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COA NO. 61853-9-I

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

IN RE PERSONAL RESTRAINT PETITION OF RAYMOND MCCOY;

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND MCCOY,

Petitioner.

REC'D
JUN 10 2013
King County Prosecutor
Appellate Unit

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

The Honorable Paris K. Kallas, Judge
The Honorable Jim Rogers, Judge

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

OPENING BRIEF OF PETITIONER

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A. ASSIGNMENTS OF ERROR

1. A Brady¹ violation violated McCoy's right to due process.
2. The superior court erred in entering the following findings of fact: 6, 16, 20, 21, 25, 26, 27, 28, 29, 30, 32, 34, 39. CP 2, 4-9.²
3. The superior court exceeded the scope of its authority on remand in asking and answering a question that the appellate court did not direct it to answer.
4. The superior court violated McCoy's right to discovery under RAP 16.12.
5. This Court should independently review a sealed report reviewed in camera to determine whether the superior court properly released all discoverable material to the defense.

Issues Pertaining to Assignments of Error

1. Whether McCoy's convictions should be reversed because the State withheld favorable evidence that could have been used to effectively impeach the informant used against McCoy at trial?

¹ Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

² The "Findings of Fact Entered For Court of Appeals Order Dated 29 July 2011" is attached as appendix A.

2. Whether the superior court acted outside the scope of its authority in asking and answering the question of whether the State failed to disclose the fact that Olsen received a benefit for McCoy's case?

3. Whether the superior court violated McCoy's right to discovery in failing to issue a subpoena duces tecum in connection with the reference hearing?

4. Where the superior court did not release all information from a report on the informant to McCoy, should this Court conduct its own in camera review to ensure McCoy was provided all information to which he was entitled?

B. STATEMENT OF THE CASE

The State charged Raymond McCoy with three counts of first degree robbery of a financial institution. State v. McCoy, 145 Wn. App. 1049 (2008). A jury convicted and the Court of Appeals affirmed on appeal. Id. McCoy subsequently filed a pro se personal restraint petition seeking to vacate his convictions, in part challenging the admission of informant testimony from Kevin Olsen. App. B. In March 2010, the acting chief judge of the Court of Appeals dismissed the petition. Id.

Also in March 2010, the State forwarded information to McCoy indicating Olsen was paid for information he provided about McCoy. Id. McCoy filed a motion for discretionary review in the Supreme Court and a

motion to supplement the record with information he received from the State regarding Olsen. Id. The Supreme Court granted McCoy's motions and referred the issue of whether Olsen lied at trial to the superior court for a reference hearing under RAP 16.11. Id.

The Court of Appeals remanded for entry of findings as to whether and during what time frame Olsen worked as a paid informant for any government agency, whether Olsen received a benefit for supplying information to authorities about McCoy or for testifying at McCoy's trial, and whether Olsen lied at McCoy's trial. Id. McCoy represented himself at the proceedings connected to the reference hearing, with assistance from standby counsel. 1RP³ 12-14.

At the reference hearing, the superior court noted the certified questions "really raise the issue in the background of whether or not there is Brady material that was not turned over. So that is an underlying issue that the Court of Appeals did not allow me to ask. But I would hope, I would assume that the Court of Appeals judges are thinking about that."

³ The verbatim report of proceedings related to the reference hearing proceedings on remand is referenced as follows: 1RP - 9/23/11; 2RP - 10/21/11; 3RP - 10/26/11; 4RP - 11/4/11; 5RP - 11/14/11; 6RP - 11/18/11; 7RP - 12/2/11; 8RP - 12/8/11 & 12/13/11; 9RP - 1/24/12; 10RP - 1/25/12 & 1/26/12 (two consecutively paginated volumes); 11RP 1/26/12 (afternoon session). The verbatim report of proceedings for the previous appeal under 60134-2-I are identified by hearing date and include: 5/1/07, 5/2/07, 5/7/07, 5/8/07, and 5/9/07.

10RP 160-61. In entering findings and conclusions, the superior court nevertheless asked and answered a question not asked by the higher courts: "did the State fail to disclose the fact that Olson[sic] received a benefit for McCoy's case." CP 1-2.

The following factual summary first sets forth the trial evidence and then sets forth the reference hearing evidence.

1. Trial

- a. Sterling Savings Bank

Marlena Willey was the customer services manager at Sterling Savings Bank. RP (5/1/07) 18-19. On December 27, 2005, Willey was training a new bank teller, Olga Moore, when a man approached Willey's teller station. RP (5/1) 18-22. At trial, Willey described the man as a black male, possibly six feet tall, with a thin build. RP (5/1) 22-23, 31, 40-41. The man reached for money that Willey was holding. RP (5/1) 21-22. Willey thought the man was joking and pulled the money back. RP (5/1) 21-22. The man told her "this is no joke. This is a robbery. Give me the money." RP (5/1) 22. Willey handed him the money. RP (5/1) 23. The man left the bank and police were called. RP (5/1) 23. The entire interaction lasted 25 to 30 seconds. RP (5/1) 23.

Two months after the incident, Willey looked at a photomontage provided by a detective. RP (5/1) 24-25. She picked out number one,

indicating she was 90 percent sure that it was a photo of the man who came into the bank. RP (5/1) 25-26, 35. About four months before trial, she looked at the same photomontage at the request of a defense investigator. RP (5/1) 27-28. Looking at the montage again, she believed the man could be number five, but still felt 90 percent sure it was number one. RP (5/1) 27-29, 37. At trial, she testified "without being a hundred percent sure still, I believe number one." RP (5/1) 30. When asked to look at the photomontage again while on the stand, Willey said "possibly number five would be what I would pick." RP (5/1) 30-31. When asked if she saw the person in court, Willey said there was no question in her mind that he was sitting behind the table, immediately next to defense counsel. RP (5/1) 33-34. McCoy was the only black man in the room. RP (5/1) 42.

Moore, who was with Willey at the time of the robbery, looked at the man as he stood at the bank counter. RP (5/2/07) 76-78. She described the person as a black man with dark skin, thin, and six feet one. RP (5/2) 80. Afterwards, there was some discussion about the robbery among the employees. RP (5/2) 88.

Moore later viewed a photomontage. RP (5/2) 80. She picked out the middle bottom photo, saying she was 95 percent sure. RP (5/2) 81-82. The detective's notations on the montage read "possibly number five" and "no pick." RP (5/2) 82, 84. At trial, when asked if she saw the person in

court, Moore said "Yes, I think so." RP (5/2) 82. She had seen him earlier that day in the hallway. RP (5/2) 83. Moore maintained she was now 100 percent certain. RP (5/2) 89. There were no other black men in the courtroom. RP (5/2) 89.

Ken Jackson, a personal banker, remembered a man coming into the bank. RP (5/1) 43-45. They exchanged greetings when he came in and pleasantries when he left, whereupon Jackson was told the man had just robbed the bank. RP (5/1) 45. Jackson subsequently looked at a photomontage and picked out number six as the robber. RP (5/1) 47-48. He was 60 percent sure. RP (5/1) 47-48. Jackson answered "no" when asked if he saw the robber in court. RP (5/1) 50. When asked how sure he was, Jackson said it was "50/50." RP (5/1) 50. On cross-examination, Jackson acknowledged he had passed McCoy in the hall moments ago and stated at the time that he was not the person who robbed the bank. RP (5/1) 50-51. Jackson then confirmed that was still his position on the stand. RP (5/1) 51.

Ruby Elwood, the bank manager, remembered a customer walked through the door, passed her desk, and went to the teller line. RP (5/2) 60, 62-63. The man was about five feet away from where Elwood was sitting as he walked by. RP (5/2) 63. Elwood testified "it all happened so quick." RP (5/2) 62. A teller called Elwood and said she had just been robbed, at

which point the man was a little past Elwood's desk. RP (5/2) 64, 72. As the person walked towards the door, Elwood got what she described as a "good look" at the person's side profile. RP (5/2) 64-65, 72. She was later shown a photomontage by a detective. RP (5/2) 67-68. She identified the photographed man in number five (bottom middle) as the man she saw, saying on the stand that she was positive when she made that initial identification. RP (5/2) 68-69. She actually said she was "pretty certain" when she identified the photo from the montage. RP (5/2) 70-71; RP (5/7/07) 132.

The number five photo seemed to have the darkest complexion of skin. RP (5/2) 71. When asked on the stand, Elwood identified McCoy in court as the person she'd seen in the bank and said she was certain. RP (5/2) 72. There were no other black people in the courtroom. RP (5/2) 73. While outside the courtroom earlier, Elwood saw McCoy in handcuffs coming out of the courtroom. RP (5/2) 73.

b. US Bank

On February 6, 2006, Jasmine Fung, a US bank teller, saw a man standing in the lobby and called him to her station to offer assistance. RP (5/2) 91-93. The man gave her a note telling her to give him money and it was not a game. RP (5/2) 93, 101-02. Fung gave the man some money. (5/2) 93. Surveillance photos were taken of the interaction. RP (5/2) 94-

97. Fung described the man to an officer dispatched to the scene as a male in his 30's to 40's. RP (5/7) 12-13.

Fung was later shown a photomontage by a detective. RP (5/2) 97-98. She picked the bottom middle photo (number five), and on the stand said she was 100 percent certain at the time. RP (5/2) 99-100. Number five had the darkest facial complexion. RP (5/2) 103. In actuality, she told the detective that she was not 100 percent certain. RP (5/7) 134, 135, 153. At trial, Fung had seen McCoy walk by in the hallway in handcuffs coming out of the courtroom before she took the stand. RP (5/2) 101, 103. Fung was 100 percent she recognized him. RP (5/2) 93, 101.

Bank employee Eric Van Diest noticed a man acting suspicious as he tended to another customer at his desk. RP (5/2) 152. He described the man to police as age 27-30, five nine to eleven, 180 pounds, with a possible scar on his cheek. RP (5/2) 159. Van Diest did not pick anyone out from a later photomontage. RP (5/2) 156. He pointed to number five as more likely than others because of the skin tone, but could not say it was the person from the bank. RP (5/2) 156, 158. The person in the number five photo had the darkest complexion of skin amongst the others in the montage. RP (5/2) 158-59. According to Van Diest, he and Fung looked at the montage at the same time. RP (5/2) 160. From Van Diest's recollection, Fung did not pick anyone out of the montage. RP (5/2) 160.

c. Key Bank

On February 13, 2006, teller Tuan Le observed a man walk past fellow teller Yen Huynh and approach his station. RP (5/2) 9-13. Le described the man as a tall, mustached, unshaven African American anywhere from 6 foot to 6 foot 4 with a muscular build. RP (5/2) 13, 15-16, 31. The man slipped Le a note that read "Attention, this is a holdup. Please reach into your drawer and place all the 100s into the bag." RP (5/2) 13-15.

Le read the note several times while he thought of what to do, then complied with the request. RP (5/2) 13. The man said, "Hurry up. This is a holdup. You shouldn't be taking this long." RP (5/2) 16. The man put his right hand on the counter at one point. RP (5/2) 14, 19, 21. After obtaining some money from the teller, the man walked out the door. RP (5/2) 15.

Le had no recollection of being previously shown a photomontage by a detective while acknowledging it could have happened. RP (5/2) 21, 34-35. He did not remember previously telling a defense investigator that the suspect was actually younger than the person in number five, although it was possible he did. RP (5/2) 34-35. Le looked at the montage before he came to court. RP (5/2) 21. He testified that he was able to recognize the man in the bank from the montage because "the facial structure was

quite different from all the others." RP (5/2) 21-22. He picked out the bottom middle photo (number five) and said he was 90 to 95 percent sure. RP (5/2) 22.

On the stand, Le said he was 90 to 95 percent certain he saw the person in court that he saw at the bank. RP (5/2) 31-32. Before taking the stand, Le saw McCoy in the hallway brought past him in handcuffs and walk into the courtroom. RP (5/2) 35-36. There were no other black people in the courtroom. RP (5/2) 42.

Fellow teller Yen Huynh only got a brief look at the person's face. RP (5/2) 49, 51-52. Huynh described the person as a very tall man, "very dark-skinned," 6 foot 2 or 3, around 200 pounds, not much facial hair, wearing a hat. RP (5/2) 51-52, 56. Huynh greeted the man that Le helped but did not pay attention to what was going on between them because she was helping another customer. RP (5/2) 51.

Huynh did not remember being shown a photomontage by law enforcement after the robbery. RP (5/2) 53-54. She did see the photomontage right before taking the stand. RP (5/2) 54. She picked out the bottom middle photo as the "closest one in my memory," explaining "I am not 100 percent sure. Like I said, he has a hat, and I just recognize him because he has black skin, dark skin." RP (5/2) 54. She was only 50 to 60 percent or "50/50" sure based on her memory, acknowledging her

montage pick was based on the complexion of the person's skin. RP (5/2) 55. She could not exclude others in the montage as being the man she saw. RP (5/2) 55.

When asked on the stand if she saw the person in court, she responded "I saw one person very close to my memory as on the photograph, and he is sitting right in front of me." RP (5/2) 56. When asked how sure she was, Huynh responded "Like 50/50 -- I am not 100 percent sure." RP (5/2) 57. Huynh agreed the man she identified in court was the only one who looked close to the montage photograph, using the photo as a reference point rather than independent recollection. RP (5/2) 58. When the prosecutor asked if the person in the montage looked like the person she saw without considering the photos, Huynh answered "Not very clearly look like. Like very similar, but I am not sure if it's him." RP (5/2) 58.

Two fingerprints were lifted from the counter at the teller's station. RP (5/2) 112-13. A latent print examiner from the Seattle Police Department concluded one of the prints matched McCoy's fingerprint. RP (5/2) 126 , 136-37, 141-42. A cleaning business employee testified that he cleaned the bank on February 12, 2006, and that his cleaning regimen included wiping down the teller counters. RP (5/7) 19, 23, 25.

A Key Bank surveillance videotape of the morning and part of the afternoon for February 13, 2006 was played for the jury. RP (5/9/07) 13-28. The video did not appear to show McCoy in the bank from the time the bank opened to the time Le opened his teller window at noon or before the time of the robbery at 3:22, but McCoy maintained at trial that he was in any frame from 10 to 10:30. RP (5/9) 38, 41-42. Due to the setup of the system, in which multiple cameras take snapshots of different areas at intervals, the video was not a continuous playback, which could result in a person in the bank not actually being captured on the video. RP (5/9) 13, 33-34.

d. Investigation

Dag Aakervik, a Seattle Police Department (SPD) detective assigned to the Puget Sound Violent Crimes Task Force, investigated the three bank robberies. RP (5/7) 109, 112, 114, 116. In September 2006, Task Force members Agent Distajo of the FBI and Detective Nelson of the King County Sheriff's Department interviewed Kevin Olsen, a confidential source who purported to have information about a bank robbery. RP (5/7) 135-36. The interview took place in the FBI building, about 20 feet away from Detective Aakervik's office. RP (5/7) 136. Aakervik was called in to the interview when Nelson and Distajo realized Olsen was talking about a series of bank robberies that Aakervik was in charge of working on. RP

(5/7) 135, 137-38. Aakervik maintained no promises were made to Olsen in exchange for his statement and nothing was offered to him. RP (5/7) 142, 154.

Detective Aakervik placed McCoy in the photomontage shown to the robbery witnesses. RP (5/7) 117. McCoy's photo was number five, in the bottom middle slot. RP (5/7) 118. Aakervik agreed that McCoy had the darkest complexion of anyone in the montage. RP (5/7) 155.

e. Testimony of Informant Olsen

Olsen and McCoy met each other in the King County Jail pending McCoy's trial. RP (5/7) 48-51, 54-55. Olsen was also being held for bank robbery. RP (5/7) 49-50. The two consulted on legal research and strategy. RP (5/7) 53-54. Olsen claimed that McCoy admitted to committing several bank robberies. RP (5/7) 55, 70. McCoy told Olsen that he left a palm print on the counter at the Key Bank. RP (5/7) 63-64. During a conversation about strategy, McCoy said he was thinking about explaining he left the print because he was at the bank at a different time than the robbery. RP (5/7) 64-65. McCoy also told Olsen he snatched money out of the hand of one of the tellers during one of the robberies. RP (5/7) 70. He further disclosed he was frustrated about one of the robberies because a teller trainee provided a more certain identification of him than did a more experienced bank employee. RP (5/7) 55-57. Olsen

claimed not to see any documents pertaining to McCoy's case, including the probable cause certificate and the police reports. RP (5/7) 62-63, 98-99.

Olsen took notes to share with authorities. RP (5/7) 58-59. He "always hoped" to get some leniency, but then said that was not a possibility at the time. RP (5/7) 59. He shared information with the police because he thought it was the right thing to do. RP (5/7) 59, 65.

The prosecutor asked "did you ever enter into any kind of bargain with the FBI, Seattle police or our office regarding your testimony?" RP (5/7) 67. Olsen answered "No, I did not." RP (5/7) 67. Prosecutor: "Did you either have a case dismissed or resolved to your benefit as a result of this investigation?" RP (5/7) 67. Answer: "No, I did not." RP (5/7) 67. Prosecutor "did you get anything in exchange for your testimony?" RP (5/7) 67. Answer: "No, I did not." RP (5/7) 67.

In addition to the two robberies, Olsen had prior convictions for crimes of dishonesty. RP (5/7) 70, 77-78. He agreed with defense counsel that honest men always tell the truth and told the jury that that he was an honest man now. RP (5/7) 75, 78. He repeated his claim that he was doing the right thing. RP (5/7) 76. He denied taking notes of his conversations with McCoy to gain something from it or to testify against McCoy later. RP (5/7) 82-83.

Olsen had testified on behalf of the State in other prosecutions. RP (5/7) 101. Giving information did not help him out in McCoy's case or any other cases that he had served as an informant. RP (5/7) 85-86. It was not his intention to inform on other inmates for his own personal gain. RP (5/7) 90-91. Olsen said he could not have gained anything for providing information on McCoy because "I already had 195 months, there was nothing to gain." RP (5/7) 91.

f. Expert Testimony On Memory

Psychologist Dr. Geoffrey Loftus, testifying as an expert witness for the defense, informed the jury that memory is a malleable thing that changes over time. RP (5/8/07) 7-10, 13-14. The brain does not record events like videotape. RP (5/7) 12. Instead, events are actually experienced through fragments of information that become mingled with post-event information. RP (5/7) 12-13, 20-21. If inaccurate post-event information is integrated into the memory, the memory becomes stronger, more complete and more confident but at the same time less accurate. RP (5/7) 21.

Environmental factors capable of negatively affecting the ability to accurately remember include distance, length of time, attention, and stress. RP (5/7) 17-18, 27. Post-event events capable of distorting memory include identification procedures that may falsely reconstruct memories of

what the perpetrator looked like. RP (5/7) 21-22. A basis for bias in the montage provided to witnesses was that McCoy's photo in the number five position appeared darker and bigger than the others. RP (5/7) 36-37.

A form of procedural bias is lack of a double blind procedure, where the police officer that conducts the viewing already knows the suspect, in which case the officer may subtly or inadvertently provide information to the witness about who to pick. RP (5/7) 32-35. A witness may make a confident in-court identification based on earlier montage identification rather than based on memory of the original event. RP (5/7) 45-47. The identification procedure itself can act as a source of post-event information that may supplement the memory. RP (5/7) 54. Seeing a person in handcuffs is another form of post-event information that could inaccurately influence the identification. RP (5/7) 47.

Contrary to common sense, confidence in identification is not always a good measure of accuracy — a person could be highly confident yet be incorrect. RP (5/7) 50-52, 78. People can honestly and confidently remember something, or more specifically make identifications, that are objectively false. RP (5/7) 14-16.

Cross-racial identification is also an important issue. RP (5/7) 28. When told that only one identifying eyewitness was black, Dr. Loftus

noted many studies show people are better to identify people of their own race compared to people of other races. RP (5/7) 28-32.

g. McCoy's Testimony

McCoy testified he did not rob any of the three banks. RP (5/8) 104. He was homeless back in 2005 and 2006. RP (5/7) 94. He went to the Key Bank in the morning on the same day as the afternoon robbery, probably around 10:30 or 11:00. RP (5/8) 96-99, 110. He exchanged coins he panhandled for paper currency. RP (5/8) 96-99. He had been to the Key Bank on prior occasions to make change. RP (5/7) 99. McCoy acknowledged the print from inside the bank was his but that it was not actually lifted from Le's teller counter. RP (5/9) 39. Olsen saw McCoy's discovery when they worked together. RP (5/8) 102-03.

h. Closing Argument

The prosecutor argued the only issue in the case was identity. RP (5/9) 47. In the course of presenting its theory of the case, the prosecutor talked about the informant, Kevin Olsen: "Now, you should be skeptical of a person who comes into court and has a criminal record and has, you know, what possible motive or who's got criminal history. But think about Kevin Scott Olsen. What possible motive did Kevin Olsen have to inform on Mr. McCoy? There was no disagreement, there was no bad blood, there was no fight, there was nothing to gain whatsoever. It was explained

to Mr. Olsen over and over and over, you are going to get nothing for this." RP (5/9) 54. The prosecutor maintained Olsen received nothing for his testimony. RP (5/9) 54-55. The prosecutor continued: "For whatever reason, Mr. Olsen has an internal compass that he wanted to tell the police about this, and he did, and then he told you about it. The defendant confessed to these three robberies to Mr. Olsen." RP (5/9) 55. The prosecutor told the jury: "He has a criminal history. That doesn't matter. The fact of the matter is that he came in here, testified under oath that the defendant told him these things. There is no reason absolutely why he would say something contrary." RP (5/9) 55.

2. Reference Hearing

The Puget Sound Violent Crimes Task Force is an interagency group comprised of federal and state agencies. CP 2 (FF 4); 10RP 12-13. Its main task is to investigate bank robberies. CP 2 (FF 4). Seattle Police Detective Aakervik, Detective Nelson of the King County Sheriff's Office, and FBI Agent Distajo were all members of the Task Force. 9RP 14, 94; 10RP 53, 105-06, 173-74, 192; CP 2 (FF 5, 6).

Detective Aakervik was the lead detective on the three bank robbery cases involving McCoy. 10RP 165-66, 192; CP 2 (FF 5). James Ferrell was the assigned prosecutor. CP 2 (FF 5). Detective Nelson and Agent Distajo were partners on the Task Force. 9RP 83-84, 96; CP 2 (FF

6). Nelson and Distajo did not work with Aakervik on the investigations, but alerted Aakervik when they received information from Olsen about bank robberies for which McCoy was facing charges. 9RP 14, 35, 67, 84, 93-94; 10RP 12-13, 179; CP 2, 6 (FF 6, 25).

Olsen was a confidential informant for the Task Force and FBI from December 2005 to March 2007. 9RP 21, 64-65, 111-12; 10RP 91-93, 128-29; CP 3, 8 (FF 7, 36); Ex. 8. His contacts were Detective Nelson and Agent Distajo, both of whom played a major role in dealing with Olsen. 9RP 96; CP 3 (FF 7). Detective Nelson and Agent Distajo developed a rapport with Olsen over many meetings on many cases. 9RP 16-16, 172-74; CP 3 (FF 9). They sometimes gave him a meal and/or tobacco during their meetings. 9RP 25, 43, 57-63, 80-81; 10RP 40, 55, 76-77; Ex 4; Ex. 9 at 4; CP 3, 6 (FF 10, 22). On one occasion Olsen brought the tobacco back with him into the jail. Ex. 9 at 18.

In a September 1, 2006 meeting with Detective Nelson and Agent Distajo, Olsen disclosed information about McCoy's involvement in robberies. 9RP 16; 10RP 111; Ex. 2; CP 4 (FF 13). Detective Aakervik joined in conducting the interview after being notified by Detective Nelson and Agent Distajo. 9RP 17-23; 10RP 173-74; CP 4 (FF 14). Aakervik and Distajo conducted much of the interview together. 9RP 22.

Detective Aakervik relayed the information he received from Olsen to the King County Prosecutor's Office, which identified Olsen as a witness for McCoy's trial. 10RP 167-68. As a result, Olsen could no longer be used as an informant. 10RP 25-27, 167, 174, 179; CP 4, 5 (FF 15, 17).

Detective Nelson and Agent Distajo discussed a desire to give some money to Olsen for the informant work he had done since 2005, but did not discuss this fact with Olsen. 9RP 80; CP 4 (FF 16). They made no explicit promise of money for information. 10RP 56-57, 121; CP 4 (FF 16). Olsen signed two documents entitled "admonishments," which could be construed as contracts. Ex. 4; 10RP 46, 49; CP 3 (FF 8). Neither document promises any benefit for providing information. Ex. 4; CP 3 (FF 8). While there was no specific agreement to pay Olsen, Nelson knew payments could be made "down the road." 9RP 75. When asked whether Olsen seemed interested in getting money for the information he provided, Nelson testified that Olsen was always "interested in money" but money was not his whole interest in providing information. 9RP 75.

Detective Aakervik never promised Olsen anything or gave him anything for information or testimony. 10RP 170-71, 181; CP 7 (FF 29). Olsen was given meals and tobacco during meetings associated with McCoy's case, and Aakervik was involved in some of these meetings. Ex.

4, 8; 9RP 25, 10RP 40; CP 6, 7 (FF 23, 29). According to Aakervik, Olsen would be taken out of the jail from time to time and given tobacco and a magazine. 10RP 177. Olsen did not receive a benefit in the form of a reduction in sentence or charges as a benefit for the information he gave for McCoy's case. 9RP 76; 10RP 128; CP 6 (FF 24).

Olsen testified at the reference hearing and at McCoy's trial that he hoped to get a benefit of a reduced sentenced, dismissed charges or some other consideration for the time he faced serving in return for giving information, but never received any such benefit. 10RP 127-28, 136-38; CP 3 (FF 11). Olsen never bargained for money. 9RP 75-76, 80; 10RP 135; Ex. 11 at 12, 46.

On September 7, 2006, Olsen gave information to Detective Nelson and Agent Distajo in another case, six days after first speaking with Task Force members about McCoy's case and the same day he had a follow-up meeting with Detective Aakervik. Ex. 4, 5; 9RP 42-43. It was determined later that month that Olsen had provided false information in that other case and that he had done so because he was attempting to "work a deal" for himself on his pending criminal charges. Ex. 5. The FBI report on the issue was admitted as an exhibit at the reference hearing

to show Olsen lied in his capacity as an informant in another case.⁴ 9RP 35-36; Ex. 5.

Detective Nelson and Agent Distajo gave Olsen \$1000 at the end of his informant relationship with the Task Force. 10RP 100-02; Ex. 4; CP 5, 6 (FF 17, 22). The FBI paid the money. 9RP 85; 10RP 58, 67. This money was given for the information Olsen gave on McCoy's case and on other cases. 9RP 52, 68; 10RP 40-41, 50-51, 65-66; Ex. 4; CP 6, 8 (FF 22, 37).

On November 21, 2006, Olsen was shown a \$1000 check and told "Merry Christmas." 10RP 102; CP 5 (FF 18). Olsen was not told why he was receiving the money. 9RP 77-78; 10RP 51, 63-65, 102, 122-23, 125-26, 132, 142, 145; CP 5 (FF 18). Olsen believed he was paid because he gave information on a number of cases, not on any particular case. 10RP 121-22, 126, 142, 145.

Olsen signed a receipt, which stated "represented \$1,000 for services and \$0 for expenses for the period 12/05/05 to 08/28/06." 9RP 69-70; 10RP 51; Ex. 7; CP 5 (FF 18). Detective Nelson was among those

⁴ On October 21, 2011, prosecutor Ferrell represented that he became aware of this document after conversing with Chief Division Counsel Jennings of the FBI, who alerted him that Olsen was involved in a sensitive investigation. 2RP 2. Ferrell then spoke with the state prosecutor that handled the case, David Seaver, who turned the material over to Ferrell. 2RP 2. Seaver apparently came into possession of this document sometime in 2010. 2RP 2-3, 5.

who signed the receipt. 9RP 79-80; Ex. 7. The \$1000 payment was deposited into Olsen's jail account, with Olsen being aware it was from the FBI, before McCoy's trial took place. 10RP 51, 63, 106; CP 5 (FF 18).

During the course of being interviewed in February 2010 in connection with another case, Detective Nelson revealed that Olsen had been paid in connection with McCoy's case. Ex. 9 at 4-6, 18, 20. When asked if Nelson would have shared that information with the prosecutor on the cases that Olsen was giving information on, Nelson responded "Mm-hmmm. I don't think he was paid 'til afterwards." Ex. 9 at 19.

Exhibit 13, an internal FBI document, shows Agent Distajo requested \$1000 in connection with information given by Olsen for the Sterling Bank robbery, although the date on the document is wrong. 10RP 20-22; CP 5 (FF 19).

Olsen did not recall telling anyone about the money he received, while acknowledging he might have done so. Ex. 11 at 12-14. Olsen said he did not expect to receive the \$1000 payment. 10RP 122, 130. Olsen drew a distinction between giving information and testifying. 10RP 132, 143. Olsen was not paid for his testimony on the Sterling Bank case. 9RP 80; 10RP 127, 140-41; CP 6, 8 (FF 23, 37).

Agent Distajo said he could not recall or was uncertain whether the King County Prosecutor's Office was informed of the payment to Olsen,

"but that they would be able to be notified prior to him being utilized as a - in testifying for the trial." 10RP 27, 36, 54. He did not talk to prosecutor Ferrell prior to trial about the payment. 10RP 54. Detective Aakervik was not informed that Olsen was paid \$1000 and so could not disclose that fact to McCoy's trial counsel in 2007. 10RP 168, 170, 180, 188, 199; CP 6, 7, 9 (FF 25, 30, 39).

Federal and local law enforcement officers on the Task Force "did not always share information" and Aakervik believed he would not have had access to FBI financial files. 10RP 182-85, 190; CP 7 (FF 28). Nonetheless, the federal and local law enforcement officers on the Task Force worked together. 10RP 175, 180, 182, 190; CP 7 (FF 28). Detective Aakervik accordingly worked together with Detective Nelson and Agent Distajo the entire time that Aakervik was with the Task Force. 10RP 180.

Aakervik was aware that informants could be paid to provide information, but never asked whether Olsen was paid anything. 10RP 180-81. In past cases, Aakervik was routinely involved with or knew when a person who had supplied information in connection with his case had been paid. 10RP 180-81, 187-88; CP 7 (FF 27). Aakervik therefore assumed he would have been told if Olsen had received any benefit of any kind from anyone as a result of information in the Sterling Bank case.

10RP 182, 189, 192; CP 7 (FF 27). Aakervik explained he should have known or somebody should have told him that Olsen had been paid: "I am the case detective. I should know everything about the case." 10RP 182. Aakervik did not ask if Olsen was paid any benefits and did not feel it was a question that needed to be asked. 10RP 180.

When asked about any benefit ever received in subsequent interviews about another case, Olsen admitted he received money for information. Ex. 11, 12; CP 8 (FF 35). At McCoy's trial, defense counsel did not ask Olsen about any payments ever made to Olsen, but it was never disclosed to counsel that Olsen had received a \$1000 payment. CP 9 (FF 39).

Following entry of the reference hearing findings, the Court of Appeals appointed counsel to assist McCoy with his personal restraint petition.

C. ARGUMENT

1. THE BRADY VIOLATION VIOLATED MCCOY'S RIGHT TO DUE PROCESS AND REQUIRES REVERSAL OF THE CONVICTIONS.

The State violated McCoy's due process right to the disclosure of favorable evidence under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence that could have been used to effectively impeach informant

Olsen at trial was not disclosed to McCoy. It should have been. The State is deemed to have constructive knowledge of such evidence prior to trial. Suppression of the impeachment evidence undermines confidence in the outcome, requiring reversal of the convictions.

a. The Brady Rule And Standard Of Review.

The prosecution's suppression of evidence favorable to the accused violates due process where the evidence is material to guilt, irrespective of the good or bad faith of the prosecution or whether the defense has requested such evidence. Brady, 373 U.S. at 87; United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). The rationale behind the rule is that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair." Brady, 373 U.S. at 87.

"There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

The first two Brady factors — favorability of evidence and suppression — are factual questions subject to the "substantial evidence" standard of review for factual findings in reference hearings. In re Pers.

Restraint of Stenson, 174 Wn.2d 474, 488, 276 P.3d 286 (2012).

"Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true." Stenson, 174 Wn.2d at 488 (quoting In re Pers. Restraint of Gentry, 137 Wn.2d 378, 410, 972 P.2d 1250 (1999)).

The third Brady factor — prejudice — is a mixed question of law and fact subject to de novo review with the appellate court applying the reference hearing facts to the law and drawing its own conclusions. Stenson, 174 Wn.2d at 488. Whether a claimed Brady violation amounts to a due process violation is a question of law reviewed de novo. State v. Mullen, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). A defendant who proves a Brady violation is entitled to a new trial. See Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (when analyzing a Brady claim, "once a reviewing court . . . has found constitutional error, there is no need for further harmless-error review").

b. Challenged Findings of Fact Entered For The Reference Hearing

McCoy challenges the superior court's finding that Olsen "gave no expectation of money." CP 4 (FF 16). Olsen said he did not expect to receive the \$1000 payment. 10RP 122, 130. Nelson testified Olsen was not expecting the \$1000 to his knowledge. 9RP 80. There was no

expectation, then, of the specific \$1000 payment. But Detective Nelson testified Olsen was always "interested in money," although money was not Olsen's whole interest in providing information. 9RP 75. Olsen's broad, open-ended interest in money is different than whether he had a specific expectation of the \$1000 payment. To the extent finding of fact 16 implies otherwise, it is not supported by substantial evidence.

McCoy challenges finding of fact 34 that Olsen's "trial testimony was truthful to the questions posed" about receiving any benefit. CP 8 (FF 34). At one point at trial, the prosecutor asked Olsen why he would tell the police about McCoy, to which Olsen responded, "Well, it probably wasn't the smart thing to do, but it was the right thing to do. I imagine there was some hopes that I would probably get some benefit, but it was told to me in no uncertain terms that no, there would be no favoritism given to me or anything like that." RP (5/7) 65.

Defense counsel followed up on this answer on cross-examination: "You also said that it was probably not smart to have raised the issue." RP (5/7) 80. Olsen answered, "Personally it was no smart. Probably." RP (5/7) 80. Counsel continued: "Is that because you are going to end up with a snitch jacket for it?" RP (5/7) 80. Olsen answered: "Some people would look at it that way, yes." RP (5/7) 80. Counsel then asked "And as a

result *you didn't get anything anyhow*, did you?" RP (5/7) 80 (emphasis added). Olsen answered "No, sir." RP (5/7) 80.

Defense counsel later asked "So when you provided this information to detectives about Mr. McCoy, you weren't intending to gain anything by it? That's not what you said on direct." RP (5/7) 91 (emphasis added). Olsen answered, "I couldn't have gained anything. I already had 195 months. There was nothing to gain." RP (5/7) 91.

We know now that Olsen did get something for providing information on McCoy. He received a \$1000 in part for providing information in McCoy's case. At the reference hearing, Olsen said he received a benefit in the form of payment for an "accumulation" of information over a period of time and had no specific knowledge what cases were involved, but assumed McCoy's case was included. 10RP 100-02, 121, 126, 132, 142, 145. Olsen lied at trial when he agreed he did not get anything and that there was nothing to gain. RP (5/7) 80, 91. There was money to gain. Olsen also received free meals and tobacco as a result of his informant relationship with the Task Force, but that was not disclosed at trial either in response to the questions cited above.

McCoy challenges a portion of finding of fact 32, which states "Each of the questions either focused on a benefit as a reduction in sentence or were answered within the context of a prior question focusing

on a benefit in sentence, and the answers were couched in the context of a reduction in sentence." CP 8 (FF 32). As shown above, not all of the questions focused on a benefit as a reduction in the sentence or in that context, nor were Olsen's answers confined to that limited context. Counsel asked a broad question about receiving any benefit, and Olsen gave an unqualified answer of "no." RP (5/7) 80.

McCoy challenges the finding that Distajo and Nelson worked separately from Aakervik on the same Task Force. CP 2 (FF6). That finding contradicts finding of fact 28, which states "the federal and local law enforcement officers on the Task Force worked together." CP 7 (FF 28). The evidence backs finding of fact 28. Aakervik testified the federal and local law enforcement officers on the Task Force worked together. 10RP 175, 180, 182, 190; CP 7 (FF 28). In particular, Aakervik worked together with Detective Nelson and Agent Distajo the entire time that Aakervik was with the Task Force. 10RP 180.

The court found "Olson [sic] apparently did not tell anyone in the Sterling Savings Bank case about the \$1,000 payment" and "apparently did not disclose any payments for any . . . cases." CP 6, 9 (FF 26, 39). Olsen said he could not recall if he told Aakervik, although he did not know why he would. 10RP 127. Olsen's testimony went no further. Aakervik said he was not told by anyone about the payment prior to trial.

But findings 26 and 39 reach too far in affirmatively stating or implying that Olsen did not tell *anyone*. The evidence does not affirmatively support that broad proposition.

The court found "Det. Nelson did not realize that the Sterling Savings Bank case was being used to request the payment." CP 6 (FF 21). This may be an accurate finding if it is read as Nelson thought the payment was not only for the Sterling Savings Bank case but other cases as well. 9RP 85. To the extent it can be read otherwise, McCoy challenges it. Nelson signed the receipt for the \$1000, so he knew of it at the time it was presented to Olsen. 9RP 79-80; Ex. 7. Nelson understood the payment was for information that Olsen had provided over a period of time. 9RP 72. When asked what he thought Olsen was being paid for at the time the receipt was signed, Nelson answered that Olsen was being paid "[f]or several things, information that he'd provided before on some other stuff, other cases, he provided also stuff on – *some on McCoy*." 9RP 79 (emphasis added). The court correctly found Nelson remembered that Olsen was paid money for the Sterling Bank information. 9RP 67-68, 99; CP 6 (FF 21). Nelson revealed his knowledge that Olsen had been paid in connection with McCoy's case (underestimating the dollar amount) in the February 2010 interview in another case, which triggered the sequence of

events leading to the reference hearing in McCoy's case. Ex. 9 at 4, 18-20; 9RP 99, 102-04.

McCoy challenges finding of fact 20 that Distajo "could not remember if the money was given for the Sterling Savings Bank robbery." CP 5 (FF 20). Distajo testified from personal knowledge that Olsen was paid in connection with the Sterling Savings Bank case. 10RP 40-41, 50-51, 65-66.

McCoy challenges finding of fact 25 that "Agent Distajo and Det. Nelson did not tell anyone about the payment of \$1,000." CP 6 (FF 25). Detective Nelson was never asked that question. Nelson did not know if any other state agent was aware of the payment and benefits that Olsen received. 9RP 68. The evidence does not affirmatively establish that Nelson did not tell anyone. Lack of knowledge does not equal substantial evidence.

Agent Distajo, meanwhile, could not answer whether the King County Prosecutor's Office was informed about the payment. 10RP 27. He later said he was uncertain, but believed the prosecutor's office would be able to be notified prior to Olsen's testimony at trial. 10RP 36. He could not recall whether he told anyone in the prosecutor's office about the payment. 10RP 54. Distajo never talked to Farrell about the payment prior to trial. 10RP 54. But the evidence does not affirmatively establish

that Distajo did not tell anyone at all. Uncertainty and lack of recollection do not equate to substantial evidence.

McCoy challenges findings of fact 30 and 39 that Ferrell was not informed that Olsen was paid \$1000 and did not know about it. CP 7, 9 (FF 30, 39). Distajo did not talk to Ferrell prior to trial, but the evidence does not affirmatively show Ferrell never received this information from another source prior to trial. Ferrell never testified and never said anything under oath. He told the superior court in closing argument that the prosecutor's office did not know. 11RP 30-31. A prosecutor's assertions are merely argument and not evidence or facts. State v. Mendoza, 165 Wn.2d 913, 926, 205 P.3d 113 (2009).

c. The First Brady Component: Impeachment Evidence Of Olsen Qualifies As Favorable Evidence.

The duty to disclose evidence favorable to the accused encompasses impeachment evidence as well as exculpatory evidence. Stenson, 174 Wn.2d at 486 (citing United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)); Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). "Such evidence is 'evidence favorable to an accused,' so that, if disclosed and used effectively, it may make the difference between conviction and

acquittal." Wilson v. Beard, 589 F.3d 651, 659 (3d. Cir. 2009) (quoting Bagley, 473 U.S. at 676).

Impeachment evidence is "[e]vidence used to undermine a witness's credibility." Stenson, 174 Wn.2d at 489 n.7 (quoting Black's Law Dictionary 637 (9th ed. 2009)). Brady requires prosecutors to disclose any benefits that are given to a government informant. Maxwell v. Roe, 628 F.3d 486, 510 (9th Cir. 2010); Benn v. Lambert, 283 F.3d 1040, 1057 (9th Cir.), cert. denied, 537 U.S. 942, 123 S. Ct. 341, 154 L. Ed. 2d 249 (2002); see On Lee v. United States, 343 U.S. 747, 757, 72 S. Ct. 967, 96 L. Ed. 1270 (1952) (testimony from witness receiving benefits from government "may raise serious questions of credibility").

There are three categories of impeachment evidence here. First, evidence that Olsen was paid in connection for providing information on McCoy's case is classic Brady evidence. See Bagley v. Lumpkin, 798 F.2d 1297, 1299 (9th Cir. 1986) (compensation two witnesses received before and after trial was material and subject to Brady disclosure); United States v. Thornton, 1 F.3d 149, 157-58 (3d Cir.) (payments made to cooperating government witnesses qualified as Brady evidence), cert. denied, 510 U.S. 982, 114 S. Ct. 483, 126 L. Ed. 2d 433 (1993); United States v. Shaffer, 789 F.2d 682, 688-89 (9th Cir. 1986) (finding Brady error where state failed to disclose witness was "a paid informant in a

separate heroin operation" and the nature of his compensation for that work).

Evidence of payment can be used to discredit an informant's testimony by casting doubt on the truthfulness of what the informant claimed to have heard and in undermining the motive of the informant to gather such information and act as a government witness. The defense could effectively use this evidence to argue a man who profits from peddling information cannot be trusted.

Benefits can take many different forms. Money is one form. Evidence that Olsen received free meals and tobacco is another form of impeachment evidence. 9RP 25, 43, 57-63, 80-81; 10RP 40, 55, 76-77; Ex 4; Ex. 8; Ex. 9 at 4; CP 3, 6, 7 (FF 10, 22, 23, 29). Olsen was in jail at the time he served as an informant on McCoy. Common sense dictates jail food is not particularly tasty, and that a person in Olsen's position would relish the opportunity to eat food from a restaurant as a respite from the usual jailhouse grub. 9RP 81. The tobacco benefit is also significant because tobacco is contraband in the jail. Olsen was evidently a user, but would not be able to use tobacco in the jail. His opportunity for using it was when he was given it in connection with his informant meetings with law enforcement. Moreover, on one occasion, Olsen actually brought the tobacco back with him into the jail, where it takes on the status of a valued

commodity to be sold or bartered to other inmates on favorable terms. Ex. 9 at 18.

A government witness may be impeached by showing bias or interest. Bagley, 473 U.S. at 676. Government benefits conferred on Olsen in the form of free tobacco and meals are further evidence that could be used to show bias and incentive to lie. The State argued these benefits were "de minimus." 11RP 28. But the significance of these benefits in relation to Olsen's credibility was for the trier of fact to decide in light of the skilled use of this evidence by the defense.

The third category of impeachment evidence is that Olsen gave a false statement in his capacity as a government informant in another case in an effort to work a deal for himself. Ex. 5; see Benn, 283 F.3d at 1055 (evidence that witness "had regularly lied" and "was untrustworthy and deceptive" would have "severely undermined his credibility."); Carriger v. Stewart, 132 F.3d 463, 479-82 (9th Cir. 1997) (informant's history of false statements to law enforcement constituted Brady material). The timing of Olsen's lie is particularly significant, as it occurred a mere six days after Olsen gave information on McCoy's case to the Task Force. Ex. 5. McCoy could have effectively used the evidence of Olsen's false statement to argue Olsen used his status as an informant as a means to serve his own interests and that he was willing to lie to achieve them. This evidence

would have directly rebutted Olsen's testimony at trial that he was an honest man who was simply telling the truth. RP (5/7) 75, 78.

The petition was remanded for a reference hearing to determine in part whether Olsen lied at trial. The court found Olsen was truthful to the questions posed at trial when asked about any benefit he received. CP 8 (FF 34). Assuming substantial evidence supports that finding, the three categories of impeachment evidence described above retain their status as "favorable evidence" under the Brady standard. Whether a government witness is shown to have lied at trial and committed perjury in light of subsequently disclosed Brady evidence is one way of showing a Brady violation, but it is not the only way. Bagley, 473 U.S. at 678-82.

d. The Second Brady Component: The State Suppressed The Favorable Evidence.

The focus of a due process analysis in Brady cases is on "the fairness of the trial, not the culpability of the prosecutor." Smith, 50 F.3d at 823 (quoting Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)). Accordingly, "Brady does not require a showing that the state willfully or intentionally suppressed the evidence; even inadvertent suppression will satisfy this prong of the test." Gonzalez v. Wong, 667 F.3d 965, 981 (9th Cir. 2011).

With this backdrop in mind, the prosecution's use of informants to build a case against the accused poses a formidable challenge to the integrity of the process. "By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom." United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993). "Criminals caught in our system understand they can mitigate their own problems with the law by becoming a witness against someone else. Some of these informants will stop at nothing to maneuver themselves into a position where they have something to sell." Bernal-Obeso, 989 F.2d at 334.

"A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system." Id. at 333. "Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy." Id. at 333-34. Prosecutors and investigators are therefore expected "to take all reasonable measures to safeguard the system against treachery. This responsibility includes the duty as required

by Giglio to turn over to the defense in discovery *all* material information casting a shadow on a government witness's credibility." Id. at 334.

"The scope of the duty to disclose evidence includes the individual prosecutor's 'duty to learn of any favorable evidence known to the others acting on the government's behalf . . . including the police.'" Stenson, 174 Wn.2d at 486 (quoting Strickler, 527 U.S. at 281); see Kyles, 514 U.S. at 437-38 (rejecting the State's invitation to adopt a rule that the State "should not be held accountable under Bagley and Brady for evidence known only to police investigators and not to the prosecutor"). "The government must disclose not only the evidence possessed by prosecutors but evidence possessed by law enforcement as well." Mullen, 171 Wn.2d at 894. Brady obligations therefore include "not only evidence in the prosecutor's file but also include evidence in the possession of the police and others working on the State's behalf." Id. at 895.

The Task Force is an interagency group comprised of federal and state agencies. CP 2 (FF 4); 10RP 12-13. Seattle Police Detective Dag Aakervik, Detective Jon Nelson of the King County Sheriff's Office, and FBI Agent Alan Distajo were all members of the same Task Force. 9RP 14, 94; 10RP 53, 105-06, 173-74, 192; CP 2 (FF 5, 6). Nelson and Distajo did not work with Aakervik on the Sterling Bank investigation, but alerted Aakervik when they received information from informant Olsen about

bank robberies for which McCoy was facing charges. 9RP 14-23, 35, 67, 84, 93-94; 10RP 12-13, 112, 173-74, 179; Ex. 2; CP 2, 4, 6 (FF 6, 13, 14, 25). Aakervik and Distajo conducted much of the interview with Olsen together. 9RP 22.

Aakervik subsequently relayed the information he received from Olsen to the King County Prosecutor's Office, which identified Olsen as a witness for McCoy's trial. 10RP 167-68. Olsen was paid money for the information he gave in his capacity as an informant, which encompassed information given on McCoy's case. Detective Nelson knew about this payment before McCoy's trial, and he understood that the payment was in part for the information Olsen gave on McCoy's case. 9RP 67-68, 72, 79-80, 99, 102-04; Ex. 7, 9.

The government's Brady obligations attach to all favorable evidence in the government's actual or constructive possession. Smith v. Sec'y of N.M. Dep't of Corrections, 50 F.3d 801, 824 (10th Cir. 1995). Where a prosecutor has no actual knowledge of evidence, a prosecutor has constructive possession of evidence if, "he should nevertheless have known that the material at issue was in existence." United States v. Joseph, 996 F.2d 36, 39 (3d Cir. 1993). Thus, under Brady, the government must "take the minimal steps necessary to acquire . . . information" of which the

prosecution should be aware. United States v. Risha, 445 F.3d 298, 307 (3d Cir. 2006) (quoting Joseph, 996 F.2d at 40 (3d Cir. 1993)).

"[T]he 'prosecution' for Brady purposes encompasses not only the individual prosecutor handling the case, but extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects [of the case]." Smith, 50 F.3d at 824. Detective Nelson of the King County Sherriff's Office, a state agent, knew about the payment but did not tell Aakervick, the state agent in charge of investigating McCoy's case. Aakervick, as the lead detective in charge of McCoy's case, was understandably upset that he was not told about the payment. 10RP 182. A "lack of communication and coordination among arms of the state cannot be, and is not, a defense to the prosecution's failure to disclose favorable, material information to the defendant when that failure to disclose amounts to denying a criminal defendant a fair trial." Id. at 832.

It is unnecessary to establish that Agent Distajo's knowledge should be imputed to the prosecutor's office for Brady purposes because Detective Nelson's knowledge is imputed to the prosecutor's office. The State failed to disclose the fact that Olsen had been paid in connection with McCoy's case prior to McCoy's trial. That is suppression under the second component of the Brady test.

That being said, Agent Distajo's knowledge of the payment is attributable to the state prosecutor's office as well, even though Distajo is a federal agent. There is no hard and fast line drawn between state and federal jurisdictions in the context of Brady obligations. The prosecution has constructive possession of evidence that must be disclosed when the evidence is known to a party acting on the government's behalf or its control, where the prosecution and the agency were part of a team or engaged in a joint effort, or where the prosecution had ready access to the evidence. Risha, 445 F.3d at 304; see In re Sealed Case No. 99-3096 (Brady Obligations), 185 F.3d 887, 896 (D.C. Cir. 1999) ("we reject as irrelevant the contention that the requested records may have been in the possession of the Metropolitan Police Department . . . rather than the U.S. Attorney's Office) (citing United States v. Brooks, 966 F.2d 1500, 1503 (D.C. Cir. 1992)).

"The prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge." United States v. Osorio, 929 F.2d 753, 761 (1st Cir. 1991). Agent Distajo said he could not recall or was uncertain whether the King County Prosecutor's Office was informed of the payment to Olsen, but acknowledged "*they would be able to be notified prior to him being*

utilized as a - in testifying for the trial." 10RP 27, 36, 54 (emphasis added). It is apparent that a simple inquiry from the prosecutor's office would have yielded the information that Olsen had been paid in connection with McCoy's case.

"[T]he prosecution is deemed to have knowledge of information readily available to it." Williams v. Whitley, 940 F.2d 132, 133 (5th Cir. 1991). Even where a prosecutor does not have evidence in his or her possession, "a prosecutor has a duty under Brady to 'learn of any exculpatory evidence known to others acting on the government's behalf.'" Gonzalez, 667 F.3d at 981 (quoting Carriger, 132 F.3d at 479–80). The Task Force, comprised of federal and state agents working cooperatively to solve crimes, was not only working on the federal government's behalf. It was working on the State's behalf as well.

Indeed, Detective Aakervik assumed he would have been told if Olsen had received any benefit of any kind from anyone as a result of information in the Sterling Bank case. 10RP 182, 189, 192; CP 7 (FF 27). Why would Aakervik harbor the belief that he should have been told by Agent Distajo or Detective Nelson about the payment? The reasonable inference is that it is common procedure to share such information. Aakervik explained he should have known or somebody should have told him that Olsen had been paid: "I am the case detective. I should know

everything about the case." 10RP 182. "A prosecutor's duty under Brady necessarily requires the cooperation of other government agents who might possess Brady material." United States v. Blanco, 392 F.3d 382, 388 (9th Cir. 2004).

On the other hand, Aakervik did not ask if Olsen was paid any benefits and did not feel it was a question that needed to be asked. 10RP 180. Thus, we have both Aakervik and the prosecutor's office sticking their heads in the sand when it comes to making a simple inquiry about whether Olsen was paid for his information. "[A]n inaccurate conviction based on government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure." Brooks, 966 F.2d at 1503.

This proposition is consistent with the Supreme Court precedent. In Stenson, the Court upheld the superior court's finding that the State failed to disclose an FBI file containing impeachment evidence to the defense, where "[n]either party apparently believed there was anything worth looking at in the FBI file. If, however, the material contained exculpatory or impeaching matter it should have been provided to defense counsel under Brady." Stenson, 174 Wn.2d at 483, 490-91.

Knowledge of Olsen's false statement in another case in an effort to work a deal should also be attributed to the prosecutor's office for the

same reasons. Ex. 5. Agent Distajo recalled that Olsen had given the false statement. 10RP 71. In fact, Distajo personally escorted Olsen down to take the polygraph test that revealed he had lied in an attempt to work a deal for himself. 10RP 74. This Brady information was not disclosed to McCoy prior to trial.

The prosecution has constructive possession of evidence that must be disclosed where the prosecution and the agency were part of a team or engaged in a joint effort, or where the prosecution had ready access to the evidence. Risha, 445 F.3d at 304. One or more of those criteria are satisfied here. The state and federal agencies that made up the Task Force were involved in a cooperative effort to investigate crimes in the area. A simple inquiry about whether impeachment evidence existed would have revealed that Olsen lied in his capacity as an informant. This is why FBI attorney Jennings referred Ferrell to this piece of information after prosecutor Ferrell started making inquiries about information needed for the reference hearing. 2RP 2-5.

As for the benefits consisting of free meals and tobacco given to Olsen, Detective Aakervik himself participated in some of those transactions. Ex. 4, 8; 9RP 25, 10RP 40; CP 6, 7 (FF 23, 29). Detective Aakervik's knowledge on this point is imputed to the prosecutor's office. Stenson, 174 Wn.2d at 486. Detective Nelson, along with Agent Distajo,

also gave Olsen a meal and/or tobacco during their meetings. 9RP 25, 43, 57-63, 80-81; 10RP 40, 55, 76-77; Ex 4; Ex. 9 at 4; CP 3, 6 (FF 10, 22). Their knowledge is likewise imputed to the prosecutor's office because Nelson is a state agent and the State reaped the benefit of its cooperative relationship with the Task Force in investigating and prosecuting crimes.

There are, of course, instances where "the connection between the nondisclosure and the State becomes too remote for the underlying rationale of Brady to apply." Mullen, 171 Wn.2d at 901. In Mullen, for example, the Court concluded that the State did not suppress certain documents or records from a separate civil case. Id. The defendants in the criminal case were charged with stealing funds from their employer, Frontier Ford, a local car dealership. Id. at 886. After their convictions, they obtained a previously sealed deposition of Rekdal, an accountant at the accounting firm of Clothier & Head, taken in a separate civil suit between the owner of Frontier Ford and the accountant's firm. Id. at 886, 888. The defense argued the nondisclosure of income documents and billing records by the accounting firm of Clothier & Head constituted suppression by the State, assuming any information possessed by accountants at Clothier & Head was imputed to Rekdal and that any information possessed by Rekdal is imputed to the State. Id. at 901.

The Court shot down that argument, reasoning "[w]hile prosecutors may be held accountable for information known to police investigators, we are loath to extend the analogy from police investigators to cooperating private parties who have their own set of interests . . . [which] are often far from identical to — or even congruent with — the government's interests." *Id.* at 901 (quoting United States v. Josleyn, 206 F.3d 144, 154 (1st Cir. 2000)).

McCoy's case presents a quite different scenario. The favorable information in McCoy's case was not held by a private party. It was known by law enforcement. This is not a case where "the connection between the nondisclosure and the State becomes too remote for the underlying rationale of Brady to apply." Mullen, 171 Wn.2d at 901. The State had a close relationship with the interagency Task Force, which was comprised of both federal and state agents, and the impeachment information regarding Olsen was readily available to the prosecution. Detective Nelson, a state agent, knew about the payment to Olsen before McCoy's trial. His partner, Agent Distajo of the FBI, helped Detective Aakervik interview Olsen about McCoy's case. 9RP 22. The requisite nexus between the prosecution and the police exists in McCoy's case and is sufficient to show suppression.

e. The Third Brady Component: Reversal Of The Convictions Is Required Because The Nondisclosure Undermines Confidence In The Outcome Of The Trial.

With respect to the third Brady factor of prejudice, the terms "material" and "prejudicial" are used interchangeably. Stenson, 174 Wn.2d at 487. To prove materiality, McCoy need only show "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. (quoting Kyles, 514 U.S. at 434) (internal quotation marks omitted). A "'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Kyles, 514 U.S. at 434 (quoting Bagley, 473 U.S. at 678).

"The suppressed evidence must be considered collectively, not item by item." Stenson, 174 Wn.2d at 487. Impeachment evidence, if disclosed and used effectively, "may make the difference between conviction and acquittal." Bagley, 473 U.S. at 676; see Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle

factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

One means of showing materiality is "how the withheld evidence could have provided additional or alternative means of impeachment." Gonzalez, 667 F.3d at 982. The withheld evidence consisting of the payment for information, the meals and tobacco given to Olsen, and Olsen's false statement given in his capacity as an informant, all constituted additional impeachment evidence that could have been used against Olsen to discredit his otherwise damaging testimony in the eyes of the jury.

Olsen repeatedly insisted at trial that his motivation for obtaining information from McCoy and giving it to the police was that he wanted to do the right thing. RP (5/7) 59, 65, 76. This enabled the State to hold Olsen up as a witness that had nothing to hide and was worthy of belief despite his prior criminal history. RP (5/9) 54-55.

The suppressed evidence would have undermined Olsen's professed motivation and compromised the State's portrayal of Olsen as a truthful witness. See Gonzalez, 667 F.3d at 983 ("the reports could be viewed to cast significant doubt on what Acker stated was his primary motivation for testifying against Gonzales. Acker repeatedly said that he was testifying because of a desire to turn his life around and do the right

thing."). The suppressed impeachment evidence would have enabled McCoy to persuasively argue that Olsen's professed reason for testifying was false. Id. at 983.

As it turned out, McCoy was only able to point to Olsen's prior convictions in an attempt to impeach him, but that point was blunted by Olsen's uncontradicted insistence that he only obtained the information from McCoy because he wanted to do the right thing. RP (5/7) 70, 77-78. Moreover, "courts have repeatedly held that withheld impeachment evidence does not become immaterial merely because there is some other impeachment of the witness at trial. Where the withheld evidence opens up new avenues for impeachment, it can be argued that it is still material." Gonzalez, 667 F.3d at 984. This is especially true here, where the prosecutor dismissed Olsen's prior history as insignificant because Olsen's motivation was pure. RP (5/9) 54-55.

Any argument by the State that the undisclosed impeachment evidence was merely cumulative to other impeachment evidence consisting of the prior convictions must fail. "[T]he government cannot satisfy its Brady obligation to disclose exculpatory evidence by making some evidence available and claiming the rest would be cumulative." Carriger, 132 F.3d at 481. "The mere fact that a prosecution witness has a prior record, even when combined with other impeachment evidence that a

defendant introduces, does not render otherwise critical impeachment evidence cumulative." Benn, 283 F.3d at 1055.

The evidence against McCoy was otherwise not overwhelming. The identifications of McCoy as the perpetrator were inconsistent or less than certain. Regarding the Sterling Bank robbery, teller Willey, the one who was actually robbed, picked out someone else from the montage with 90% certainty. RP (5/1) 25-26, 35, 37. Employee Jackson picked out another person from the montage and testified he did not see the robber in court. RP (5/1) 47-48, 50. Employee Moore maintained she was 95 percent certain when she picked McCoy out of the montage, but the police notation on the montage only stated "possibly number five." RP (5/2) 81-82, 84. Teller Elwood was "pretty certain" that the person she picked from the montage was the robber. RP (5/2) 70-71; RP (5/7) 132.

There was a basis to doubt the reliability of the montage identifications made by Moore and Elwood. The photo of McCoy had the darkest complexion of anyone in the montage. RP (5/2) 71, 103, 158-59; RP (5/7) 155. Concerns over the reliability of eyewitness identifications, and more specifically cross-racial eyewitness identifications, have arisen in cases for some time. State v. Allen, 176 Wn.2d 611, 616, 294 P.3d 679 (2013). Based on scientific research and evidence, there is no serious question about the inherent unreliability of eyewitness identification

generally and of cross-racial eyewitness identification specifically. Allen, 176 Wn.2d at 621 & n.4. Defense expert Loftus testified to the cross-racial identification problem. RP (5/7) 28-32. Dr. Loftus also noted, consistent with common sense, that a basis for identification bias in a montage exists where one person appears darker than the others in the montage. RP (5-7) 36-37.

Willey, Moore and Elwood identified McCoy in court as the robber as he sat next to defense counsel. RP (5/1) 33-34; RP (5/2) 72, 82, 89. There was no other black person in the courtroom besides McCoy. RP (5/1) 42; RP (5/2) 73, 89. The jury was certainly entitled to weigh the reliability of in-court identifications of McCoy — the only black man in the courtroom — as the perpetrator and find them lacking in persuasive force. See State v. Vaughn, 101 Wn.2d 604, 611-12, 682 P.2d 878 (1984) (reliability of in-court identification was matter for jury to decide).

Furthermore, Moore had seen McCoy in the hallway before she took the stand, and Elwood saw McCoy in handcuffs walking out of the courtroom before she took the stand. RP (5/2) 73, 83. These observations provide yet another additional basis to question the reliability of their identifications. See United States v. Emanuele, 51 F.3d 1123, 1127, 1130 (3d Cir. 1995) ("to walk a defendant-in shackles and with a U.S. Marshal

at each side-before the key identification witnesses is impermissibly suggestive").

Regarding the US Bank robbery, teller Fung picked McCoy out of the montage, acknowledging McCoy had the darkest facial complexion of anyone in the montage. RP (5/7) 99-100, 103. On the stand, Fung said she was 100 percent certain when she viewed the montage, although in actuality she told the detective she was less certain. RP (5/2) 99-100, RP (5/7) 134, 135, 153. Fung also made an in-court identification of McCoy after seeing him walking in handcuffs while walking out of the courtroom earlier in the day. RP (5/2) 93, 101, 103. Employee Van Diest did not pick anyone out of the montage, pointing to McCoy as more likely than the other because he had the darkest skin complexion. RP (5/2) 156, 158-59. Van Deist recalled that he and Fung looked at the montage at the same time but that Fung did not pick anyone out. RP (5/2) 160.

Fung's identification suffers from the same problems of montage bias, cross-racial identification and seeing McCoy in handcuffs that afflicted identification in the Sterling Bank case. There is also an evidentiary inconsistency in terms of whether Fung made a montage identification at all. There was a basis for jurors to doubt Fung's identification in connection with the US Bank robbery.

Regarding the Key Bank robbery, teller Le had no recollection of being shown a montage by a detective, but acknowledged it was possible he told a defense investigator that the robber looked younger than the number five person in the montage (McCoy). RP (5/2) 21, 34-35. When shown the montage shortly before he came to court, Le picked out McCoy due to facial structure. RP (5/2) 21-22. Le identified McCoy — the only black man in the courtroom — in court after seeing him in handcuffs walking into the courtroom earlier in the day. RP (5/2) 31-32, 35-36, 42. Le's identification suffers from the same problems of montage bias, cross-racial identification and seeing McCoy in handcuffs that afflicted identifications in the Sterling Bank and US Bank cases.

Key Bank teller Huynh, meanwhile, was only "50/50" on her montage identification of McCoy, which she made based on the darkness of his skin. RP (5/2) 54-55. Her in-court identification was also only "50/50," using the montage photo as her reference point. RP (5/2) 56-58. When asked by the prosecutor to put the montage photo aside, Huynh acknowledged "I am not sure if it's him." RP (5/2) 58.

There was an additional piece of evidence in the Key Bank case. Police purported to lift McCoy's print from the teller station where the robbery took place and a cleaning business employee testified that he wiped down the counters the day before the robbery took place. RP (5/2)

112-13, 126, 136-37, 141-42; RP (5/7) 19, 23, 25. McCoy acknowledged the print from inside the bank was his but maintained it was not actually lifted from Le's teller counter. RP (5/9) 39. He further testified that he went to the Key Bank in the morning on the same day as the afternoon robbery, probably around 10:30 or 11:00, to exchange coins he panhandled for paper currency, which accounted for his fingerprint being left in the bank. RP (5/8) 96-99, 110.

Surveillance videotape did not appear to show McCoy in the bank from the time the bank opened to the time Le opened his teller window at noon or before the time of the robbery at 3:22, but McCoy maintained at trial that he was in any frame from 10 to 10:30. RP (5/9) 13-28, 38, 41-42. Due to the setup of the system, in which multiple cameras take snapshots of different areas at intervals, the video was not a continuous playback, which could result in a person in the bank not actually being captured on the video. RP (5/9) 13, 33-34.

The fingerprint and video evidence, then, was not definitive in the Key Bank case. In determining the materiality of Brady evidence, it must be remembered that it is not a sufficiency of evidence test. Stenson, 174 Wn.2d at 487. McCoy need not even demonstrate that the evidence, if disclosed, probably would have resulted in acquittal. Kyles, 514 U.S. at 433-34. The relevant question "is not whether the defendant would more

likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Stenson, 174 Wn.2d at 487 (quoting Kyles, 514 U.S. at 434).

The State will no doubt argue the suppressed Brady evidence was not so significant as to undermine confidence in the outcome of the trial. But the damage caused by the suppressed impeachment evidence can be "best understood by taking the word of the prosecutor" in closing argument. Gonzalez, 667 F.3d at 986 (quoting Kyles, 514 U.S. at 444). The prosecutor, in attempting to convince the jury that guilt had been proven beyond a reasonable doubt, took pains to stress Olsen's testimony and its credibility while discounting the significance of Olsen's prior convictions. RP (5/9) 54-55. See Horton v. Mayle, 408 F.3d 570, 580 (9th Cir. 2005) ("The prosecutor's emphasis on the importance of [the witness's] testimony bolsters the conclusion that disclosure of the [impeachment evidence] may have significantly damaged the prosecution's case."); Gonzalez, 667 F.3d at 986 ("The prosecutor spent time during his summations discussing Acker's testimony and countering the attempted impeachment of him, and a court could view this as further support for the proposition that Acker was central to the prosecution's cases.").

Indeed, the prosecution thought Olsen was so important to its case that it was willing to sacrifice Olsen's status as an informant in order to make him a witness in McCoy's case. That was no slight decision, given that the Task Force clearly believed Olsen provided useful information in other cases but now could no longer use Olsen as an informant as a result of his testifying against McCoy. 9RP 52, 68, 74; 10RP 25-27, 57, 167, 174, 179; CP 4, 5 (FF 15, 17). If Olsen's testimony were not material, and if the prosecution was confident that it could obtain convictions without Olsen's testimony, there is no reason why it would take the dramatic step of taking a long-time informant out of service to assist the prosecution effort.

It is understandable why the prosecution believed Olsen was an important witness. Olsen's testimony amounted to a confession by McCoy to committing the robberies. See RP (5/9) 55 ("The defendant confessed to these three robberies to Mr. Olsen."); Gonzalez, 667 F.3d at 985 (confidential informant testimony amounted to defendant's confession). It is recognized that "[a] confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." Id. at 986 (quoting Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (internal quotation marks omitted)). The prosecution used Olsen to present

the jury with McCoy's confession to the crimes. But the jury never heard the impeachment evidence that would have cast severe doubt on the truthfulness of Olsen's testimony.

A Brady violation requiring reversal is established "by showing that the favorable evidence could reasonably be taken to put the whole case in a different light." Stenson, 174 Wn.2d at 487. The different light here is that Olsen's testimony that McCoy confessed to him would have been severely compromised had the full range of impeachment evidence been made available to McCoy. The question of prejudice turns on the appellate court's de novo review of whether McCoy has shown the government's evidentiary suppression undermined confidence in the outcome of his trial. Id. at 491. Reversal of the convictions is required because McCoy has made that showing.

- f. If This Court Declines To Reverse The Convictions On This Record, Then Remand For Additional Discovery And Fact Finding Is Appropriate.

In the event this Court declines to find a Brady violation based on the present record, McCoy requests remand for a second reference hearing to develop a complete record on the Brady issue. Three main reasons form the basis for this request.

First, the superior court did not address the issue of whether the State knew that Olsen gave a false statement in his capacity as an informant prior to testifying at McCoy's trial.

Second, the superior court exceeded the scope of its authority under RAP 16.11(b) when, without notice to the parties, it asked and answered a question that it was not directed to answer by the appellate court.

Third, the superior court erred in failing to issue McCoy's subpoena duces tecum under RAP 16.12.

- i. Another Reference Hearing Is Appropriate To Address The Issue Of Whether The State Knew About Olsen's Lie In the Other Case.

The fact that Olsen gave a false statement in connection with another case was not revealed until shortly before the reference hearing took place. 2RP 2-3, 5. The superior court deliberately refrained from making a finding on whether the King County Prosecutor's Office or the SPD knew about the polygraph result showing Olsen lied because the Court of Appeals did not remand for an answer to that question. 11RP 42, 44. The superior court was correct in refraining from addressing the issue because it was outside the scope of the remand order. App. B.

As set forth in section 1. c., supra, the State had constructive knowledge of that evidence for Brady purposes. But in the event the

record is deemed insufficient, then the matter should be remanded for an additional reference hearing to address the issue. See Stenson, 174 Wn.2d at 487 (Supreme Court ordered second reference hearing that directly addressed Brady issues after reviewing superior court findings from first reference hearing); RAP 12.2 ("The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.").

The State's position was that the prosecutor's office and the SPD did not know of this impeachment evidence. 11RP 41-42. McCoy shouldn't have to take the prosecution's word for it. McCoy is entitled to address the issue at a second reference hearing to ensure the complete scope of his Brady claim is determined on the merits.

- ii. The Superior Court Acted Outside The Scope Of Its Authority In Making Factual Determinations Of Whether The State Knew About the Payment To Olsen.

Although the superior court was rightfully wary of violating the scope of the remand order in connection with whether the State knew of Olsen's false statement, it unfortunately lacked similar restraint when it came to asking and answering its own question on whether the State knew of the payment to Olsen.

Under RAP 16.11(b), an appellate court may direct a superior court to hold a reference hearing in order to resolve factual questions. A trial court may not, on remand, exceed the scope of an appellate court order that specifically limits what a trial court may do on remand. See Deep Water Brewing, LLC v. Fairway Resources, Ltd., 170 Wn. App. 1, 9 n.5, 282 P.3d 146 (2012) (appellate court "both authorizes the lower court to act on remand and determines the scope of that authority."); Godefroy v. Reilly, 140 Wn. 650, 657, 250 P. 59 (1926) ("When the [appellate] court intends that a specific issue shall alone be tried, it will give instructions to that effect in unmistakable language."); Stenson, 174 Wn.2d at 484 (Supreme Court ordered second reference hearing on whether due process right under Brady was violated after superior court judge declined to answer that question at first reference hearing on basis that Brady determinations were outside the scope of Supreme Court's remand order).

The Court of Appeals remanded for entry of findings as to whether and during what time frame Olsen worked as a paid informant for any government agency, whether Olsen received a benefit for supplying information to authorities about McCoy or for testifying at McCoy's trial, and whether Olsen lied at McCoy's trial. App. B. In its findings of fact, the superior court announced that it would "answer another question not

asked: did the State fail to disclose the fact that Olson[sic] received a benefit for McCoy's case." CP 1-2.

In doing so, the superior court exceeded the scope of this Court's remand order. McCoy therefore challenges all of the findings of fact dealing with whether the State failed to disclose Olsen's receipt of a benefit. CP 6-7 (FF 25, 26, 27, 28, 29, 30). The court lacked authority to enter those facts.

It is perhaps understandable that the superior court took it upon itself to ask and answer the question of whether the State knew of the benefit to Olsen prior to McCoy's trial. Who knew what regarding the payment to Olsen was addressed to varying degrees with varying witnesses at the reference hearing. But the court did not announce it would sua sponte answer the question of whether the State failed to disclose the fact that Olsen received a benefit for McCoy's case until after the actual reference hearing was finished. It made that announcement in its written findings and conclusions.

Acting outside the scope of the remand order is problematic because McCoy was not on notice that this particular factual issue would be decided by the superior court. Had he known, he may have altered his litigation strategy in any number of ways to present the most complete record available on the question. For example, McCoy may have called

additional witnesses on the issue, including prosecutor Ferrell. He may have asked different questions of the witnesses who did testify on the issue. His discovery requests, including any subpoena duces tecum, may have been pinpointed to address this precise issue. He may also have cast a wider net with his discovery request to include other entities besides the Task Force. For example, McCoy may have requested discovery from the King County Prosecutor's Office, the Seattle Police Department and the King County Sherriff's Office on the issue of whether it knew of the payment to Olsen.

Remand for a second reference hearing is appropriate to allow the superior court to address the issue of whether the State knew of the payment to Olsen. At that point, McCoy will be in a fair position to properly prepare to meet his burden on this issue.

iii. The Court Erred In Denying McCoy's Request For A Subpoena Duces Tecum.

McCoy requested a subpoena duces tecum be served to assist with production of evidence at the reference hearing. A copy of the subpoena, which was never served, is attached as appendix C.⁵ The superior court erred in failing to issue a subpoena, which resulted in the truncation of the record available for review.

⁵ McCoy later gave the court a signed copy. 7RP 13.

The subpoena, directed to Chief Division Counsel Jennings and the Task Force, requests, among other items associated with Olsen, "any and all written agreements, evidence of oral discussions, communications, electronic mail, voicemails, etc. between all State and Federal officers in connection with, relating to, or involving Mr. Kevin Scott Olsen including, but not limited to monetary agreements with Mr. Olsen." App. C. The subpoena further requests "any and all recordings of discussions with Mr. Kevin Scott Olsen regarding his employment, sponsorship, endorsement of, solicitation of, or reports to the any [sic] law enforcement entity, be it federal or state, including but not limited to the Federal Bureau of Investigation, the Seattle Police Department, the King County Sherriff's Department and the Puget Sound Violent Crimes Task Force." App. C.

The court initially told McCoy that his subpoena would be set for a hearing, stating "I need to send this out to the Puget Sound Violent Crimes Task Force." 1RP 32-33, 35. At the next hearing on October 21, 2011, the State acknowledged the subpoena was for all the records of the Task Force but attempted to "bottom line" the matter to "help" the court and McCoy, stating "the central issue to this entire reference hearing is this payment that was made" and that proof of payment "goes down to the very nub of the matter." 2RP 23. McCoy objected to the State's attempt to control the disclosure of documents in this manner. 2RP 24-25. The court

agreed with McCoy that a return date on the subpoena was an issue. 2RP 29.

At the October 26, 2011 hearing, the court fleshed out that the federal government routinely complies with subpoena requests once the proper procedure for disclosure under 28 C.F.R. 16.21 et seq. is followed. 3RP 18-20. The procedure required by federal regulations, i.e. a letter to the responsible person in the U.S. Attorney's Office setting forth the request, was already underway. 3RP 9-16. Prosecutor Ferrell had sent a letter to counsel Jennings of the U.S. Attorney's Office and spoke to him on the phone, telling Jennings that the crux of the issue was documentary support for the justification of the payment. 3RP 15-16. Ferrell's letter apparently duplicated McCoy's subpoena duces tecum. 3RP 13. Ferrell represented that Jennings would provide "the file." 3RP 15.

The court said "It sounds to me like the subpoena's about to be complied with in part. I can't answer that is full compliance because I haven't seen what they are going to send." 3RP 20. The court declined to set a return date for the subpoena because "it sounds like the information is being returned." 3RP 21. It was clarified that the subpoena had not actually been sent out yet. 3RP 23.

McCoy did not want the court to confuse his subpoena request with the prosecutor's request. 3RP 14. The court did not view the

prosecutor's request as a substitute for the subpoena, indicating it would wait to see if the information supplied in response to the letter was complete before the subpoena was addressed. 3RP 22. The court explained, "let's see what they are giving us apparently voluntarily, and if there is a need to send a Subpoena Duces Tecum I will sent it. I mean, that's not really an issue." 3RP 25. The court suggested it was pointless to subpoena documents "which we may be getting anyway," but that "[i]f we don't get the documents that you need or I decide that you need, we will send a subpoena right away." 3RP 26-27.

At the November 4, 2011 hearing, McCoy raised the issue of the subpoena again, setting forth what he wanted. 4RP 5-7. In response, the court summarized its understanding that McCoy was still seeking signed contracts with the FBI and that this seemed to be "the last issue on these documents." 4RP 8-10.

At the November 14, 2011 hearing, upon learning that Agent Distajo gave an ambiguous answer in his pre-hearing interview regarding whether a written agreement between Olsen and the government existed, the court decided to send an order to the U.S. Attorney's office on the specific issue of whether a written agreement with Olsen existed in regard to McCoy's case. 5RP 17-20. The court said that the order "will be in response to your subpoena duces tecum on the issue." 5RP 20-21.

At the November 18 hearing, the court announced it had not yet sent the order but that it would include a request for a statement that there was no agreement specific to McCoy's case or confirmation that there was no other agreement. 6RP 2-5. The court said it would send a subpoena covering this issue if needed. 6RP 4. McCoy said "everything is on point for me to be able to conduct the hearing on the . . . 13th." 6RP 7.

At the December 2, 2011 hearing, McCoy argued the letter sent by the court to the U.S. Attorney's office did not cover everything he requested in the subpoena duces tecum, pointing out that a hard copy of a file on Olsen existed. 7RP 12-15. The court responded that McCoy misread the scope of his letter, saying he was trying to find out whether a specific document existed showing an exchange for testimony. 7RP 15. The court continued, "your subpoena is so broad that they don't -- they are not answering it specifically." 7RP 15. McCoy asked "So you have sent the subpoena to them?" 7RP 15. The court acknowledged it hadn't because "I'm trying to get at what your subpoena does not. You are not asking for any specific documents. I'm trying to get to the heart of the matter by sending this letter first, and then if not, to send a subpoena." 7RP 15.

At the December 8 hearing, McCoy again raised the subpoena issue. 8RP 24-25. By that time, a signed receipt for the \$1000 payment

had been turned over, which the prosecutor described as part of "some new developments." 8RP 25-26. When McCoy attempted to raise his concern about the "very partial discovery," he was told he could raise it at the next hearing. 8RP 27-28.

At the subsequent hearing on December 13, McCoy objected to the response given by the U.S. Attorney's Office in its letter dated December 5, 2011. 8RP 31. In that letter, the U.S. Attorney's Office stated the FBI was authorized "to produce materials or documentary evidence regarding any payments or benefits made to and/or received by Kevin Olsen between September 1, 2006 and May 7, 2007. The FBI subsequently provided that information to you with all responsive materials via letter dated November 28, 2011." Ex. 3. In that letter, the U.S. Attorney's Office further stated the FBI had confirmed "there are no written, signed agreements between the FBI and Kevin Olsen material to the information or testimony Mr. Olsen provided in connection with the investigation and/or prosecution of Raymond D. McCoy." Ex. 3.

The court said the subpoena duces tecum took the direction it did "because I asked you specifically what you were looking for and made . . . a judgment based on that as to what would get you the documents the fastest." 8RP 42. The court did not send the subpoena because a letter was quicker. 8RP 42. The court asked what else McCoy was looking for

because it thought every document that McCoy wanted had been provided.
8RP 42.

McCoy identified email messages, meeting notes, documentation on converting Olsen from a confidential informant, and the case file on Olsen. 8RP 43-47. The court agreed "if there's a file that exists and it contains information related to you and Mr. Olsen," McCoy had a right to view it. 8RP 47. The court believed the FBI had given everything they had related to McCoy, asking McCoy if he had missed something. 8RP 49. McCoy maintained his subpoena duces tecum request was broad and covered everything he had a right to see. 8RP 49-51. The court said the subpoena was too broad in terms of its time span, but also agreed McCoy was "entitled to anything related to you" and there was no question McCoy was "entitled to everything related to you and Mr. Olsen." 8RP 51-53. The court mused the FBI had sent everything they were going to send already, but took McCoy's request under advisement. 8RP 52-53.

The evidentiary portion of the reference hearing began on January 25, 2012. No further action was taken on McCoy's subpoena request, thereby demonstrating its implicit denial.

During Detective Nelson's morning testimony, the court asked him "if there are documents attached to Mr. McCoy's -- Mr. Olsen's testimony against Mr. McCoy?" 9RP 96. Nelson answered, "I'm going to say I don't

know. I know I reviewed the file. I've seen documents in there." 9RP 96. Nelson later answered that, if he had the file in front of him, his memory would be refreshed on the issue of whether there were any signatures of Olsen pertaining to McCoy's case. 9RP 98.

At the start of the afternoon session on January 25, the prosecutor announced Agent Distajo brought two documents to the prosecutor's office that morning: a request for the Olsen payment (exhibit 13) and Distajo's handwritten chronological log of his involvement with Olsen "reconstructed from his notes" after reviewing his "files" (exhibit 14). 10RP 2-3, 45. The prosecutor turned these documents over as soon as he received them. 10RP 2-3. The court put on the record that "it is fair to say that none of us in the courtroom knew that these documents existed. We knew that the substance of them, but we didn't know that the actual documents were in existence." 10RP 8.

Before Olsen took the stand, the court stated "I don't think that there is anything else remaining to be turned over." 10RP 83. McCoy objected to that assessment, referencing a second January 6, 2012 subpoena duces tecum addressing "the files and documents" pertaining to Olsen. 10RP 87-88. The court said it would not respond further. 10RP 88. The court also noted "this comes in the context of the following, the State is not disputing most of the issues in this case. The only issue, really,

for argument is my review of a transcript and whether or not that proves the fact that issue on the third or fourth question as you have posed it, Mr. McCoy." 10RP 88.

RAP 16.12, which governs reference hearings, provides "The parties, on motion and for good cause shown, will be granted reasonable pretrial discovery." Where "good cause" is not defined in the rule, its existence generally depends on the circumstances and context at hand. State v. Rafay, 167 Wn.2d 644, 653, 222 P.3d 86 (2009).

The circumstances and context here is that the court agreed McCoy was entitled to everything related to McCoy and Olsen. 8RP 51-53. A record or file pertaining to Olsen and his connection with McCoy's case exists. 9RP 49-50, 56-58, 66, 96, 98;10RP 45; Ex. 6 at 1, 3; Ex. 17. This file was not turned over to McCoy as part of the discovery process. His original subpoena duces tecum covers it, as did his second subpoena request. App. C; 10RP 87-88. Review of the various responses provided by the U.S. Attorney's Office shows it provided information on specific issues rather than everything relevant to McCoy's case in relation to Olsen's informant capacity. Ex. 3, 4, 8, 10, 15, 18.

• McCoy was entitled to have the file on Olsen, subject to any redaction for irrelevant material following in camera review. The bottom line is that at least one file on Olsen existed and the court agreed that

McCoy was entitled to every document that related to McCoy's case. That file was never produced in the absence of a subpoena duces tecum being issued.

There is more material out there. Agent Distajo summarized his contacts with Olsen in a handwritten document based on notes in his file. This handwritten document was admitted as an illustrative exhibit. Ex. 14; 10RP 78-80. This file was not turned over to McCoy as part of the discover process. McCoy's subpoena duces tecum covers it. App. C.

Even after the court appeared to reach a conclusion that everything relevant to McCoy's case had been turned over, Agent Distajo showed up in the courtroom with the payment request document that no one in court knew existed until Distajo brought it to court. 10 2-3, 7-8. The whimsical arrival of that document belies the notion that no stone was left unturned in responding to requests by McCoy and the court.

Of particular importance, the subpoena duces tecum covers the issue of what knowledge was shared between the State and federal actors in requesting "any and all written agreements, evidence of oral discussions, communications, electronic mail, voicemails, etc. *between all State and Federal officers* in connection with, relating to, or involving Mr. Kevin Scott Olsen including, but not limited to monetary agreements with Mr. Olsen." App. C (emphasis added). As set forth in section 1. g. ii, supra,

the issue of who knew what ultimately played a prominent role in the superior court's findings. The subpoena duces tecum was a vehicle to provide a more complete record on that point.

Under these circumstances, there was good cause to issue the subpoena duces tecum. The court violated McCoy's right to discovery under RAP 16.12 in failing to do so.

- h. This Court Should Independently Review The Unredacted Version Of Exhibit 5 To Determine Whether All Information Was Properly Released.

The superior court reviewed an unredacted FBI report in camera and ruled the redacted portion of Exhibit 5 was irrelevant and would not be disclosed to McCoy. The unredacted version of Exhibit 5 was sealed and made part of the court file for later appellate review. CP 10-16; Supp CP __ (sub no. 274, Attachment/FBI report (1/6/12)).

McCoy has a constitutional right to discover favorable evidence, including impeachment evidence. Brady, 373 U.S. at 87; Kyles, 514 U.S. at 432-33; Bagley, 473 U.S. at 676. He also has the right to discovery under RAP 16.12. McCoy is entitled to have the appellate court conduct an independent in camera review of evidence subject to a claim of privilege or confidentiality, to determine whether the records contain exculpatory or impeaching information, or could lead to such, and which portions of the records are protected. Pennsylvania v. Ritchie, 480 U.S. 39,

59-61, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); State v. Casal, 103 Wn.2d 812, 822-23, 699 P.2d 1234 (1985); State v. Mines, 35 Wn. App. 932, 938-39, 671 P.2d 273 (1983).

This Court should make an independent review of the unredacted version of Exhibit 5 to determine whether there was material that should have been, but was not, disclosed to McCoy. Casal, 103 Wn.2d at 822-23. "The appellate courts will not act as a rubber stamp for the trial court's in camera hearing process." State v. Wolken, 103 Wn.2d 823, 829, 700 P.2d 319 (1985). Independent review by this Court will show whether the superior court erred in withholding any undisclosed information.

D. CONCLUSION

For the reasons set forth, McCoy requests that this Court grant his personal restraint petition and reverse the three convictions. In the event this Court declines to do so, McCoy alternatively requests remand for further discovery and fact-finding proceedings.

DATED this 10th day of June 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

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FILED
KING COUNTY WASHINGTON

FEB - 8 2012

SUPERIOR COURT CLERK
BY DAVID J. ROBERTS
DEPUTY

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

STATE OF WASHINGTON

NO. 06-1-03538-7 SEA

COA NO. 61853-9-I

V.

FINDINGS OF FACT ENTERED FOR
COURT OF APPEALS ORDER
DATED 29 JULY 2011

RAYMOND MCCOY

The following Findings of Fact follow a reference hearing ordered by Division I of the Court of Appeals (Order dated 29 July 2011). The parties agreed that Mr. McCoy had the burden of proof by a preponderance of the evidence.

The Court of Appeals remanded on certain questions. The questions are: (1) Whether and during what time frame Olsen worked as a paid informant for any governmental agency; (2) Whether Olsen received a benefit for supplying information to authorities about McCoy or for testifying at McCoy's trial; and (3) whether Olson lied at McCoy's trial. This Court also

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HON. JAMES E. ROGERS
KING COUNTY SUPERIOR COURT
DEPT. 45
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104

1 answers another question not asked: did the State fail to disclose the fact that Olson received a
2 benefit for McCoy's case.

- 3 1. The Court found all witnesses credible at the hearing. Specific comments are made
4 herein as to specific issues for each witness.
- 5 2. Throughout the hearing, witnesses did not always carefully differentiate from what
6 letters from the US Attorneys' Office stated as fact and what they could remember.
- 7 3. Raymond McCoy was convicted by a jury on May 10, 2007 of the robbery of the
8 Sterling Savings Bank under this cause number. Mr. Kevin Olson testified in the trial
9 on May 7, 2007.
- 10 4. The Puget Sound Violent Crimes Task Force is an interagency group that is comprised
11 of federal and state agencies. At all relevant times, their main task was to investigate
12 bank robberies.
- 13 5. Seattle Police Detective Dag Aakervik was the lead detective on the Sterling Bank
14 robbery case. He was a member of the Task Force. Mr. James Ferrell was the Senior
15 Deputy Prosecutor assigned to the case.
- 16 6. Federal Bureau of Investigation Special Agent Allen Distajo worked with King County
17 Det. Jon Nelson separately from Det. Aakervik on the same Task Force. Distajo and
18 Nelson did not work on the Sterling Bank robbery or with Det. Aakervik on this
19 investigation except as noted herein.
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23 Olsen worked as an informant for the FBI /PSVCTF
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7. Kevin Olson was a confidential informant for the FBI from December 5, 2005 to roughly March 13, 2007. His contacts were Agent Distajo and Det. Nelson.
 8. Olson was read and signed a document called "admonishments" twice, once when he started his relationship in 2005 and again on March 13, 2007. This document could be construed as a contract. The first document was not admitted into evidence. The second admonishment is Exhibit 4. Mr. Olson signed both but did not receive a copy of either document. Both documents make clear that Olson is not promised any benefit for providing information. The officers made oral statements to Olson consistent with these admonishments.
 9. Det. Nelson testified that he and Distajo developed a rapport with Olson over many meetings on many cases.
 10. When he met with these law enforcement personnel, Olson sometimes received a cheeseburger and/or chewing tobacco.
 11. Mr. Olson testified in this hearing, the McCoy trial, and elsewhere, that he did hope to get a benefit of a reduced sentence, dismissed charges or some other consideration for the time he faced serving. However, he never did receive any such benefit for any information or case.
 12. These law enforcement personnel used Olson to gain information but not as a testifying witness.

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1 13. In a meeting on September 1, 2006, Mr. Olson disclosed information about Mr.
2 McCoy's involvement in the Sterling Savings Bank robbery to Agent Distajo and Det.
3 Nelson. This disclosure was not made as the result of questioning about the Sterling
4 case.

5 14. Agent Distajo and Det. Nelson then contacted Det. Aakervik, whom they knew was
6 working this case.

7
8 Olsen received a benefit from the FBI for supplying information to authorities about
9 McCoy

10 15. Once Mr. Olson gave information about the McCoy case, Det. Aakervik, who was the
11 Seattle Police Officer in charge of the Sterling Bank robbery, decided to consider using
12 him as a trial witness. This decision by Det. Aakervik led to Special Agent Distajo to
13 make a decision that Mr. Olson was no longer of use to Distajo and Nelson for
14 obtaining information as an informant in the jail.

15 16. Det. Nelson and Agent Distajo both testified that the two of them had discussed a desire
16 to give Mr. Olson some money for the work he had done for them since 2005.
17 However, they never discussed this fact with Olson before actually giving him the
18 money. There was no promise of money for information. Olson never bargained for
19 money and gave no expectation for money-he did hope for a reduced sentence.
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KING COUNTY SUPERIOR COURT
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17. Olsen was given the \$ 1,000 at the end of his relationship with the FBI, which relationship ended because Mr. Olsen became a witness on the Sterling Savings Bank case. In other words, the agents gave Mr. Olson money for his earlier assistance.
18. Olson was shown (not given) a \$1,000 check on November 21, 2006. He was told "Merry Christmas" or words to that effect. At that time, Olson was told to sign and did sign Exhibit 7, receipt. No one, including Distajo and Nelson, verbally told him why he was receiving the money. However, Exhibit 7 itself states, "... represented \$1,000 for services and \$ 0 for expenses for the period 12/05/05 to 08/28/06." Thus the dates preceded Olson's disclosure of the Sterling Savings Bank information. Olson did not receive a copy of the receipt. The money was later deposited in his jail account.
19. Exhibit 13, an internal FBI document request for funds, evidences that Agent Distajo requested \$1,000 on August 29, 2006, in connection with information given by Olsen for the Sterling Savings Bank robbery. The date on the document is wrong, as Olson did not disclose the information until three days after this date. Distajo had no real independent memory of the document.
20. Agent Distajo created Exhibit 13. Distajo testified that it was routine to use the last case information received would be used as the reference case for money paid. Distajo said that Olson was being given money for all the work he had done, but could not remember if the money was given for the Sterling Savings Bank robbery. He admitted that Exhibit 4 was evidence that the money was for the robbery.

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21. Distajo was the only witness from the hearing to have ever seen Exhibit 13 before this hearing. Nelson, Aakervik and Olsen never saw it. Aakervik testified that he would not have had access to the document. Det. Nelson did not realize that the Sterling Savings Bank case was being used to request the payment. Nelson had never seen Exhibit 13 prior to the scheduling of this hearing on 2010; however, Nelson did have a recollection that Olson was paid some money for the Sterling Savings Bank information.

22. Exhibit 4 has a list of all benefits received by Olson that the FBI had on record, which included a few meals and the \$1,000.

Olson Did not Receive a Benefit Specifically for Testifying

23. Olson was not paid for his testimony in the Sterling Savings Bank. Aakervik did supply him with a meal during one meeting with Detectives.

24. Mr. Olson did not receive a benefit in any reduction in sentence or charges at the time that could be construed as a benefit for the information he gave for the McCoy case. He was sentenced to the highest standard range sentence he could have received.

Did The State Know of the Payment at the Time of the May 2007 Trial?

25. Agent Distajo and Det. Nelson did not tell anyone about the payment of \$1,000. They were not part of the Sterling Savings Bank investigation.

26. Olson apparently did not tell anyone in the Sterling Savings bank case about the \$1,000 payment.

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1 27. Det. Aakervik assumed that he would have been told if Olson had received any benefit
2 of any kind from anyone as a result of information or testimony in the Sterling Bank
3 case. He said that in the past, persons who had supplied information or tips on bank
4 robberies were sometimes paid and he was routinely knew or was involved. He did not
5 know of any bank robbery case where someone had been paid to testify.

6 28. While the federal and local law enforcement officers on the Task Force worked
7 together, they did not always share information and did not have access to areas in the
8 Federal building. Aakervik testified that he would not have had access to FBI financial
9 records. These State officers were not even allowed in every part of the FBI's building
10 in Seattle.
11

12 29. Det. Aakervik never promised Mr. Olson anything or gave him anything for
13 information or testimony. He did buy Olson a meal while meeting with him at Seattle
14 Police Robbery headquarters.
15

16 30. Since neither Det. Aakervik nor James Ferrell were ever informed that Mr. Olson was
17 paid \$1,000, they could not disclose this fact to Mr. McCoy's trial counsel in 2007, Mr.
18 McKay.

19 Did Mr. Olsen Lie at McCoy's Trial When Asked if He Received a Benefit?

20 31. Both attorneys at Mr. McCoy's trial asked Mr. Olsen numerous times about any benefit
21 he received at trial. These questions are in Exhibit 1, the certified transcript of his
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1 testimony. In each question and answer found at pages 59,65,67,79-80,91 and 101, Mr.
2 Olsen denied receiving a benefit.

3 32. Each of the questions either focused on a benefit as a reduction in sentence or were
4 answered within the context of a prior question focusing on a benefit in sentence, and
5 the answers were couched in the context of a reduction in sentence. Mr. Olson stated
6 that this was the primary benefit he originally hoped he would receive when working
7 for the FBI.

8 33. Mr. Olson is a careful witness who listens to questions and who answers only the
9 question posed.

10 34. Mr. Olson's trial testimony was truthful to the questions posed.

11 35. In subsequent defense interviews on unrelated cases, when asked about any benefit ever
12 received, Mr. McCoy has admitted that he received money for information, although at
13 times he appears to have believed that his entire relationship with the FBI had some
14 sort of confidentiality agreement that would allow him to not discuss any aspect of it.
15 See Exhibits 11 and 12.

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18 Summary

19 36. Mr. Olson was a government informant as noted during all times relevant.

20 37. The FBI paid Mr. Olson for his initial information for the Sterling Savings Bank.

21 Olson was not paid for his testimony.
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HON. JAMES E. ROGERS
KING COUNTY SUPERIOR COURT
DEPT. 45
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104

1 38. Mr. McCoy's defense attorney focused his cross examination on Mr. Olson about
2 possible leniency received as a benefit. When the attorney asked about broader
3 benefits, Mr. Olson answered, consistent with the earlier context, that he received no
4 leniency and no promise of leniency. This was truthful testimony.

5 39. Mr. McCoy's defense attorney did not ask about any payments ever made to Mr. Olson.
6 However, it was never disclosed to Mr. McCoy's defense attorney that Mr. Olson had
7 received the \$1,000 payment. Det. Aakervik did not know about the payment and
8 assumed that Mr. Olson had received nothing. Mr. Ferrell did not know about the
9 payment. Mr. Olson apparently did not disclose any payments for any for any cases.
10

11 This concludes the reference hearings in this Court. This Order shall be transmitted to the
12 Court of Appeals for further appellate proceedings.
13

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15 February 8, 2012

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18 Hon. James E. Rogers
19 King County Superior Court
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HON. JAMES E. ROGERS
KING COUNTY SUPERIOR COURT
DEPT. 45
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104

APPENDIX B

the FBI as a paid informant at the time of McCoy's trial. McCoy filed a motion for discretionary review in the Supreme Court, as well as a motion to supplement the record with the information he received from the State regarding Olsen. The Supreme Court granted McCoy's motions for discretionary review and to supplement the record and remanded the matter to this court to refer the issue of whether Olsen lied at trial to the superior court for a reference hearing under RAP 16.11(a).

Accordingly, this matter shall be remanded to the trial court for a hearing and entry of findings as to whether and during what time frame Olsen worked as a paid informant for any government agency, whether Olsen received a benefit for supplying information to authorities about McCoy or for testifying at McCoy's trial, and whether Olsen lied at McCoy's trial.

Now, therefore, it is hereby

ORDERED that this matter is remanded to King County Superior Court for a reference hearing on the material issues of fact set forth above and for the entry of findings of fact.

Done this 29th day of July, 2011.

Seach, A.C.J.
Acting Chief Judge

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

APPENDIX C

RECEIVED
COURT OF APPEALS
DIVISION ONE
JUN 10 2013

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

STATE OF WASHINGTON

Plaintiff,

v.

RAYMOND D. MCCOY,

Defendant.

CAUSE NO. 06-1-03538-7 SEA

SUBPOENA DUCES TECUM

To: Mr. Gregory W. Jennings
Supervisory Special Agent
Chief Division Counsel
U.S. Department of Justice
Puget Sound Violent Crimes Task Force
and Third Party Draft Office Seattle
Personnel and Records Department
1110 3rd AVENUE
SEATTLE, WA 98101

YOU ARE HEREBY COMMANDED to make available for inspection and copying
the following records, documents, and materials:

1. Any and all monetary contracts between Puget Sound Violent Crimes Task Force and Mr. Kevin Scott Olsen, for anytime after 1/1/2001 to the present.
2. Any and all original authenticated signed and dated documentation of monetary contracts and written agreements between Puget Sound Violent Crimes Task Force and Mr. Kevin Scott Olsen, for anytime after 1/1/2001 to the present.
3. Any and all written agreements, evidence of oral discussions, communications, electronic mail, voicemails, etc., between all State and Federal officers in

SUBPOENA DUCES TECUM
PAGE 1 OF 2

THE WOMACK LAW
GROUP, PLLC
2001 Sixth Avenue, Suite 1707
Seattle, Washington 98121
(206) 223-1875 Fax: (206) 223-1887

1 connection with, relating to, or involving Mr. Kevin Scott Olsen including, but not
2 limited to monetary agreements with Mr. Olsen.

- 3 4. Any and all recordings of discussions with Mr. Kevin Scott Olsen regarding his
4 employment, sponsorship, endorsement of, solicitation of, or reports to the any
5 law enforcement entity, be it federal or state, including but not limited to the
6 Federal Bureau of Investigation, the Seattle Police Department, the King County
7 Sherriff's Department and the Puget Sound Violent Crimes Task Force.

8 **YOU ARE FURTHER COMMANDED TO APPEAR:**

9 On: _____ day of _____ at 8:30 a.m. or such other date and time
10 as you may be informed at: Hon. Jim Rogers, King County Superior Court

11 Address: King County Courthouse
12 516 - 3rd Avenue
13 Seattle, WA 98104

14 to testify in the above matter and to remain in attendance until you have given your
15 testimony or you have been dismissed or excused by the court.

16 Compliance may be had by delivering the required information to: James M.
17 Womack, Attorney at Law at The Womack Law Group, PLLC, and 2001 Sixth Avenue,
18 Suite 1707, Seattle, Washington 98121 by _____ on the _____ day of _____
19 2011.

20 GIVEN UNDER MY HAND this ___ day of _____ 2011

21 _____
22 King County Superior Court Judge

23 Presented by:

24 _____
25 Raymond D. McCoy

26 Pro Se

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

In re the Personal Restraint Petition of)
Raymond McCoy)
STATE OF WASHINGTON)
Respondent,)
v.)
RAYMOND McCOY,)
Petitioner.)

COA NO. 61853-9-1

DECLARATION OF SERVICE

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

THAT ON THE 10TH DAY OF JUNE 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RAYMOND McCOY
DOC NO. 270764
CEDAR CREEK CORRECTIONS CENTER
P.O. BOX 37
LITTLEROCK, WA 98556

2013 JUN 10 PM 4:22
COURT OF APPEALS
STATE OF WASHINGTON

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF JUNE 2013.

X Patrick Mayovsky