 101RP 28-29; 108RP 107-08. Bellevue Police hoped to obtain telephone records, financial information on the Rafay family, and biological samples from the boys to compare with evidence found at the crime scene. Exhibit 494; 108RP 110-114. The RCMP agreed to assist. But in order to do so legally, they would have to have their own investigation. They felt they "could probably squeak something out on a conspiracy angle." 114RP 141. The RCMP opened its investigation on conspiracy to commit homicide (on a theory the boys could have planned the murders in Canada) and insurance fraud (on a theory the boys killed Tariq to improperly collect on his life insurance). 108RP 115-117.

Thus began months of cooperation between the two agencies, information sharing, and an RCMP undercover operation designed to elicit incriminating statements from the boys. 101RP 29-46; 134RP 45-50, 58-59.

g. "Project Estate."

The RCMP called its investigation "Project Estate." 109RP 158. The RCMP gathered information already collected from the

West Vancouver Police, but did not alert the boys or those who knew them to their efforts. 108RP 117-18. In addition to a planned undercover operation, the RCMP used covert surveillance, wiretaps, and listening devices to eavesdrop on the boys' private discussions. 108RP 119-120.

The RCMP "Special O" team conducted surveillance. Members of the team were provided photos of the boys, information on the car they drove, the address of the home they now rented (2021 Phillip Avenue in North Vancouver), and information on their housemates (Jimmy Miyoshi and Robin Puga). 108RP 119-124. By March of 1995, Special O was actively watching Atif, Sebastian, and Jimmy. 108RP 124. That same month, they collected napkins and a straw Sebastian had discarded at a restaurant and cigarette butts from Atif. The collected items were then given to Bellevue Police. 108RP 125-130. Special O also gathered information on the boys' habits and activities to assist in planning the undercover operation. 108RP 131.

The following month, in April 1995, the RCMP used information provided by Bellevue Police to obtain judicial authorization to use wiretaps and other intercept devices for a

Honda Accord frequently driven by the boys and several homes, including 2021 Phillip Avenue.⁷ 108RP 134-36, 144-47.

The RCMP "Special I" team installed listening devices on the phones and in the homes by the end of that month. 108RP 149-154; 113RP 151. They installed a device in the Accord on June 1, 1995, after taking the car, making it look like it had been stolen, and abandoning it where it would be found and returned to the boys. 108RP 154; 109RP 165-67. All of the intercepts were monitored, recorded, and summarized for investigators. 108RP 155-58. The RCMP recorded almost 4,400 hours of surveillance; there were enough recordings to fill two file cabinets. 114RP 155-56. Ultimately, however, not once did the telephone, home, or car

⁷ In a pretrial ruling under Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the trial court found that information provided to the Canadian courts to obtain these authorizations contained material misrepresentations and omissions concerning the boys. These included misstating the time of death as between 10:00 p.m. and midnight, omitting that the neighbors heard the murders before 10:15 p.m., omitting the results of the Bellevue Police sound recreation tests, and omitting the "other suspect" evidence. The court, however, concluded that these misrepresentations and omissions were not intentional or reckless. 37RP 26-30; Supp. CP ____ (sub no. 292, Findings/Conclusions Re: Admissibility of RCMP Evidence (cause no. 95-1-05433-8), at 9).

intercepts detect one of the boys confessing to the murders.
112RP 63-65.

For the undercover component, the RCMP decided to employ a "Mr. Big" operation, which they had used in other cases to obtain confessions.⁸ 118RP 23. The goal is to create a fictitious international crime organization and attract the target with the promise of future earnings or other benefits. The target is given the impression he is lucky to be associated with the organization. The relationship builds to a point where the man in charge (Mr. Big) indicates that he knows the target has committed a crime and insists the target tell him what happened to prove he is trustworthy. 118RP 24-29.

For Project Estate, the RCMP selected Corporal Gary Shinkaruk and Sergeant Al Haslett to pose as members of the international criminal organization. 108RP 165-66, 122RP 93. Haslett was to play the crime boss who controlled the mobsters and thugs working for him, including Shinkaruk. 112RP 24-25, 27; 118RP 23.

⁸ Although this was not the RCMP's first "Mr. Big" operation, pretrial proceedings revealed that Atif and Sebastian were among the youngest individuals ever targeted. 21RP 9.

Similar to other operations, in this case the RCMP undercover officers portrayed themselves as hardened criminals in an organization where violence was not only accepted, it earned the individual respect. Individuals had to prove themselves to the boss, and the message would be that crime pays. On the other hand, the more information the target learned about the boss and the organization, the greater danger he posed. And disloyal underlings were "dealt with." 112RP 28-33, 61; 118RP 25.

The RCMP created "scenarios," which were intended meetings between the undercover officers and the boys designed to achieve specific objectives on the path to incriminating statements. 108RP 168-170; 115RP 18.

Scenario 1 took place on April 11, 1995. The purpose was to make initial contact with Sebastian and establish the possibility of further contact. Exhibit 501. On April 10, the RCMP intercepted a message from Krimper's Salon left on the boys' answering machine confirming Sebastian's hair appointment for 5:00 p.m. the following day. 108RP 173-74; 123RP 52-53. It was decided that Shinkaruk would contact Sebastian after that appointment. 123RP 66.

Shinkaruk looked and dressed the role. He had very long hair, pulled back in a ponytail, and a beard and moustache. He wore jewelry and snakeskin cowboy boots. 123RP 58. And he drove a newer black Trans-Am. 123RP 71. Shinkaruk parked the Trans-Am close to the Accord Sebastian was driving. 123RP 73. As Sebastian approached the parking lot, Shinkaruk pretended that he had locked the keys in his car and asked Sebastian for a ride to the Bay Shore Hotel so that he could pick up a spare key. 123RP 74. Sebastian agreed, and Shinkaruk paid for Sebastian's parking at the lot. 123RP 76-77.

Once at the Bay Shore, Shinkaruk pretended to get the key. Sebastian then drove him back to the Trans Am. Shinkaruk offered to buy Sebastian a drink and took him to the Skyline Pub, a strip club. 123RP 86-87, 90-91. Shinkaruk engaged Sebastian in conversation. 123RP 83-84. They discussed sports cars and Sebastian's interest in filmmaking. 123RP 83-84, 88. Sebastian mentioned he was looking for investors for a film he hoped to make, and Shinkaruk indicated he knew someone that might be interested. 123RP 88-89.

The person to whom Shinkaruk referred was undercover RCMP Officer Haslett. 123RP 89. Shinkaruk had arranged for

Haslett to meet them at the Skyline Pub and told Haslett to pose as someone with access to money. 123RP 90; 127RP 43-44. Haslett was already there when Shinkaruk arrived with Sebastian. 123RP 94. Without mentioning anything specific, Haslett asked Sebastian if he wanted to make some money and Sebastian responded that he did. Haslett told Sebastian he would simply have to do "some stuff" with Shinkaruk from time to time. Sebastian agreed. 127RP 54, 61.

Sebastian gave Haslett his phone number. Haslett said that if he ever left a message on Sebastian's answering machine, Sebastian was to erase it after listening to it. 127RP 51, 55-57. Sebastian assured Haslett that only he and his friends would hear the messages. 127RP 61. Haslett left and Shinkaruk dropped off Sebastian at the Krimper's parking lot, where his car remained parked. 123RP 100-01, 122.

Scenario 2 -- referred to as the Whistler "Stolen Car Scenario" -- took place two days later on April 13, 1995, and was intended to establish a relationship with Sebastian and introduce him to the fictitious organization's criminal activities. Exhibit 501; 123RP 126-27. Specifically, the goal was to convince Sebastian to help them steal a car. 123RP 127. In fact, however, the RCMP

had merely rented a car and made it look like it belonged to a family by placing a baby car seat and children's toys inside. 123RP 127-28. By placing these items in the car, the intended message for Sebastian was that even families do not get in the way of business. 125RP 79-81.

Sebastian was not informed ahead of time that he was expected to participate in a theft. 123RP 140. Rather, Haslett simply called and asked if Sebastian was available for a few hours and then told him that Shinkaruk would pick him up. 123RP 129-130, 136; 127RP 72-75. They kept the plan secret to avoid any possibility Sebastian would call police (or anyone else) and report what was about to happen. 123RP 75-76.

The officers chose Whistler because the drive from Vancouver would allow Shinkaruk to spend more time with Sebastian. 123RP 138-140. The distance would also make it more difficult for Sebastian to opt out of participating in a crime. 118RP 42-43. The two met Haslett at a Whistler pub. Shinkaruk then left and Haslett told Sebastian about the plan to steal a car. 123RP 152-54; 127RP 79-82.

When Shinkaruk returned, Sebastian looked "very scared and pale white." 123RP 157. As Shinkaruk drove Sebastian to the

targeted car, Sebastian expressed concern. He had not known anything about this and was worried about what would happen if police pulled him over. 123RP 157-58. Once at the lot where the car had been parked, Shinkaruk had Sebastian stay with the Trans-Am and act as a lookout while he pretended to break into the vehicle. Shinkaruk then drove the "stolen" car out of the lot. 123RP 159-160. Shinkaruk got back into the Trans-Am and had Sebastian drive the stolen car back to Vancouver. 123RP 160-63.

Once back in Vancouver, Shinkaruk drove Sebastian to a nearby restaurant to meet with Haslett again. 123RP 163. Sebastian was not happy and still upset about what would have happened had he been pulled over. 123RP 169. In fact, when Sebastian left to go to the restroom, Shinkaruk and Haslett had doubts whether he would return to the table. 123RP 169; 127RP 95-97. Sebastian did return, however, and Haslett gave him \$200.00. 123RP 170. Sebastian complained that he could make \$200.00 stealing videos or recirculating ski tags on the mountain. 123RP 170-71.

Haslett left and Shinkaruk continued to talk with Sebastian. 123RP 171-72. According to Shinkaruk, Sebastian complained about only receiving \$200.00, and Shinkaruk responded that he

had to prove himself to Haslett. 123RP 180. He explained to Sebastian that he was not told the plan in advance because “the less he knows, the less he can hurt Haslett.” 123RP 180. This conversation was not recorded, but according to Shinkaruk’s notes (which he conceded were sometimes inaccurate), at some point Sebastian indicated he could be a hit man or sell cocaine.⁹ 123RP 182-84; 125RP 53-62. Shinkaruk drove Sebastian back to North Vancouver and his home. 123RP 187.

Despite the statement Shinkaruk attributed to Sebastian about what he might be willing to do, based on his reaction to the car theft, the RCMP feared that if it introduced “harder crime” into future scenarios, Sebastian might pull away. 125RP 44-45.

Scenario 3 simply involved telephone calls from Shinkaruk to Sebastian intended to maintain the relationship and eventually arrange a meeting for the next scenario, which was to take place in May. Exhibit 501; 109RP 126-130; 124RP 16-38, 48-53.

Scenario 4 -- referred to as “The Four Seasons Hotel” scenario -- took place on May 6, 1995, and was designed to

⁹ In fact, Shinkaruk’s notes for a later scenario also have Sebastian indicating he would be interested in “murder for hire.” A tape of that conversation, however, reveals that he said no such thing. 125RP 58-62.

elevate in Sebastian's mind the organization's level of criminal activity, build further credibility with him, and discuss the Bellevue investigation. Exhibit 501; 124RP 55.

The RCMP hoped to entice Sebastian's further participation with the organization by convincing him there was a lot of money to be made. 109RP 132. For this scenario, Shinkaruk drove a brand new Corvette. And an attractive female RCMP officer posed as Shinkaruk's girlfriend or mistress (his "flavor of the moment") and dressed provocatively. 109RP 134-35; 124RP 60-61; 129RP 67. They met Sebastian at a bar and drove him to the Four Season's Hotel in downtown Vancouver. Because Corvettes have only two seats, the female officer sat on Sebastian's lap.¹⁰ 124RP 60-61, 77-79. Once at the hotel, Shinkaruk gave the female officer \$3,000.00 in front of Sebastian and told her to leave. 129RP 77, 83-84.

Sebastian was taken to a hotel room that had been bugged. This was a posh suite designed to impress. All conversations inside the room were recorded and monitored by officers in an

¹⁰ When asked to describe Sebastian on the ride to the hotel, the officer would later say, "he was a polite young 19-year-old man who had a 38-year-old 137-pound broad on his lap." 129RP 82.

adjacent hotel room. 109RP 141-45; 115RP 69-70; 124RP 157-59; exhibit 507. After Shinkaruk made small talk with Sebastian, another undercover officer -- Scott Doran -- knocked and entered the room. He was dressed as a "biker" and tough guy. 113RP 158-59; 124RP 62-63; 127RP 12; exhibit 507. He delivered a large sum of money to Shinkaruk that was designed to reinforce the notion that criminal activity pays big dividends. 127RP 11.

To emphasize the message that the organization values secrecy, Doran initially hesitated before discussing any business in Sebastian's presence, but then spoke openly once Shinkaruk vouched for Sebastian. 124RP 100-102, 14; 127RP 14-15; exhibit 546, at 8; exhibit 507.

In order to convince Sebastian of the organization's broad reach, Doran explained that he needed a Quebec driver's license and a Medicare card, and Shinkaruk assured him it would not be a problem. 124RP 105-06; 127RP 16-17; exhibit 546, at 8, 12; exhibit 507. Doran then pulled out two .9 mm handguns that he wanted to give Haslett. 113RP 58; 124RP 63, 102-03; exhibit 546, at 14; exhibit 507. Unlike the United States, Canadian gun laws are quite strict; few may legally possess handguns and displaying

them in a hotel room in this manner is “a very big deal” in Canada. 109RP 136-37; 112RP 55.

Referring to one of the handguns, Doran said, “if [Haslett’s] gonna try to use it, tell him to uh throw it in the salt right away cause uh, she’s pretty hot like she’s uh, I don’t mean hot stolen, I mean still warm.” Exhibit 546, at 14; exhibit 507; 127RP 18-20. This was designed to convince Sebastian that the gun had been used and demonstrate to Sebastian that violence -- even murder -- was simply a part of doing business. It was no big deal. 115RP 66; 124RP 104; 127RP 20, 117-18. It was Doran’s impression that Sebastian was uncomfortable the entire time he was in the hotel room. 127RP 27.

After Doran left, the conversation turned to the movie Sebastian hoped to make. When Shinkaruk asked him how much he needed to make the film, Sebastian said it could be done for \$200,000.00 and the financing had already been arranged through investors. Exhibit 546, at 18-20; exhibit 507. The RCMP knew this was not true -- Sebastian did not have \$200,00.00. 118RP 89. But based on Sebastian’s claim that he no longer needed their money, they knew they would have to find another “carrot” to keep him interested. 124RP 109.

Sebastian mentioned the Bellevue investigation. He explained that although he had no reason to worry about what was going to happen, getting involved in crimes with the organization and getting caught might make the situation worse for him. Exhibit 546, at 23-24; exhibit 507. Shinkaruk explained that there had been little risk involved with stealing the car in Whistler. The car belonged to the wife of an individual who owed Haslett money. Haslett wanted to send this individual a message: that Haslett was willing to “fuck up things that are dear to him,” including his family, and that nothing was off limits; he might even “do” the man’s wife. Exhibit 546, at 26; exhibit 507.

To further reassure Sebastian that any risk was minimal, Shinkaruk told him that he had once “toasted a guy” and Haslett made sure that when it came time for court, “the person that could finger me, they’re not around anymore,” intentionally leaving the impression with Sebastian that Haslett may have had the witness murdered to ensure Shinkaruk was not convicted for homicide. 124RP 115; 126RP 20-22; exhibit 546, at 27; exhibit 507.

Shinkaruk emphasized that trust was essential and indicated he had concerns because Sebastian apparently did not feel comfortable telling him the details of the Bellevue situation. Exhibit

546, at 30; exhibit 507. Sebastian then explained that he and Atif came home to find Atif's parents murdered. They became suspects and were treated poorly by police and the media. Exhibit 546, at 30-35; exhibit 507. They feared that if they went back to the United States they would be arrested. They also knew Bellevue Police wanted blood and hair samples from them, but Sebastian did not see the point of providing them, expressing concern that evidence against them might be fabricated. Exhibit 546, at 32; exhibit 507.

Sebastian indicated that with production about to begin on his film, it was not a good time to be committing crimes. He suggested that maybe in a year things would be different and he would be in a position to make money for them. Exhibit 546, at 41-42; exhibit 507. He preferred to simply keep in touch until then. Exhibit 546, at 50-51; exhibit 507.

Haslett entered the room and asked about the money Doran had dropped off. Exhibit 546, at 150; exhibit 507. Haslett, Shinkaruk, and Sebastian then counted the money. Exhibit 546, at 55-59; exhibit 507. This was actually \$250,000.00 in RCMP funds, but Sebastian was told they had counted \$300,000.00 and led to

believe it was proceeds from illegal activities. 109RP 137-39; 127RP 11; exhibit 546, at 72; exhibit 507.

Shinkaruk left Haslett alone with Sebastian, and Haslett also focused on trust. Exhibit 546, at 60-61, 69; exhibit 507. Haslett asked Sebastian about his role in the Bellevue murders and Sebastian explained that he was a suspect because Bellevue Police had nobody else. Exhibit 546, at 62-64; exhibit 507. Haslett said he needed to know about the homicides to make sure Sebastian was trustworthy and to make sure Sebastian was "solid" and could take care of business. Exhibit 546, at 65; exhibit 507. Sebastian responded that he wanted to focus on his movie and did not need work. Exhibit 546, at 66; exhibit 507. Haslett emphasized the vast amount of money Sebastian could make working for him. Exhibit 546, at 70-72; exhibit 507. But Sebastian again indicated he was going to be very busy. Exhibit 546, at 72; exhibit 507.

Instead of trying to attract Burns with the lure of money, which was not working, investigators decided on a different tact. They would entice Sebastian with the prospect of destroying evidence in the Bellevue case. 118RP 6-13, 27-29; 127RP 131.

Haslett said he had read a lot about Sebastian and it was because of what he had read that Sebastian was with them that

night. Exhibit 546, at 73; exhibit 507. Sebastian again responded that he was busy. Exhibit 546, at 74; exhibit 507.

Haslett then focused on what would happen if Sebastian were arrested on homicide charges. He told Sebastian the first person he would “give up” to help his situation would be Haslett himself. Exhibit 546, at 75; exhibit 507. Haslett asked what happened in Bellevue, and Sebastian once again explained how he and Atif came home to find the family murdered. Exhibit 546, at 76; exhibit 507. And he once again tried to explain that he would be busy for a while. Exhibit 546, at 77.

Haslett then discussed with Sebastian the possibility evidence in the case could be destroyed. Exhibit 546, at 78-79; exhibit 507. Haslett said that if Sebastian proved he could “take care of business,” Haslett had people in place who could accomplish many things. Exhibit 546, at 79; exhibit 507. Haslett indicated he was going to be checking on the status of things in the United States. Exhibit 546, at 80; exhibit 507.

Thinking it would be humorous, Sebastian revealed to Haslett and Shinkaruk that he had taken down the license plate number on Shinkaruk’s car. Exhibit 546, at 81; exhibit 507. Haslett and Shinkaruk were not pleased and wondered if Sebastian had

done this so that he had a “bail out” and could turn them in should he get arrested. Exhibit 546, at 81-84. Haslett explained there were two things in life he was not willing to experience -- losing money and going to jail. Exhibit 546, at 85; exhibit 507.

Haslett told Sebastian that he only trusted him because he had done the Bellevue murders: “You did that murder. And that’s why you’re here, it’s you’re, here today, because you’re fuckin’ solid.” Exhibit 546, at 94; exhibit 507. “Solid” means trustworthy and someone who “will back you up no matter what.” 127RP 120-21. Haslett’s message to Sebastian was: I trust you because you are a murderer. 135RP 6. Sebastian, however, neither confirmed nor denied that he committed the murders. Exhibit 546, at 96; exhibit 507.

Haslett told Sebastian he would see what he could find out about the Bellevue investigation and they would talk again. Exhibit 546, at 131, 146; exhibit 507. He reiterated that he knew Sebastian had committed the murders, but reassured him that he didn’t “give a fuck.” Exhibit 546, at 134; exhibit 507. Haslett referred to it as “the perfect crime.” Exhibit 546, at 135, 147; exhibit 507.

Sebastian again expressed concern that police would fabricate evidence against him. Exhibit 546, at 141; exhibit 507. Haslett encouraged Sebastian to go back and read every newspaper article on the murders to figure out the evidence against him. Exhibit 546, at 141; exhibit 507. He then gave Sebastian \$100.00 for a cab and said he would talk to him later. 129RP 40-41.

Scenario 5 was simply a series of telephone calls to Sebastian on May 29-30, 1995, designed to assess whether a local newspaper article had compromised the undercover operation. Exhibit 501.

Specifically, on May 13, 1995, the *North Shore News* ran an article discussing an RCMP undercover operation very similar to Project Estate -- where officers involved the target in "crimes," and focused on trust as a tool to eventually elicit a confession. 109RP 156-59. On May 14, monitors in the boys' home picked up a conversation in which the article was discussed. There was concern the undercover officers' cover had been blown. 109RP 157-162. That concern dissipated, however, after Shinkaruk spoke to Sebastian on the phone and the boys were never heard discussing the matter further. 109RP 162-64; 115RP 86-87.

Scenario 6 -- referred to as the "First Royal Scott Money Laundering" scenario -- occurred on June 15-16, 1995. The purposes were to maintain a relationship with Sebastian, introduce housemate Jimmy Miyoshi to the operation, and determine if there were any lingering concerns about the *North Shore News* article. Exhibit 501. It took place at the Royal Scott Hotel in Victoria. As before, the room was wired. Exhibit 540 (vol.1), at 1; exhibit 508.

Haslett and Shinkaruk had Sebastian and Jimmy make cash deposits at several banks in the area. Exhibit 540 (vol. 1), at 12-15, 18-20; exhibit 508. The goal was to convince the boys that they were laundering significant proceeds from criminal activities. 114RP 108, 112-13. Money laundering is a very serious crime in British Columbia. 114RP 111-12. In fact, however, all of the funds and accounts belonged to the RCMP. 114RP 76-77; 130RP 56.

By involving the boys in this scheme, the boys also became more of a threat to Haslett. They now knew the bank accounts being used to launder the organization's money. This information could be extremely useful to any law enforcement agency investigating the group. 114RP 114-120; 118RP 32-38. And, of course, the boys already knew Shinkaruk was a murderer, had his

license plate number, and knew the hotels where Haslett and Shinkaruk liked to stay. 119RP 38.

When the boys returned from money laundering, Haslett shared information he had supposedly learned about the Bellevue investigation with Sebastian. Exhibit 540 (vol. 1), at 35; exhibit 508.

In an attempt to make the boys feel they could be assets to the organization, Haslett feigned interest in the boys' computer skills and asked if they could help him set up a system for keeping track of financial information. 118RP 28; Exhibit 540 (vol. 1), at 68-82; exhibit 540 (vol. 2), at 1-25; exhibit 508. It was apparent to the officers that Sebastian had no interest whatsoever in participating in "hard crimes," such as assaults or robberies. Pretending Sebastian was an asset based on his computer skills and using him for money laundering made it unnecessary to engage him in violent activities that could have scared him away. 135RP 88-92.

The boys were given \$300.00 in spending money. 130RP 91. Haslett also paid for the boys to stay in the hotel room that night so that they could do more money laundering the following day at different branches. Exhibit 540 (vol. 1), at 32, 41, 44-46; exhibit 508. The recording device was left on to capture the boys'

private discussions. They did not say anything indicating involvement in the Rafay murders. 115RP 99; exhibit 540 (vol. 2), at 26-37; exhibit 540 (vol. 3), at 1-4; exhibit 540 (vol. 4), at 1-13; exhibit 508.

The morning of June 16, Shinkaruk arrived to pick up the boys for their second day of money laundering. Exhibit 540 (vol. 4), at 12-13; exhibit 508. Haslett also dropped by and expressed interest in stopping by the boys' house some time to see their computer. Exhibit 540 (vol. 4), at 21; exhibit 540 (vol. 5), at 2; exhibit 508. After the boys made deposits at several more banks, they were paid \$2,000.00. 119RP 35-57; 130RP 106; exhibit 540 (vol. 5), at 2; exhibit 508.

Scenario 7 involved a visit to 2021 Phillip on June 20, 1995, to further convince Sebastian that his knowledge of computers was an asset to the organization. 118RP 44-45; Exhibit 501. The officers also hoped to meet Atif for the first time. 109RP 173. Sebastian was not pleased about the unannounced visit, and did not allow the men to enter until Haslett demanded to be let in. Once inside, Haslett told Sebastian that his source from Bellevue would be coming up shortly with some important information. Sebastian indicated he thought his house was bugged. 109RP

177; 118RP 45; 132RP 11-14. Before leaving, Haslett warned Sebastian never again to leave him "standing on the doorstep like a dog." 132RP 15. The undercover officers did not meet Atif. 131RP 51.

Scenario 8 -- referred to as the "Second Royal Scott Money Laundering" -- took place at the Royal Scott Hotel on June 28-29, 1995. It was designed to strengthen the relationships with Sebastian and Jimmy. Exhibit 501.

The officers once again gave the boys \$300.00 in spending money. 132RP 34. And the RCMP once again paid for the room and had it wired. Exhibit 541, at 1, 167; exhibit 509. But, as before, recordings of Sebastian and Jimmy when the two were alone after checking into the room failed to reveal any discussions linking them to the Rafay murders. Exhibit 541, at 1-31; exhibit 509. After spending some time in the room, the boys left with Shinkaruk and made deposits on June 28. 132RP 50-51; exhibit 541, at 34; exhibit 509.

Back at the room, Haslett raised the subject of computers again with the boys, feigning interest in their discussion of the Internet and encryption techniques. 133RP 3-5; exhibit 541, at 53-77; exhibit 509.

Haslett then had Shinkaruk take Jimmy out of the room so that he could speak with Sebastian alone. Haslett chastised Sebastian for not letting him know that his home was bugged before he showed up there. Exhibit 541, at 78-80; exhibit 509. He then explained what he had learned about the Bellevue investigation:

they have you in a pretty big fucking way down there, to the point when these murders took place, whoever did it – and not whoever did it – the report I read knows you did it. They have you with your hair samples in the shower, not lots of ‘em about twenty, twenty-one or twenty-two are named in this report I read, they’re just about right around the drain. In with these hair samples there is blood from the dead people from the male and female dead person in that house, and it comes right back to you. They know the last person to take a shower in there had the blood from the dead people on them ‘cause they used some sort of, light, to scan it which shows the fuckin’ droppings of the blood. It shows your hair in there. You’re the only person mentioned in this whole report I read. It’s your hair, their blood, in that shower. You said they haven’t got your D.N.A., or whatever, they have got your D.N.A. They got it out of some fuckin’ snot Kleenex up here somewhere in a restaurant.

Exhibit 541, at 80; exhibit 509. Haslett also told Sebastian a lab was culturing his DNA and police found his fingerprint on a box that had been tipped over. Exhibit 541, at 81-82; exhibit 509.

Haslett then offered to help Sebastian, but only if Sebastian helped him. Exhibit 541, at 82; exhibit 509. Specifically, Haslett

said he wanted Sebastian to continue working for him, including future computer work. Exhibit 541, at 83; exhibit 509. The two discussed the possibility of manipulating the evidence to clear Burns, but Haslett indicated he needed to know what evidence Bellevue Police had in order to destroy it. Exhibit 541, at 83-84; exhibit 509.

Sebastian responded that he had no idea. Exhibit 541, at 84; exhibit 509. Haslett pressed Sebastian for details on evidence in the Rafay home, but Sebastian did not provide any. Exhibit 541, at 85-91; exhibit 509. Haslett said he had to know everything or somebody “gets fuckin’ bit. And nobody that works for me is going to get bit. If they get bit I get bit.” Exhibit 541, at 91; exhibit 509. Sebastian responded, “if I were to fuck you around, okay, I would just assume that I would wake up one day with a bullet in my head.” Exhibit 541, at 91; exhibit 509. It was clear to Haslett that Sebastian feared death if he did anything to displease Haslett. 135RP 156-57.

But Haslett continued to press Sebastian for details of the murders. Sebastian continued to provide nothing. Exhibit 541, at 92-159; exhibit 509. And whenever Sebastian said anything

consistent with innocence, Haslett accused him of lying. 126RP 102-03; 134RP 79-80; 135RP 159.

Haslett asked Sebastian if he was playing games and warned him he would “not be set up by anybody.” Sebastian denied any games. Exhibit 541, at 106; exhibit 509. At one point, Haslett told Sebastian to “stop the bullshit” and accused him of “out and out fucking lying” when Sebastian would not admit his involvement. Exhibit 541, at 112; exhibit 509. Regarding Sebastian’s claim that he and Atif came home to discover the bodies, Haslett said, “You must think I come down on last night’s rain.” Exhibit 541, at 112; exhibit 509. He threatened not to help Sebastian if he didn’t “fuckin’ like the feeling of it” and made it clear he would not get rid of the evidence in Bellevue unless Sebastian confessed to the murders. Exhibit 541, at 114; 135RP 18-19; exhibit 509.

Because Haslett personally believed Sebastian was guilty, it never occurred to him that by telling Sebastian Bellevue Police had strong evidence against him, it would simply confirm Sebastian’s often stated fear that evidence had been fabricated. It never occurred to him that Sebastian might therefore want evidence

destroyed not because he was guilty, but because he was *innocent*. 135RP 20-30, 43-56.

Instead, Haslett told Sebastian that he knew Sebastian killed the Rafays and police knew it, too. Exhibit 541, at 129; exhibit 509. Sebastian said he would not answer any questions for his own protection. Exhibit 541, at 146; exhibit 509. Haslett warned Sebastian that if Sebastian “went down” on a murder charge, Haslett would go down, too. Exhibit 541, at 149; exhibit 509.

At Haslett’s suggestion, he and Sebastian left the room to go on a walk. There is no recording of their conversation away from the room. Exhibit 541, at 160; exhibit 509. According to Haslett, he asked Sebastian if he could kill again and Sebastian responded that he could not because his heart was not in it. 133RP 36-37. Sebastian raised the topic of his movie again, and the two then returned to the hotel room. 133RP 37.

Shortly thereafter, Shinkaruk returned to the room with Miyoshi. 133RP 41. Shinkaruk and Haslett then left Sebastian and Miyoshi in the room for the evening. Exhibit 541, at 167-170. As before, while alone, neither Sebastian nor Miyoshi made any incriminating statements about the murders. Exhibit 541, at 170-220; exhibit 509.

The boys spent the night at the hotel. Exhibit 541, at 184; exhibit 509. The following morning, they paged Shinkaruk, met him at an agreed upon spot, and deposited more funds. Exhibit 541, at 170, 207, 218; exhibit 509; 134RP 25-26.

Scenario 9 -- referred to as "Miyoshi Money Laundering" -- took place July 10, 1995, and involved only Jimmy. Shinkaruk tried to learn additional information about Sebastian and Atif. 115RP 106-08; Exhibit 501; 114RP 108-09. Jimmy was not asked about the murders. 126RP 120-22.

Scenario 10 -- called "First Ocean Point Hotel" scenario -- took place on July 18, 1995, at the Ocean Point Hotel in Victoria. It was designed to employ a fake Bellevue Police Department memorandum and discuss further with Sebastian the organization's ability to destroy evidence for him. Exhibit 501; exhibit 542, at 1; exhibit 510. Officers were seeking to give Sebastian "a logical reason to confess" and hoped the fake memo would evoke sufficient concern on his part. 114RP 122; 115RP 116, 132. All of the assertions in the memo were "potentially true" but not necessarily true. 115RP 125.

In this scenario, Haslett waited in the hotel room for Shinkaruk and Sebastian to arrive. The room was wired for audio

and video. Exhibit 542, at 1; exhibit 510. Shinkaruk then left the room so that Haslett could speak with Sebastian alone. Exhibit 542, at 7-9; exhibit 510.

Haslett asked Sebastian if he had been reading the newspapers about his case, and Sebastian responded that he had. Exhibit 542, at 9; exhibit 510.

In fact, there had been extensive coverage of the murders, including details about the crimes. Bellevue Police provided much of this information. 102RP 74-78, 83; 95RP 199-206. By the time of this conversation between Haslett and Sebastian, the papers had disclosed that the Rafays were specifically targeted; their murders were not random, and the true motive was not robbery. 102RP 76-77; 104RP 42-43. The papers disclosed the order of the killings. 104RP 46. The papers disclosed that the murder weapon was likely a metal baseball bat. 102RP 81; 121RP 48-49; 126RP 117; 138RP 36-37. The papers disclosed that Bellevue Police believed the boys left the Lion King before it ended and committed the murders while the movie was still showing. 121RP 50; 138RP 38. The papers also disclosed that Sultana did not fight back and was struck once or twice, the killers then attacked Tariq while he slept, and Basma fought back by trying to get away from her

attackers. 102RP 81-82; 104RP 47-50; 121RP 50-52; 126RP 118-119; 138RP 38-39.

After confirming that Sebastian had been reading the papers, Haslett attempted to scare him:

Well I'll tell ya, they're fuckin' coming to lock your ass up. Yours and your friends. But there's uh, things here that can be done quick. But, you're gonna want to do them, you're gonna have to tell me you want them done, and you're gonna have to play straight with me, 'cause things are fuckin' happening quick here now. But it can't be done without you fuckin' saying you want it done. And, there's too many questions that are unanswered here right now. And you and your friend, your fuckin' asses are going to jail. So you got two choices to make that are gonna effect me and you. Me financially, you, your stay out of jail. It's your call. . . .

Exhibit 542, at 10; exhibit 510. Sebastian said he *wanted* Haslett's help. Haslett corrected him, saying he *needed* his help. Exhibit 542, at 10; exhibit 510.

Haslett then produced the fake Bellevue Police memorandum and had Sebastian read it. The memo, which is dated July 10, 1995, indicates that both Sebastian and Atif will be charged with murder "once the culturing of the DNA is completed." Exhibit 542, at 10; exhibit 510; exhibit 502. The memo also lists five items of evidence from the scene: (1) red fabric fibers found in the shower mixed with Sebastian's hair, (2) stains on boxer shorts

found in the washer, (3) bloodstains in the garage, (4) saliva on Tariq's bedroom wall, and (5) murder weapon impressions from the bedroom wall. Exhibit 502.

Sebastian responded that the red fibers could have been from showers he took while staying in the home, he did not recall washing his boxer shorts, and he did not know anything about bloodstains in the garage or saliva on the wall. Exhibit 542, at 11-13, 17; exhibit 510. Sebastian again expressed fear that police were fabricating evidence against him, meaning they were taking innocuous facts and converting them into incriminating ones. Exhibit 542, at 12; exhibit 510.

Haslett repeated that police were "coming to lock your ass up" and indicated "things got to be acted on fast." Exhibit 542, at 14; exhibit 510. But he would not have his contact help any further unless Sebastian did as he said. Exhibit 542, at 14; exhibit 510. Haslett told Burns he could take care of the lab evidence in the case, but only with Sebastian's help. Exhibit 542, at 15; exhibit 510. Haslett then burned the fake report and repeated that he was only willing to destroy the evidence if Burns gave him "the straight goods." Exhibit 542, at 18; exhibit 510.

By this point, the RCMP undercover officers had provided information to Sebastian allowing him to believe the following:

- Haslett headed a large criminal organization with international reach;
- The organization used violence to satisfy its needs;
- Haslett only trusted Sebastian because he believed Sebastian was a murderer (he was “solid”);
- If Sebastian betrayed Haslett’s trust, he could end up with a bullet in his head;
- Haslett was not willing to go to jail, and if Sebastian were arrested, Haslett was at risk;
- Haslett was the only option for dealing with Bellevue Police and ensuring Sebastian did not go to jail;
- Haslett would only help Sebastian if he confessed.

135RP 18-19; 138RP 42-45.

For the first time, Sebastian made incriminating statements. In response to questions from Haslett, he told Haslett that Atif was in the home during the murders but did not actively participate. Exhibit 542, at 18; exhibit 510. He claimed that both he and Atif disposed of their clothes in dumpsters and had a change of clothes waiting. Exhibit 542, at 19-21; exhibit 510. He used a bat, which was also placed in a dumpster. Exhibit 542, at 20; exhibit 510. Sebastian said each person was killed separately and both Tariq

and Basma were sleeping. Exhibit 542, at 21; exhibit 510. When asked how it was planned, Sebastian said it wasn't; they just woke up one day and decided to do it. Exhibit 542, at 25; exhibit 510.

In response to further questioning, Sebastian said they committed the murders during the movie. Exhibit 542, at 27-28; exhibit 510. Although he had just claimed that he disposed of his clothes in several dumpsters, he also claimed that he committed the murders naked. Exhibit 542, at 28, 48; exhibit 510. Later, he claimed that he wore only underwear. Exhibit 542, at 29; exhibit 510. Later still, he indicated he was wearing shoes. Exhibit 542, at 47; exhibit 510.

Sebastian said he showered downstairs before they went back out for the evening and washed off the bat in the shower. Exhibit 542, at 28, 47; exhibit 510. He said there should not have been any blood in the garage. Exhibit 542, at 46; exhibit 510. And he claimed that he wore gloves. Exhibit 542, at 47; exhibit 510.

According to Sebastian, Atif was fully clothed and only witnessed his mother get hit. Exhibit 542, at 31; exhibit 510. Sebastian then hit Tariq and then Basma. Exhibit 542, at 32; exhibit 510. Sebastian claimed that it took about an hour and a

half to commit the murders and get out of the house. Exhibit 542, at 48; exhibit 510.

When asked where he got the baseball bat, Sebastian indicated he thought they found it at the Rafay house and denied buying it. Exhibit 542, at 32; exhibit 510. Haslett asked Sebastian if they committed the murders to finance their film and he indicated they did not. Although they knew they wanted to produce a film at the time of the murders, in fact, they had planned on Atif returning to Cornell, where he could gain access to the necessary equipment and the movie would be shot there. Exhibit 542, at 34; exhibit 510.

Haslett told Sebastian he was going to arrange for a fire in the crime lab to destroy evidence. He was also going to replace some hair samples with those currently in the lab. Exhibit 542, at 36; exhibit 510. He added that he would need to speak with Atif and Jimmy before he did this. Exhibit 542, at 37-38; exhibit 510. Haslett indicated he would not let Atif work with the organization until he talked to him and decided he could trust him. Exhibit 542, at 39; exhibit 510. Sebastian expressed his belief that if he, Atif, or Jimmy ever "fucked anyone around" in the organization, they'd be dead. Exhibit 542, at 54; exhibit 510.

Shinkaruk returned to the room and gave Sebastian a ride back to his hotel. Exhibit 542, at 59, 65; exhibit 510.

Scenario 11 -- called "Second Ocean Point Hotel" -- took place the following day. The purpose was continued discussions on the destruction of incriminating evidence, but this time with both Sebastian and Atif. Exhibit 501.

Prior to the recorded conversations, however, Shinkaruk took Sebastian with him to collect on a debt. Sebastian was told that he should stand lookout while Shinkaruk roughed up the debtor. Unknown to Sebastian, the debtor was just another RCMP officer and the beating was staged. 115RP 148-153; 126RP 125-130; 139RP 67-80. When told beforehand what was going to happen, Sebastian became nervous and anxious again. 126RP 129; 139RP 92-93.

Within earshot of Sebastian, Shinkaruk told the debtor that if it happened again, he would find the debtor's wife and cut off her hand. Exhibit 543, at 4; exhibit 511. Afterward, he indicated to Sebastian that he may have broken the man's jaw. Exhibit 543, at 9; exhibit 511. Back at the room, Haslett, Shinkaruk, and Sebastian counted the money collected from the debtor, which

Sebastian was led to believe was about \$100,000.00. 141RP 32; exhibit 543, at 4-9; exhibit 511.

Haslett had Sebastian call Atif and Shinkaruk then drove to pick Atif up. Exhibit 543, at 11-14; exhibit 511. While Haslett and Sebastian waited, they discussed the murders some more. In response to questions from Haslett, Sebastian said he and Atif had moved items in the home to make it look like a burglary. They also took the VCR and placed it in a dumpster. Exhibit 543, at 18-19; exhibit 511.

Haslett asked Sebastian about the bat again. Whereas he had previously said they found it at the Rafay home, this time Sebastian said they purchased it in the Bellingham area. Exhibit 543, at 20-21; exhibit 511.

Sebastian told Haslett that rather than helping Shinkaruk with collections (as he had just done), he thought his time was better spent working on his film. Haslett assured him he would not have to do collections again. Exhibit 543, at 24-25; exhibit 511.

Shinkaruk then arrived with Atif, and Sebastian introduced him to Haslett. Exhibit 543, at 30; exhibit 511. Haslett once again stressed the need for trust and told Atif that he was going to get the two out of trouble. Exhibit 543, at 34-35; exhibit 511. He asked Atif

if he'd been reading the papers, and Atif said that he had. Haslett told the boys they were both close to going to jail and had Sebastian tell Atif about the Bellevue Police memo. Exhibit 543, at 35-38; exhibit 511.

Haslett asked Atif why they committed the murders, and he said for financial gain. Exhibit 543, at 38; exhibit 511. Atif said that he was merely present in the house and pulled out the VCR. Exhibit 543, at 39-40; exhibit 511. When asked if any of the victims fought back, Sebastian said that Basma stood up, was walking around, and took more effort. Exhibit 543, at 40; exhibit 511. Haslett asked if Atif showered afterward, and he said he simply washed up in a men's room. Exhibit 543, at 42; exhibit 511. He also claimed that he "hucked" his clothes out the window, and he threw the VCR into a dumpster. Exhibit 543, at 44-46; exhibit 511.

Haslett explained to Rafay how he was going to arrange a fire at the crime lab and replace Sebastian's hairs with those of someone else. Exhibit 543, at 47; exhibit 511. He also explained that he expected Atif to assist in setting up the computer system for the organization. Exhibit 543, at 48-51; exhibit 511.

Haslett asked Atif how it felt to kill his parents and sister and he responded "pretty rotten" but that it was necessary to achieve

what he wanted in life. Exhibit 543, at 56; exhibit 511. After some lengthy small talk, Shinkaruk left with the boys. Exhibit 543, at 58-79; exhibit 511.

Scenario 12 -- referred to as the "Landis Hotel" scenario -- took place a week later, involved discussions with Sebastian and Jimmy, and was designed to reveal if Jimmy knew anything about the murders. As before, the conversation was recorded. Exhibits 501, 544.

Haslett stressed trust again and explained how he was going to destroy the Bellevue evidence. He then asked Jimmy about the murders. Exhibit 544, at 2-3; exhibit 512. Jimmy was hesitant to say anything, but finally did so at Sebastian's urging. Exhibit 544, at 3-7; exhibit 512. He said he did not participate directly in the killings because he was too busy at work. Exhibit 544, at 8; exhibit 512. He said he knew about the plan a month before and had learned generally what happened in the house afterwards. He provided no details of the murders. Exhibit 544, at 10-13, 15; exhibit 512.

h. The arrests.

On July 31, 1995, Sebastian and Atif were arrested for murder on King County warrants.¹¹ 112RP 14-15; 115RP 160; 138RP 202. Jimmy was arrested for investigation of conspiracy to commit murder. 138RP 195, 202.

Jimmy was taken to a RCMP detachment for interrogation. Once there, Haslett revealed his true identity. 138RP 155-57. Interrogating officers told Jimmy that Sebastian and Atif were “toast” and the “fat lady sang.” They tried to convince him that his friends were beyond help and that he should therefore help himself. He needed to pick a side. 138RP 170-73.

Officers conveyed to Jimmy that if he became a witness against his friends, he would not get in any trouble. 138RP 174. They told him they did not want to see him go down for a crime he did not commit. They also warned him that Sebastian and Atif posed a physical threat to his family -- that if he did not cooperate, the boys might kill his parents next or someone else close to him.

¹¹ The boys were incarcerated for six years in Canada while the terms of extradition were litigated. They were turned over to United States authorities in March of 2001. 145RP 28.

138RP 176-185. Officers told Jimmy "it's either them or you."

138RP 182.

Initially, officers were unsuccessful in convincing Jimmy to implicate Sebastian and Atif. 138RP 186-191. He told officers that neither of his friends had discussed committing the murders in Bellevue. 34RP 93-95, 99-102; 138RP 206.

By the following month, however, Jimmy began giving statements to the RCMP in the hope that he could receive immunity from prosecution -- statements that allowed the RCMP to see what he *might* be willing to say, but which could not be used by the RCMP as evidence. 34RP 7, 12-13. And by October 1995, Jimmy agreed to trade testimony implicating Sebastian and Atif for assurances that he would not face prosecution on any charge. 34RP 13, 133-137; 102RP 29-31; Supp. CP ____ (sub no. 129, Motion To Set Up MLAT Deposition of Jimmy Miyoshi, Immunity Agreement (cause no. 95-1-05433-8)).

By the time of trial, Jimmy was living in Japan. His employer -- a multinational financial services company -- was not happy about Jimmy's association with the case and it was clear to Jimmy that if he refused to testify, he could be fired. 33RP 22-23; 34RP 42, 188. Moreover, the King County Prosecutor's Office would be

reporting to Jimmy's employer whether he had complied with the terms of the immunity agreement on the stand. 34RP 42-43. Jimmy also faced criminal prosecution if he testified inconsistently with his earlier statements about Sebastian and Atif (not the one professing their innocence; only the ones implicating them). 34RP 51; 102RP 33.

At trial, Jimmy took advantage of the deal he had made with prosecutors, testifying in a way that prevented his prosecution. According to Jimmy, Atif first mentioned the idea of killing his parents the summer of 1994 on a drive back to Vancouver after Atif and Jimmy had dinner with the Rafay family at their Bellevue home. 33RP 50-58. According to Jimmy, Sebastian subsequently asked him if Atif had mentioned the idea. 33RP 58-59.

Jimmy testified that the three discussed the idea again sometime later. 33RP 61-62. According to Jimmy, Sebastian led a discussion about the method to be used. They discussed burning the house or using a baseball bat. 33RP 62-65. They also may have discussed the murders one other time. 33RP 77-78. Jimmy testified he knew of the boys' plan to leave a movie early and be seen in public. 33RP 100-01.

According to Jimmy, both Atif and Sebastian discussed with him some of the details after the fact. 33RP 91, 94. Jimmy testified that according to Atif, they lured his mother downstairs and Sebastian struck her from behind. Sebastian then struck his father, and then his sister, who was still alive. They took the VCR to make it look like a burglary. 33RP 91-92. According to Sebastian, there was a lot of blood, and they threw away the bat and other items involved in the crime. 33RP 94, 96.

Regarding the undercover operation, Jimmy testified that all three boys feared Haslett and Shinkaruk. 34RP 77-78. Sebastian had discussed these fears openly with Jimmy, including the fact he feared for his life after sharing with Shinkaruk that he had taken down his license plate number. 34RP 80-81. Jimmy, Sebastian, and Atif found both men to be intimidating and believed they may have killed someone in the past. 34RP 84.

Jimmy testified that Sebastian wanted him to tell Haslett that he knew about the murders to build Haslett's trust. 33RP 127. Once at the Landis Hotel, Sebastian encouraged Jimmy to provide this information when Jimmy was hesitant to do so. 33RP 135-36. According to Jimmy, he had expressed concern to Sebastian that Haslett and Shinkaruk might be police officers. However,

Sebastian told Jimmy that even if their statements were used against them later, they were only providing information already in the media. 33RP 146-47; 34RP 2-3, 28.

i. Sebastian takes the stand.

At trial, Sebastian testified in his own defense. He was now 28 years old. 143RP 99. He denied any part in the murders and denied being in the home at any time between 8:30 p.m. and midnight on July 12, 1994. 143RP 100-01, 173-74. He and Atif falsely confessed to participating in the murders out of fear -- fear of what would happen if they admitted to Haslett that they were not the trusted murderers he believed them to be. 143RP 101-03.

Sebastian testified there was no plan to kill Atif's parents. Atif had invited several friends down to Bellevue for a visit, but Sebastian was the only one to accept. They did not sneak out of the Lion King and kill Atif's parents. Rather, Bellevue Police Officers were given the true story on July 13 and 14, 1994. 143RP 104-05.

Sebastian admitted that the opportunity to make money through his association with Haslett had been attractive. 145RP 105-06. But he felt tricked into participating in the Whistler car theft. He did not feel that he could turn to police for help given his

legal situation in Bellevue and he feared the consequences of refusing to participate with Haslett and Shinkaruk. 143RP 129-131. Sebastian denied ever telling Shinkaruk that he wanted to be a hit man. 143RP 134-35.

Sebastian testified that he went to the Four Seasons Hotel on May 6, 1995, to explain that he did not want to work for Haslett and Shinkaruk again. He offered two excuses: the Bellevue investigation and the need to work on his movie project. As to the movie, Sebastian gave both men the impression he was further along in the process than he actually was. 143RP 139-141.

But Shinkaruk did not accept his excuses. 143RP 142. And at the same time, Sebastian learned of the violence to which these men could resort. Shinkaruk admitted to killing someone, it appeared that Haslett then had a key witness to that murder killed, and Sebastian was now in the same hotel room with a gun that had apparently just been used to kill yet another person. Meanwhile, Haslett was expressing concern that Sebastian knew enough about the operation that he posed a threat to the group if he were ever arrested. 143RP 141-45.

Later, Sebastian's suspicions about why Haslett wanted to associate with him were confirmed when Haslett said he only

trusted Sebastian because he knew Sebastian was a murderer. 143RP 147. And once he and Jimmy learned more about the organization from their money laundering deposits, Sebastian felt that he posed what could be perceived as a growing threat to Haslett and his organization if he were ever charged with murder. 143RP 154-55.

Regarding the June 28-29, 1995, scenarios at the Royal Scott Hotel, Sebastian testified that he was necessarily vague and evasive when responding to Haslett's questions. Haslett wanted every detail of a crime Sebastian did not commit. Haslett was pushing Sebastian to provide a story, but warning him that if the information were not correct, his associate in Bellevue would find out about it. Consequently, Sebastian was attempting to walk a very fine line. 143RP 157-59. By June 29, Sebastian believed his arrest on murder charges was in fact imminent. 143RP 160-62.

According to Sebastian, once Haslett told him that Bellevue had determined he was guilty, his fears had come true -- the evidence had either been fabricated or misrepresented. 146RP 16, 78-79. At that point, he wanted the evidence sabotaged. If it were destroyed, he would not be wrongly convicted and it would

extinguish any perceived threat he posed to Haslett. 146RP 16, 27.

Sebastian and Atif had followed news coverage of the Bellevue murder investigation closely. 143RP 153. They decided that Sebastian had to give Haslett a story and would base it on what they had learned from the media and information from Haslett's source in Bellevue. 143RP 163-65. Sebastian and Atif engineered this plan away from their Phillip Avenue house because of their suspicions the home was bugged. 143RP 151-52. They also shared the concocted story with Jimmy. 146RP 86-87.

Haslett had questioned Sebastian on why there did not appear to be any forensic evidence tying Atif to the murders. To answer that question, the boys came up with the story that Atif only watched and took the VCR. 143RP 165-66.

On July 18, Sebastian gave the concocted story to Haslett at the Ocean Point Hotel. 143RP 166-68. The part about Sebastian committing the crime in his underwear came from Detective Thompson, who had shared this theory with more than one person, including Atif's probate attorney. 143RP 171-72. Sebastian was provided the fake Bellevue Police memo at this same meeting. It contained information he had not seen before and he was unable

to incorporate most of it into the preconceived story. Nor was he able to discuss information from the memo with Atif before Atif arrived the next day. 143RP 167-68.

The following day, when Atif was brought to the hotel to speak with Haslett, Haslett had Sebastian tell him about the Bellevue memo. According to Sebastian, while telling Atif what the memo said, he tried to signal to Atif how to use the information in their story. For example, as the recording of the discussion bears out, when telling Atif about the blood found in the garage, Sebastian said, "Another one was this thing which I didn't know how the fuck it got there you perhaps remember or maybe you're not sure . . . it, it was um, said bloodstains found in the garage. . . ." Exhibit 543, at 35; exhibit 511; 143RP 172-73.

In an attempt to undermine Sebastian's testimony, the State focused on two events well before the murders. First, they focused on an incident when Sebastian was 16 years old. He hit a light post while driving the family car. Fearful he would get in trouble with his parents, he took some of the debris to a movie theater parking lot and bought a ticket to a movie so he could claim someone hit him in the parking lot. 146RP 29-35. Sebastian pointed out that the ploy did not work in 1992 -- the insurance

company, local police, and his parents saw right through it -- and if he were going to plan an alibi two years later, he would never have chosen one about which everyone knew and that had failed. 146RP 69-71.

The second event was a conversation in 1993 involving Sebastian, Atif, and a friend -- Nazgol Shifteh. The State pointed out that during that discussion, Sebastian said he would like to see how it would feel to kill someone because he might enjoy it. 146RP 61-65. Sebastian explained that this was a sarcastic remark made during a philosophical discussion in the wee hours of the morning. It was typical of the discussions he and Ms. Shifteh had. The defense introduced a letter from Ms. Shifteh -- written prior to Sebastian's remark -- in which Ms. Shifteh mentioned killing Sebastian out of jealousy over another girl. Neither Sebastian nor Ms. Shifteh was seriously contemplating murder, however. 146RP 65-69.

Following Sebastian's testimony, the parties made closing arguments. 148RP 24. For the first time ever -- in an apparent attempt to render the boys' alibi irrelevant -- the State suggested that even if Sebastian and Atif *did* stay until the end of the Lion King movie at 11:30 p.m. on July 12, 1994, they still could have

committed the murders before arriving at Steve's Broiler. 148RP 94; 149RP 105. The defense pointed this out to jurors. 150RP 54. The prosecution retracted its new theory at the next opportunity. 150RP 148-150.

As discussed later in this brief, during the State's closing argument, Senior Deputy Prosecuting Attorney James Konat engaged in repeated and blatant misconduct in convincing jurors to find the boys guilty. 148RP 37-38, 124-25; 150RP 150, 181, 204-05.

Atif now appeals to this Court.

C. ARGUMENT

1. RAFAY'S ATTORNEYS WERE INEFFECTIVE FOR INFORMING JURORS THIS CASE DID NOT INVOLVE THE DEATH PENALTY.

The law is well established in Washington. "The question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases." State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). Consequently, in a first-degree murder case, it is error to tell jurors the death penalty is not involved. State v. Townsend, 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001); State v. Murphy, 86 Wn. App. 667, 668, 671, 937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002 (1998).

This is a “strict prohibition” that “ensures impartial juries and prevents unfair influence on a jury’s deliberations.” Townsend, 142 Wn.2d at 846. Specifically, “if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility.” Townsend, 142 Wn.2d at 847.

Jury voir dire in this case was a monumental task. Given the projected length of trial, the court issued about 3000 summonses. 8RP 165. Defense attorneys were involved in drafting a juror questionnaire. 36RP 173-74. And although the Townsend opinion had been out for two years, defense counsel ultimately agreed that prospective jurors would be told in the questionnaire that the death penalty was not an option. 44RP 102-03; 46RP 86; 50RP 113-15; 55 RP 195.

The fact defense counsel agreed that jurors could be told the case did not involve the death penalty raises the specter of invited error. But invited error is trumped by ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

No reasonable attorney would have allowed jurors to learn that the death penalty did not apply. In Townsend, defense counsel failed to object when the court informed jurors of this fact. Addressing that failure, the Supreme Court recognized that, considering the longstanding prohibition against revealing that information, the failure to object fell below prevailing professional norms. Townsend, 142 Wn.2d at 847. The Court also rejected any argument that revealing this information was part of a legitimate strategy:

There was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such

instructions, if anything, would only increase the likelihood of a juror convicting the petitioner.

Townsend, 142 Wn.2d at 847.¹² Similarly, there was no tactical advantage when Atif and Sebastian's own attorneys permitted jurors to learn that the case did not involve the death penalty.

Moreover, both suffered prejudice. There is a reasonable probability that the mistake affected the jury's verdicts on aggravated first-degree murder. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 693-94).

The absence of the death penalty became a recurring topic during voir dire. Not only did the questionnaire tell all perspective jurors that the death penalty did not apply, the absence of the penalty was discussed individually with 22 prospective jurors. 44RP 34, 102-03, 131-32, 165, 197-98; 46RP 67-68, 85-99, 125-26, 221-22; 47RP 137, 155; 48RP 15, 99; 50RP 110-11; 52RP

¹² In direct opposition to Townsend and its own opinion in Murphy, a Division One panel recently held it may not always be error in a first-degree murder case to instruct jurors the death penalty does not apply. See State v. Mason, 127 Wn. App. 554, 126 P.3d 34, 43-44 (2005). The Washington Supreme Court has accepted a defense Petition for Review. See State v. Mason, 157 Wn.2d 1007, 126 P.3d 34 (2006).

205; 53RP 48; 54RP 33-34; 55RP 194-200; 56RP 59-60, 247-48; 57RP 55, 60. Two of these individuals made it onto the jury -- William Dewey and Jeffrey Browne (alternate). 44RP 161, 165; 46RP 60, 67-68; 73RP 162-63; 128RP 172.

The death penalty was also mentioned on the second to last day of voir dire in the presence of the entire remaining venire. Defense counsel discussed why individuals might confess to crimes they did not commit. Referring to individuals convicted but later exonerated by DNA, counsel asked one juror, "Are you aware that 20 of the 101 people freed from death row, because they were innocent of the crime they were convicted of, are you aware that 20 of them confessed?" 59RP 84-85, 95. The juror indicated that he was not aware of that fact. 59RP 95.

Since defense counsel's point was to warn jurors they needed to be careful because false confessions sent innocent people to death row, letting those same jurors know the death penalty was not a possibility in this case was a bizarre tactic. Jurors in this case knew that they could not repeat that same unthinkable mistake.

This was a close case in which jurors would have struggled over reasonable doubt. The State's case against the boys had several significant holes, including the following:

- prior to the murders, an RCMP informant received the tip about a murder contract on an East Indian family that had moved from Vancouver to Bellevue;
- the boys had an alibi largely confirmed by independent witnesses that, if believed, demonstrated that they could not have committed the murders;
- neighbors heard the Rafay family being killed at a time when the boys were certainly at the movie theater or the Keg restaurant;
- there were no eyewitnesses to the murders;
- there was no physical evidence demonstrating that the boys committed the murders;
- physical evidence suggested that unidentified individuals were in the home during the murders (unidentified hair in Tariq's bed, mixed blood in the shower, mixed blood in the garage);

Alone or in combination, these weaknesses could have established reasonable doubt in jurors' minds. But by informing jurors that the case did not involve the death penalty, the court and the parties made the jurors less careful. And less careful jurors are necessarily more prone to convict based on shaky, uncertain, or incomplete evidence. They are less likely to hold out for acquittal. Townsend, 142 Wn.2d at 847.

In attempting to argue harmless error, the State will undoubtedly focus on the boys' taped statements to the undercover RCMP officers. But these are not "confessions" in the usual sense. They are not, for example, the product of an interview where the suspect is arrested, read his Miranda¹³ rights, and then admits to a crime to clear his conscience, improve his position with prosecutors, or just put the matter behind him.

As the United States Supreme Court has recognized:

the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual. The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to resolve. But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be "insufficiently corroborated or otherwise . . . unworthy of belief."

Crane v. Kentucky, 476 U.S. at 689-690 (citations omitted).

The boys' statements in this case are the product of a scam that placed them in fear for their lives and convinced them that

¹³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

incriminating statements were the only means to safety. And while the methods used may not rise to a legal impediment to their use at trial, there is good reason to discount them as incriminating evidence. The methods used on the boys raise the genuine prospect that Haslett and Shinkaruk were not the only ones lying when they said they had killed someone.¹⁴

Information about the murders was widely available in the media. Haslett had encouraged Sebastian to read newspaper stories on the crimes and he did. Exhibit 542, at 9; 95RP 199-206; 102RP 74-83; 104RP 42-50; 121RP 48-52; 126RP 117-119; 138RP 36-39; 143RP 54. Moreover, other portions of Sebastian's story were first suggested by Haslett himself, including taking a shower after the murders, washing off the weapon while in the shower, and moving a box in the bedroom to make it look like a break-in. 143RP 46-47; 145RP 203.

Indeed, in telling their stories about the killings to Haslett, the boys could not even keep their facts straight. At various times, Sebastian said all of the following: he threw away his clothes in a

¹⁴ Indeed, the "Mr. Big" scenarios have been criticized for leading to false confessions. See Gisle H. Gudjonsson, *The Psychology of Interrogations and Confessions* 573-582 (2003) (attached to this brief as appendix B).

dumpster, he was naked during the attack, he wore only his underwear during the attack, and he wore shoes (apparently with underwear) during the attack. Exhibit 542, at 28-29, 47-48. He also told Haslett both that he found the bat in the Rafay home and, later, that he purchased the bat in the Bellingham area. 103RP 243-44; exhibit 542, at 32; exhibit 543, at 20-21.

The boys' stories did not match some of the physical evidence, either. Whereas the boys claimed that Atif had not seen the attack on his father, the prosecution's expert concluded that a second individual actively participated in that attack. 103RP 244-47; Exhibit 542, at 18, 31; exhibit 543, at 39-40. While both boys told Haslett there was no blood in the garage, there clearly was. Exhibit 542, at 46; 113RP 60. The boys claimed they threw evidence in dumpsters, but the police search of dumpsters revealed nothing. Exhibit 542, at 19-21; exhibit 543, at 18-19, 46; 72RP 155-160. And there was no evidence at the scene to support their claim that they wore gloves. Exhibit 542, at 47. Indeed, police made much of Sebastian's fingerprint on the box in his room.

Thus, there was good reason to doubt the boys "confessions." Unfortunately, however, jurors were less likely to view the boys' statements with the appropriate level of suspicion

once they were told the boys' lives were not in jeopardy. Defense counsel made a costly mistake.

Atif was denied the effective assistance of counsel. His convictions should be reversed and his case remanded for a new trial.

2. EXCLUSION OF ALL EVIDENCE PERTAINING TO DOUGLASS MOHAMMED AND FUQRA DENIED RAFAY HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND A FAIR TRIAL.

As previously discussed, within days of the murders and before police had released information to the public about the murder weapon, FBI informant Douglass Mohammed told Bellevue detectives that an extremist faction within the Muslim community sought Tariq Rafay's murder. 63RP 12, 28-30. A member of this militant group was nervous and concerned whether Mohammed had seen a baseball bat in a member's car prior to the murders. Mohammed indicated he had not and was told to "forget about it." 63RP 30; 70RP 33, 40.

Around this same time, Seattle Police indicated to their Bellevue counterparts that the Rafay murders were possibly associated with a radical Islamic Terrorist Group known as Fuqra, which was active in Seattle and known to contract for the murder of

those with whom it disagreed on religious issues. Supp. CP ____ (sub no. 19, Motion To Enforce Subpoena Duces Tecum, appendix c (cause no. 95-1-05433-8)).

In other words, consistent with the RCMP informant's tip that prior to the murders Jesse Brar was contacted about a murder contract placed on an East Indian family originally from Vancouver and living in Bellevue, and consistent with information known about Fuqra, FBI informant Mohammed had information indicating that not only had a radical Muslim group sought Tariq Rafay's death in Bellevue, one of its members was asking about a murder weapon only police and the murderers knew about. Even without Brar and the information on Fuqra, it is difficult to conceive of evidence more probative to the boys' defense.

The State moved to exclude all evidence of Mohammed and Fuqra. 63RP 3, 12-22, 45-51; Supp. CP ____ (sub no. 303A, State's Trial Memorandum (cause no. 95-1-05433-8), at 10-16). The defense argued vigorously for the admission of this evidence on two theories. First, it was admissible as "other suspect" evidence. Second, it was admissible to impeach the State's evidence that it had conducted an exhaustive and thorough

investigation before concluding the boys were guilty. 62RP 98-101; 63RP 28-44.

The court granted the State's motion. In excluding Mohammed's information as "other suspect" evidence, the court focused on the fact Mohammed did not come forward with his information until after the homicides. It found that the connection to the Rafay murders required "too much speculation." 63RP 60-62. The court also excluded all evidence concerning Fuqra. 63RP 62.

The defense moved for reconsideration, but the motion was denied. 70RP 4-21, 39-47; Supp. CP ____ (sub no. 304, Motion to Reconsider (cause no. 95-1-05433-8)); Supp. CP ____ (sub no. 306, Memorandum In Support of Motion To Reconsider Admission of Evidence (cause no. 95-1-05433-8)); Supp. CP ____ (sub no. 311, Reply To State's Response (cause no. 95-1-05433-8)). The court again found the evidence too speculative and concluded that any attempt to impeach the thoroughness of the police investigation was merely an effort to "back door" the other suspect evidence. 70RP 45. The court acknowledged, however, "I may be wrong on this." 70RP 46.

The court was wrong. Exclusion of this important defense evidence was reversible error.

a. Rafay Had A Constitutional Right To Present "Other Suspect" Evidence Casting Doubt On The State's Claim That He Murdered His Family.

The Sixth and Fourteenth Amendments to the United States Constitution,¹⁵ and article 1, § 21 of the Washington Constitution,¹⁶ guarantee the right to trial by jury and to defend against the State's allegations. These constitutional guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d

¹⁵ 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 defence.

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

¹⁶ Article 1, § 21 provides, "The right of trial by jury shall remain inviolate."

1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Absent a compelling justification, excluding exculpatory evidence violates the Constitution because it "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" Crane v. Kentucky, 476 U.S. 683, 689-690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)(quoting United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

The Washington Supreme Court's decisions in State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) and State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002), define the expanse of a criminal defendant's right to present evidence in his defense. A defendant must be permitted to present even *minimally* relevant evidence unless the State can demonstrate a compelling interest for its exclusion. Moreover, no State interest is sufficiently compelling to preclude evidence with high probative value. Darden, 145 Wn.2d at 621-22; Hudlow, 99 Wn.2d at 16; State v. Reed, 101 Wn. App. 704, 714-15, 6 P.3d 43 (2000).

As the Ninth Circuit Court of Appeals has recognized, there is a broad due process right to present all evidence tending to implicate another suspect:

Even if the defense theory [were] purely speculative . . . the evidence would be relevant. In the past, our decisions have been guided by the words of Professor Wigmore: "[I]f the evidence [that someone else committed the crime] 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."

Thomas v. Hubbard, 273 F.3d 1164, 1177-78 (9th Cir. 2001)(quoting United States v. Vallejo, 237 F.3d 1008, 1023 (9th Cir. 2001)(quoting 1A John Henry Wigmore, Evidence in Trials at Common Law § 139 (Tillers rev. ed. 1983)), overruled on other grounds, Payton v. Woodford, 299 F.3d 815, 829 n.11 (9th Cir. 2002).

Recently, the United States Supreme Court reiterated that a defendant is denied the right to present a defense if evidence is excluded under rules that are arbitrary or disproportionate to the purposes they are designed to serve. Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006) (citing United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)). Specifically, the Holmes Court stated that

when the defense proffers evidence that someone other than the defendant committed the offense, a trial court may only exclude that evidence if it is repetitive or poses an undue risk of prejudice or confusion. 126 S. Ct. 1732-33 (citing Crane v. Kentucky, 476 U.S. 683, 689-690).

The rule in Washington governing the admission of evidence that someone else committed the crime ("other suspect" evidence) was articulated over 70 years ago. In State v. Downs, 168 Wash. 664, 13 P.2d 1 (1932), the Washington Supreme Court held that such evidence is admissible when "there is a train of facts or circumstances as tend clearly to point to someone besides the accused as the guilty party." Downs, 168 Wash. at 667; see also State v. Maupin, 128 Wn.2d 918, 925, 913 P.2d 808 (1996), and State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993) (both cases citing Downs).

Under Downs, neither a third party's opportunity to commit the crime nor a third party's motive, will, by itself, satisfy this standard because it would simply invite speculation about whether an outsider committed the offense. Maupin, 128 Wn.2d at 927; Downs, 168 Wash. at 667-68. Instead, there must be specific "evidence tending to connect such outsider with the crime." Downs, 168 Wash. at 667

(quoting 16 C.J. § 1085). When Washington courts have properly excluded evidence under Downs, they have done so based on the absence of a specific connection between the proffered evidence and the charged crime. See Maupin, 128 Wn.2d at 927 (discussing cases).

The evidence provided by Mohammed went far beyond mere motive or opportunity. Mohammed's evidence was specific indeed. An extremist faction within the local community had taken issue with Tariq Rafay's beliefs and teachings and sought his death. They did not seek the death of some unidentified individual in the community. They specifically wanted *Tariq Rafay* dead. 63RP 29.

But what truly cements the relevance of this evidence is knowledge of the murder weapon. *This was not public information*. Yet, the individual to whom Mohammed had spoken was concerned enough to travel to Mohammed's home within a few days of the murders to ask Mohammed if he had seen a baseball bat -- the same object used to murder the Rafays -- that a member of this faction had in a car prior to the murders. 63RP 30-31.

This revelation about the bat is known as "holdback evidence." Police often do not disclose certain evidence publicly so that only they and the killers are in a position to know about it. If a

suspect later discloses the evidence, it is a strong indicator police have the right individual. 102RP 72-73.

By itself, evidence from Mohammed satisfied the standard for “other suspect” evidence under Downs and Maupin. But the case for admission grows even stronger when the evidence is considered in context with the other trial evidence. The family had religious enemies. Exhibit 72, at 87-88. Tariq had been active in the local Muslim community. He was co-founder and president of the Pakistan-Canada Friendship Association and had published his work disclosing the fact North American Muslims had been praying in the wrong direction. 109RP 90-91. It is hardly surprising that certain individuals may have taken issue with some of Tariq’s beliefs or his works.

Moreover, the information Mohammed provided dovetails with the information prior to the murders involving Jesse Brar. A murder contract had been placed on an East Indian family that had moved from Vancouver to Bellevue. Jurors could have reasonably concluded that the RCMP informant’s information and Mohammed’s information described precisely the same event, only from different perspectives -- one shortly before the murders and one immediately after.

Mohammed's information is also consistent with the information Seattle Police provided to Bellevue on Fuqra. Fuqra was a militant Islamic group with ties to Seattle. The group used contract assassinations and was linked to murders in the Seattle/Tacoma area. Moreover, they targeted individuals with whom they disagreed on interpretation of the Koran. Supp. CP ____ (sub no. 19, Motion to Enforce Subpoena Duces Tecum, appendix c (cause no. 95-1-05433-8)). In a vacuum, the Fuqra evidence may not have been admissible in its own right. But in combination with the evidence from Mohammed and the RCMP tip, this was further evidence indicating the boys did not commit murder. Therefore, due process also required its admission.

In short, the evidence from Mohammed was neither mere motive nor mere opportunity. It was specific, it included information only the killers would know, it was consistent with the other defense evidence, and it was critical to the defense case. The trial court erred when it ruled the evidence inadmissible. Similarly, it erred when it precluded jurors from hearing evidence about Fuqra.

If, however, this Court concludes that the evidence was inadmissible because the Downs "train of facts" standard requires something more, that standard violates due process. Hudlow and

Darden require the admission of evidence minimally relevant to the defense unless the State can show a compelling interest in its exclusion. This is what the federal and state constitutions require. If the Downs standard is more demanding, it unfairly limits a defendant who says "not me" from presenting evidence that attempts to answer the question "then who?" See United States v. Crosby, 75 F.3d 1343, 1347 (9th Cir. 1996) (introduction of "other suspect" evidence answers this relevant question, thereby rebutting the inference that only the defendant could have possibly committed charged crime).

The rationale behind Downs is to ensure an orderly and expeditious trial:

It rests upon the necessity that trials of cases must be both orderly and expeditious, that they must come to an end, and that it should be a logical end. To this end it is necessary that the scope of inquiry into collateral and unimportant issues must be strictly limited. It is quite apparent that if evidence of motive alone upon the part of other persons were admissible, that in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendant to produce evidence tending to show that hundreds of other persons had some motive or *animus* against the deceased; that a great many trial days might be consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion.

State v. Mak, 105 Wn.2d 692, 717, 718 P.2d 407 (citing People v. Mendez, 193 Cal. 39, 52, 223 P. 65 (Cal. 1924)), cert. denied, 479 U.S. 995 (1986).

This rationale is valid. Motive alone is insufficient to present evidence that someone else committed the crime. Such evidence truly would be "collateral and unimportant." But to the extent Downs is read to exclude evidence (as in this case) far exceeding mere motive or opportunity -- that it requires some greater, heightened foundation beyond its tendency to create reasonable doubt -- this violates due process.

Several courts have now rejected heightened foundational requirements for the admission of "other suspect" evidence. As the D.C. Court of Appeals has said:

There is no requirement that the proffered evidence must prove or even raise a strong probability that someone other than the defendant committed the offense. Rather, the evidence need only *tend to* create a reasonable doubt that the defendant committed the offense. In this regard, our focus is on the effect the evidence has upon the defendant's culpability, and *not* the third party's culpability.

Johnson v. U.S., 552 A.2d 513, 517 (D.C. Ct. App. 1989); see also, e.g., Smithart v. State, 988 P.2d 583, 588 (Alaska 1999)(also rejecting notion that evidence must raise a strong probability

someone else committed the crime; due process merely requires that evidence tend to create a reasonable doubt as to defendant's guilt); People v. Hall, 718 P.2d 99, 104 (Cal. 1986) (rejecting need for "substantial proof of probability" someone else committed offense; even circumstantial evidence linking another to crime will suffice).

Particularly noteworthy is the California Supreme Court's rejection of a heightened burden because it is that court's initial rationale for the rule that has been cited in support of the Downs standard. See State v. Mak, 105 Wn.2d at 717; State v. Kwan, 174 Wash. 528, 533, 25 P.2d 104 (1933). In 1986, the California Supreme Court rejected a heightened rule because it created an indefensible "distinct and elevated standard for admitting this kind of exculpatory evidence." People v. Hall, 718 P.2d at 104. Instead, the Hall Court recognized that "other suspect" evidence should be treated like any other -- if relevant, it is admissible unless its value is substantially outweighed by other factors such as undue delay or juror confusion. Id.

In Holmes, a murder case, there was overwhelming evidence of Holmes' guilt: his palm print was found on the inside of the front door of the victim's house; fibers consistent with Holmes' sweatshirt

were found on the victim's bed sheets; matching fibers were found on the victim's pink nightgown and on Holmes' jeans; fibers found on the victim's nightgown also matched fibers found on Holmes' underwear; a mixture of DNA consistent with Holmes and the victim was found on the victim's underwear; the victim's blood was found on Holmes' shirt; and Holmes was seen near the victim's home within an hour of the murder. Holmes, 126 S. Ct. at 1730.

In addition to attacking the forensic evidence, at trial Holmes sought to introduce proof that another man had attacked the victim. Holmes proffered witnesses who placed the other suspect in the victim's neighborhood on the morning of the assault and witnesses who would testify that the other suspect had either acknowledged his guilt or Holmes' innocence. The other suspect, however, denied making any incriminating statements and provided an alibi. Holmes, 126 S. Ct. at 1730-31.

The trial court excluded the other suspect evidence and the South Carolina Supreme Court affirmed, reasoning that because the evidence against Holmes was strong, "the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." Holmes, 126 S. Ct. at 1731, 1734. The United States Supreme Court reversed Holmes'

conviction. It reasoned that even where the State's case is strong, evidence of other suspects cannot be excluded unless the evidence poses an undue risk of harassment, prejudice, or confusion of the issues. Id. at 1734-35. Holmes had been denied "a meaningful opportunity to present a complete defense." Holmes, 126 S. Ct. at 1735 (quoting Crane v. Kentucky, 467 U.S. at 485).

To the extent the Downs rule requires a defense showing beyond the usual test for relevancy, Holmes makes it clear that such a heightened standard for other suspect evidence is unconstitutional. Holmes is consistent with Hudlow and Darden. Under the holdings in those cases, minimally relevant evidence under ER 401 -- "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" -- that someone other than the defendant committed the offense is admissible unless the State can show a compelling interest for excluding it. There was no such showing in Atif's case.

Atif's convictions must be reversed because the State cannot show, as it must, that the violations of his constitutional rights were harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986)

(constitutional error is presumed prejudicial and State bears burden to show otherwise).

The primary issue at trial was the identity of the individuals who killed the Rafay family. Even without the evidence concerning FBI informant Mohammed and Fuqra, this was a close case. As previously discussed, the State had no eyewitnesses; the State had no conclusive physical evidence; and, if neighbors correctly reported the time at which they heard the murders, the boys had a complete alibi. Moreover, the boys "confessions" were obtained by duress and trickery, were internally inconsistent, depended in large part on information readily available to the general public, and sometimes did not square with the physical evidence.

The evidence provided by Mohammed could have convinced one or more (perhaps all) jurors that the prosecution had not proved its case beyond a reasonable doubt. The additional evidence concerning Fuqra would have had this same effect. On appeal, the State simply cannot show that precluding compelling evidence someone else committed the crimes was harmless beyond a reasonable doubt.

b. The Evidence Was Also Admissible to Rebut The Prosecution's Claim That It Conducted An Exhaustive And Thorough Investigation.

Prior to the taking of testimony, the court indicated that the State "would be able to offer testimony of the dimensions of the police investigation . . . to show that they conducted a thorough investigation" 61RP 17. On the flipside, noted the court, the defense was "going to be telling this jury they did a lousy job." 61RP 17.

It was for this very purpose the defense sought to elicit evidence that the Bellevue Police did not take the Mohammed tip seriously and did not bother following up on any of the information he had provided. Specifically, police did not investigate the radical Muslim group he had identified even when given member names and specific contact information for these individuals. 62RP 98-101; 63RP 28-38; 70RP 4-21, 39-44.

The defense pointed out that the day after Mohammed provided Bellevue detectives with the names, addresses, and phone numbers for members of the group that sought Tariq's death, Bellevue Police sent the boys' names and the names of two of their friends to the FBI Hate Crime Unit for any information the agency had. Yet, they failed to take the same step or any other for

the individuals Mohammed had identified. The defense wanted to use this as an example of a bias against the boys that permeated Bellevue's investigation. 73RP 55-60, 65-68. The court still refused to allow the evidence. 73RP 68-69.

The Court's conclusion that this was nothing more than a way to "back door" the other suspect evidence is incorrect. This was relevant evidence for which the State could not offer a compelling reason favoring exclusion. Just as the evidence from Mohammed was admissible as "other suspect" evidence, due process required admission of the evidence for this additional purpose -- to impeach the State's evidence suggesting a thorough and exhaustive investigation.

It is accepted practice for defense attorneys to attack the adequacy of a police investigation. Kyles v. Whitley, 514 U.S. 419, 446, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)(citing cases). In Kyles, the prosecution failed to disclose the fact a key witness in the defendant's murder trial had given several contradictory statements to police, thereby preventing the defense from using the evidence at trial. In discussing relevance, the United States Supreme Court recognized defense counsel could have used the officer's failure to consider this evidence to attack reliability of the

investigation. Kyles, 514 U.S. at 419. In short, “indications of conscientious police work will enhance probative force and slovenly work will diminish it.” Kyles, 514 U.S. 419 n15.

Other cases are in accord. In United States v. Crosby, 75 F.3d 1343, 1346-47 (9th Cir. 1996), the defense sought to prove that someone other than the defendant (the victim’s estranged husband) had an opportunity and motive to commit the charged assault, thereby making it less likely the defendant had committed the crime. The evidence was excluded. In reversing the defendant’s conviction, the Court found the evidence admissible on two grounds. First, it was relevant “other suspect” evidence because it supported an alternative theory on who committed the crime. Crosby, 75 F.3d at 1346-47. Second, it was relevant to demonstrate the police investigation was sloppy, *i.e.*, a more thorough investigation could have turned up evidence incriminating someone else. Crosby, 75 F.3d at 1347-48.

Similarly, in Mendez v. Artuz, 303 F.3d 411, 412-13 (2d Cir. 2002), *cert. denied*, 537 U.S. 1245 (2003), the Second Circuit Court of Appeals affirmed reversal of the defendant’s convictions for murder and attempted murder where, due to the prosecution’s failure to disclose material evidence, Mendez was denied an

opportunity to use evidence a third party had placed a murder contract on one of the victims. The Court found that the evidence someone other than the defendant wanted the victim dead -- for an entirely different motive than that attributed to the defendant -- was relevant to establish reasonable doubt in jurors' minds concerning who committed the crime. Mendez, 303 F.3d at 413-416. No one knew or suggested the identity of a specific assassin. Mendez, 303 F.3d at 414, 418. Nonetheless, the Court held, "Inasmuch as this evidence supplies a possible alternative perpetrator and motive, we cannot conclude that its exclusion from Mendez's trial did not prevent the jury from weighing differently all of the facts before it." Mendez, 303 F.3d at 413.

Citing the Supreme Court's opinion in Kyles, the Court further held that Mendez "could also have used the suppressed information to challenge the thoroughness and adequacy of the police investigation." Mendez, 303 F.3d at 416. "Presented with detailed information about a contract murder plot and no indication that Mendez was involved or even associated with the participants, the police essentially did nothing." Mendez, 303 F.3d at 416. The Court continued, "The absence of any credible investigation could

have allowed Mendez to present a strong challenge to the thoroughness and reliability of the police work.” Id.

The Massachusetts Supreme Court reached a similar conclusion in Commonwealth v. Reynolds, 429 Mass. 388, 708 N.E.2d 658 (1999). Reynolds was charged with the murder of a known drug dealer. The State’s case turned largely on the testimony of another drug dealer, who claimed he saw Reynolds commit the murder, and a jailhouse informant, who testified that Reynolds had given him a detailed confession. Reynolds, 708 N.E.2d at 661. At trial, Reynolds was denied the opportunity to question police on whether they had received an informant’s tip suggesting that a criminal organization had the victim killed over a drug debt. Reynolds, 708 N.E.2d at 661-62.

The Massachusetts Supreme Court reversed, finding it “well settled that a defendant has a right to expose inadequacies of police investigation.” Reynolds, 708 N.E.2d at 662. The Court reasoned:

The adequacy of the investigation was a question for the jury, and the cross-examination sought to reveal facts pertinent to their inquiry. The defendant should not have been precluded from eliciting evidence on the question simply because the Commonwealth asserted that the investigation was adequate. The

defendant was entitled to show that the investigation was deficient.

Reynolds, 708 N.E.2d at 662. “[A defendant] may argue to the jury that, had the police done certain aspects of their investigation differently, it would have supported his defense.” Id. (citation omitted); compare United States v. Patrick, 248 F.3d 11, 22-23 (1st Cir. 2001) (but no per se right to attack investigation where information at issue would not have supported defense theory in any event).

In Atif's case, the information Mohammed provided to Bellevue Police was fully consistent with his trial defense: that someone else committed these crimes. And the detectives' failure to investigate this lead despite having the names, addresses, and even the phone numbers of those involved goes well beyond sloppy. This failure was, at best, reckless. Kyles, Crosby, Mendez and Reynolds demonstrate that Atif had a constitutional right to present this evidence as part of his trial defense. It would have placed the investigation and evidence in a whole new light.

Moreover, if there could be any doubt as to the admissibility of this evidence prior to the State's presentation of witnesses, that

doubt certainly dissipated once witnesses took the stand. The State opened the door to the defense evidence.

The State's message to jurors was unmistakable -- law enforcement conducted an exhaustive, thorough, and careful investigation. Conscientious police work and extreme attention to detail left no room for doubt that law enforcement had correctly identified the killers.

So extensive and thorough was the State's presentation of evidence on its investigation, an appellate brief simply cannot do it justice. But over the course of 12 trial days, prosecutors called witness after witness to discuss in detail the myriad items Bellevue Police collected or photographed inside the home and garage. The presentation included discussion of the hairs found in the house, countless samples of unidentified stains, fingerprints from throughout the home, documents from several rooms, carpet samples, bedding, car keys, unfinished laundry, numerous drywall sections, samples of "trace evidence" from upstairs and downstairs, a telephone, a checkbook, jewelry, storage boxes, soap and other hygiene products, towels, wash cloths, dishes, cookware, dryer lint, miscellaneous clothing items, a Kleenex, magazines, notebooks,

pamphlets, brochures, letters, a postcard, videotapes, and doorknobs. See generally 78RP – 89RP.

The prosecution presented so many photos, diagrams, and other objects related to the investigation, the clerk began breaking them down by number *and* alphabet. For example, exhibit 425 contains photos and diagrams of the scene. The first 26 items were broken down into 425A to 425Z. The next 26 were designated 425AA to 425ZZ. The next 26 were designated 425AAA to 425ZZZ and so on. The final item is 425FFFF. In other words, this one exhibit alone contains 84 items. Exhibit 425; 92RP 175-212; 93RP 7-194; 94RP 4-94. Other prosecution exhibits were broken down in a similar fashion. See exhibits 423A through 423TTT (91RP 20-186; 92RP 4-96); exhibits 267A through 267MM (84RP 171-182).

Moreover, whether collected items had any evidentiary value -- independent from showing police were very careful -- did not particularly matter. For example, prosecutors put on multiple witnesses to discuss *every single one* of the 58 homes officers visited in Sommerset as police canvassed the neighborhood, including houses where nobody was home and where the occupants had absolutely nothing of value to offer (which was

almost all of them). 72RP 97-109, 124-134; 73RP 38-52, 83-97; 83RP 57-67.

Another example -- Bellevue Police examined 276 fingerprints. 85RP 145. And although all but 38 of these prints were deemed "not of comparison value," prosecutors had their expert print examiner, Carl Nicoll, discuss the prints without value anyway. 84RP 94-183; 85RP 5-143.

Similarly, the State's expert hair examiner, Kim Duddy, testified that she examined 338 hairs from inside the home, 98 of which were mounted for microscopic comparison. 88RP 158-59. Prosecutors had Duddy discuss the concepts behind microscopic hair analysis. They also had her discuss many of the hairs she had examined in 1994 and 1995, including her conclusions about them. 88RP 117-169. And when she could not complete this testimony her first day on the stand, prosecutors continued with the subject the following day. 89RP 4-34. After all that, she ultimately conceded that in light of DNA technology, microscopic hair analysis is no longer widely used and largely unreliable. 89RP 59, 87-88. In other words, her hair evidence was useless. As the State continued to present additional evidence consistent with a careful and thorough police investigation, the defense repeatedly asked

the court to reconsider its ruling on the failure to investigate anything having to do with Mohammed's tip.

The defense moved to reconsider during Carl Nichol's testimony. 85RP 33-34. The defense pointed out that his fingerprint evidence sent a clear, but mistaken, signal to jurors that police were extremely careful in every aspect of the investigation. Yet, their refusal to investigate the information Mohammed provided significantly undermined the State's characterization of its investigation. 85RP 33-35. The motion was denied. 85RP 38.

The defense also moved for reconsideration after the State introduced Atif's statement from the park, in which he was asked who might have wanted his parents dead, and he told detectives about the family's religious enemies. Exhibit 72, at 87-88; 76.5RP 23-24, 27-29; 79RP 4-35, 65-68; Supp. CP ____ (sub no. 324, Memorandum Re: Admissibility of Evidence (cause no. 95-1-05433-8)). The introduction of this exchange made it appear (falsely) that detectives were interested in suspects other than the boys. Yet, their failure to follow up on the Mohammed information, even after Atif had mentioned religious enemies, showed the contrary to be true. The exchange also gave the impression that Atif was just "blowing smoke" by suggesting a religious motive

jurors would find farfetched in the absence of the evidence concerning Mohammed. 79RP 4-18, 28-31, 65-67. This motion was also denied. 81RP 192-99.

The defense moved for reconsideration again based on the testimony of Detective Thompson. Specifically, Thompson told jurors that he had investigated the Dosanjh crime family and (in violation of an in limine ruling) provided details of that group's activities to demonstrate why he did not believe the family had anything to do with the Rafay murders. 144RP 40-45. Although the court struck the improper testimony, defense counsel argued that it had once again left the false impression of a thorough investigation. And this time the subject was whether the murders were part of an organized hit. The defense argued that the State had opened the door to Thompson's failure to investigate the information from Mohammed. 144RP 49-52. Again, however, the motion was denied. 144RP 52-53, 66.

The court's exclusion of the Mohammed evidence violated Atif's right to present a defense and right to a fair trial. Whether as "other suspect" evidence or to impeach the State's portrayal of its case as careful and thorough, the defense had a right to present its case. Exclusion of the evidence denied Atif the right to cast doubt

on the prosecution's claim that he was a killer and unfairly permitted the State to bolster the credibility of the Bellevue Police investigation.

On this additional ground, reversal is required.

3. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO EXCUSE JUROR 4 (DONNA PERRY).

During voir dire, both the State and the defense had ample opportunity to question Donna Perry and determine whether she was qualified to serve as a juror. See 44RP 52-66; 59RP 95-96, 141-42. Both sides concluded she was. And having been sworn, Ms. Perry could not be removed absent proof that she had somehow become unfit. There was no such proof. Rather, Ms. Perry was a perceptive, intelligent, and thoughtful juror -- precisely the type of juror needed on this case.

Dismissal of a sitting juror is limited by statute:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110.

A court's decision to remove a juror is reviewed for abuse of discretion. State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000), review denied, 143 Wn.2d 1015 (2001). While there is no mandatory procedure for investigating accusations of misconduct, a chosen method that fails to produce an adequate and balanced investigation will not suffice. See State v. Elmore, 155 Wn.2d 758, 774-75, 781, 123 P.3d 72 (2005) (court erroneously employed wrong standard and based decision on "very limited evidence"); Jorden, 103 Wn. App. at 229 (no "mandatory format" for trial courts).

Donna Perry, who ultimately sat as juror 4, worked as a paralegal for a Bellevue estate planning firm. 44RP 52-53; 128RP 4. She had two teenage sons. One was nineteen and no longer living at home. The second was sixteen and very independent. Perry did not believe jury service -- even for six months or more -- would be a problem. 44RP 53-54.

During individual voir dire, Perry indicated she was living in Georgia when the Rafays were murdered and had heard little about the case. 44RP 55-57. She believed the criminal justice system was fair, although perhaps somewhat less fair for people from different cultures. 44RP 57-58, 62. The fact a family had been

murdered disturbed Perry. But she had no opinion regarding who had committed the murders and would be looking to the evidence presented to prove that point. 44RP 59-60. She had no difficulty following Washington law to ensure a fair and just verdict and indicated she would be impartial. 44RP 65-66.

During group voir dire, Perry spoke out on why an individual might falsely confess. She indicated that someone might falsely confess in order to obtain something they need. As an example, she noted a battered wife might falsely confess something to her husband out of fear and with the hope of obtaining short-term freedom from the abuse. 59RP 95-96.

Perry also responded to another question: "If you see something that's really disturbing or tragic, is there a certain way you would expect someone to react after having seen something like that?" 59RP 138. Perry indicated that individual's reactions vary depending on the circumstances following a death. 59RP 141-42.

Jurors were permitted to submit questions during the trial. They were told to write the question in their juror notebook, tear out the page with that question, and submit it to the court. 64RP 7.

Perry turned out to be the most active in this regard. She sought information concerning Sebastian's demeanor while being taken from the scene by police. 67RP 138; Supp. CP¹⁷ ____ (sub no. 310-A, Juror Question dated 12/4/03). She asked about searches for evidence inside dumpsters located in the Somerset neighborhood. Supp. CP ____ (sub no. 317, dated 12/10/03). She asked about physical evidence from the bathrooms. Supp. CP ____ (sub no. 328, dated 1/15/04). She asked about possible biological evidence on Tariq's wallet. Supp. CP ____ (sub no. 332, dated 1/28/04). She asked about Canadian fingerprint databases. Supp. CP ____ (sub no. 334, dated 1/29/04). She asked questions pertaining to information the boys had about the funeral. Supp. CP ____ (sub no. 336A, dated 2/4/04). She asked about the possible source of a bloodstain. Supp. CP ____ (sub no. 350, dated 2/12/04).

On one day alone, she asked about the injury to Tariq's neck, rate of digestion to establish time of death, the Rafay's religious practices, and the plaster shoeprint casts from the front yard. Supp. CP ____ (sub no. 358, dated 3/10/04). She asked

¹⁷ All of the juror questions and comments were filed under cause no. 95-1-05433-8.

about the expectation of Atif's extended family concerning his role in any funeral arrangements. Supp. CP ____ (sub no. 353, dated 2/23/04). And she questioned the strategy behind some of the undercover tactics using what appeared to be criminal activities. Supp. CP ____ (sub no. 362-B, dated 4/13/04).

Early in her jury service, Perry proved she was not afraid to report the misconduct of fellow jurors. On December 11, 2003, she informed the court that juror Jim Grage had been discussing the evidence and commenting on the veracity of the witnesses. 73RP 177-185. Referring to Atif, Grage also said, "That foreign boy glares at me. Every time I look at him, he's glaring at me and I don't like it." 73RP 177-78.

In discussing this matter with jurors, the court learned that Grage was not the only one discussing the evidence. Juror Jeffrey Browne had also been discussing the evidence with Grage. And when a fellow juror reminded Browne he was not to do that, he became quite angry. 73RP 147-148, 189-196. Judge Mertel released Grage, but refused to release Browne, who denied discussing the witnesses or the evidence. 73RP 163-65, 196-201.

The following month, another issue arose. Juror Dione Langdon reported that fellow juror John Elverston made an

inappropriate comment on the evidence. Supp. CP ____ (sub no. 327, dated 1/15/04, Juror Comment). Specifically, Langdon reported that after seeing photos of the blood spatter in the master bedroom, Elverston said to juror Browne, "Well, that doesn't look like a Picasso, does it?" 82RP 9-10, 17. The court questioned all jurors. Several confirmed the comment and also reported that Elverston had quoted a newspaper article that discussed one of the defense attorneys. 82RP 10, 24-25, 31-32, 38, 42-44, 52, 75. Juror Perry knew nothing about either allegation. 82RP 19-23. Elverston was excused. 82RP 94-95.

On February 18, 2004, approximately three months into the trial, Patricia Passig (juror 19) submitted a note to Judge Mertel indicating concern over a comment attributed to Perry. 97RP 6-8; 128RP 9. Passig had not actually heard the comment, but was told that Ms. Perry had been talking on the phone to her husband and complaining about the absence of adequate heat in the courtroom. Perry allegedly told her husband that she would be "fighting her battles during deliberation." Supp. CP ____ (sub no. 351 (no. 95-1-05433-8), Juror Comment).

Although Perry had merely turned in another juror for saying "the foreign boy glares at me," the prosecutor accused Perry of

having “been at the center of I think every controversy [we’ve] had on this jury.” 97RP 8. He encouraged the court to address the matter with Perry and anyone who heard the comment. 97RP 9-10, 12-13. Defense counsel argued that Perry had only been involved in the one matter. 97RP 11. Counsel also argued that Perry’s comment may simply mean she is not going to fight over relatively petty matters and will properly save any debates for deliberating the critical question of guilt or innocence. 97RP 11.

Unfortunately, Judge Mertel also mistakenly believed that Perry had been involved in both instances where a juror had been removed. 97RP 12. But he declined to address the matter with jurors, finding that these types of issues are going to arise anytime strangers are forced together for six months or more. 97RP 14. He noted that the courtroom was in fact poorly heated and ventilated and yet another juror was obviously feeling *overheated* because she was constantly fanning herself. 97RP 14; 100RP 77.

The following week, a juror submitted a note to Judge Mertel complaining that Perry’s “constant snorting and coughing problems” were “distracting and annoying” to several fellow jurors, including juror 19, Ms. Passig. Supp. CP ____ (sub no. 355 (no. 95-1-05433-8), Jury Comment). Outside the jury’s presence, Judge

Mertel indicated his intention to shuffle the jurors' seats in an attempt to solve what had become "personal relationship issues." 100RP 4, 8.

The State indicated that might not suffice and suggested that Perry's actions "in the best light, border on potential juror misconduct or an intent to commit misconduct" 100RP 6-7. The defense disagreed strongly with the notion that Perry's actions approached some sort of misconduct. 100RP 7. Judge Mertel indicated he was not yet ready to do something as draconian as removing Perry from the jury, but he might at some point. 100RP 8.

Later that same day, the State tried again to get rid of Perry. The State claimed that as Detective Thompson went over what Sebastian had told him in the Bellevue park, every juror except Perry followed along with the written transcript of that interview. 100RP 78-79. Judge Mertel indicated it was his perception that Perry had not been paying attention for a couple of days. 100RP 81. Defense counsel pointed out that much of Thompson's testimony during that period had simply duplicated evidence jurors had already heard. 100RP 81. Judge Mertel conceded the testimony had been "deadly boring." 100RP 80-81. Defense

counsel expressed concern that the effort to rid the jury of Perry was to ensure juror unanimity. 100RP 82.

At a subsequent break, defense counsel noted for the record that several jurors were not following along with the transcript during periods of the examination and two other jurors had their eyes closed at times. 100RP 137-38. Moreover, at one time or another, every juror was looking at his or her feet, rocking in his or her chair, and shaking his or her head back and forth. 100RP 138. Judge Mertel responded that he observed all jurors paying attention "in a normal manner, which is sometimes on and sometimes off." 100RP 138.

On March 1, 2004, in an attempt to alleviate the personality conflicts among jurors, Judge Mertel shuffled jurors' locations in the jury box under the auspices of accommodating temperature preferences and giving everyone a new angle from which to watch. 101RP 4, 8, 154-55, 192-93; 102RP 12-13.

On March 8, a juror sent a note to Judge Mertel indicating that Perry was sleeping when the lights were turned down and Jimmy Miyoshi's testimony (which was pre-recorded) was played. 106RP 3-4. Neither Judge Mertel (who had been specifically watching her), nor the defense attorneys, had seen her sleeping,

however. 106RP 4-5, 8-9. But one jail guard and Detective Thompson indicated they had seen it. 106RP 7-8. The State once again asked the court to dismiss Perry. 106RP 8. Judge Mertel instead gave jurors a “pep talk” on the importance of staying alert. 106RP 12-13.

Despite the new seating arrangement, jurors were still on edge. On March 11, Judge Mertel learned that two jurors (jurors Michael Jay and Steve Wilson) had been arguing. 109RP 31-32. It had nothing to do with the evidence, and after speaking with all jurors, Judge Mertel took no action. 109RP 100-122.

On April 14, 2004, with only about a month remaining at trial, juror Passig once again sent out a note complaining about Perry. In this note, Passig attributed to Perry a comment that “she will do whatever she had to do to be dismissed.” Supp. CP ____ (sub no. 365 (no. 95-1-05433-8), Juror Comment). Passig also told the bailiff that Perry was not taking notes and writing personal letters instead. 128RP 11-13. The prosecutor argued that Perry should have already been dismissed based on earlier misconduct. 128RP 6. Judge Mertel decided to speak with jurors, starting with Ms. Passig. 128RP 5-6, 9.

Passig claimed that the previous day Perry said, "I will do anything I can do to get off this F'ing jury." 128RP 10. In response to questions from the State, Passig also claimed that "[t]here are a lot of us who know that she doesn't take notes; she writes letters," folds them, and takes them to the jury room. 128RP 11-12, 14. Passig also claimed that Perry does not pay attention, comments "all the time" that she does not want to be here, and told another juror (Deborah Purdy) that she would just follow the other jurors during deliberations. 128RP 12-16.

When questioned by the defense, however, Passig conceded that none of the comments attributed to Perry pertained to the evidence or her opinions of the case. Nor had Perry blamed either party for the significant delays in the trial. 128RP 17. Moreover, Passig could not actually see what Perry had been writing. It simply *appeared* to Passig to be letter writing. 128RP 18-19.

None of the other jurors confirmed that Perry was writing personal letters in the courtroom. 128RP 28, 38, 40, 42-43, 45, 48, 50, 55-57, 60, 77, 83. A juror seated next to her indicated that it appeared she was actually taking notes and not writing personal letters. 128RP 47-48. Another juror concurred. He saw a portion

of some pages (at least two pages) that Perry had ripped from her notes and then folded multiple times into squares. The writing pertained to the case, and the juror did not believe Perry was writing a personal letter. 128RP 67-70. Another juror also believed everyone was following along and taking notes on the case. 128RP 74-75.

Passig and two other jurors indicated they had seen Perry tear pages from her notebook and place them in her pocket. 128RP 18-19, 55-57, 82. But none knew what happened to them after or their content, and one juror conceded the possibility these were merely questions she was formulating for submission to the court. 128RP 19, 57.

Several jurors heard Perry voicing her frustration about the length of the trial. 128RP 10, 27, 37, 39, 59, 65. But Perry was hardly alone. That very morning, another juror had commented that he did not believe Judge Mertel cared about them. 128RP 34. This same juror had previously lost his temper and banged his hand against the wall, causing security to respond. 128RP 109. When asked about Perry's comment, one juror indicated he thought that *all* jurors were upset about the length of trial. 128RP 26. Another juror who heard Perry's complaint simply attributed it

to expected “venting” in light of the “hot house environment” in the jury room. 128RP 39-40. Similarly, another attributed the comment to the great stress many on the panel were experiencing and voicing, but she did not believe Perry would actually do something to get off the jury. 128RP 66.

As to Passig’s last allegation -- that Perry was falling asleep -- this was true for several of the jurors. Earlier in the trial, juror Jeffrey Browne was falling asleep. 67RP 223, 225. The court simply reminded all jurors to stay alert. 68RP 8-9. Over the course of the next three weeks, however, prosecutors witnessed Browne sleeping several more times -- as many as half a dozen -- alerted the court, and moved for his dismissal. 77RP 75-79, 81; Supp. CP ____ (sub no. 321 (no. 95-1-05433-8), State’s Comment). The motions were denied. 77RP 81-82.

In fact, Browne’s sleeping became the subject of a newspaper article. 78RP 12-14, 167-68; Supp. CP ____ (sub no. 323 (no. 95-1-05433-8), Newspaper Article). Despite further argument that Browne should be removed, and over defense objection, Judge Mertel decided to make Browne -- already an alternate -- the very last alternate, thereby increasing the odds he would not end up deliberating. 78RP 169-170, 172-182. In

addition to Browne, defense counsel had also seen jurors Steve Wilson and William Dewey sleeping during trial. 128RP 171-72. And prosecutors had witnessed other jurors “dozing as well.” 73RP 186.

Judge Mertel finally spoke with Donna Perry about the allegations. Perry indicated that all jurors had expressed frustration from time to time, and she had said she wished she could go home. But she denied the specific remark attributed to her about doing whatever was necessary to get off the “fucking jury.” 128RP 85-86, 89-90, 93.

Perry denied writing personal letters in court, but explained that she does make notes to herself in her notebooks expressing her opinions on the evidence. 128RP 86. She had not, however, removed any of her notes from the courtroom. 128RP 87. She had torn out two sheets that had her personal observations on the case, but those sheets were still with her notebooks. 128RP 88, 107-08. And the only other sheets she had removed were used for her questions to the witnesses. 128RP 106.

Like other jurors, Perry had struggled to stay awake at times. She noted it was hard to stay alert when tapes were being replayed several times. Moreover, there were portions where nothing was

happening; for example, where jurors had to sit and listen for 30 minutes while the undercover officers counted money with Sebastian. 128RP 88. Lately, there had been little new, useful information to write down. 128RP 89. She also noted that Judge Mertel kept saying "the tapes speak for themselves" and she wished that this were, in fact, true. 128RP 89.

In response to questions from the prosecutors, Perry denied saying she would "just go along with what other jurors do" during deliberations. The only similar comment she made had to do with going along with the others on temperature preferences in the jury room. 128RP 93-94. This was the same day she spoke to her husband on the phone and he told her to just go along with the others and pick her battles, a statement she then repeated in earshot of other jurors. 128RP 94-96.

Perry indicated there was a lot of general frustration back in the jury room -- bickering about such things as the coffee, how the restrooms are labeled for men versus women, whose water cup is whose, and the scent of the air fresheners -- but nothing that would interfere with her ability to be fair and impartial. 128RP 97-98. For other jurors, however, she feared their personalities could interfere with the work at hand. 128RP 99.

When asked about her personal life, Perry indicated that her youngest son (a high school Junior) had not been doing well in school and she felt that she had not been available to help him. But she did not deem this a sufficient hardship to warrant going home and indicated it would not affect her ability to be fair. 128RP 100-02.

When Judge Mertel specifically asked Perry if she preferred to go home, Perry responded:

I feel like I am one of the ten to twelve that has bothered to take four notebooks of notes, and has bothered to concentrate on what I have heard in here, instead of bickering over the bathroom labels.

And I'm one of the few that I'd rather call my husband at lunch and cry than bicker with them over something that is going to cause animosity between me and somebody in there, that might affect my judgment later, just because I don't like this guy over here, and if he votes this way, then I'm going to vote the other way.

I think, honestly, from hearing everybody talk in there for the past six months, that I am one of the minority that treats this like a job, like a serious responsibility. And I'm trying desperately to keep my personal life out of it.

128RP 103.

In response, the State asked Perry why she was not watching the rolling transcript on the screen when the tapes were

being played. She explained that she is more comfortable looking at the paper transcripts because she is almost legally blind and, even with corrective contacts, her eyes get tired when she focuses on the screen. Moreover, she can hear what is being said on the recordings. 128RP 105-06.

Perry assured everyone that her family supported her commitment to jury service and thanked Judge Mertel for letting her “vent a little bit.” 128RP 110-11.

After Perry returned to the jury room, prosecutors indicated “the State has always believed that Ms. Perry committed juror misconduct” and argued for her removal. 128RP 115-125. The defense argued that she had not engaged in misconduct, clearly still wanted to serve, and was likely making prosecutors uneasy with her questions. 128RP 125-156. The defense asked Judge Mertel to question jurors further on precisely what they had heard Perry say and to examine her notebooks and materials to determine whether she was writing letters or, as Perry claimed, writing down her impressions of the case. 128RP 134-35.

Judge Mertel dismissed Perry for misconduct and hardship. 128RP 161. He treated the statement about fighting battles during deliberations as equivocal and not justifying her release. 128RP

161. Based on his own observations, he could not determine whether she had actually been sleeping because she took notes with her head down. But he noted that some days her head was down for significant periods and she was not writing. He concluded there was “clear evidence” she was sleeping at times. 128RP 162.

Judge Mertel also found “clear evidence” she was writing things in her juror notebook and removing pages from the courtroom, and noted her anger and “pettiness toward her fellow jurors.” 128RP 162. He found that she lied when she denied making the remark about getting off the jury. 128RP 163.

As to hardship, Judge Mertel noted her asthmatic condition and that “she is nearly legally blind.” 128RP 164.

Judge Mertel declined to make further inquiry of jurors and declined to look at Perry’s notes. But he took custody of them to ensure their availability for appeal. 128RP 164-65.

Defense counsel moved for a mistrial based on the court’s improper interference with the jury. Counsel also moved to dismiss several jurors who had been sleeping, arguing, and engaging in other nefarious activities. 128RP 171-73. The motions were denied. 128RP 173-74.

The applicable standard for reviewing a trial court's findings on juror unfitness is not particularly well defined. In Jorden, Division Two compared the court's fact-finding discretion to that involved in assessing challenges for cause based on bias. Jorden, 103 Wn. App. at 229. Under that standard, the appellant must show that the court's decision on fitness "very clearly appears to be erroneous, or an abuse of discretion" State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991) (quoting 14 L. Orland & K. Tegland, Wash.Prac., *Trial Practice* § 202, at 332 (4th ed. 1986)).

The trial court abused its discretion in this case by not conducting a sufficient investigation before releasing Perry and by releasing her for reasons not supported by the record. Because the court improperly dismissed Perry, the defense motion for mistrial should have been granted.

Since Judge Mertel's main concern was that Perry had lost focus due to the length of the trial and personal conflicts with other jurors, the only way to adequately assess this concern was to look at her notes outside the presence of the parties. The defense specifically asked Judge Mertel to do this.

Had Judge Mertel looked at the notes before making a decision on Perry, it would have confirmed the defense arguments

that she was a thoughtful and attentive juror who took comprehensive notes on the evidence. It would have also revealed a juror who took the State's burden of proof and the presumption of innocence very seriously. Whatever personal problems she was having with certain fellow jurors, they were not impacting her capacity to serve. Rather, she was extremely diligent and perceptive.

For example, Perry noted where the State's witnesses had made new claims against the boys for the very first time at trial. She even concluded one of the Bellevue officers was not being truthful when discussing Sebastian's demeanor at the scene based on the officer's physical appearance on the stand (he turned red when confronted about his new claim). Supp. CP ____ (sub no. 364, Steno Book #1). She noted the "nasty," "relentless," "harassing," and "insulting" tactics Thompson and Gomes used on Atif in the park interview. Supp. CP ____ (sub no. 364, Steno Book #2).

Later, referring to Detective Gomes' testimony on the stand, she wrote, "I just do not believe this man's gaul!" and, referring to Gomes' version of events concerning what Atif had been told about his family being in town, she wrote "I'm not sure I believe him."

Supp. CP ____ (sub no. 364, Steno Book #3). She repeatedly commented on the contradictions in Gomes' testimony and expressed disappointment with his presentation of "conjecture and 'character' criticism; opinionated baseless conclusions." Supp. CP ____ (sub no. 364, Steno Book #3).

Perry noted the facts surrounding the crimes that the boys eventually gave to the RCMP undercover officers were available to them from other sources, including the media and the insurance providers. Thus, the information was not "holdback evidence." Supp. CP ____ (sub no. 364, Steno Book #3). She described Detective Thompson as argumentative. She also wrote that his notes are not always accurate and he sometimes supplemented his original notes with additional information. But whenever the boys added more detailed information to what they had first said, Thompson labeled their statements "inconsistent." Id. She observed that Thompson made a lot of assumptions and never considered that he was dealing with teenagers. Id.

Perry's notes also confirm that she was in fact paying close attention to Jimmy Miyoshi. She felt he was not a good witness because he had given contradictory information, he was unsure of many details, and could not necessarily distinguish between what

the boys supposedly told him and what he heard in the media. She also noted he appeared to agree with what he believed the prosecutors wanted to hear, but what he said could not be independently confirmed. She wrote “I don’t know how much importance to place on Mr. Miyoshi’s statements or his deposition!?” Supp. CP ____ (sub no. 364, Steno Book #3).

Perry also noted displeasure with the tactics employed by the RCMP undercover officers. She believed the officers were pressuring Sebastian to do and say things, and noted that whenever Sebastian denied involvement in the murders, Haslett called him a liar. Supp. CP ____ (sub no. 364, Steno Book #4). Moreover, when Sebastian discussed the murders with Haslett, it appeared to her he was simply making it up on the spot and sometimes offered inconsistent versions (for example, where he got the bat and what was done with clothing). Id. She also found it hard to believe a “cold-blooded killer” could be scared pale over stealing a car. Id.

Similarly, concerning Atif’s “confession,” Perry noted inconsistencies concerning what supposedly happened during and after the murders and noted that he seemed to be looking to

Sebastian for assistance in what he should say happened. Supp. CP ____ (sub no. 364, Steno Book #4).

Comments throughout Perry's fourth and final notebook reflect frustration concerning how repetitive the presentation of evidence had become. See generally Supp. CP ____ (sub no. 364, Steno Book #4)(regarding Sgt. Dallin, Shinkaruk, Haslett, and prosecutor's questions already answered).

Perry's final comment in her notes, made before Sebastian took the stand and just before she was released, says:

Maybe what [the prosecutors] are driving on, is that Burns doesn't ever come right out and say that he "did not kill that family in Bellevue." He repeats what he told the BPD, Al says he's lying and that's not all.

Maybe Burns thinks that letting Al & Gary believe he did the murder will make him look more credible to them – and maybe more useful.

Maybe that's why, later, Burns and Rafay can't make the same story (claims) like what they may have done w/bloody clothes and weapon – trying to tell Al what he wants to hear – but really screwing up the "confession."

Supp. CP ____ (sub no. 364, Steno Book #4)(emphasis in original).

The papers another juror saw Perry rip from her notebook and fold several times do, as Perry herself reported, contain her observations on the trial, including the State's witnesses. 128RP

67-70, 88, 107-08. In addition to lamenting the repetition of the evidence and the strain felt by all the jurors, Perry wrote:

I have been very surprised and frankly, shocked, at the ethics of Police Department Officers and Detectives. Though it becomes obvious that they are subjected to a great deal of stress and demand to solve crimes, much of their conclusions appear to be forced rather than concluded by real investigative diligence and intelligent deduction. They often proceed with very little evidence to “bite” someone they “want” to be guilty . . . they try to force things to fit into place. Hence, jury’s cannot convict someone based on suspicion or maybe just the opinion that the Defendant isn’t necessarily a very likable person. Convictions must be based entirely on a preponderance of the evidence. Too often, Prosecutors make a grand attempt to sell a theory to a jury rather than a real account of fact. A plausible theory cannot take the place of facts. Police are impatient and much less thorough than they should be. Convicting the wrong person doesn’t solve the crime. The police should be better trained in investigative prowess. Often, they are simply too eager to show that they can be smarter and quicker than the criminal. Criminals are getting smarter; so, police officers should be getting better – not just cockier. I don’t understand why police officers are not trained better! My personal confidence in the ability and their ethics is low; and that’s what disturbs me most. Their tactics and lack of accountability make its ability to make anyone look guilty – great. . . .

Supp. CP ____ (sub. No. 364, folded notes) (emphasis in original).

Contrary to the court’s ultimate conclusion that Perry was no longer fit to serve, her extensive notes show the contrary to be true.

The court's more specific findings also fail for lack of evidence. The court cited four reasons supporting her dismissal: (1) she had been sleeping, (2) she was removing pages from her juror notebook, (3) she had demonstrated anger and pettiness toward her fellow jurors, and (4) she lied when denying the remark about getting off the jury. 128RP 162-63.

Regarding sleeping, Perry conceded the obvious. Given the repetitious evidence, at times she found it hard to concentrate. 128RP 88-89. But even the court agreed that portions of the State's case were "deadly boring." 100RP 81. At one point, the court asked prosecutors to please focus on "who" rather than the "how" of the murders. 107RP 3. And later in the trial, the court described the playing of undercover tapes as "brutal" on the jury. 130RP 111.

Judge Mertel had watched Perry, but never confirmed that she was sleeping. 128RP 162. But even if she had dozed occasionally, she would be no different than several other jurors during this seven-month trial. 78RP 186; 128RP 171-72. In fact, as previously noted, juror Browne's frequent sleeping even made it into the press. Supp. CP ____ (sub no. 323 (no. 95-1-05433-8),

Newspaper Article); 77RP 75-79. Yet, even he was not completely removed from the jury. 78RP 169-182.

Regarding the removal of pages from her notebook, the content of those pages was nothing more than speculation. No one saw her writing personal letters and no one saw what she had written on those pages removed. Jurors sitting close by only saw Perry taking notes on the evidence. 128RP 47-48, 67-70. The removed pages could simply have been the questions she was formulating for witnesses.

As to anger and pettiness, the record reveals that Perry chose *not* to argue with fellow jurors about petty matters. Instead, she properly chose to save argument for what mattered -- deliberating the guilt or innocence of the defendants. 128RP 103.

Lastly, concerning her comment about getting off the jury, Perry conceded that she, like other jurors, had been venting about the length of trial. 128RP 85-86, 89-90, 93. Several of her fellow jurors who heard the remark agreed she had merely been letting off some steam. 128RP 26, 39-40, 66. Perry explained that she did not want to leave jury service. And the fact she denied the specific language attributed to her by some jurors does not mean she had lied to the court.

The court's hardship findings do not fare any better. While Perry suffered from asthma, no one complained about her symptoms once jurors were shuffled in the box on March 1, 2004. The court also noted Perry was "nearly legally blind." 128RP 64. But Perry was obviously describing her eyesight without her corrective contacts, which she wore during trial. 128RP 105-06.

The only remaining question is prejudice. Where "there is no evidence that removing the juror resulted in a tainted or unfair jury," a defendant has no recourse on appeal. Jorden, 103 Wn. App. at 228. There is no right to be tried by a particular juror. State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). But in this case, the panel lost one of its most conscientious members -- someone who understood the presumption of innocence and the concept of proof beyond a reasonable doubt. With such a juror improperly dismissed, the remaining jurors were more likely to convict the innocent. Her improper removal tainted the remaining panel.

Juror Perry was improperly dismissed. The defense motion for mistrial should have been granted.

4. REPEATED AND FLAGRANT MISCONDUCT FROM BELLEVUE POLICE WITNESSES DENIED RAFAY A FAIR TRIAL.

a. Comments on Guilt/Veracity

"No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Included within this prohibition are opinions on whether a particular individual told the truth. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); Black, 109 Wn.2d at 349.

Several cases serve as examples of violations. In State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985), overruled on other grounds by City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994), testimony that a police dog tracked the defendant by following a fresh "guilt scent" was held inadmissible opinion testimony. In State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973), an ambulance driver testified that the defendant's reaction to news of his wife's death was unusually "calm and cool." The court concluded the driver's testimony improperly implied his opinion that the defendant was guilty. And, in State v. Black, 109 Wn.2d at 348, the court held that an opinion the victim suffered

from “rape trauma syndrome” was, in effect, an improper opinion that the defendant was guilty of rape.

The prohibition against opinions on guilt stems from the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution, which guarantee the right to a fair trial before an impartial trier of fact. A witness's opinion as to the defendant's guilt, even by mere inference, violates this right by invading the province of the jury. Demery, 144 Wn.2d at 759; State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977, review denied, 136 Wn.2d 1002 (1998); Carlin, 40 Wn. App. at 701-02. Consistent with the constitutional prohibition, in Atif's case, the court specifically ordered prosecution witnesses not to express their opinions on the boys' demeanor following the murders. Factual observations were permitted. Interpretations, however, were forbidden. Supp. CP ____ (sub no. 229A, Order On Defense Preliminary Motions in Limine cause no. 95-1-05433-8), at 3 (item 15)). Despite this ruling, Bellevue Police witnesses repeatedly offered such opinions.

The comments began with Bellevue officers who had assisted at the scene. One of those was Officer Greg Neese, who responded shortly after the 9-1-1 call. 67RP 113-15. Neese

testified that as Sebastian was driven away from the scene, he had a “wry smile.” Neese told jurors that he was “shocked” to see this. 67RP 138. The defense objected, and the court instructed jurors to disregard the fact Neese was shocked. 67RP 139. But the damage was done. A Bellevue Police Officer was shocked at Sebastian’s conduct immediately following a triple homicide; and not in a good way. Neese’s reaction was obviously inconsistent with the notion that Sebastian was merely a witness to the murders. This was a comment on guilt.

Later, another responding officer, Officer Lisa Piculell, also offered improper opinion testimony. 69RP 68-71. She described Atif’s demeanor following the slaying of his family as “robotic.” 69RP 90. The implication from this comment was that Atif was lacking appropriate human emotion. Once again, the defense was forced to lodge an objection, which was sustained. 69RP 90.

Unfortunately, that was not the end of it. Officer Stephen Cercone testified that after Atif had given his initial statement to police at the scene, Cercone told him that he would need to go to the station and speak with detectives. 71RP 207. The prosecutor asked how Atif responded, and the officer testified that Atif asked about the necessity of doing so. 71RP 208. But he then added

that Atif was “very concerned” about the prospect of going to the station for an additional interview. 71RP 208. Jurors would not have missed the message here: only someone who has something to hide would be “very concerned” about speaking to detectives at the station. In what had now become a familiar refrain, the defense objected and the court struck the comment. 71RP 208.

But the worst offender -- Detective Gomes -- was still to come. His improper remarks tainted the discussion of several aspects of the case.

Atif did not want to contact his extended family to tell them that his father, mother, and sister had been murdered. 99RP 87. In fact, after the murders he did not want to talk to anyone; he just wanted to sleep. 102RP 142. Detective Gomes recognized that reporting the death of a loved one to family members is extremely difficult, and a teenager might want assistance in doing so. 96RP 106-08. Gomes even suggested he might assist Atif in contacting his extended family. But he never followed through. 96RP 25, 102-04, 108-110.

Despite this, at trial Gomes could not or would not refrain from taking “pot shots” at Atif’s failure to contact his extended family to report the murders. Gomes testified that instead of

contacting family, Atif “was just chillin’ with his buddy.” 95RP 40. A defense objection was sustained and the improper remark stricken. 95RP 40. Later, Gomes did it again. He commented that instead of contacting family, Atif “was watching videos, movies, he was reading.” 96RP 210. Again, the improper remark was stricken. 96RP 211.

Both comments were apparently aimed at the fact Atif and Sebastian went to a nearby bookstore and rented a few movies to help pass the time while housed in the Bellevue Motel without a telephone. See 76.5RP 14-19; 90RP 96-98. Like the improper comments made by officers at the scene, Gomes’ message was unmistakable: Atif was not acting like an innocent son who just lost his family. Rather, he was just relaxing and having a good time with a friend.

But Gomes was still not finished. And this time he chose to comment directly on Atif’s veracity. Following the murders, Atif told police that he could see a large amount of blood on the wall and at the head of the bed when he looked in the master bedroom. He could also see his father’s feet. Exhibit 78, at 2; exhibit 72, at 54-65; exhibit 73. Consistent with Atif’s statement, a Bellevue Police

Officer also indicated he could plainly make out blood on walls and the body without anything to enhance the lighting. 68RP 135-37.

After the bloody drywall behind the bed had been removed, Bellevue Police attempted to recreate the lighting in the room (the hall light outside the bedroom door was on) to determine what the boys could see the night of the murders. 95RP 65, 125-132. Gomes testified that under the conditions of the recreation, he could not see the detail Atif had described. 95RP 65-66.

But Gomes continued. He testified that the purpose of the test was to see if Atif had “fabricated” the story of what he had seen. 95RP 66. The prosecutor asked Gomes what had been learned and Gomes responded, “I don’t believe he saw what he said he saw.” 95RP 66. In other words, Atif knew what was in the room not because he viewed it for the first time after returning home and looking in the room, but because he had assisted in the murder.¹⁸ Another defense objection was sustained, and jurors were told to disregard the remark yet again. 95RP 66-67.

Gomes also suggested that rather than simply not remembering more details about their comings and goings in the

¹⁸ The prosecution later argued this very theory during closing argument. See 148RP 80-81.

days before the murders, the boys may have been “not willing to give me information.” 96RP 200. This improper comment was also stricken. 96RP 200.

And, later, referring to the fact Atif had yelled out in the movie theater to complain when the curtain malfunctioned, Gomes told jurors, “I guess he wanted to be noticed.” 97RP 150. This comment was also stricken. 97RP 150.

The improper opinion testimony in Atif’s case was egregious. Since Atif and Sebastian had denied any participation in the Rafay murders, their credibility was very much at issue. If they were telling the truth about events when interviewed by the Bellevue Police, they were not guilty of murder.

One or two improper passing remarks might have gone unnoticed or been subject to a suitable remedy short of mistrial -- but not eight comments, and not comments of this magnitude. Although the court properly sustained objections to all eight comments on the boys’ guilt and told jurors to disregard the testimony, this was simply not sufficient. There is some conduct that simply cannot be fixed in this manner. See State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); see also Krulewitch v.

United States, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Jackson, J., concurring) ("the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.").

Indeed, inadmissible opinion evidence is most likely to affect the jury and thereby deny the defendant a fair and impartial trial where the witness is a police officer because officers carry "a special aura of reliability." See Demery, 144 Wn.2d at 765; Carlin, 40 Wn. App. at 703. Every single witness that expressed an improper opinion on Atif's guilt was a police officer or detective. They each carried that special aura.

The State cannot demonstrate that these constitutional errors -- inherently prejudicial -- were harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); State v. Guloy, 104 Wn. 2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986); Thompson, 90 Wn. App. at 46. In an otherwise close case, these repeated comments unfairly tipped the balance in favor of conviction.

b. Violations of In Limine Orders

"The purpose for a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the

presence of the jury which might prejudice his presentation." State v. Evans, 96 Wn.2d 119, 123-24, 634 P.2d 845 (1981). The prosecution has an ethical responsibility to follow the court's rulings. RPC 3.4(e); see also American Bar Association, Standards for Criminal Justice, § 3-5.2(d) (2nd Ed. 1982).

Washington courts have long held that disregard for an in limine ruling is misconduct. State v. Smith, 189 Wash. 422, 426-28, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993); State v. Escalona, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987). Misconduct requires a new trial where there is a substantial likelihood that it affected the jury's verdict. Copeland, 130 Wn.2d at 284; State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994). And, as just discussed, some errors are not capable of correction with a curative instruction. Copeland, 130 Wn.2d at 284 (quoting State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988)).

At trial, the prosecution and its witnesses repeatedly violated in limine orders.

i. Gomes and Thompson

The boys had no prior criminal convictions. 95RP 106. And the court granted a defense motion to exclude evidence that either

of the boys may have been involved in “thefts, stealing, etc.” CP 3675; Supp. CP ____ (sub no. 229A, Order On Defense Preliminary Motions in Limine cause no. 95-1-05433-8), at 2 (item 7)).

Despite this ruling, Gomes and Thompson each employed a similar technique to signal jurors there was a history of criminal conduct. On direct examination, Gomes told jurors that he went to British Columbia, in part, to investigate “whether the boys were involved with law enforcement in a negative way.” 95RP 60. But the prosecutor did not follow-up with a question to make it clear neither boy had a criminal conviction. 95RP 63.

To rectify any negative impression, on cross-examination defense counsel made that point clear: “Okay. I just wanted to clear this up. Neither Sebastian Burns nor Atif Rafay have any criminal convictions in Canada, right? 95RP 106. Although there is no indication that defense counsel stuttered, or stammered, or that her voice trailed off mid sentence, Detective Gomes responded, “Convictions?” 95RP 106. Counsel said “yes” and Gomes replied, “Not to my knowledge.” 95RP 106.

Gomes’ manner of clarification implied that while the boys had no “convictions,” there was other criminal history not being shared with jurors. And if there was any doubt in jurors’ minds,

Detective Thompson and prosecutor Konat put that doubt to rest on direct examination of Thompson. Konat asked:

Q: Did you look to see whether or not either Mr. Burns or Mr. Rafay had criminal convictions in Canada?

101RP 21. As Mr. Konat asked this question, he made a gesture in the air placing imaginary quotation marks around the word "convictions." 102RP 10.

Apparently suffering from the same hearing defect as Gomes, Detective Thompson answered using inflection that further emphasized the question only pertained to convictions. 102RP 4-5. He responded:

A: Convictions?

101RP 21; 102RP 4-5. Mr. Konat confirmed that he was only asking about "convictions" and then continued:

Q: Did you find any convictions? And perhaps I shouldn't limit it just to Canada. Were you aware of whether or not Mr. Burns had any convictions either in the United States or Canada?

A: He had no convictions.

Q: And same question with regard to Mr. Burns. Did you find – were you able to determine whether or not he had any convictions in either the United States or Canada?

A: He had no convictions.

101RP 21-22.

In response, defense counsel made two suggestions. First, counsel asked permission to question Thompson further on this subject and elicit that the boys had no criminal *charges* at the time, either. In fact, the only criminal charge they faced (filed subsequent to the Bellevue Detectives' inquiry in North Vancouver) was malicious mischief for playing music too loudly. 102RP 4-6. The State objected, arguing that such an inquiry would imply that the boys had never been *investigated* for any crimes, which they had. 102RP 8-9. The defense request was denied. 102RP 10.

Second, the defense asked the court to instruct jurors that although Mr. Konat used his imaginary quotes around the word "convictions" and Detective Thompson responded by emphasizing he was only speaking of convictions, jurors should not infer there is some other, nefarious information they are not hearing. 102RP 10-11. The court also denied this request, but noted it would be giving the general instruction at the end of trial indicating counsel's statements are not evidence. 102RP 11.

Of course, the instruction telling jurors that questions are not evidence was useless here because it was the detectives' manner

of answering that indicated jurors were not hearing the whole story. Without telling jurors that the boys had not faced any criminal charges, jurors were left to speculate on what criminal history was being kept from them. They were limited only by their imaginations.

ii. Officer Larry Overcast

As part of the prosecution's case, the State called Officer Larry Overcast of United States Customs and Border Protection. 106RP 40. On October 11, 1994, Overcast was working at the Sweet Grass, Montana border crossing when Atif and Sebastian entered the United States. 106RP 45-46. Overcast questioned the boys on their citizenship, purpose of their trip, and length of stay. 106RP 47.

Prior to Overcast's testimony, he was informed that certain information he had gathered from the boys was not to be shared with jurors, including the fact Burns had a "bar ID" with the name of another individual. 106RP 41-43.

Overcast testified that when the boys crossed the border, they were carrying thousands of dollars in cash. When asked about the source of that money, Atif initially said it was a loan from his parents. 106RP 51-52. But the boys then asked to speak with Overcast in private rather than at the public counter where they

were standing. Behind closed doors, they then explained that Atif's parents had been murdered and that the Bellevue Police were investigating the case. 106RP 54-56, 62-64. The boys were permitted to go on their way. 106RP 62.

Unfortunately, despite being told not to do so, Overcast testified that Burns was carrying "a British Columbia driver's license bearing the name of another person." 106RP 53. Rather than simply change the subject, the prosecutor asked Overcast why that was suspicious. 106RP 53. Overcast responded, "I was concerned that someone, if they were in possession of someone's else [sic] identification, could be possibly using it to cross the border." 106RP 53. Outside the jury's presence, defense counsel complained that the court's orders were repeatedly being disregarded. 106RP 66.

This testimony improperly suggested that Sebastian might attempt to cross international borders using an alias. And deception of that sort, of course, was consistent with the State's theory of the case.

iii. Inspector Lorne Schwartz

Inspector Lorne Schwartz was an RCMP investigator. 108RP 106. Prior to Inspector Schwartz's testimony, and outside

the jury's presence, Schwartz was also told that certain subjects were off limits based on in limine rulings. 108RP 78. For example, Schwartz was not to mention that the boys had retained counsel in Canada, he was not to comment on any perceived lack of cooperation from the boys or any alleged criminal conduct associated with the boys after they returned home to British Columbia, and he was not to express an opinion on their guilt. 108RP 79-92.

During the State's examination of Schwartz, however, he revealed to jurors that he had been instructed not to disclose everything he knew. Specifically, when asked if he could list the homes the RCMP had bugged, Inspector Schwartz replied, "I can. But because of this morning's instruction, I don't know if I want to be complete in that answer." 108RP 136.

Defense counsel requested a sidebar and the court excused the jury. 108RP 137. Defense counsel pointed out a primary purpose for handling motions in limine outside the jurors' presence is to ensure jurors do not think evidence is being hidden from them. 108RP 139. Although the court agreed the remark was "probably inappropriate," it did not believe any corrective action was necessary. 108RP 140. The defense expressed frustration that

there had been so many violations of in limine rulings. 108RP 141-43.

In an attempt to mitigate the damage from Schwartz's remark, when the jury returned, the prosecutor had Schwartz list all of the locations that had been bugged. 108RP 140, 144-47. Unfortunately, the damage had already been done. Much like the testimony about the absence of "convictions," jurors knew that prosecution witnesses were not being permitted to share everything they knew with jurors.

iv. Motion for Mistrial

Based on the violations involving Officers Gomes, Thompson, Overcast, and now Schwartz, the defense moved for a mistrial, which was denied. 108RP 210, 213. This was error.

As counsel pointed out to the court, Gomes and Thompson indicated to jurors through their testimony that while the boys did not technically have any "convictions," there was nefarious conduct being withheld from them. 108RP 210-13. Overcast, despite being told not to do so, revealed some of this conduct when he told jurors that Burns had a British Columbia Driver's license in someone else's name, a license that could be used to sneak across international borders. 106RP 53; 108RP 213. And, finally,

Inspector Schwartz had now further confirmed (albeit unintentionally) that jurors were not privy to all evidence against the boys. 108RP 213.

In a case that turned in large part on credibility, these violations of in limine orders placed the defendants in an extremely poor light. There was no adequate remedy short of mistrial.

c. Detective Thompson violates another ruling

After trial had begun, and in response to criticism that he had not taken the information about Jesse Brar seriously, Detective Thompson conducted additional research on the Dosanjh crime group. 101RP 59-60. In an offer of proof, prosecutors indicated Thompson had heard the Dosanjh group consisted of two brothers, both of whom were killed in 1994 prior to the Rafay homicides. 101RP 61; 136RP 78-80. According to Thompson, he also heard that the Dosanjh group smuggled cocaine and there was no indication Brar had any connection with the group. 101RP 62. Prosecutors hoped to share this information with jurors. 101RP 60, 62; 136RP 78-80. But they conceded it was all based on hearsay. 136RP 80.

Defense counsel noted for the record that when they interviewed RCMP members about the Dosanjh group, the

information they received was inconsistent with the hearsay prosecutors hoped to introduce through Thompson. 136RP 93. The court responded that it could not foresee any circumstances where it would permit Thompson to testify regarding information he had heard about the Dosanjh group. 136RP 93.

The court later confirmed that it had excluded all evidence of what Thompson had heard, including his information that the Dosanjh group was involved in drug trafficking. 143RP 80-83. It is not clear if Thompson was in the courtroom when the court confirmed exclusion of this evidence. But prosecutors clearly were. 144RP 65-66.

Unfortunately, with some help from prosecutors, Thompson managed to convey to jurors his hearsay evidence anyway. Prosecutor Davidheiser mentioned to Thompson that one of the jurors had submitted a question asking if he had investigated the Dosanjh group. Over a defense objection, Thompson was permitted to answer that he had. 144RP 40.

The prosecutor asked Thompson to tell jurors about the Dosanjh group. A defense objection was properly sustained. 144RP 40-41. Thompson was then asked why he concluded the RCMP tip regarding Jesse Brar was unrelated to the Rafay

murders. A defense objection was again sustained and Mr. Davidheiser threw his hands up in disgust. 144RP 41.

Thompson was then permitted to testify that he saw nothing during his investigation that tied the Rafays to the Dosanjh group. 144RP 42. But when Thompson was then asked if he had learned what type of activities the Dosanjh group was involved in, the court admonished Thompson that anything beyond a “yes” or “no” answer would be stricken. 144RP 42-42.

The prosecutor then asked Thompson to compare the lifestyles of those in the Dosanjh group with the Rafay family:

Prosecutor: What was it about the life style of the Rafay family that you keyed in on or that you looked at that led you to the conclusion that there was no connection between the Rafay family and this Dosanjh group?

Defense: Your Honor, this is a back door way to get at it, and if you get at it, it's a back door way to get at the exact thing the court has already ruled on.

144RP 43-44. The court indicated it would limit the question to the lifestyle of the Rafay family only. 144RP 44. Thompson ignored the court's limitation:

Prosecutor: What was it about the lifestyle of the Rafay family that led you to the conclusion that there was no connection or relationship between the Rafays and the Dosanjh group?

Thompson: The Rafay family was a middle class Muslim family, working class. [Tariq] had a job with \$59,000 a year or so, he owed no bills, they were not involved in drug trafficking or –

Defense: Objection.

Court: Sustained.

Prosecutor: Is that a fact?

144RP 44. Before Thompson could confirm this was “a fact,” the court instructed jurors to disregard the remark about drug trafficking. 144RP 44-45.

But Thompson was not yet finished telling jurors what he had heard about the Dosanjh group:

Prosecutor: Did you determine during the course of your investigation whether any of those four members of the Rafay family were connected to or were members of the Dosanjh group?

Thompson: No. What I determined, there was no Dosanjh group at the time.

144RP 47. The court sustained a defense objection and granted a motion to strike everything following the word “no.” A defense request for sidebar was denied. 144RP 47.

Not wanting to completely abandon this line, however, the prosecutor asked Thompson if the Rafay family had connections to the type of criminal activities that Jessie Brar was involved in. The court sustained a defense objection and told the prosecutor to move on to another question. 144RP 48. The prosecutor responded, “Based upon the court’s ruling, those may be all my questions.” 144RP 48-49.

Outside the jury’s presence, defense counsel complained bitterly about Thompson’s violation of the court’s order prohibiting specific information about the Dosanjh group. 144RP 49-50. The court agreed Thompson’s answers were out of bounds. 144RP 55. The defense moved for a mistrial, but the motion was denied. 144RP 56-57.

Detective Thompson’s testimony is yet another example of misconduct that cannot be rectified merely with a curative instruction. Prosecutors knew Thompson was not permitted to testify to the hearsay he had gathered regarding the Dosanjh

group, yet they pressed for answers that revealed that information anyway. And Detective Thompson was happy to oblige.

The tip involving Jesse Brar was a key component of the defense case. Using excluded hearsay, the prosecution and Detective Thompson had now told jurors that the group was involved in drugs (as opposed to murder) and, in any event, its members predeceased the Rafays. The defense had no way to adequately respond to this hearsay.

Making matters worse, Mr. Davidheiser indicated he had no more questions “based on the court’s ruling.” Once again, the prosecution had signaled to jurors there was more to the story than they were hearing. And this was evidence the State had hoped to use. Davidheiser’s act of throwing his hands up in disgust sent the same message.

This was not some collateral issue. Jurors were clearly interested in this subject, as they had specifically asked about it. Supp. CP ____ (sub no. 367, Juror Question (cause no. 95-1-05433-8)). By improper means, Detective Thompson had done what he could not do by proper means. He effectively gutted important defense evidence using hearsay that had been specifically

excluded by the court. This evidence went to the heart of the defense case.

This testimony provides yet another ground on which a new trial must be ordered.

5. PROSECUTORIAL MISCONDUCT DENIED RAFAY
A FAIR TRIAL.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

Consistent with their duties, prosecutors must not urge guilty verdicts on improper grounds. They may not appeal to jurors' passions and prejudices because such arguments inspire verdicts based on emotion rather than evidence. Nor may they refer to matters outside the evidence. State v. Belgarde, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988); State v. Gibson, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), cert. denied, 396 U.S. 1019 (1970).

Prosecutors recognized that closing argument was “going to be very important” in this case. 136RP 16. Senior Deputy Prosecuting Attorney James Konat handled closing for the State. 148RP 24.

It is worth noting this is not Mr. Konat’s first trip to this Court on issues of misconduct. In State v. Lewis, 78 Wn. App. 739, 898 P.2d 874 (1995), review denied, 128 Wn.2d 1012 (1996), this Court found that Mr. Konat had engaged in “serious misconduct” when he repeatedly asked questions of a witness prejudicial to the defendant and for which there was no foundation. Lewis, 78 Wn. App. at 744-45. In that case, also a murder prosecution, the trial court declared a mistrial. Lewis, 78 Wn. App. at 740-42.

In Atif’s case, perhaps Mr. Konat feared the defense had established reasonable doubt in jurors’ minds. Perhaps he succumbed to the pressure for a conviction in such a public trial. Or, perhaps he gambled that (unlike his Lewis case) no trial judge would declare a mistrial after seven long months. But whatever the impetus, he resorted to several clearly improper tactics in asking jurors to convict.

Prosecutorial misconduct requires a new trial where there is a substantial likelihood that the conduct affected the jury's verdict.

State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). “If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” Belgarde, 110 Wn.2d at 508 (quoting State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956)). That is the situation here.

a. Konat Compares Atif and Sebastian (Unfavorably) To Islamic Terrorists Who Cut People’s Heads Off.

Wanting to set the right tone with jurors early in his argument, Konat compared the Rafay murders to a terrorist beheading of an American civilian:

Konat: This is the State of Washington versus Atif Rafay and Glen Sebastian Burns, but the people who were murdered in this case were human beings. They were human beings who were executed in a fashion that is not unlike something that has been in the news lately.

Last week, or some days ago, an American civilian was beheaded. He was beheaded by some people --

Defense: Excuse me. I am sorry, Counsel, I have to object to this argument. It is completely inappropriate.

Court: Objection’s noted. This is argument. I am going to allow all sides some latitude in argument. Your objection’s noted, Mr. Robinson.

Konat: He was beheaded as an apparent retaliation for mistreatment of Iraq's prisoners, as I understand it, at the hands of American military personnel.

So that Mr. Robinson is clear and that you all are clear as well, I don't raise this subject to somehow make light of an American civilian being executed. Even more grotesque is the notion that they took the time to video tape it before they did, and that is ultimately what led to the outrage all over the world about what had happened.

I bring this up because as grotesque and as horrible as that notion is, what these two did to Tariq Rafay, Sultana, and Basma Rafay is even worse. . . .

148RP 37-38. At the first break, the defense moved for a mistrial, but the motion was denied. 148RP 124-25.

Concerned about any "misunderstanding on the part of any parties, including the jury," later -- and outside the jury's presence -- Mr. Davidheiser attempted to explain why his trial partner had compared Atif and Sebastian unfavorably to a terrorist who beheaded an American and filmed the incident for worldwide broadcast. 150RP 3-4. He indicated the purpose behind the

comparison was to demonstrate the defendants' lack of empathy. 150RP 4-5.

The State drafted an instruction that would have told jurors to disregard the comparison. 150RP 5-7. The court indicated it was not inclined to give such an instruction and would only consider doing so if the defense wanted it. 150RP 8. The defense apparently chose not to address the topic again with jurors because no such instruction was ever given.

Atif Rafay is of Pakistani heritage. And Mr. Konat was now comparing him to terrorists from that same region that had beheaded an American. If Konat hoped to convince jurors the defendants lacked empathy, he surely succeeded. The only purpose of this argument was to inflame jurors' passions and prejudices. Moreover, one has to wonder if Mr. Konat recognized the irony of what he had just done. Throughout trial, he argued strenuously and successfully to keep the Mohammed and Fuqra evidence out so jurors could not consider whether Islamic radicalism played a role in the murders. Yet, he had just invoked that same radicalism in trying to convince jurors to convict Atif and Sebastian.

The court's response to the objection -- it was overruled -- only exacerbated the harm. Not only did it do nothing to mitigate the damage, it implied that comparing the boys to terrorists who behead and film executions of their American victims was appropriate.

There is a substantial likelihood this misconduct affected the outcome at trial. The court erred when it denied the motion for mistrial.

- b. Konat Discredits Key Defense Witness By Telling Jurors He Knows She Was Intoxicated On The Stand Because He Smelled Her.

Konat also handled the State's rebuttal closing argument. He chose to focus on Jennifer Osteen (now Haslund), the waitress from Steve's Broiler. 144RP 177-78, 103.

Osteen was a problem for the State. The prosecution argued that Atif and Sebastian did not arrive at Steve's Broiler until 12:50 or 1:00 a.m., which gave them plenty of time to commit the murders, clean up, and dispose of evidence before arriving at the restaurant. 148RP 69; 149RP 105.

But Osteen was clear that the boys had arrived much earlier -- between midnight and 12:30 a.m. 144RP 101. Moreover, it did

not appear to her they had cleaned up recently. To the contrary, they appeared “grubby.” 144RP 83. Osteen was also a problem for the State because she told jurors she felt pressure from Bellevue police to revise her time estimate. They told her that the boys could not have arrived when she said they did, and then explained to her that they had killed three people. 144RP 100-01.

In his initial closing remarks, Konat asked jurors to recall that Osteen had some difficulty navigating the stairs leading to the witness chair. 148RP 68-69. But Konat apparently believed he would need much more to undermine Osteen with jurors. Although there was no evidence on the record to support his assertion, Konat told jurors:

Let me tell you, last week was a challenge when Ms. Osteen was here, and I tried to be as polite as I could with her, but you saw the way she went up the stairs and you saw the way that she came down, and I smelled the way she was when she went up and down the stairs.

150RP 150 (emphasis added).

The court sustained a defense objection, told jurors to disregard the remark, and asked Konat to move on. 150RP 150. Konat reminded jurors that they were free to consider a witness's demeanor when testifying because it was relevant to memory and

credibility. He then argued that Osteen was wrong concerning when the boys arrived at Steve's. 150RP 151. An additional motion for mistrial was denied. 150RP 174-75.

Denial of this motion was also error. Osteen was a critical defense witness because she placed the boys at the restaurant very early, she undermined the State's position that Sebastian had showered just before arriving at Steve's, and she testified to inappropriate pressure from the Bellevue Police. With his assertion that Osteen smelled of alcohol, Konat accomplished what he could not possibly accomplish if abiding by the rules. He improperly impeached everything she said.

There is a substantial likelihood that this misconduct affected the jury's verdict. While the defense objection was sustained this time, nothing short of a mistrial would suffice. See Belgarde, 110 Wn.2d at 508; State v. Davenport, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984).

- c. Konat Shares Recent Death of His Father And Argues That Atif Did Not Act Like Someone Who Recently Lost His Parents.

Unfortunately, Konat was not yet finished with his improper remarks. And these remarks would once again require him to go outside the trial evidence. During the course of trial -- and

unknown to jurors -- Konat's father had died, requiring his absence from the proceedings for several days. 135RP 227; 136RP 4.

Mr. Konat decided to use his personal loss to the State's advantage during closing argument:

I want to tell you something. I have just one little thing to share with you. I was gone for a couple of days because my father died, and for those of you who haven't lost a parent, I encourage you to go back there and listen to the people who have and listen to the people on this jury who have lost a parent, and then you attempt to make sense of the way that these defendants laughed and giggled and snickered at the notion of their family, that is Atif Rafay's family, being murdered.

150RP 181.

At the next break, the defense once again moved for a mistrial. 150RP 204-05. The court confirmed that the parties had discussed this very point in chambers and agreed that jurors would not be told the reason for Konat's absence during trial. Konat responded that he had not been part of that discussion, and defense counsel pointed out that Mr. Davidheiser had an obligation to share information with his trial partner. Nonetheless, a motion for mistrial was denied. 150RP 205-07. This, too, was error.

It is simply unimaginable that an experienced prosecutor like Mr. Konat would believe it acceptable to share a personal

experience like this with a jury. It was not part of the evidence. It improperly engendered sympathy for one of the State's advocates. And, it improperly created an "us" (those who have suffered a similar loss and grieved appropriately) against "them" (the defendants) mentality. See State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984)(improper to use arguments "calculated to align the jury with the prosecutor and against the petitioner.").

The death of a loved one was already on these jurors' minds. One juror lost his father around the same time Konat suffered his loss. 137RP 4. And another juror lost her grandson during trial. 134RP 19-20. To use such a personal experience to persuade jurors to convict was outrageous.

The court erred when it denied the individual motions for mistrial based on each instance of prosecutorial misconduct and it erred when it later denied a motion for new trial based on their combined effect. See Supp. CP ____ (sub no. 395, Motion for New Trial (cause no. 95-1-05433-8)); 154RP 24.

"[T]rained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." State v. Fleming, 83

Wn. App. 209, 215, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Mr. Konat apparently felt so here.

6. THE CUMULATIVE EFFECT OF THE TRIAL ERRORS DENIED RAFAY HIS RIGHT TO A FAIR TRIAL.

Cumulative trial error may deprive a defendant of his constitutional right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). Assuming that this Court concludes that neither ineffective assistance of counsel (for telling jurors the death penalty was not an option); nor deprivation of the right to present a defense (for exclusion of the evidence of Mohammed and Fuqra); nor removal of a fully qualified juror; nor the multiple violations of in limine orders; nor the recurring prosecutorial misconduct, by itself, warrants a reversal of Atif's convictions, the combined effect of these errors certainly warrants that result.

In combination, these errors eased significantly the State's ability to convince jurors they had proved Atif's guilt while simultaneously impeding his ability to establish reasonable doubt. In combination, they denied him his constitutional right to a fair trial.

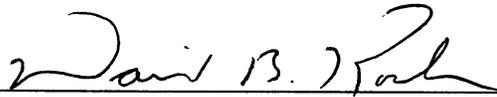
D. CONCLUSION

Atif was denied effective representation. He was denied the opportunity to present his defense. And he was denied a fair trial based on recurring misconduct by prosecution witnesses and prosecuting attorneys. He should receive a new and fair trial.

DATED this 29th day of June, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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APPENDIX A

Verbatim Report of Proceedings Volume Index

1RP: 07-27-01
10-18-01
10-19-01
2RP: 11-30-01
12-06-01
12-14-01
3RP: 01-04-02
01-09-02
01-25-02
4RP: 03-13-02
03-29-02
5RP: 04-08-02
04-29-02
04-30-02
6RP: 05-17-02
06-17-02
06-28-02
7RP: 08-14-02
08-15-02
08-20-02
08-27-02
8RP: 09-20-02
10-08-02
10-30-02
12-16-02
9RP: 01-31-03
10RP: 02-18-03
02-19-03
11RP: 04-22-03
12RP: 04-23-03
13RP: 04-24-03
14RP: 05-13-03
05-20-03
15RP: 05-21-03
16RP: 05-22-03
17RP: 05-27-03
18RP: 05-28-03
19RP: 06-03-03
06-17-03
20RP: 06-09-03
21RP: 06-10-03
22RP: 06-11-03

23RP: 06-16-03
06-24-03
06-25-03
06-26-03
24RP: 07-07-03
25RP: 07-08-03
26RP: 07-21-03
27RP: 07-22-03
07-23-03
28RP: 07-24-03
07-28-03
29RP: 07-29-03
30RP: 07-30-03
31RP: 08-05-03
32RP: 08-06-03
08-08-03
33RP: 08-13-03
34RP: 08-14-03
35RP: 08-15-03
36RP: 09-22-03
37RP: 09-30-03
38RP: 10-10-03
39RP: 10-13-03
40RP: 10-14-03
41RP: 10-15-03
42RP: 10-16-03
43RP: 10-17-03
44RP: 10-20-03
45RP: 10-21-03
46RP: 10-22-03
47RP: 10-23-03
48RP: 10-27-03
49RP: 10-28-03 (am)
50RP: 10-28-03 (pm)
51RP: 10-29-03
52RP: 10-30-03
53RP: 10-31-03
54RP: 11-03-03
55RP: 11-04-03
56RP: 11-05-03
57RP: 11-06-03
58RP: 11-10-03
59RP: 11-12-03
60RP: 11-13-03
61RP: 11-18-03 (am)
62RP: 11-18-03 (pm)

63RP: 11-19-03
64RP: 11-24-03
65RP: 11-25-03
66RP: 12-01-03
67RP: 12-02-03
68RP: 12-03-03
69RP: 12-04-03
70RP: 12-08-03
71RP: 12-09-03
72RP: 12-10-03
73RP: 12-11-03
74RP: 12-15-03
75RP: 12-16-03
76RP: 12-17-03
76.5RP: 12-22-03
77RP: 12-23-03
78RP: 01-08-04
79RP: 01-12-04
80RP: 01-13-04
81RP: 01-14-04
82RP: 01-15-04
83RP: 01-26-04
84RP: 01-27-04
85RP: 01-28-04
86RP: 01-29-04
87RP: 02-02-04
88RP: 02-03-04
89RP: 02-04-04
90RP: 02-05-04
91RP: 02-09-04
92RP: 02-10-04
93RP: 02-11-04
94RP: 02-12-04
95RP: 02-17-04
96RP: 02-18-04
97RP: 02-19-04
98RP: 02-23-04
99RP: 02-24-04
100RP: 02-24-04
101RP: 02-25-04
102RP: 03-01-04
103RP: 03-02-04 (am)
104RP: 03-02-04 (pm)
03-03-04
105RP: 03-04-04
106RP: 03-08-04

107RP: 03-09-04
108RP: 03-10-04
109RP: 03-11-04
110RP: 03-15-04
111RP: 03-16-04
112RP: 03-22-04
113RP: 03-23-04
114RP: 03-24-04
115RP: 03-25-04
116RP: 03-29-04
117RP: 03-30-04
118RP: 03-31-04
119RP: 04-01-04
120RP: 04-02-04
121RP: 04-05-04
122RP: 04-06-04
123RP: 04-07-04
124RP: 04-08-04
125RP: 04-09-04
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138RP: 05-04-04
139RP: 05-05-04
140RP: 05-06-04 (am)
141RP: 05-06-04 (pm)
142RP: 05-10-04
143RP: 05-11-04
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151RP: 05-24-04
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152RP: 07-09-04
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154RP: 08-06-04
155RP: 09-03-04
156RP: 09-17-04
157RP: 10-22-04

APPENDIX B

The Psychology of Interrogations and Confessions

A Handbook

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WILEY

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West Sussex PO19 8SQ, England
Telephone (+44) 1243 779777

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John Wiley & Sons Inc., 111 River Street, Hoboken, NJ 07030, USA

Jossey-Bass, 989 Market Street, San Francisco, CA 94103-1741, USA

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John Wiley & Sons Australia Ltd, 33 Park Road, Milton, Queensland 4064, Australia

John Wiley & Sons (Asia) Pte Ltd, 2 Clementi Loop #02-01, Jin Xing Distripark, Singapore 129809

John Wiley & Sons Canada Ltd, 22 Worcester Road, Etobicoke, Ontario, Canada M9W 1L1

Library of Congress Cataloging-in-Publication Data

Gudjonsson, Gisli H.

The psychology of interrogations and confessions : a handbook / Gisli H. Gudjonsson.

p. cm.—(Wiley series in the psychology of crime, policing and law)

Includes bibliographical references and index.

ISBN 0-471-49136-5—ISBN 0-470-84461-2 (pbk. : alk. paper)

1. Police questioning—Psychological aspects. 2. Confession (Law)—Psychological aspects.
3. Confession (Law)—Great Britain. 4. Confession (Law)—United States. I. Title. II. Wiley series in psychology of crime, policing, and law.

HV8073 .G889 2003

363.2'54—dc21

2002151145

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

ISBN 0-471-49136-5 (hbk) 0-470-84461-2 (pbk)

Typeset in 10/12pt Century Schoolbook by TechBooks, New Delhi, India

Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

This book is printed on acid-free paper responsibly manufactured from sustainable forestry in which at least two trees are planted for each one used for paper production.

CHAPTER 22

Canadian and Israeli Cases

The cases discussed so far in this book almost exclusively fall within the context of police custodial interrogation. Interrogations do take place in other settings and may involve different agencies, including undercover police officers and the security services. The two cases presented in this chapter involve confessions being coerced in specialized settings; first, during a lengthy police undercover operation by the Canadian Police, and second, by the Israeli General Security Service (GSS) in their fight against terrorism. The techniques used are different to those typically found during custodial interrogation, and as we shall see, concerns have been raised about their legality. The two cases highlight problems with the use of the term 'voluntariness' to decide on the admissibility of confession evidence obtained outside custodial interrogation.

A CANADIAN CASE OF NON-CUSTODIAL INTERROGATION

When the police anticipate problems in obtaining confessions during custodial interrogation they may resort to undercover activities, which may take different forms. Undercover officers may pose as a suspect or criminal and be placed in a prison cell with the accused (*Rothman v. The Queen* [1981] 59 C.C.C. (2d) 30 (S.C.C.)), portray themselves as members of a criminal organization (*R. v. French* [1998] 98 B.C.A.C.265 (B.C.C.A.)) or violent criminals (*R. v. Roberts* [1997] 90 B.C.A.C.213 (B.C.C.A.)) or use a promise of sex and a loving relationship as an inducement to confess (*R. v. Stagg*, Central Criminal Court; 14 September 1994).

The Canadian rules that apply to in- and out-of-custody situations are so markedly different as to give rise to what some think are anomalous consequences. It has traditionally been the rule in Britain and Canada that custody interrogations were covered by the *Ibrahim* rule (*Ibrahim v The Queen* [1914] A.C. 599), assuming that the police were identifiable as police officers. In Canada, undercover officers may pose as a suspect or criminal, although the Canadian Constitution puts certain limitations upon what the police may do. Once a person has asserted that he or she wishes to contact counsel, the police are prohibited from using the accused's custodial status, coupled with an undercover agent, to subvert the person's expressed right to remain silent

(*R. v. Herbert* [1990] 57 C.C.C. (3d) 1 (S.C.C)). Undercover agents in cells may observe such a person, but not actively elicit information by subterfuge.

The case discussed raises some important issues related to the use of undercover operators to elicit confessions from resistant suspects.

Brief Background

The case involved the murder in Canada of two German tourists, a young couple, who were visiting friends and relatives. They were last seen at the end of September 1983. Their bodies were discovered on 6 October 1983, in a wooded area 32 kilometres west of the village Chetwynd. Both victims had been shot in the head.

On 7 October a pair of blue jean trousers, size 34, were found in a refuse container just over one kilometre from the area where the bodies had been found. An examination of the jeans revealed that they had been exposed to high velocity spraying of blood. The trousers were heavily blood stained, particularly below the knees. The blood on the jeans was consistent with that of the victims. Five of the victims' travellers' cheques were cashed at petrol stations on 4 and 5 October. There was a bloodlike substance under the fingernails of the female victim.

Andrew Rose was convicted of the two murders at his first trial in 1991. He successfully appealed against his conviction in 1992, because of misdirection to the jury by the trial judge. A second trial commenced in April 1994. He was again convicted of two counts of second-degree murder. At both trials, the main witness against Rose was Madonna Kelly, who was a friend of Rose's at the time of the murders. There was no other evidence against him. During the summer of 1983 they had both worked on a farm near Chetwynd. Ms Kelly did not inculcate Rose until August 1989. Her alleged conversation with Rose in 1983 came to light because she had mentioned the conversation to a drug dealer who was staying with her in 1989.

Kelly's story was that in the early morning of 3 or 4 October 1983, Rose came to her trailer and told her he had killed two people. He was allegedly wearing blood stained jeans. Kelly's evidence was crucial in convicting Rose; without it there was no case to answer. After reporting the alleged conversation with Rose to the police in 1989, Kelly at the request of the police had a one hour telephone conversation with Rose on 7 September 1989 where she tried to get him to confess to the murder. Rose persistently insisted that he had not killed anybody and denied having confessed to her in 1983. However, he admitted that one night he had had a fight outside a bar. He forcefully challenged Kelly and claimed that he would not have had access to a gun.

The circumstantial evidence was largely in Rose's favour. He did not own a car, he had no access to firearms, he did not cash the five travellers cheques belonging to the victims, and none of the forensic evidence found at the crime scene implicated him. What did appear to match is that Rose wore size 34 jeans, but those linked to the murder could not be proven to be his. Subsequent to the second trial, Rose voluntarily provided the police with a blood sample for further DNA testing of the bloody jeans and the fingernail clippings from the

female victim. The DNA analysis excluded Rose as a source of the DNA from the two exhibits.

The circumstances associated with Mr Rose's second appeal in 1998 and the pending third trial were that new evidence had come forward from Californian witnesses that someone else had confessed to the murder, an American man called Vance Hill.

Hill was an American construction worker and lived in Western Canada between 1967 and 1983. He lived there with his wife and children. He had a history of chronic alcoholism. In April 1983 his wife left Canada and moved back with the children to California. Hill remained behind in Prince George. In November 1983, at the age of 55, Hill returned to his family in California 'in a hurry'. Within months of returning to California he disclosed to his wife that he had murdered two hitchhikers whom he had met in a bar in Chetwynd and gave a detailed account of what had happened. She did not believe the story at the time and thought it one of his 'drunken fantasies'. Shortly after telling his wife about the murders Hill left his wife a suicide note, stating that he was going to kill himself because he 'wouldn't go to jail'. He did not kill himself at that time.

On 28 July 1985 Mr Hill killed himself by placing a gun barrel in his mouth and pulling the trigger. Mrs Hill told her children about the confession to the murders of the hitchhikers. Many years later she told the story to her nephew, who was bothered by it and contacted the police in September 1997. As a result, Rose was given bail in 1998 and a re-trial was ordered. Hill's surviving wife and their daughter were to testify at the forthcoming trial.

The Canadian police were undoubtedly concerned that in view of the fresh evidence from the Californian witnesses, Rose might not be convicted again. In order to ensure a conviction they set out to trick Rose into a confession through an undercover operation, which was to last between October 1998 and July 1999, which included early on setting up surveillance at Rose's home. The main undercover operator was a man named 'Fred'. His primary task was to build up Rose's trust and the credibility of the boss of the criminal organization, 'Al'. Fred first met Rose in January 1999 and established a cover story (i.e. that he was looking for a particular girl and needed Rose's assistance, for which he was offered \$50). Within two weeks Rose told Fred that he had been wrongly convicted twice of murder. He told Fred that he was innocent of the murders and was confident in view of the fresh evidence from California that he would not be convicted again. The two men then met regularly over the next few months, during which the undercover officers got Rose involved in alleged criminal activities, mainly to do with drug dealing, but it also involved Rose being made to be in breach of his own bail conditions. Rose was being provided with regular payments for his assistance with the organization, which to him were large sums of money. He was told that he could make a great deal of money from his work with the organization. A big and profitable job was coming up, but in the meantime a meeting was to be organized for Rose to meet the big boss, Al, who would allegedly help him with his 'problems' (i.e. the murder charges). Three meetings took place on 16 and 17 July 1999 in a hotel room. They were surreptitiously

video-recorded. Rose was to confess to the murders during the second and third taped interviews.

The Canadian Law on Voluntariness

The law in Canada concerning voluntariness, which is the same as that existing in the Britain before the introduction of the Police and Criminal Evidence Act 1984, is found in *Ibrahim v The Queen*, [1914] A.C. 599. In essence, if a suspect gives a statement to a person in authority while in custody or detained by the police then the prosecution has to prove beyond a reasonable doubt that the statement was obtained voluntarily (i.e. without fear of prejudice or hope of advantage as a consequence of anything said or done by the police). In Canadian law, the voluntariness rule does not apply if the accused person is speaking to a police officer whom he does not know is a police officer. The reason for this principle is that unless the accused knows that he is speaking to a police officer there could be no fear of prejudice or hope of advantage regarding the prosecution against him. This means that threats or inducements made by undercover police officers in order to obtain a confession are sanctioned legally, the weight of which is for the jury to decide upon (e.g. *Rothman v. The Queen* [1981], 59 C.C.C. (2d) 30 (S.C.C.); *R. v. Roberts* [1997] 90 B.C.A.C.213 (B.C.C.A.); *R. v. French* [1998] 98 B.C.A.C.265 (B.C.C.A.); *R. v. McCreery* [1999] 8 W.W.R. 699 (B.C.C.A.)). Therefore, if the confession is not made to persons who the accused understands to be persons in authority, there is no obligation on the Crown to prove it was obtained voluntarily. If the person is in custody then the traditional rules mostly apply (*R. v. Herbert* [1990], 57 C.C.C. (3d) 1 (S.C.C)).

Rose's third trial was to commence in June 2000. It began with legal arguments during the *voire dire*. The main legal argument was the admissibility of my expert psychological evidence. Two days before the trial started I had interviewed Mr Rose when I met him in Vancouver and conducted a psychological assessment.

The Psychological Evaluation

In addition to interviewing and testing Rose, I read through the various papers and documents in the case, which included transcripts of the telephone conversation that Rose had with Kelly on 7 September 1989, and the transcripts of Rose's three interviews with the undercover officers on 16 and 17 July 2000. I had also listened to the audiotape of the telephone conversation and watched the three videotapes of the undercover interviews. I had come to the conclusion that the confessions to the undercover officers were unreliable and indeed unsafe to rely on. The reasons for my views were as follows.

Psychological Vulnerabilities

During my assessment Mr Rose proved very resistant to suggestions on the GSS 2, but he was abnormally compliant on the GCS. On the EPQ-R his profile was that of a somewhat anxious introvert. He scored very low on the Gough Socialisation Scale, suggesting problems with role taking ability and

personality problems. A Canadian Clinical Psychologist assessed Rose on the WAIS-III. Mr Rose proved to be of high average intelligence. In terms of his enduring personality, it was the combination of his high compliance and poor role taking ability that made him vulnerable to giving into pressure during the undercover interrogation. The poor role taking ability suggested problems in interpersonal relationships, which undoubtedly made him more dependent on the criminal organization for emotional, social and financial support.

Surrounding Circumstances

There were a number of situational factors that made Rose vulnerable to making a false confession during the undercover operation. These were the following.

- i. Rose had been convicted twice before on the same charge. He served seven years in prison before he was given bail pending the current trial. He would have had little faith that he might not be convicted again. Undoubtedly, the Californian witnesses gave him new hopes that he might not be re-convicted.
- ii. He had the forthcoming court case with its uncertain outcome preoccupying him. He was trying to save money to enable himself and his brother to stay in Vancouver during the trial.
- iii. The role of the undercover officer, 'Fred', over an eight-month (January–September) period, was to build up a good friendship with Mr Rose. According to Fred's testimony at the *voire dire* in June 2000, he had to work hard at Rose's 'trust level'. Rose had problems with trusting people. This took some time. Rose told Fred about one week after their meeting that he needed \$2000 for his Court case in Vancouver during the forthcoming May. This was to enable him to afford to stay in Vancouver for a month.
- iv. Fred told him that in the past he had committed a murder and had a murder charge hanging over him. His boss, Al, had conveniently taken care of the problem and Fred had narrowly escaped a conviction for the murder. Al was presented to Rose as having much money, power and influence. Fred's task was to build up Al's credibility as a person who can make murder charges go away and to make Rose believe that without the assistance of the organization, he would be convicted. It was evident that Rose completely trusted Fred and at one point said to him 'I love you'.
- v. Rose became dependent on the organization. There was a good potential for making money, he appeared to be interested in the work, he valued his friendship with Fred, and the organization could ensure that he was not going to be convicted of the murders for a third time.
- vi. Rose was subtly made to believe that the organization could help him with this forthcoming court case, but the murder charge and court case could ruin his future prospects with the organization. His problem had to be sorted out before he was accepted by the organization. The organization could help him make the court case fall apart, but there was a condition: Rose had to tell all the details of the murder, otherwise the organization would not help him.

- vii. The day before the video-recorded interviews with the undercover officers, Al told him that, without their help, Rose would go back to prison: he had been set up to be in desperate need of help from the organization.

The Undercover Interrogation Sessions

During the sessions there was relentless pressure, abusive language, threats, inducements, robust challenges and psychological manipulation. For most of the time there were three undercover officers in the room, 'Fred', 'Al' and 'Street'. The process went as follows.

Al repeatedly told Rose that there was 'this evidence' and that he was 'going back to jail'. He was also told that Al had information that the police had been interfering with the Californian witnesses. His hope of an acquittal was repeatedly challenged. Rose's confidence in his possible acquittal was seriously undermined.

It was made clear to him that Al could sort out his problem. Al could guarantee acquittal, but it required a confession and a disclosure of details. It was made clear to Rose that unless he confessed to the murders the organization could not assist him.

Rose tried extremely hard to persuade Al that he did not commit the murders and that he was completely innocent. He repeatedly stated that he could not and would not confess to something he did not do. Al responded firmly that Rose was lying (e.g. 'And don't fucking lie to me').

There were continued threats and inducements. During the first interview alone, Rose was told 24 times that if he did not confess to the murders he would go back to jail. If he confessed, his problems would be taken care of by the organization (Al—'I know I can help there is no doubt about that', 'If I fucking help you, you would be guaranteed not to be found guilty', 'You won't even go to another trial. But, I gotta be sure you need my help').

Al stated repeatedly that he did not care whether Rose had committed the murders (e.g. 'I don't give a fuck', was repeated several times).

As Rose continued to deny the murders, Street became very abusive and aggressive towards him (e.g. 'Just shut the fuck up', 'Think then fucking talk'). When Rose tried to explain his position Street shouted at him 'Did I say talk yet?'

Al told Rose that the police had been interfering with the Californian witnesses ('The police have been fucking soft-shoeing her big time'). Rose expresses surprise; 'Really? Now you're telling me some news right?'

As the first interview progressed Rose became increasingly desperate:

Can you help me?

I need your help.

I want your help.

Help me, please (at this point he was begging for help).

At the end of the first interview his perceptions of the chances of an acquittal were shattered. He then looked totally helpless. During this interview Rose was sitting next to Al on a settee. Two other undercover officers, including Fred, were

also in the room. Rose was cornered, with the exit being blocked by a table and one officer's outstretched feet. There was then a break for almost two hours where Rose spent time in the bar with Fred drinking beer. When they returned to the hotel room for a further interview, Rose sat at the end of the settee, and leant away from Al (he was clearly trying to distance himself physically and psychologically from Al). His manner looked different. He looked defeated. At the beginning of the second interview he expressed his despair, included his begging for help:

I need your help.
Can I get your help please.
I seriously need your help.
Help, help me.
Christ I need it (help).

The pressure and incentive for confessing was by this time extremely strong. He kept denying the offences, but eventually realized that it was not getting him anywhere. Al told him that he has been lying and when Rose asks what he has lied about Al states:

Well, I'm convinced you did these two people.
Rose now makes a compromise and replies
Nope. Well, we'll go with I did okay?
When further pressured he eventually states
Okay, I did 'em.

Rose then made numerous attempts to retract the confession, which were met with more pressure from the undercover officers, including an angry outburst by his friend Fred. He was not allowed to retract the confession and confessed again. The following morning Rose retracted the confession again and said he could not confess to something he had not done. He was firmly challenged on his retractions and told that he was talking 'bullshit'. He then confessed again.

When the undercover officers ask for details he should know if he were the murderer he was unable to provide any apart from what is already known. For example, in the final interview Rose was pressured to tell where he got the gun from. He apparently could not think of a good answer and replied:

Oh I had it, I had it.

The Final Trial

Crown counsel, Gil McKinnon QC, representing Her Majesty, argued that the reliability, or weight, of the confession statement was for the trier of fact to determine and no question of admissibility need to be decided at a *voire dire*. In contrast, defence counsel, Ian Donaldson QC sought to persuade the trial judge to hold a *voire dire* concerning the admissibility of the confession Mr Rose gave on videotape to the undercover officers. This was not an easy objective to achieve for the defence, because previous Canadian legal judgments ('authorities') predominantly argued that this was really a matter of weight, and not

admissibility. In other words, without an admissibility issue there was no right to a *voire dire* and the jury would have to consider the weight of confession evidence. Fortunately for the defence, Mr Donaldson was able to persuade the judge to hold a *voire dire* concerning the admissibility of the videotaped confession. The defence was going to argue that ruling the confession statements admissible would have brought the administration of justice into disrepute. In addition, this was a perfect case in which the residual discretion to exclude a confession statement ought to be exercised. The defence said that the cases constituted an abuse of the judicial process. Rose had been convicted twice before for the same offence, he was on bail because fresh evidence had surfaced to indicate that he was innocent and the undercover agents had falsely made him believe that the police were interfering with the exculpatory witnesses who were going to be testifying at his trial.

The defence sought to qualify me as an expert at a *voire dire* to give evidence with regard to the 'putative reliability' of Rose's confession statement, pursuant to the decision on *R. v. Hodgson* [1998], 127 C.C.C. (3d) 449 (S.C.C.), and *R. v. Moham* [1994], 114 D.L.R. (4th) 419 (S.C.C.). The main issues with which I was going to be assisting the Court were the following.

- The scientific literature relating to false and coerced confessions.
- The nature of coercive police interrogation techniques.
- The similarities between the non-custodial interrogation conducted in Rose's case and techniques used by the police in custodial interrogations.
- The nature of the techniques used to break down Rose's denials, and the extent of coerciveness used by the undercover officers.
- Factors in the case that were consistent with those typically found in cases of false confessions.
- The results of the psychological evaluation of Rose and his psychological vulnerabilities at the time the statements were obtained by the undercover officers.
- The 'putative reliability' of the confession statements.

The main overall purpose of my testifying was to assist the trier of fact (the judge during the *voire dire*, and the jury during the trial proper, if the confession statements were ruled admissible) with an understanding of why and how an innocent man might confess falsely.

The first few days of the *voire dire* were spent on legal arguments, the undercover officers testified, and the two Californian witnesses gave their testimony. Mrs Hill, aged 72, seemed very clear in her testimony regarding her husband's confession. Her testimony was entirely credible. Her husband's confession had been detailed and was very convincing, which included a motive for the murders. The only thing that did not go in Rose's favour was that her husband did not wear jeans, and wore trousers size 40-42, whereas Rose wore size 34.

Towards the end of the first week I testified regarding my qualifications. I spent most of the day in the witness box. The Crown was going to challenge the scientific foundation of my evidence. They requested two days to cross-examine me on my qualifications. I returned to England and it was agreed that the cross-examination could take place through a video link. In the meantime

the Crown requested, with Rose's consent, that DNA testing was carried out on the blood stained jeans found near the crime scene. The Crown was undoubtedly concerned, and rightly so, about the lack of physical evidence linking Rose to the murders and the testimony of the California witnesses, and my testimony, if allowed in by the trial judge, would have further undermined the Crown's case.

Outcome

In January 2001 the prosecution announced that they were not going to proceed with the case against Rose. Further DNA testing revealed that non-deceased DNA found on the inside pocket of the bloody jeans did not come from Rose, whereas Hill could not be eliminated as a contributor to some of the non-deceased DNA which was found. In view of the DNA testing results, the defence had succeeded in Rose being released by the trial judge shortly before Christmas 2000.

Conclusions

I am in no doubt that this case was of a pressured-compliant type of confession. It is highly probable that the confession was false. It was coerced by the undercover police officers who portrayed themselves as members of a criminal organization. They encouraged Rose to participate in apparent criminal activities of that organization, psychologically manipulated his perception of the likely outcome in his forthcoming trial, played on his vulnerabilities and distress concerning his case and used threats and inducements to break down his persistent claims of innocence. The immense pressure that Rose was placed under, and the extreme distress he displayed during the three videotaped interviews, raises important ethical issues about the use of non-custodial interrogations in a case like this. No doubt there are good reasons why the police sometimes resort to undercover interrogations. Unfortunately, such operations are open to abuse, because police in Canada know from legal judgments that normal procedural standards relevant to custodial interrogations do not apply and that the courts almost invariably rule confessions so obtained as admissible. The argument typically put forward by the Crown, and accepted by the court, is that since the accused does not know that the lies and pressure are exercised by persons in authority there can be no threats and inducements which would be influential in determining the outcome of the prosecution.

In the present case, the defence argued that the police had exceeded their professional and ethical boundaries, and potentially brought the administration of justice into disrepute, when they told Rose that the police were interfering with the Californian witnesses, who were at the time his greatest chance of an acquittal. This clearly influenced his perception of the likely outcome in his case and made him desperate to accept the assistance of the bogus criminal organization. The type and intensity of the threats and inducements clearly amounted to oppressive questioning. Admitting confessions coerced in this way into evidence, and letting the jury determine their weight, is worrying, because

the risk of such confessions being false is considerable if an innocent person is coerced in this way. It is possible to argue that the risk of a false confession being obtained under such conditions *may on occasions* be even greater than during custodial interrogation. The reason is that during undercover operations accused persons are unlikely to fully appreciate the adverse consequences of making the confession. They may confess merely as a way of compromising between agreeing to something they did not do (i.e. telling lies about the involvement in the offence) and fear of the consequences if they do not confess (i.e. perceived certainty of a conviction, upsetting the members of the organization with whom they have developed a relationship and being rejected by the criminal organization).

What is interesting about Rose is that on psychometric tests he scored very low with regard to suggestibility, but very high with regard to compliance. How did this combination of scores influence the outcome of the undercover interrogation? Certainly, the low level of suggestibility indicates that he did have a critical faculty, which up to a point assisted him in resisting the pressure in the police interview. His determined and frequent attempts to retract the confession suggest that he was able at times to temporarily discontinue his reactive responding and instigate strategic coping. Here his low level of suggestibility is likely to have facilitated that process (Gudjonsson, 1995b). Unfortunately, Rose's high level of compliance, which was also evident on occasions during the video-recorded undercover interrogations (e.g. towards the end of the third and final interrogation he commented at one point, 'Whatever you say, I'll do'), meant that he would have been very eager to please his interrogators and that he was susceptible to avoidance coping (e.g. avoiding upsetting his interrogators, pretending everything was going to be alright).

AN ISRAELI TERRORIST CASE

Shortly after the occupation of the West Bank and Gaza in 1967 the Israeli authorities established military courts, which were empowered to try Palestinians for security or public order offences (Human Rights Watch/Middle East, 1994). Every year between 4000 and 6000 Palestinians are interrogated by the two security agencies, the Israeli General Security Service (GSS) and the Israel Defense Force (IDF). Numerous allegations have been made that these two agencies have used torture against Palestinian prisoners in order to obtain confessions from them (Cohen & Golan, 1991, 1992; Human Rights Watch/Middle East, 1994).

In a historic legal ruling in 1986, the Israeli Supreme Court overturned the conviction of an Israeli army officer who had been wrongly convicted of espionage on the basis of a confession coerced by the GSS. This led to the Government setting up a Commission, under the Chairmanship of Justice Landau, to investigate the interrogation methods of the GSS and form legal conclusions concerning them. The Commission reported in 1987, and it is referred to as the 'Landau Report' (Gur-Arye, 1989). The Israel Law Review published an English translation of Part One of the Report (Landau Commission Report, 1989).

