

NO. 64839-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

NAVEEN HAQ

Appellant.

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

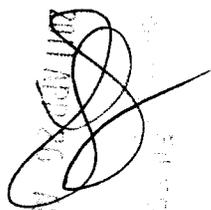
The Honorable Paris Kallas, Judge

REPLY BRIEF OF APPELLANT

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**A. ARGUMENT IN REPLY TO RESPONDENT'S
"STATEMENT OF THE CASE"**

1. Presentation of the state's case

Respondent presents Naveed Haq as an angry "soldier of Islam" and "Jihadi" who set out to kill Jews because of Israel's bombing of Lebanon in July 2006. *See* Brief of Respondent (BOR) 5-15. If this picture of Mr. Haq were accurate or the facts of the case as simple as the state represents, a first jury would not have been unable to decide on any counts except for an acquittal of attempted first degree murder of Carol Goldman, CP 739-742.

Aside from the evidence related to the central issue at trial -- whether Mr. Haq was legally sane at the time of the shootings -- there were many facts, including Mr. Haq's own statements about his motivation, which weigh against the state's portrayal of him in its "Statement of the Case":¹ *e.g.*, (1) his dismay over 9/11 and saying at that time that it was "not Muslim" and "[t]hey are going to hell" (RP(11/9/09) 104); (2) his writings found on the computer, the Khutbah and "Sources of Muslim Anger," which were researched and academic in tone; and, although the "Sources of Muslim Anger" predicted future bloodshed in the Middle East if political changes were not made, did not advocate violence (RP(11/3/09) 48, 51, 55, 57-58, 134-135; RP(11/4/09) 6-18, 135-136); (3) that none of the women

¹ Respondent concedes that Mr. Haq had experienced thoughts of killing people during severe episodes of his mental illness well before the Jewish Federation shootings. BOR 16.

who were at the Federation Center heard Mr. Haq say anything derogatory about Jews (RP(10/22/09) 23); (4) that one of the women reported him saying that it was “not about you people,” but about not wanting the United States to give money to Israel (RP(10/21/09) 111; and (5) that another described him, consistently with his being in a manic or hypomanic state, as happy and excited rather than angry (RP 10/21/09) 137).

More specifically, when asked directly by the 911 operator why he was “so upset at these people?” he responded, “*I am not upset at the people. I’m upset at the – at your foreign policy.*” Exhibit 7, at 4 (emphasis added). And after initially, and uncharacteristically, declaring himself a “Jihadi” on the phone to his parents shortly after the shooting, Mr. Haq spoke to them with regret about the medications which he said ruined him: “I was a good guy until, uh, I started getting on Effexor and Depakote and Lamictal . . . And then all of a sudden I turned into this wild person.”² Pretrial 12 at 82.

State’s witnesses to the shooting and its aftermath described Mr. Haq inconsistently with the state’s characteristic of him as a “soldier of

² Mr. Haq had, in fact, won awards in high school for his volunteer work, essay for Black Awareness Month and from the United Nations Institute of Peace. RP(11/9/09) 49-50; RP(11/11/09) 57-58, 137. He remained on the drug Effexor and without lithium in the early weeks in jail; once his medication was changed he no longer made statements such as that he was a “Jihadi.” RP(11/10/09) 20-38; RP(11/11/09) 172-173.

Muslim.”³ Ms. Bush described Mr. Haq initially as shooting with one hand firing rapidly “as opposed to a purposeful aim.” RP(10/22/09) 48, 56. Molly Bennett recalled Mr. Haq talking, but not sounding convinced or like he cared a lot about what he was saying. RP(10/22/09) 100. One of the arresting officers reported Mr. Haq as being “in a bit of a stupor,” and they yelled at him as a “verbal slap” to wake him. RP(10/26/09) 77. Another officer described his passivity as “surprising.” RP(10/22/09) 149-150.

These central facts, omitted by the state, do not support its picture of Naveed Haq .

2. Presentation of evidence of mental illness

The state’s recitation of the evidence of Mr. Haq’s history of mental illness consisted of little more than a report of a series of diagnoses over the more than ten years in which he was treated by mental health professionals, and defense expert Dr. James Missett’s final conclusion that Mr. Haq was unable to and did not know the nature and quality of his acts, and was unable to and did not have the ability to distinguish between right and wrong at the time of the shooting. BOR at 15-20.

³ Defense expert Dr. Missett later described, in some detail, Mr. Haq’s conversation with the 911 operator and the video images of his running back and forth in the Center from one place to another to be concrete proof that he was in a manic episode. RP(11/23/09) 79-124. *See*, AOB at 31-32.

Its report of the state's rebuttal case consisted of: (1) the reports of two treatment providers who saw Mr. Haq near the time of the shooting and who took at face value Mr. Haq's reports that he was doing well; and (2) the conclusions of the state's expert that Mr. Haq was sane and had the ability to form intent because of his purchase of guns, his statements that he felt enraged and suicidal, and his writings. BOR 20-24.

The state omitted all of the facts relevant to the critical issue of whether Mr. Haq had been improperly taken off his lithium medication and been given Effexor instead; the state sets out only the conclusion of state's expert Dr. Victor Reus that Mr. Haq's medication was appropriate. BOR 24. Omitted, for example, was defense expert Dr. Robert Julien's testimony about the drastic changes that occurred when Mr. Haq's medication was changed after 10 years of substantial remission on lithium: crying spells, an angry outburst in a pharmacy, a serious traffic accident, being asked to leave the local college campus by a security guard, being fired from several jobs, compulsive driving at night, getting into a fistfight at a dance club and other incidents involving criminal potential activity – as well as Dr. Julien's opinion that if lithium had not been discontinued, and Effexor not prescribed, the shootings would not have occurred. RP(11/16/09) 120, 123, 156. Other testimony documented sudden explosions of anger with friends (RP(11/9/09) 135-137), fights with strangers (RP(11/9/09) 138); incidents of road rage

(RP(11/10/09)166-172); driving long distances across the country (RP(11/11/09) 26-32); improvident business ventures (RP 11/9/09) 62; RP(11/11/09) 92-94); and an arrest for lewd conduct (RP(11/9/09) 128-133) during this period.

Other relevant facts are set out in the Appellant's Opening Brief at 20-42, and where relevant during the discussions of issues below.

B. ARGUMENT IN REPLY

I. MISALLOCATION OF THE BURDEN OF PROOF OF INSANITY

In response to Appellant's argument that the Washington State Constitution, at the time it was adopted, required the government to prove sanity beyond a reasonable doubt (AOB 44–54), the Respondent claims: (1) the burden of proof requirement is unrelated to the constitutional right to a jury trial; (2) the jury trial right was satisfied here since a jury decided the issue of sanity; (3) the issue has been addressed under a due process analysis; and (4) the burden of proof applied in this case was the same as the burden applied at the time the state constitution was ratified. BOR 24 – 36. Each of these counter-arguments fails.

First, the Respondent's argument that the burden of proof requirement is unrelated to the constitutional right to a jury trial (BOR 24), rests on the faulty premise that redefining the burden of proof is a mere

procedural change and thus not tethered to the constitutional right to a jury trial. But, if the burden of proving insanity could be reallocated to the defense without offending the right to a jury trial under Article I, § 21, the burden of proving any and all elements of a criminal charge could be reallocated to the defense — a claim that would clearly eviscerate the right to a jury trial. The Washington State Supreme Court has rejected such a whittling away of the right to a jury trial:

Now, this right of trial by jury which our Constitution declares shall remain inviolate must mean something more than the preservation of the mere form of trial by jury, else the Legislature could by a process of limitation in defining crime or criminal procedure entirely destroy the substance of the right by limiting the questions of fact to be submitted to the jury.

State v. Strasburg, 60 Wash. 106, 116-117, 110 P. 1020, 1023 (1910)

(internal citations omitted).

Second, the Respondent suggests that since a jury decided the sanity issue, then the right to a jury trial guarantee under Washington State's Constitution was satisfied. BOR 25. The issue is not whether sanity was decided by a jury, but whether, at the time the state constitution was ratified, the prosecution was required to prove sanity beyond a reasonable doubt. And that answer is in the affirmative. *McAllister v. Washington Territory*, 1 Wash. Terr. 360 (1872).

Third, Respondent's assertion that the issue of whether the state

holds the burden to prove sanity beyond a reasonable doubt has been resolved under a due process analysis is irrelevant. It concedes – as it must – that “appellate courts have not previously addressed the argument that this allocation of the burden of proof violates the jury trial guarantee of the Washington Constitution [the argument raised on appeal].” BOR 25-26. Critical to the issue on appeal is just that: at the time of the ratification of the state constitution, including Article I, Section 21, the government bore the burden of providing sanity beyond a reasonable doubt whenever the facts of sanity could properly be considered part of the *res gestae*. *McAllister*, 1 Wash. Terr. at 367. And as demonstrated by the Respondent’s lack of citation, there is no authority to the contrary.

When the Respondent finally addresses *McAllister*, it claims the insanity defense in this case was not related to the *res gestae* of the crimes, therefore alleviating it from the burden of proof. BOR 35. Specifically, the Respondent suggests there was no outward evidence of insanity during the shooting incident. *Id.* This fails both legally and factually.

Legally, the Respondent’s limited definition of “*res gestae*” is not supported by case law. The *McAllister* court explained that situations that permitted the burden to be placed on the defendant, when proof of insanity “is separate and distinct” from the charged offense, are where “its proof does not consist of facts attending the killing.” *McAllister*, 1 Wash. Terr.

at 366. And if this situation were to occur at all, it would do so rarely. *State v. Clark*, 34 Wash. 485, 496, 76 P.98 (1904).

Factually, the Respondent's suggestion fails because the facts surrounding the insanity claim were an integral part of the facts included in the *res gestae*, demonstrated by the Respondent's own brief. Respondent cites its mental health expert – who testified against the claim of insanity – as finding significant to the issue of insanity the Appellant's explanation of selecting a target; the pre-incident purchase of weapons and ammunition; the planning and preparation; and the Appellant's behavior during the crime, *e.g.*, aware of the nature of his actions, his thoughts and feelings were "significant" during the shooting. BOR 22 – 24; 64 – 66; 68 – 69 ("Dr. Missett's opinion was based in large part on Haq's description of claimed delusions during the shootings.") *see also* AOR 34 – 42 (full factual description of the state's expert's testimony referencing facts relevant to the issue of insanity). There existed additional evidence linking the claim of insanity to the *res gestae* of the murder, including: being controlled by divine intervention during the incident ((RP 11/23/09) 52,58); hearing the words of "awesome" and "murder" during the crime ((RP 11/23/09) 149 – 150); and testimony regarding the bizarre and incoherent 911 video and audio tape ((RP 11/23/09) 79 – 124)); *see also* AOR 30 – 33 (defense expert's testifying regarding insanity with the *res*

gestae of the murder).⁴

At the time of the ratification of the state constitution the burden to prove sanity was placed on the prosecution, and the Respondent has not shown that the insanity facts in this case falls within the rare occurrence of being “separate and distinct” from the charged offense. As demonstrated above and from the trial record, the Respondent’s assertion fails.

II. THE INADMISSIBILITY OF THE JAIL CALLS.

The Respondent concedes that in addition to jail security, the King County Jail record pre-trial detainee out-going phone calls for the purpose of gathering evidence for past, present and potential future crimes. BOR 36. The Respondent also implicitly acknowledges that, in Mr. Haq’s case, the sole function of the recording was to gather evidence as the record clearly demonstrates that Mr. Haq did nothing to threaten the jail security or safety, nor did he engage in any alleged criminal activity while in the jail.

The issue is not whether it’s proper for the King County Jail to record pre-trial detainee phone calls, but rather the issue is whether it’s proper for the King County Jail to gather evidence via recorded phone calls and allow the prosecution unfettered access to that evidence. In

⁴ The special instruction given to the jurors requires a showing that the issue of insanity must exist at the time of the offense, at least strongly suggests a connection to the issue of insanity to the *res gestae* of the underlining crime. RCW 10.77.040.

short, the issue is not one of recording, but dissemination. This unlimited dissemination absent probable cause or reasonable suspicion violates a defendant's rights under the state and federal constitution. AOR 54 – 72.

1. The recording of jail calls for purpose of investigating pending cases and providing the prosecution unlimited access to those calls violates a defendant's right to counsel.

The Appellant argued that recording phone calls for the sole purpose of gathering evidence of a pending crime and providing that evidence to the prosecution violated Mr. Haq's right to counsel. AOR 54 – 60. The Respondent concedes that since Mr. Haq was charged with an offense it would be a Sixth Amendment violation for a state agent to confront the defendant without counsel present to elicit incriminating statements from the defendant about the charged offense. BOR 39. The Respondent's claims, however, that Mr. Haq failed to establish the existence of a state agent. BOR 40. Insofar as this argument suggests that an employee of the King County Jail is not a state agent for purpose of the Sixth Amendment this claim is erroneous. *See e.g., State v. Denney*, 152 Wn.App. 665, 671, 218 P.3d 633, 636 (2009)(the State concedes that Denney was in custody when the jail service officer asked about her drug use and that the service officers were state agents). Moreover, the Appellant specifically stated that the King County Jail and the King County Prosecutor's Office acted as state agents. AOB 59 ("The state

intentionally recorded these calls. . . The King County Prosecutor’s Office, for no other reason than an investigate fishing expedition, was permitted unfettered access to these calls by simply requesting them by email.”); and AOB 64 (“This separate and arbitrary access to the King County Jail Recordings not only illustrates the state-connection between the King County Jail and the King County Prosecutor’s Office, it also exposes the secrecy of this ‘investigative tool.’”).

The Respondent further argues that the recorded jail calls were not deliberately elicited in violation of the right to counsel. BOR 41. The government in *Maine*⁵ argued a similar position that the Sixth Amendment right to counsel could not be violated when the defendant initiates the captured conversations. The Supreme Court rejected this limited viewpoint of Sixth Amendment jurisprudence, noting that “the identity of the party who instigated the meeting in which the Government obtained incriminating statements was not decisive or even important to our decision in *Massiah* or *Henry*.” *Moulton*, 474 U.S. at 174. The Supreme Court concluded that the government has an affirmative obligation to use counsel as a medium and that the government fails that obligation, not only by setting up an opportunity to confront an accused in the absence of counsel, but also by knowingly exploiting such an opportunity. *Moulton*,

⁵ 474 U.S. 159, 170, 106 S.Ct 477, 484 (1985).

474 U.S. at 176. Here, the recording of phone calls was unavoidable and mandatory in order for a pre-trial detainee to have any outside contact with loved ones that are unable to visit in-person. There was no way that counsel could participate in calls recorded by a state agent. Although a recording warns the caller that calls will be recorded, there is nothing to inform the pre-trial inmate that he or she has a right to counsel, or how the recordings will be used, or to whom the recordings will be provided. RP(2/17/09) 38; CP 1160.

Finally, the Respondent claims that recording Mr. Haq's calls was justified for security concerns. BOR 42 – 43. Notwithstanding the record that everyone agreed that Mr. Haq was not a safety concern, Respondent's argument misses the point: it is not whether the jail can properly record out-going jail calls – it can – but it should not be able to record and disseminate the calls to the prosecution for the sole purpose of gathering evidence for the prosecution.

2. Unlimited and unilateral access to jail calls violated equal protection.

The Respondent requests this Court to affirm the trial court's finding that Mr. Haq, as a county jail inmate, was not similarly situated to prisoners at the Department of Corrections (DOC), and thus no equal protection violation. BOR 45. The trial court's finding was in error and

not supported by authority. CP 1157 – 1167 ¶ C(i)(d).

The Respondent cited *McGinnis v. Royster*, 410 U.S. 263, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973) to claim that jail and prison institutions may have different policies without running afoul of equal protection. BOR 46. The issue in *McGinnis*, however, was whether disparate treatment of the county jail and state prison in rewarding “good time” violated the equal protection. The United States Supreme Court concluded it did not because the different functions between county jails (solely to detain individuals) and state prisons (intended to have rehabilitation as a prime purpose) provided a basis for the difference. Here, neither the Respondent nor the trial court provided any analogous basis to warrant the difference in treatment between pre-trial detainees detained at the county jail and convicted felons incarcerated at DOC.

The Respondent’s additional claim that the recording and release of Mr. Haq’s phone calls was no different than those permitted under RCW 9.73.095 (DOC inmates) lacks merit. Specifically, the Respondent argues that RCW 9.73.095 allows the unfettered dissemination of DOC recorded calls for the prosecution of any crimes. BOR 47. However, RCW 9.73.095(3)(b), when read with the provision that the contents would be divulged only to the superintendent and his designee, contemplates a process in which the superintendent approves the release of

information based on a request to investigate a specific crime or prosecution. Additionally, given that the calls are from individuals at DOC, it is safe to presume they have already been convicted and therefore the investigation would not be for the crime of which they were convicted; but rather a new and separate allegation – a significant difference than the broad position taken by King County Jail that recording and disseminating the calls is a “*great resource as an investigative tool for past, ongoing, and future crimes.*” RP (2/17/09) 9 (emphasis added).

3. Article I, Section 7 of the Washington State Constitution prohibits the unfettered dissemination and collection of recorded jail calls for any purpose other than to maintain security and order of the facility.

The Respondent requests this Court to uphold the trial court’s reliance on *State v. Archie*, 148 Wn.2d 198, 199 P.3d 1005 (2009), as the sole reason for rejecting the Appellant’s Article I, Section 7 claim, arguing that the recording of calls are permissible, and as such, whatever privacy interest that existed is lost “once the State has properly seized” them.⁶ BOR 48 – 51. As noted, the recording of the jail calls falls within a legitimate state interest, namely to maintain institutional security and preserving internal order and discipline. *See e.g., Archie*, 148 Wn.App 198, quoting *Bell v. Wolfish*, 441 U.S. 520, 533, 99 S.Ct. 1861, 60 L.Ed.2d

⁶ This position appears contrary to the Respondent’s earlier claim that the King County Jail is not a state agent. *See* BOR 40.

447 (1979). The rationale supporting the *Archie* decision (security concerns), and hence the trial court's ruling, is not present here. Since there was no security basis, the only rationale here was to provide the prosecution with unfettered access to the recorded calls without probable cause or reasonable suspicion in hopes that incriminating evidence would be gathered. This rationale was quite different than jail security. The prosecution's access to the recorded calls, rationalized as for jail security, was pre-textual in nature.⁷ The prosecution sought the jail calls in hopes of finding that Mr. Haq incriminated himself, not to protect the security of the jail. This purpose goes beyond the understandable security basis expressed in *Archie* and tramples inappropriately on Article I, Section 7. The trial court's reliance on *State v. Archie* to deny the defense's motion was error.

4. The Washington State Privacy Act prohibits dissemination of recorded jail calls for a purpose other than the security and order of the facility.

The Appellant's argument is that the trial court's reliance on *State v. Modica*, 164 Wn.2d 83, 186 P.3d 1062 (2008) was misplaced because the

⁷ See e.g., *State v. Ladson*, 138 Wn.2d 343, 359, fn. 4, 979 P.2d 833, 843 (1999) ("Pretext is, by definition, a false reason used to disguise a real motive. Thus, what is needed is a test that tests real motives. Motives are, by definition, subjective." Patricia Leary & Stephanie Rae Williams, *Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures*, 69 Temp. L.Rev. 1007, 1038 (1996)).

Modica decision rested, in part, on the purpose behind the phone calls: “because Modica was in jail, *because of the need for jail security*, and because Modica's calls were not to his lawyer or otherwise privileged, we conclude he had no reasonable expectation of privacy.” *Modica*, 164 Wn.2d at 89 (emphasis added). The basis for recording and dissemination calls was not because of jail security, but solely for investigative purposes.

Even if this Court concludes that *Modica* is controlling as to the Washington Privacy Act, the dissemination of the recorded calls without the benefit of counsel and absent probable cause or reasonable suspicion still violates both the state and federal constitutions.

5. The trial court erred when it admitted statements provided to the prosecution by the King County Jail.

The Respondent argues under the theory of invited error that the Appellant cannot challenge the admission of prejudicial statements from the jail phone calls. BOR 57 -58. This argument fails to appreciate the fact that defense counsel sought to exclude all jail recordings, and only when the court denied the request, accepted the court's invitation to seek redaction of specific statements. CP 1894-1897; RP (10/19/09) 12. The recordings were therefore introduced over defense objection. RP (10/19/09) 13 – 17. It cannot be argued the error was invited when defense counsel, aware of the court's pre-trial ruling, sought to address the

statements in a manner most helpful to the defense.

Furthermore, the challenged statements are not harmless as the Respondent claims. Allowing statements which conveyed to the jury that Mr. Haq was a “jihadi” or that his actions were similar to the acts of terrorism in Britain and Spain was unnecessarily and unfairly prejudicial; it was not the state’s position that he was in any way linked to a terrorist movement, religious or otherwise and there was no evidence to support such a link. Additionally, Mr. Haq’s statement about people who had murdered more people than him and his lawyers advising him not to read hate mail, had virtually no probative value and considerable potential for misleading the jury. There was no evidence that Mr. Haq received any hate mail and the suggestion that he was acting on the advice of counsel was improper and misleading as was his statement that other people had killed more people than he. The court should have excluded these statements.

III COMPELLED MENTAL HEALTH EXAMINATION AND DISCLOSURE OF PRIVILEGED AND CONFIDENTIAL INFORMATION.

It is undisputed that Mr. Haq raised the defense of Not Guilty by Reason of Insanity (NGRI) at trial. For this reason and over defense objection, the court granted the state’s request to compel Mr. Haq to submit to an examination by its retained expert. CP 36-41, 57-59. This

violated RCW 10.77.060, which requires *the court* to appoint the mental health expert to examine a defendant raising the defense of NGRI.

The Respondent seeks to skirt the substantive issue by suggesting the examination was ordered pursuant to CrR 4.7, not RCW 10.77.060; and that the claim was not raised in the trial court and therefore should not be considered here. BOR 59. The Respondent's position is an unreasonably narrow interpretation of the record.

To suggest the examination was ordered solely under CrR 4.7 (b)(2)(viii) is to place too much emphasis on a discretionary court rule while ignoring the mandatory directive of RCW 10.77.060. *See e.g., State v. Pawlyk*, 115 Wn.2d 457, 800 P.2d 338 (1990) (the discovery rules are discretionary)⁸; and *State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241, 1244 (1982) (the procedures of RCW 10.77.060(1) are mandatory and not merely directory).⁹ Further, the court's order compelling the defendant to undergo a mental health examination specifically referenced provisions of RCW 10.77. CP 65-66.

The Respondent's claim that Appellant somehow waived the

⁸ CrR 4.7 (b)(2)(viii) : "the court on motion of the prosecuting attorney or the defendant, **may** require or allow the defendant to (viii) submit to a reasonable physical, medical, or psychiatric inspection or examination. (emphasis added).

⁹RCW 10.77.060(1)(a) Whenever a defendant has pleaded not guilty by reason of insanity . . . , the court on its own motion or on the motion of any party **shall** either appoint or request the secretary to designate at least two qualified experts or professional persons. (emphasis added).

procedural requirements of RCW 10.77.060 is also misplaced. Respondent cites to *State v. Heddrick*, 166 Wn.2d. 898, 215 P.3d 201 (2009) to advance its position. *Heddrick* was limited to its facts, namely the issue of competence to stand trial. Here, the prosecution moved the court to order Mr. Haq be examined by a mental health expert, thus triggering the provisions set forth in RCW 10.77.060. And, contrary to the Respondent's position, the defense objected to the court compelling a mental health examination by a state-retained expert:

The defense asserts, however, that compelling Mr. Haq to participate *in an examination by an expert for the State* and denying him the right to refuse to incriminate himself violates his constitutional right against self-incrimination under the Fifth Amendment to the U.S. Constitution and Article I, section 9 of the Washington State Constitution.

CP 36 – 41 (emphasis added). The Respondent's procedural arguments are not supported by the record.¹⁰

As such, Mr. Haq should be afforded the protections against self-incrimination under the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Washington State Constitution and should not be forced to forgo his attorney-client privilege (RCW 5.60.060(2)) or physician-patient privilege (RCW 5.60.060(4)).

¹⁰ The Respondent also suggests there is no argument presented in the Appellant Opening Brief and therefore no basis for this Court to consider the issue. BOR 60. However, a review of the Appellant Opening Brief demonstrates otherwise. See AOB 75–77, analyzing the rulings in *State v. Bond*, 98 Wn.2d. 1, 653 P.2d 1024 (1982) and *State v. Hutchinson II*, 135 Wn.2d 863, 959 P.2d 1061 (1998) to the facts presented in this case.

IV. INADMISSIBILITY OF INCRIMINATORY STATEMENTS FROM A COMPELLED EVALUATION

The Respondent offers three reasons why the court properly admitted incriminating statements from a compelled evaluation: (1) a defendant raising a mental defense and compelled to undertake a mental health examination loses all Fifth Amendment protections (BOR 66 – 0); (2) the “door was opened” by the defense expert’s reliance on the statements (BOR 70–78); and (3) the statements were properly admitted to impeach the statements introduced by the defense expert (BOR 78–79).

The Respondent cites *State v. Pawlyk*, 115 Wn.2d 457, 800 P.2d 338 (1990) and *State v. Hamlet*, 133 Wn.2d 314, 944 P.2d 1026 (1997) for the general proposition that once a defendant raised a mental defense all Fifth Amendment protections are removed. BOR 66–67. The Respondent’s reliance on this authority is misplaced since the context is different. The issue in those cases was whether a defendant raising a mental defense may be compelled to be examined by a state expert and whether he/she may remain silent during such an examination – not the admissibility of those statements:

When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be *required*

to submit to a sanity examination conducted by the prosecution's psychiatrist.

Pawlyk, 115 Wn.2d at 466 (emphasis added).¹¹ These cases therefore address the Fifth Amendment protections only in the context of an examination.

Contrary to the Respondent's assertion, the right to self-incrimination is not wholly lost when a defendant raises a mental defense. See e.g., *Hutchinson I*, 111 Wn.2d 872 (1989); *State v. Brewton*, 49 Wn.App. 589, 744 P.2d 646 (1987); and *Hutchinson II*, 135 Wn.2d 863, 959 P.2d 1061 (1998)(quoting *State v. Craney*, 347 N.W.2d 668, 673 (Iowa, 1984) (an expert who conducts a compelled examination may testify to "non-incriminatory" observations and conclusions, but may not relate "incriminatory" statements or express "incriminatory" opinions.)). The *Hutchinson II* court went on to hold that an expert should not be permitted to testify to a defendant's incriminating statements, e.g., confessions or admissions that he or she committed the crime charged. *Hutchinson II*, 135 Wn.2d at 878. Also inadmissible is testimony derived from the expert's "incriminatory observations in arriving at his opinions." *Hutchinson I*, 111 Wn.2d at 883. Because the Fifth Amendment is not completely lost, Washington courts are careful to balance the competing

¹¹ Moreover, in *Pawlyk*, the issue was whether the state may use information derived by an expert retained by the defense; not information that was the by-product of a court compelled examination by a state-retained expert. *Pawlyk*, 115 Wash.2d at 466

interests of full disclosure and protection of a defendant's right against self-incrimination when a criminal defendant's mental state is at issue. *Id.*

The Respondent takes issue with the *Hutchinson* decisions, claiming the cases did not pertain to the state's expert. BOR at 73. However, this claim is erroneous. See e.g., *Hutchinson II*, 135 Wn.2d at 878 (the court reiterated its holding in *Hutchinson I*, that the State's expert should not be allowed to testify to a defendant's incriminating statements.). The Respondent also appears to invite this Court to overrule the *Hutchinson* decisions. BOR 73 ("More recent decisions have not referred to the balancing *Hutchinson I* articulate."). Since there is no authority supporting this invitation, it should be rejected.

After its attempts to circumvent the *Hutchinson* holdings, the Respondent argues it was proper for the court to admit the statements because they were addressed by the defense. BOR 74 – 79. This argument overlooks numerous pre-trial orders by the court. The defense sought unsuccessfully to prevent a state-compelled mental health examination. The defense sought, also unsuccessfully, to retain privileges and protections during the state-compelled examination. Finally, the defense sought to limit the testimony of the state's expert derived from the compelled examination, but the court specifically ruled that all statements by Mr. Haq during the compelled interview would be admissible:

Having heard the testimony of defense expert, Dr. Missett, and considered all of the topical area Dr. Missett discussed with the defendant and considered in arriving at his conclusions, *all statements made by the defendant to Dr. Wheeler* are available for direct testimony and cross-examination of the mental health expert.

CP 8561 – 8570 ¶ 30 (emphasis added).

The defense was forced to proceed within the confines of these rulings. It is, therefore, disingenuous for the Respondent to argue that the defense “opened the door” when it elicited the “incriminating statements” the court admitted over objection.

V. RCW 10.77.020(5) VIOLATES THE SEPARATION OF POWERS DOCTRINE

It is Appellant’s argument that RCW 10.77.020(5) violates the separation of powers doctrine because it makes mandatory the exclusion of any defense expert or professional if a defendant refuses to answer questions or participate in an examination after asserting an insanity defense. AOB 84 – 91. The Respondent does not take issue with or challenge Appellant’s substantive argument, but claims instead that the issue was waived and that the Appellant lacks standing to raise the issue. These procedural claims fail.

The Respondent first argues that the Appellant did not raise the separation of powers challenge to RCW 10.77.020(5) to the trial court, and thus the issue is waived. BOR 80 – 81. But an issue that the legislature

improperly violated the separation of powers doctrine may be raised for the first time on appeal. *State v. Ramos*, 149 Wn.App. 266, 270, 202 P.3d 383 (2009) (“Ramos raised this constitutional argument [separation of powers], as he may, for the first time on appeal”); RAP 2.5(a)(3); *State v. Aguirre*, 73 Wn.App. 682, 687, 871 P.2d 616 (1994) (addressing a separation of powers issue raised for the first time on appeal). Respondent’s waiver claim fails.

The Respondent argues that Appellant does not have standing to raise a separation of powers challenge because he participated in the state-compelled examination and therefore was not harmed by RCW 10.77.020(5). Under the Respondent’s position, the Appellant would have had to forgo his right to present his defense at trial in order to maintain standing to challenge an unconstitutional statute. This argument is unsuccessful. First, implicit in the Respondent’s argument is that the Appellant idly agreed to the state-compelled evaluation and therefore the mandatory exclusion set forth in RCW 10.77.020(5) was not invoked. This simply was not the case. The Appellant vigorously sought to preclude a *compelled* mental examination conducted by a state-retained expert. As part of that challenge, the Appellant argued that RCW 10.77.020(5) impermissibly required a defendant to exercise his right to self-incrimination at the “penalty of forfeiting the right to present an

insanity defense.” CP 36-41. The threat of exclusion under RCW 10.77.020(5) was part and parcel of Appellant’s argument that participation in an examination and being required to answer questions was compulsory self-incrimination.

The Respondent’s standing argument also fails because it rests on flawed logic. According to the Respondent, Mr. Haq could only demonstrate harm and challenge RCW 10.77.020(5) if he chose, at trial, not to participate in the state-compelled examination or to answer questions, thus triggering the mandatory exclusion provision of RCW 10.77.020(5) and was effectively forced to forgo his right to present his insanity defense.¹² The Respondent’s argument presents Mr. Haq with the Hobson’s choice between challenging his compelled examination and presenting his trial defense. *See e.g., Bittaker v. Woodford*, 331 F.3d 715, 723 (9th Cir. 2003) (constitutionally unacceptable to force defendant to choose between asserting one right at the detriment of another); *Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (defendant need not have to surrender one constitutional right in order to assert another); *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997) (individual must not choose between right to speedy trial and right to

¹² Courts have held that a criminal defendant has a due process and jury trial right to present an insanity defense. *State v. Recuenco*, 163 Wn.2d 428, 445, 180 P.3d 1276, 1285 (2008) citing *State v. Strasburg*, 60 Wash. 106, 118, 110 P. 1020 (1910).

effective representation).

Contrary to the Respondent's assertions, Mr. Haq has not waived his challenge to RCW 10.77.020(5) and has suffered harm from its application. As such, the Respondent's procedural-bar arguments fall short.

Substantively, RCW 10.77.020(5) violates the separation of powers because the legislature in no uncertain terms removed all judicial discretion and ordered complete exclusion of "any evidence from any testimony or evidence from any expert or professional obtained or retained by the defendant." RCW 10.77.020(5) is no less mandatory because the court has the discretion to exclude similar evidence under CrR 4.7. BOR 82, fn. 25. CrR 4.7, in fact, demonstrates the separation of powers problem inherent in RCW 10.77.020(5.). And although exclusion is a disfavored remedy, CrR 4.7 provides the court with discretion in determining the appropriate sanction for failure to comply with an order. *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). In contrast, as noted in Appellant's Opening Brief, it is the mandatory directive of RCW 10.77.020(5) which is an impermissible attempt by the legislature at regulating, by statute, a core judicial function, namely the power to determine admissibility of evidence in an individual case. *State v. Long*, 113 Wn.2d 266, 778 P.2d 1027 (1989). AOB, 84 – 91.

**VI. FAILURE TO INSTRUCT ABOUT THE NEED FOR
A SEPARATE AND DISTINCT INTENT FOR
THE BURGLARY AGGRAVATING FACTOR**

State v. Hacheny, 160 Wn.2d 503, 158 P.3d 1152 (2007), sets out the legal analysis for determining when a first degree murder becomes aggravated because it occurred “in the course of” an enumerated felony. The *Hacheny* Court concluded that “[a] person is guilty of aggravated first degree murder if the *murder* was committed “in the course of” an enumerated *felony*, RCW 10.95.020(11), *not*, if the enumerated felony is committed in the course of the murder.” *Hacheny*, 160 Wn.2d 503, at 518 (emphasis in the original).

The plain language of the aggravated first degree murder statute does *not* provide that the aggravating circumstance applies if the felony occurred in the course of the murder. Even if we were to find the term “in the course of” to be ambiguous, the rule of lenity dictates the narrow construction of aggravating circumstances.

Hacheny, at 520.

In reaching this conclusion, the Court expressly adopted reasoning set forth in *People v. Green*, 27 Cal.3d 1, 164 Cal.Rptr. 1, 609 P.2d 468 (1980, *overruled on other grounds by People v. Dominguez*, 39 Cal.4th 1141, 47 Cal. Rptr.3d 575, 140 P.3d 866 (2006):

The court (in *Green*) reasoned that when the legislature characterized murders committed “during the commission” of an enumerated felony as aggravated, it intended to allow the death penalty for those “who killed in

cold blood in order to advance an *independent felonious purpose*, e.g., who carried out an execution-style slaying of the victim of or witness to a holdup, a kidnapping or a rape.” Thus, where the murder was the primary crime and the felony was incidental because it was intended only to conceal the murder, imposition of aggravating circumstances was improper.

Hachenev, at 517-518 (emphasis added)(internal citations omitted).

Because *Hachenev* involved arson committed after the victim was dead, the Respondent argues that *Hachenev's* analysis, and *Green's*, is restricted to instances in which the aggravating felony took place after the murder or to conceal the murder. BOR 85-91. Such a restriction is not supported by *Hachenev*.

First, *Hachenev* set out the general governing legal principle requiring an independent felonious purpose for an aggravating crime, and then applied it to the particular facts of the case, and did so without restricting that principle to instances in which the felony took place after the murder. Second, the decision expressly applies the principle to other instances not involving a murder to conceal the crime:

This is not to say that a robber, for example, who kills his victim before committing the taking can necessarily avoid conviction for aggravated first degree murder. A killing to facilitate a robbery would clearly be “in the furtherance of the robbery.” RCW 10.95.020(11). And where the killing itself is the force used to obtain or retain the property, then the death can be said to be the probable consequence of the felony. *State v. Allen*, 159 Wn.2d 1, 9, 147 P.3d 581 (2006) (finding considerable circumstantial evidence that murder

defendant used force, at least in part to obtain stolen cashbox).

Hacheny, 160 Wn.2d at 518 n.6. These examples clearly apply the general principle that the felony must have an independent purpose from the murder to instances other than crimes committed after the murder. And certainly a person could burglarize a home to accomplish an independent purpose such as to take the person's property or commit a sexual assault within and murder someone in the course of carrying out that purpose. These facts are different from committing a burglary incidental to committing the murder, which *Hacheny* holds is an improper basis for an aggravated first degree murder conviction.

The Respondent nonetheless asserts that the prior decision in *State v. Howland*, 66 Wn. App. 586, 832 P.2d 1339 (1992), rejecting the analysis of *People v. Green* for a burglary committed incidental to the murder, remains good law even after the Supreme Court adopted the *Green* analysis in *Hacheny*. BOR at 89. The four grounds for rejecting *Green* in *Howland*, as presented by the Respondent, are simply not valid grounds. First, the fact that *Green* involved a felony after the murder, does not make the principle it articulated – that the enumerated aggravating crime must have an independent felonious purpose – any less valid for other factual settings. Second, the fact that Washington has not adopted a felony murder merger

doctrine while California has is irrelevant because the issue is not one of merger, but of conviction for aggravated first degree murder. As the *Hacheney* Court held, the rule of lenity requires a narrow construction of aggravating circumstances “especially where their application determines the imposition of our most severe penalties, death or life without possibility of release.” *Hacheney*, at 519. Third, the fact that other aggravating circumstances are based on the victim’s status and do not require an independent intent, is also irrelevant. Nothing dictates that every aggravator require proof of an additional crime. And finally, the fact that the Legislature has enacted a discretionary burglary anti-merger statute, dictates only that a person convicted of first degree murder could also be convicted of burglary.¹³ These reasons are not reasons to reject the analysis in *Green*, and, in fact, the Supreme Court in *Hacheney* adopted *Green’s* reasoning.

Finally, the case cited by the Respondent, *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007), does not reject the independent felonious purpose rule. The decision in *Mason* does not involve an instructional error and it is unknown what instructions were given to the jury in that case. Most importantly, in *Mason*, the burglary did have an independent purpose other than the murder – to eliminate the victim as the only witness to a prior kidnapping and attempted murder. *Mason*, 160 Wn.2d at 916.

¹³ The burglary anti-merger statute is only discretionary. *State v. Lessle*, 118 Wn.2d 773, 781, 827 P.2d 996 (1993).

The independent felonious purpose rule is necessary to truly narrow the class of persons who can be subjected to the death penalty or life without parole. Without this narrowing interpretation, Washington's capital sentencing scheme would not provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not," as required by the Eighth and Fourteenth Amendments. *Furman v. Georgia*, 408 U.S. 238, 313, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), (White, J. concurring); *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) ("an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder").

The prosecution admitted at trial that it could not prove more than that the burglary was committed to further the murder or that the burglary had any independent felonious purpose other than the intent to commit a murder. RP(12/9/09) 116-117. The trial court erred in refusing to give an instruction and verdict form which required that the jury find such an independent purpose. Because of the state's concession and the court's ruling, however, it is not necessary to remand the case for retrial on the aggravating factor since it can be dismissed at resentencing.

VII. OPINION TESTIMONY AS TO GUILT AND DENIAL OF A JURY TRIAL

Expressions of personal belief as to (1) the guilt of the defendant, (2) the intent of the defendant or (3) the veracity of other witnesses is “inappropriate for opinion testimony in criminal trials,” even for expert witnesses. *State v. Montgomery*, 163 Wn.2d 577, 591 n.5. 183 P.2d 267 (2008). Profile testimony implying guilt is also impermissible, *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987), as is testimony that the accused had the mental state constituting an element of the crime. *United States v. Morales*, 108 F.3d 1031, 1037-1038 (9th Cir. 1997). All of these types of testimony came into evidence at Mr. Haq’s trial through state witnesses and denied him his state and federal constitutional rights to trial by a jury. *Montgomery*, 163 at 590.

While not all were objected to, those that were not were of such “an explicit or nearly explicit’ opinion on the defendant’s guilt or a victim’s credibility [that they] constitute manifest error,” and can be raised for the first time on appeal. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007)).

Specifically, police officers and SWAT team members who entered the Jewish Federation Office shortly after the shootings went

beyond a description of what information they had available to them at the time, to expressions of their opinions that Mr. Haq fit the profile of an “active shooter” which meant “he was hunting for people and shooting them as he found them”(RP(10/26/09) 53) and had a “very good plan” and would continue “looking for and shooting individuals randomly until there is some type of intervention.” RP(10/27/09) 15. One of the officers also described Ms. Waechter as the “woman who had been executed.” RP(10/26/09) 77-78. Another gave his opinion that “it was apparent to me that he [Mr. Haq] wasn’t acutely insane.” RP(11/2/09) 42-43.

The state’s experts on Mr. Haq’s mental illness gave their opinions as to guilt. Dr. Reus testified that purchasing a shotgun and knife and choosing the type of ammunition Mr. Haq chose went “to the heart of premeditation and intent.” RP(12/2/09) 18-19. Dr. Reus reviewed the state’s evidence in his testimony and concluded that “[h]e’s shooting I think with intent.” RP(12/2/09) 11-30. He also rendered his opinion that Mr. Haq had the capacity to form intent for each bullet fired and “I think he understood that [what he was doing] at the time.” RP(12/2/09) 36-37. The defense objected to this testimony in both instances and moved for a mistrial after the first. RP(12/2/09) 30, 38.

Dr. Reus also gave his opinion of the credibility of Dr. Wheeler’s report, on which he relied for his own opinions about Mr. Haq’s mental

illness. RP(12/1/09) 109-110, 119, 122.

Dr. Wheeler testified that he could not take Mr. Haq's statements at "face value," and that they were "retroactive" attempts to rationalize his behavior. RP(12//3/09) 122; RP(12/7/09) 98. He gave his direct opinion as to guilt by commenting on Mr. Haq's statement that he heard a voice in his head saying "murder" when he saw Pam Waechter that "it certainly was an accurate characterization of what had occurred." RP 12/7/09) 134-135.

The Respondent's response is that this testimony was not opinion as to guilt, the issue was waived where the testimony was not objected to and harmless error where not waived. BOR at 91-92. Further, the Respondent argues that defense witnesses also violated motions in limine and made other mistakes, and that a defendant is not entitled to a perfect trial. BOR 99-100.

Contrary to these assertions, the testimony by the officers were not just descriptions of the scene as they responded to it, nor harmless because the witnesses "knew nothing about how the shootings occurred." BOR 95-96. The testimony that Mr. Haq was "an active shooter" and what that term meant to the officers clearly indicated their belief that Mr. Haq fit a known profile and implied that, because he fit the profile, they not only knew about how the shootings occurred – randomly and continuing until

some intervention stopped them – but the intent and planning of the shooter. Testimony that Ms. Waechter had been “executed” conveyed, again, the opinion that she had been shot deliberately, cold-bloodedly and with premeditation. These were direct opinions as to guilt, just as they were in *Black, supra*, and not harmless. Detective Cruise’s testimony that Mr. Haq was not insane at the time of the shooting was objected to, and a direct opinion as to guilt which carried a great deal of weight because he was assessing Mr. Haq’s status at the crucial time immediately following the shooting. Striking the testimony could not remove from the jurors’ minds, the opinion of a homicide police detective that Mr. Haq was not insane immediately following the shootings. *See* BOR at 98-100.

With respect to Dr. Reus’s testimony lauding Dr. Wheeler’s report, the testimony was improper comment on the credibility of another witness, the key state’s witness on the issue of Mr. Haq’s mental state, and this comment denied Mr. Haq a jury trial on the issue. BOR 101-102. Dr. Wheeler commented directly on Mr. Haq’s credibility and guilt.

All of this testimony was overwhelmingly and unfairly prejudicial because it usurped the right of the jury to determine the facts and the credibility of the evidence.

**VIII. DR. REUS’S TESTIMONY ABOUT IMPORTANT,
HIGH-FUNCTIONING PEOPLE HE HAD HEARD
OF WHO ARE BIPOLAR**

Although later stricken, the jury heard testimony by Dr. Reus that members of congress, a specific surgeon, and a judge all suffered from bipolar disease and were able to function well in spite of their mental illnesses. This implied that people with the same mental illness as Mr. Haq were able to function not only well, but exceedingly so in important positions. It implied Dr. Reus's opinion that Mr. Haq's mental illness could not be the cause of his shooting at the Jew Federation Center, and was the kind of seemingly common sense information likely to stick in the mind of the jurors and influence their verdicts. Moreover, it was put before the jury and the defense had no opportunity to expose differences between these people and Mr. Haq or Dr. Reus's lack of knowledge of important aspects of their mental conditions..

Contrary to the Respondent's argument (BOR 111-114), this was dissimilar to other testimony that persons with bipolar and schizoaffective disorder can learn to function. It implied that bipolar disorder was not a significant mental defect, no barrier to a position of responsibility for the lives of others, and Mr. Haq's claim that it prevented him from knowing right from wrong and conforming his actions to the requirements of the law could not be sustained. Nothing short of a new trial can cure the prejudice of the jury's having heard this testimony.

**IX. IMPROPER EXPERT STATEMENTS OF THE LAW
INVADED THE PROVINCE OF THE JUDGE**

Over defense objection, Dr. Reus presented slides with definitions not only of insanity, but also of premeditation and intent. RP(12/1/09) 95. In his oral testimony, Dr. Reus made erroneous statements of the law: (1) he stated what he called the “legal question” of whether Mr. Haq’s mental disorder made him “at this particular point in time of the event . . . unable to perceive the nature and quality of the acts with which he’s charged or unable to tell right from wrong,” became the psychiatric question of whether his mental condition “which waxes and wanes” was present at the time (RP(12/1/09) 131-132); (2) he erroneously defined premeditation as an act which took long enough to convince the jurors “that there was thought – that the act was thought of ahead of time,” RP(12/1/09) 132-133; and (3) he defined “acting with intent” as “knowing that the action that you’re going to take is something that constituted a crime.” RP(12/1/09) 133. These were clear misstatements of the law. *See* AOB at 110-113.

Dr. Wheeler was similarly provided instructions from the prosecutor on intent and premeditation. RP(12/3/09) 131-133.

The Respondent argues that allowing the state’s expert witnesses to instruct the jury on the law is merely an evidentiary issue, and that it is okay to allow the expert witnesses to instruct the jury if the witnesses’ instructions

are provided by the prosecution and if the jurors are reminded that the judge's instruction must control their decisions. BOR. 114-116. The Respondent further argues that because a defense witness testified about his understand of the legal definition of insanity before giving his opinion that Mr. Haq was not legally sane at the time of the shooting, that any error was invited. BOR 117.

First, the error is not merely an evidentiary error and the Respondent cites no authority to support its claim that it is. BOR 116. In fact, under Const. art. IV, § 15, judges "shall declare the law." Expert witnesses invade the province of the judge when they usurp this function. *See* AOB at 108-109.

Second, it does no good to instruct the jurors that the prosecutor provided the instructions to the witness or that they ultimately must follow the judge's instructions; to be relevant, the instructions given by or to the witnesses must be the instructions which the jurors are bound to follow. If the instructions given by the experts during trial differ from or are not approved by the court, they cannot be helpful to the jury. Even a proper written instruction by the judge cannot overcome an erroneous oral instruction. *Ho v. Carey*, 332 F.3d 587, 593-95 (9th Cir. 2003).

Finally, the fact that Dr. Missett testified about his understanding of the legal definition of insanity did not invite the error of the state's expert

providing written legal definitions—particularly defining elements of the crime – or invite the state’s experts to give erroneous statements of the relevant law on those elements while testifying. Invited error occurs when a party proposes an instruction, which the trial court adopts, and then that party complains on appeal that the instruction is an incorrect statement of the law. *State v. Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010)

Dr. Missett’s testimony about his *understanding* of the legal definition of insanity provided the jury with information relevant to the jury’s consideration of his opinion that Mr. Haq was not sane.¹⁴ The jurors could compare his understanding with the instruction given by the court. And, in any event, if Dr. Missett’s testimony opened the door, at most, it opened the door to Dr. Reus and Dr. Wheeler sharing their understanding of the legal definition of insanity for the same purpose. This is very different than presenting the jury with written definitions of insanity and the elements of the crime and eliciting from the witnesses that the prosecutors provided those definitions. And, as this case demonstrates, allowing witnesses to testify as to legal standards leads to improper instructions and misstatements of law.

The jurors were improperly instructed in the law by the state’s expert

¹⁴ Q. Do you have – do you understand what the legal – what is your understanding of the legal definition of insanity in the State of Washington?

witnesses and likely were misled by the testimony.

**X. EXCLUSION OF ANECDOTAL EVIDENCE
OF A LEARNED ARTICLE ABOUT “MANIC FLIPS”**

The trial court excluded evidence which supported Mr. Haq’s defense that taking him off lithium and giving him Effexor was responsible for his manic state at the time of the shootings. This evidence included a published study and information Dr. Julien learned from talking to psychologists and other mental health practitioners across the country over the course of four or five years. RP(11/16/09) 110-111, 115.

The study was a learned treatise and admissible under ER 803(18) of the Rules of Evidence. The information Dr. Julien had collected was from his professional interaction with colleagues in his practice and gathered independently of the legal case.¹⁵ The evidence was relevant and admissible and excluding it denied Mr. Haq his constitutional rights under the Fifth, Sixth and Fourteenth Amendments to put forth relevant evidence in his own defense.

The Respondent asserts, without any citation to authority, that the article was properly excluded because Dr. Missett did not rely on it in

¹⁵ In his offer of proof, Dr. Julien explained that he presented workshops to clinicians across the country; and, when he described odd behavior, aggression, agitation and confusion associated with Effexor, they reported that his descriptions were consistent with what they had seen in their practices and were consistent with his position in Mr. Haq’s case. RP(11/16/09) 110-111.

forming his opinions and because it “was just updated research about the propensity of Effexor to induce mania in persons with bipolar disorder” – which is the precise point for which its admission was sought. BOR at 119. The Respondent also asserts that Dr. Julien’s testimony about what he had heard from clinical practitioners was “completely unreliable,” again without citation to authority or explanation why this is the case. BPR 119-120. Absent cogent legal argument or citation to relevant authority, this Court need not consider these arguments. *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990).

The Respondent further asserts that the evidence was not admissible because the prosecution did not dispute that some people with bipolar disorders move into a manic state when given antidepressants. BOR at 120. The opposite is, in fact, true. The state’s expert Dr. Reus testified that Mr. Haq’s medication was appropriate (RP(2/1/09) 164-166, and belittled the information in the Physician’s Desk Reference and package insert for Effexor.. RP(10/1/09) 164-155; RP(10/2/09) 55-66. He testified that there was a controversy surrounding whether Effexor caused homicidal or suicidal ideation – presumably from his awareness of what other mental health experts had said. ER(10/1/09) 164-166. At the least, Mr. Haq had the right to present evidence to rebut this testimony by Dr. Reus.

These two types of evidence, particularly the published article, represented independent and scholarly confirmation of the defense experts' testimony. Mr. Haq had the right to present this relevant evidence to the jury and the denial of that right unconstitutionally limited his right to present a defense.

XI . INSUFFICIENT EVIDENCE OF MALICIOUS HARASSMENT

The state presented sufficient evidence for the jury to find that Mr. Haq caused physical injury because the employees of the Federation were Jewish. What was lacking was evidence that he did so because of their religion. A person can be a Jew through his or her ancestry, regardless of whether he or she practices the religion, Judaism.

The Merriam-Webster on-line dictionary defines "Jew" as "1. (a) a member of the tribe of Judah; (b) Israelite; (2) a member of a nation existing in Palestine from the sixth century B.C. to the first century A.D.; (3) a person belonging to a continuation through descent or conversion of the ancient Jewish people; and (4) one whose religion is Judaism." www.merriam-webster.com/dictionary.

The Random House Dictionary of the English Language (2nd Ed. New York 1987) defines "Jew" as "(1) one of a scattered group of people that traces its descent from the Biblical Hebrews or from post-exilic

adherents of Judaism; Israelite; (2) a person whose religion is Judaism.”

The evidence all points to Mr. Haq’s concern as political rather than religious.

XII. CUMULATIVE ERROR

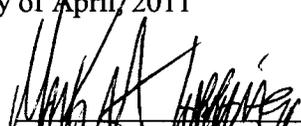
Cumulative error, as well as individual error, denied Mr. Haq a fair trial. *See* AOB 119-120.

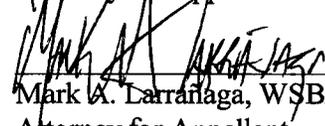
C. CONCLUSION

Mr. Haq respectfully submits that for all of the reasons set out above and in his Opening Brief of Appellant, his conviction for aggravated murder should be reversed and the aggravating factor dismissed, and that his conviction for malicious harassment should be reversed and dismissed. His premeditated murder conviction and all other convictions besides the malicious harassment should be reversed and remanded for retrial.

Respectfully submitted,

DATED this 25th day of April, 2011

FG


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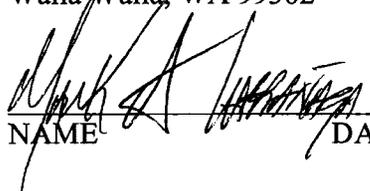
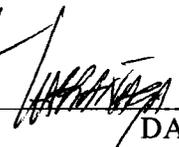
CERTIFICATE OF SERVICE

I certify that on the 25th day of April, 2011, I caused a true and correct copy of the Reply Brief of Appellant to be served on the following via first class mail/delivery to his office:

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  4/25/11

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