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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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STATE OF WASHINGTON COURT OF APPEALS DEPUTY
DIVISION II

IN THE PERSONAL RESTRAINT OF
TOMMY L. CROW Jr.
PETITIONER,

V.

STATE OF WASHINGTON
RESPONDENT.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
CAUSE #08-1-00585-6
THE HONORABLE WM. THOMAS MCPHEE, JUDGE

RAP 16.3 (A) & 16.4 (C)
PERSONAL RESTRAINT PETITION

Tommy L. Crow Jr.
Clallam Bay Corr. Center
1830 Eagle Crest way
Clallam Bay, Wa. 98326

I. OPENING STATEMENT

The petitioner, Tommy L. Crow Jr., humbly asks this court to please not hold him to the same standards as a lawyer. Since he is acting PRO SE, and has no legal training. Maleng v. Cook, 490 U.S. 488, 493 109 S.ct. 1923, 1926-27 (1989) The petitioner seeks relief from The State Of Washington who has violated his 5th, 6th, and fourteenth Amendment rights of the U.S. CONST; Wash. CONST. Art. 1 § 3, 4, and 22. The doctrines of due process, effective assistance of appellate counsel, jury unanimity, fair trial, right to present a defense, compulsory process.

a. STATUS OF PETITIONER

The petitioner, applies for relief of confinement. Mr. Crow is serving an SRA sentence for two counts of second degree murder with aggravating factors found by the jury for an exceptional sentence of 660 months.

Mr. Crow, with the appeals attorney Thomas E. Doyle, WSBA No. 10634 appealed his conviction to the Court of Appeals Division II, No. 39075-2-II.

The issues raised 1.) Reversible error trial court to admit 404 (b) evidence. 2.) Ineffective assistance of counsel for failing to move to exclude prior bad acts evidence. 3.) Limiting instruction allowed to jury to consider prior assault as improper propensity evidence & constitutes a comment on the evidence. 4.) Ineffective assistance of counsel for the agreement of the courts purported limiting instruction contained appropriate language. 5.) Accomplice liability instruction relieved the state of it's burden to prove crow committed an overt act.

The Appeals Court affirmed Mr. Crow's conviction, and the

petitioner filed a RAP 13.4 petition for review with the State Supreme Court to properly exhaust his claims for federal review. Mr. Crow now timely files this RAP 16.3 (a) Personal restraint petition.

b. INTRODUCTION

The petitioner claims there are 5 issues for this court to grant relief under. The petitioner is requesting relief from restraint based upon RAP 16.4 (c) (2), (3), (5), (6).

The petitioner raises constitutional issues, and the facts presented herein are of evidentiary value and therefore warrant a full hearing on the merits in this court, pursuant to RAP 16.11. IN RE RICE, 118 WN.2d 876, 886-7, 828 p .2d 1086 (1992).

c. ASSIGNMENT OF ERRORS

- 1.) The prosecutor told the jury to glean the truth from select portions of Mr. Crow's co-defendants testimonies then proceeded to put together a frankenstein testimony in closing argument becoming a witness testifying himself.
- 2.) The prosecution failed to disclose materially exculpatory evidence of handwriting analysis results & notes written by co-defendant Mr. EKE that would impeach him at trial, also the prosecutor threatened co-defendant Mr. Durga into testifying untruthfully.
- 3.) Appeals counsel is ineffective for failure to raise ineffective assistance of counsel for failure to request lesser of Manslaughter as the petitioner had an intoxicated defense, failure to go over evidence with the petitioner only visiting him for 2 hours, failure to call material witness, failure to object to prosecution testifying in closing.
- 4.) The petitioner has a bashaw type instruction the allowed the jury to believe they must be unanimous to "NO".

5.) The trial judge abused his discretion by allowing the jury to violate Mr. Crow's unanimous verdict protection's.

D. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Did the prosecution violate Mr. Crow's rights to due process and fair trial by failing to disclose exculpatory evidence and threatening witnesses ?.

2.) Did the prosecution telling the jury glean the truth from states witnesses and using those gleans as his unified prosecutor testimony in closing violate the juries fact finding function and the petitioners right to a fair trial ?.

3.) Did the appeals counsel violate the petitioners 6th Amendment rights by failing to raise key issue of Ineffective Assistance of Trial Counsel ?.

4.) Does the special verdict instruction violate the petitioners 5th, 6th, and 14th Amendment rights by requiring the jury to keep deliberating even if one juror finds for "NO".?

5.) Did the trial judge violate the petitioners rights to a unanimous verdict ?

II STATEMENT OF FACTS

Procedural Facts: Tommy Lee Crow Jr. (petitioner) was charged by second information filed in Thurston County Superior Court on March 9th, 2009 with two counts of murder in the second degree, counts I, & II, and arson in the second degree, count III, contrary to RCW's 9A.08.020, 9A.32.501 (1)(A) or (b), 9.94A.535 (3)(b) and (w), and 9A.48.030 [CP 40-41]

Trial to a jury commenced on March 9th, the Honorable WM. Thomas McPHEE presiding. The parties stipulated that the two deceased bodies located on March 28th, 2008 were David N. Miller & Norman L. Peterson, the victims in counts I, & I

II. [CP 38-39; RP 275-77] Append. B

The jury returned verdicts of guilty as charged (CP 60, 63-64), in addition to special verdicts the victim in count I was killed while acting as good samaritan. (CP 61), and that Crow's conduct during the commission of count II Manifested deliberate cruelty to the victim.[CP 62].

Crow was given an exceptional sentence of 660 months. Mr. Crow adopts his appeals attorney's substantive facts, and objects to the prosecutions facts on direct appeal. The prosecutions facts mistated the record and were not accurate.

PROSECUTOR TESTIFIED AS WITNESS:

During closing arguments prosecutor, Mr. Powers begins to call his two star witnesses and co-defendants of pet, liars. He only classifies portions of Mr. Durga and Mr. EKe's testimony as fantasies and lies and puts together an ultimate testimony unified from his own mouth as the truth gleaned from the two liars. RP Append. B 1296-1298, 1303, 1317-1321, 1333-1336, 1358.

"That in the midst of the events which may in fact reflect reality Christopher Durga is a witness who is quite capable of implanting these little bits of fantasy... but I have one other reference to Mr. Durga and Mr. Eke collectively, because I don't want to suggest that I'm singling Mr. Durga out. The state believes that it's important for all of you to use caution with regard to the testimony either one of these individuals. Neither one of these individuals unfortunately, came up to this witness stand to simply tell the truth. And the state submits that that was pretty apparent". Each of them brought a bias if you will... RP 1296. "Each one of them had a different kind of motive, if you will. For Mr. Eke its himself. For Mr. Durga... perhaps a little for himself, but mostly for his

brother, the person on trial here today, Mr. Crow". RP 1297. "You know , they had something in mind here, and it's not the truth. And if the truth gets in the way of what it is that is of concern to them, then the truth is going to have to go away. And we see that over and over again, the state submits... in both of their testimonies... but at the same time, by considering their testimony in the light of all the other evidence you have it, it is possible to GLEAN THE TRUTH out of all of this. that's a bit of an aside.RP 1298.

After the prosecutor informs the jury to glean the truth from the two co-defendants, he proceeds to put together his own ultimate testimony as an unsworn witness. "Mr. Durga says, oh yeah, I wasn't upset about it. Mr. Crow, he wasn't upset it. Mr. Eke, he was kinda upset about it. It's a... this is a pattern... not because it's the truth, but because that's where the bias is coming from. Mr. Eke is sort of the outsider in this group here... he's not one of the brothers. When you hear Mr. Durga testimony, you hear a constant theme of protecting my brother.... that doesn't mean we can necessarily trust Mr. Eke's testimony, because we're hearing the constant theme of protecting himself... well, the truth is, they're all concerned. How do we know that? because they're all out on the street checking up on this. RP 1303.

"But what can we glean from all this testimony? Again, it's the three of them. They've all started down that road earlier that day, reacting to learn about the police taking a hold of that bat. And now this is the next step. And they're all three part of it. And they can say oh, it's the other two... when anybody leaves that camp to carry out the acts, it's all three of them." RP 1317.

"Now we've heard some testimony about, well he threw that punch and he missed. And them... I heard Mr. Durga say that." RP 1318-19. Mr. Miller gets a little edge on the

fight with Mr. Durga, and there's Mr. Eke's opportunity to do his part.

"And Mr. Crow now has Norman Peterson on the ground. And he's holding him and pinning him down on the ground. And now the next step is going to take place, and Mr. Eke's comes right along there to do his backup role again.

And we that Mr. Crow told Mr. McKague that he proceeded to cause Mr. Peterson, Norman Peterson, to at that point in time be knocked out... From what we know from the medical evidence is, it means dead."RP 1333

"But you know, the case needs to be evaluated on the basis of the evidence, rationally considered on the basis of the evidence, holding the state to it's burden to prove every element of either alternative or any of these charges beyond a reasonable doubt. That's the way our system works. That's the way it should work. It has to work. And that's all I'm you to do, evaluate the facts. We've had a lot of lies on the stand from these individuals involved we've heard about. But you can glean the truth. It's there to be gleaned. It's there to be seen. Put it together. The state submits that when it comes together, Mr. Crow over here is guilty of two counts of murder in the second degree and one count of arson"...RP 1358.

Failure To Disclose Handwriting Analysis & Threatening Mr. Durga:

While awaiting trial co-defendant Mr. Eke wrote a series of letters and notes which could have been used to impeach Mr. Eke in his credibility contest.[see 2-26-09 statement pg. 60 of 99][see Exhibit 1 letter to the petitioner from Mr. Eke] Mr. Eke then wrote a series of letters/notes to Aaron Adams & Anthony McKague asking them to lie for him. [see Exhibit 2 notes and letters from Mr. Eke to Adams [McKague]. Mr. Eke tried to get Mr. Adams to go to the prosecutor and tell him that the petitioner confessed to

him. Mr. Eke instructed Mr. Adams on what to tell the state about what Mr. Crow told him about the murders. Mr. Eke offered to pay Mr. Adams \$15,000 to do this. [see statement dated 2-26-09 pg. 62-63][See Exhibit 2]. Mr. Adams turned these letters over to his attorney, Mr. Meyers in order to get a better plea & this happened to be the petitioners attorney too. This resulted in a conflict of interest & Mr. Meyers withdrew from the petitioners case. [RP 3 NOV. 5, 2008; RP 3-4 NOV. 12, 2008]. Evidence from Mr. Adams was never turned over to new counsel. Mr. Sergi was appointed NOV. 12, 2008 RP 7.

On 2-9-09, S.A. Castello, case # 2008-2501 does a follow-up investigation on Mr. Eke for writing to Anthony J. McKague, at 1530 hrs. Mr. Eke was obtained for hand writing analysis. This at the request of commander J. Upton, hand writing analysis expert, with the Lacey Police Department. The initial investigation started on 2-6-09 at 1333 case # 08-2501. (see Exhibit 3 2-6-09 interview of Eke & Exemplars)(see Exhibit 4 2-9-09 follow-up & Exemplars & property report). None of the evidence, nor results were ever disclosed to trial counsel Sergi by the p prosecutor.(See Exhibit 5 letter from Sergi to petitioner).

During trial, counsel Sergi was unable to impeach Mr. Eke who denied writing the letters to Mr. Crow. Mr. Sergi was also unable to impeach him with the Adams and McKague note/letters, because he never received them. The ultimate devastation to the defense was that the state never disclosed the hand writing analysis to the defense to use against Mr. Eke in trial. See Vol. RP 1080 (See Exhibit 6 P.D.A. request from petitioner to thurston county).

Anthony McKague notifies the court that Mr. Crow has not told him about the murders, it was Mr. Eke RP 1234-35. Mr. McKague tells Mr. Sergi that Mr. Eke wrote him letters telling him what to say. RP 1252. Mr. McKague states on

record he gave the prosecution the 7 letters from Mr. Eke, that he never been disclosed to the defense.RP 1246.

Mr. Durga has provided an affidavit exculpating Mr. Crow. Mr. Durga said when he notified the prosecutor of this exculpating information he threatened him with an exceptional sentence.(See Exhibit 7 Affidavit of Chris Durga).

TRIAL COUNSEL FAILED TO DO PROPER INVESTIGATION, RESEARCH, AND FAILED TO GO OVER THE EVIDENCE WITH MR.CROW:

On March 5th, 2009, status conference RP 7, Mr. Sergi notifies the court the petitioner filed a complaint with Ms. Harrison because counsel only spent 2 hrs. total with Mr. Crow. The defense attorney never went over the evidence with Mr. Crow.(See Exhibit 8 letter from sheriffs office & visiting log) RP 7.Mr. Sergi even refused to call Mr. Adams as a witness. "your Honor, as I stated yesterday, and.. I talked to Mr. Adams, and my opinion is that he doesn't add anything... and it's over Mr. Crow's objection that I am not going to be calling him as a witness."Vol. 8 RP 1253.

The DNA expert stated that blood was found, and confirmed to be from and alleged on Mr. Durga & Mr. Eke, none was found on Mr. Crow. RP 784-785.Mr. Crow was thrown into the fire before the incident started at pops camp. The residue on the shoe had no connection to the partial print on the alleged victims back.RP 788. The partial print on the back couldn't be proved to be Mr. Crow's.RP 865-894.

There are numerous statements from people saying Mr. Crow was drunk, and always is drunk.(See Exhibit 9 Celtic investigations report) RP 1115,1344-47.Although an intoxication instruction was given counsel didn't request the lesser included of Manslaughter. The prosecutor also was allowed to testify as an unsworn with no objection from Mr. Sergi. The appeals attorney should have raised these claims. Thomas E. Doyle didn't raise these issues.

BASHAW/RYAN FACTS: In the instruction conference starting at RP 1174, The prosecution began to explain Goldberg/Bashaw. Defense counsel requested an instruction that says that they have to be unanimous as to "yes" and not unanimous as to "no". RP 1179, 1174-1182. Then counsel stated that he would like the court "to consider adding language to that instruction that requires them to be unanimous as to "yes" here, and that if they're not unanimous, then the answer would, by default, essentially be "no". RP 1180. (See instruction 30 in appendix "A" complete jury instructions). The Judge approved of this instruction which in it's total context doesn't stop the jury from further deliberation as to "no". The first part of the instruction paragraph 4 tells the jury they must all be unanimous. The eighth paragraph only says "if you are not unanimously satisfied beyond a reasonable doubt that "yes" is the correct answer to the question in a special verdict form, you must answer "no" on that special verdict form."

Absolutely nothing in this language tells them that they don't have to be unanimous as to "no", nor does anything stop them from urging each other on to continue deliberating if they don't agree as to "yes" or "no". Nothing allows one juror to answer "no" by themselves without all 12 jury members. This instruction requires them to believe they all must answer "yes" or "no" unanimously.

JURY UNANIMITY AS MEANS OF MURDER: On the morning of March 20th, 2009 the Judge called defendant & defense counsel to inform them of a jury inquiry. RP 1393. "n deciding murder in the second degree, do we need to specify intentional versus felony on a verdict form? If so, do we need a different form." RO 1393-1394. The Judge Honorable WM. Thomas McPhee sated "the answer to that is clearly "no", and an answer in that respect may be all that needs to be responded to". RP

RP 1393-1394. The Judge Honorable WM. Thomas McPhee stated, "the answer to that is clearly "no", and an answer in that respect may be all that needs to be responded to." RP 1394. Mr. Sergi explained that if the Judge sends back a message saying "no" then the jury will follow the source of confusion & not be unanimous. 1394. The prosecution even backed up the defense & said "it certainly can't help but be of benefit to the defendant to remind them of the necessity of being unanimous." RP 1395

The Judge came back and said "after further review of the matter in mind, I have determined to answer this question "no" without further explanation... If the jury has determined that Mr. Crow is guilty of murder in the second degree, there is an equally possible situation here where the jury has determined that he is not guilty of one theory and unable to reach a decision on another theory. Under those circumstances to answer anything other than "no", I think, would run a substantial risk of error." This makes no sense & by answering "no" allows the jury to convict without being unanimous.

III. ARGUMENT

ISSUE ONE

The prosecutor told the jury they must glean the truth from the two co-defendants testimony then put together his own ultimate testimony testifying as an unsworn witness depriving Mr. Crow of a fair trial. Prosecutorial misconduct denies a defendant the right to a fair trial and necessitates a new trial if there is a substantial likelihood that the misconduct affected the verdict. State v. Echevarria, 71 Wash. App. 595, 597, 860 P.2d 420 (1993). If the misconduct implicates the Constitutional Rights of the defendant, however, reversal is required unless the error is harmless beyond a reasonable doubt. State v. Easter, 130 Wash. 2d 228, 242, 922 P.2d 1285 (1996). State v. Fleming,

83 Wash. App. 209,216,920 P.2d 1235 (1996). Even in the absence of an objection by the defense, reversal is required if the remarks were so flagrant or ill intentioned that no curative instruction could have obviated the prejudice.Echevarria, 71 Wash. App. at 597.

A. THE PROSECUTOR IMPROPERLY MADE HIMSELF INTO AN UNSWORN WITNESS AGAINST CROW .

It is a "well established principle that the prosecutor has a special obligation to avoid improper suggestions, insinuations, and especially assertions of personal knowledge." U.S. v. Roberts, 618 F.2d 530,533 (9th Cir. 1979). Assertions of personal knowledge run afoul of the advocate witness rule, which prohibits attorneys from testifying in cases they are litigating. U.S. v. Edwards, 154 F.3d 915,921 (9th Cir. 1998). The advocate witness rule is particularly important in criminal cases, where the concern is "that the jurors will be unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors."Edwards Supra. The danger in having a prosecutor testifying as a witness, is that jurors will automatically presume the prosecutor to be credible and will not consider critically any evidence that may suggest otherwise... The policies underlying the advocate witness rule apply equally when a prosecutor implicitly testifies to personal knowledge or otherwise attains "witness verity" in a case which appears a advocate for the government...[the rule is] designed to prevent prosecutors from taking advantage of the natural tendency of jury members to believe in the honesty of lawyers in general and government attorneys in particular... U.S. v. Hosford, 782 F.2d 936,939 (11th Cir. 1986).

In Edwards, the prosecutor discovered a piece of evidence during a recess in the trial. The next day he elicited testimony regarding his discovery from two police officers.

In the instant case the prosecutions gleaning of the truth from snippets of each co-defendants testimony to create his ultimate testimony is the receipt found by the Edwards, prosecutor. The prosecutor in the instant case elicited his points from the two co-defendants, and then told the jury most of their testimony is a self serving lie, but the truth can be gleaned from the two testimonies together. This allowed all his participation in the trial to act as silent witness. Then during closing arguments he put it all together into his ultimate testimony.

The Ninth Circuit in Edwards, held that the prosecutor's continued participation in the trial constituted prejudicial error mandating reversal and a new trial. The same should apply here because the prosecutions implicit testimony was devastating to Mr. Crow's only theory of defense, and was a blow against which he had no way to defend. Because the prosecutor was not exposed to cross-examination, defense counsel did not have a fair opportunity to cast doubt on the circumstances under which the prosecution crafted together his ultimate testimony gleaned from his version of the truth.

The prosecutor told the jury their duty is to determine the truth by telling them over & over to glean the truth. This undermines the burden of proof and trivialized the jury's role in weighing evidence because they must determine the truth from life's experience instead of weigh the evidence and determine the facts. This is a type of error, State v. Johnson, 158 Wn. App. 677,684-85, 243 P.3d 936 (2010) Prohibits. No type of objection, or instruction can cure this error.

CONCLUSION

The prosecutions misconduct was flagrant and ill intentioned and this court should reverse for new trial.

ISSUE 2.

THE PROSECUTOR FAILED TO DISCLOSE EXCULPATORY EVIDENCE TO THE DEFENSE AND THREATENED A WITNESS INTO TESTIFYING UNTRUTHFULLY.

As discussed in the facts, and shown in Exhibits one, two, three, four, five, six, and seven. The prosecutor failed to disclose key notes and letters written by co-defendant Mr. Eke where he is trying to get Mr. Adams & Mr. McKague to lie for him in trial. He also tried to get the petitioner to do the same. The state also had a handwriting analysis done that proves Mr. Eke wrote the notes/letters, this analysis wasn't disclosed to defense. Had defense had this material they could have prepared properly for trial formulating questions for cross examination, and impeached Mr. Eke when he denied ever writing any of the letters to petitioner. Also, had the prosecutor not threatened Mr. Durga he would have testified truthfully in trial as his affidavit in Exhibit 7. Mr. Crow is entitled to a new trial or dismissal.

A. THE PROSECUTOR COMMITTED GOVERNMENT MISCONDUCT

To support dismissal under CrR 8.3 (b), the petitioner must show by a preponderance of the evidence both (1) arbitrary action or government misconduct, and (2) actual prejudice affecting the defendant's right's to a fair trial. State v. Wilson, 149 Wash. 2d 1,9,65 P. 3d 657 (2003). Claimed government misconduct need not be evil or dishonest in nature; "simple mismanagement is sufficient." State v. Michielli, 132 Wash. 2d 229,239,937 P.2d 587 (1997). This remedy is proper in truly egregious cases of mismanagement, and misconduct such as Mr. Crow's case because the prosecutor's conduct materially prejudiced the rights of the accused. State v. Moen, 150 Wash. 2d 221,226,76 P.3d 721 (2003).

B. DEFENSE COUNSEL MADE A GENERAL REQUEST FOR DISCOVERY UNDER CrR 4.7

Rule 4.7 Discovery:

(a). Prosecutors obligations.

(1). Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

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(IV). Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparison. (emphasis added).

In, U.S. v. Agurs, 427 U.S. 97,104,96 S.ct. 2392, 49 L.Ed.2d 342 (1976), The U.S. Supreme Court ruled that specific request are not required in situations which evidence is obviously of such substantial value to the defense that elementary fairness requires disclosure. The notes/letters and handwriting analysis are pieces of evidence which require disclosure. The prosecutor must always be faithful to Justice because he is a servant of the law. Berger v. U.S., 295 U.S. 78,88,55 S.ct. 629,633, 79 L.Ed. 1314.

C. THE STATE MAY ARGUE THIS EVIDENCE IS ONLY IMPEACHING BUT THIS CASE IS A CREDIBILITY CONTEST AND IMPEACHMENT EVIDENCE IS MATERIALLY EXCULPATORY

"Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady Rule." Giglio v. U.S., 405 U.S. 150,154, 92 S.ct. 763,766, 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." The Court of Appeals treated impeachment evidence as constitutionally different from exculpatory evidence. According to that court, failure to disclose impeachment evidence is even more egregious than failure to disclose exculpatory evidence because it threatens the defendants right to confront adverse witness... The governments failure to

disclose impeachment evidence that the defendant could use to conduct an effective cross examination of important prosecution witness constitutes constitutional error of the first magnitude requiring automatic reversal." U.S. V. Bagley, 473 U.S. 667,105 S.ct. 3375,3380 (U.S. Wash. (1985)).

Our State Court of Appeals have made similar ruling's "Thus, we find that CrR 4.7 discovery requirements apply to rebuttal and impeachment evidence; consequently, the state violated it's obligations when it unintentionally failed to disclose." State v. Linden, 89 Wn. App. 184,947 P.2d 1284,1288 (Wash. App. Div. 1 (1997)).

CONCLUSION

Failure to disclose this information violated Mr. Crow's right to a fair trial & to confront adverse witness. The threats to Mr. Durga did the same. Dismissal or reversal is required. Mr. Crow prays for relief.

ISSUE THREE

APPELLATE COUNSEL IS INEFFECTIVE FOR FAILING TO RAISE MERITOROUS INEFFECTIVE OF COUNSEL CLAIMS

Defense counsel only spent 2 hours total with the petitioner in preparing for a murder trial. (See Exhibit 8), RP 7. The petitioner even filed a complaint against his attorney for this. RP. 7. Defense counsel even failed to call key defense witness who would have testified as to what co-defendant Mr. Eke tried to get Mr. Adams to testify falsely in trial. Vol. 8 RP 1253. A lesser included for the intentional murder in the second degree wasn't requested by counsel either, he in fact refused it.

A petitioner who raises ineffective assistance of appellate counsel on collateral review must show (1) that the legal issue that the appellate counsel failed to raise had merit, and (2) that he or she was actually prejudiced by appellate counsel's failure to raise the issue. In RE

Pers. Restraint of Maxfield, 133 Wn. 2d 332,344,945 P.2d 196 (1997).

Although, the 2nd degree felony murder charge was not able to get the lesser of manslaughter. The 2nd degree intentional murder is allowed to receive manslaughter one as a lesser included. State v. Berlin, 133 Wn. 2d 541,947 P.2d 700 (1997).

This most Honorable Court review's the trial courts refusal to give an instruction based on a ruling of Law De Novo, however, it was the defense counsel who failed to request the lesser, not the trial court who refused to give it.

A. WHEN THE PRONGS OF WARD ARE APPLIED TO THIS CASE Mr. CROW IS CLEARLY PREJUDICED

In State v. Hasan, 151 Wash. App. 209,211 P.3d 441 (2009). it is noted that examining the deficient performance prong of a claim that trial counsel is ineffective for failing to request a lesser included offense instruction, the reviewing court must engage in a highly fact specific inquiry. Hasan at 219. First, is there a significant disparity in the penalty between the greater and lesser offense? There is a huge difference between murder and manslaughter, the prong is met.

Second, is the defense theory consistent the greater and lesser offense? Yes, everybody consistently said Mr. Crow was drunk out of his mind, and an intoxication instruction was given. There is evidence that he was passed out in the bushes & had no part in the murders. At the very least the jury could have found he lacked the mental element for murder.

Also the jury wasn't unanimous as to which degree, or type of murder Mr. Crow was involved in. RP 1393-1395. Had the jury been instructed properly they would have resolved their conflict in convicting Mr. Crow in the lesser of manslaughter. Instead of being instructed that they didn't have unanimous by the Judge. RP 1393-1395.

Finally, the risk of conviction in pursuing the all or nothing strategy adopted by trial counsel, if indeed counsel had any strategy at all—was overwhelming. It is obvious from the two hours spent with Mr. Crow that Mr. Sergi was unprepared & failed to do his legal research. There could be no strategy in not requesting a lesser in light of all the evidence because bottom line it appears Mr. Crow plays some small roll in this crime, but not the main part as a murder, so counsel should have given the jury the means to determine that his role was small as an accomplice guilty of manslaughter.

Appellate counsel is ineffective because this issue clearly has merit & prejudiced Mr. Crow by many, many extra years of incarceration.

B. COUNSEL WAS INEFFECTIVE FOR FAILURE TO RAISE CLAIMS CHALLENGING FAILURE TO OBJECT, FAILURE TO CALL WITNESS

In any ineffectiveness claim, a particular decision not to investigate must be directly assessed for reasonableness; Giving greater deference to counsel's judgement & Inquiry into counsels conversations with defendant may be critical to a proper assessment of counsel's investigation decisions. In RE Elmore, 162 Wn. 2d 236,172 P.3d 335,344 (Wash. 2001). Mr. sergi only spent two hours with Mr. Crow, so how could he conduct a reasonable investigation, or be prepared for trial? In RE Davis, 152 Wn. 2d 647,101 P.3d 1,41 (Wash. 2004). Mr. Sergi didn't even interview Mr. Adams, so how could he rely on a proper assessment as whether to call this witness or not? Lord v. Wood, 184 F. 3d 1083,1096 (C.A. 9 (Wash) 1999).

Defense counsel even failed to hold a 3.6 hearing to suppress the shoe print evidence. No witness could say the print on the alleged victims back was Mr. Crow's, and witnesses did say Mr. Crow was pushed into the fire. The prosecution used the soot on the victims back, and soot found on Mr. Crow's shoes, as circumstantial evidence that

Crow stepped on their backs during the burning. "Failure to bring a plausible motion to suppress is deemed ineffective if it appears that a motion would likely have been successfully if brought." State v. Meckelson, 133 Wn. App. 431, 135 P.3d 991, 993 (Wash. App. Div. 3 2006).

Under ER 401, this evidence can't be relevant because it doesn't prove Mr. Crow stepped on anybody. This is more prejudice than probative and under ER 403 is inadmissible. The Judge would have suppressed this evidence. The jury would never have been allowed to believe Mr. Crow stepped on the alleged victim. Therefore it is exculpatory lessening Mr. Crow's involvement.

CONCLUSION

It is more than likely these issues are meritorious warranting appellate counsel to raise them, and it is evident the cumulation of these errors created actual & substantial prejudice severley affected the outcome of Mr. Crow's trial. Mr. Crow prays this court will remand for new trial.

ISSUE FOUR

Mr. CROW'S RIGHT TO A UNANIMOUS VERDICT ARE VIOLATED AND THE JURY EXPRESSED CONFUSION

The jury asked the Judge if they must be unanimous as to which type of murder Mr. Crow is guilty of, for purposes of the verdict form. This clearly proves that the jury is split in which type of murder Mr. Crow committed. Had the instructions not confused the jury they would have understood that they need to all be unanimous, and if they can't be unanimous then Mr. Crow gets a mistrial, or acquitted. Even the prosecutor told the Judge, the jury should be told that they must be unanimous. The Judge told them "no" they didn't have to be unanimous. The jury convicted Mr. Crow on different means, and different theories violating his State & Federal protection's against a non-unanimous verdict.

When the state presents evidence of several distinct act's, any of which could be the basis of a criminal charge. The trial court must ensure that the jury reaches a unanimous verdict on one particular incident. State v. Petrich, 101 Wn. 2d 566,683 P.2d 173 (1984). The court didn't ensure this, and Mr. Crow is a victim of severe constitutional violation.

CONCLUSION

Mr. Crow asks this court to remand for new trial with instruction that the jury is properly informed as to not make the same error twice.

ISSUE FIVE

MR. CROW'S SPECIAL VERDICT INSTRUCTION FORM STILL VIOLATE'S THE HOLDING IN BASHAW

The trial courts discussed, Goldburg/Bashaw in trial. RP 1174-1181. the problem Bashaw attempted to stop is the jury being forced to continue to deliberate if they don't reach a unanimous verdict. Due to the fact they are not required to be unanimous to the "no", the Bashaw court believes if the jury thinks that they are required, it will cause them to keep deliberating to reach a unified answer. The prejudice is because they might out of sheer fatigue give up & conform with the majority as to "yes".

The only way to cure this error would be to simply tell the jury they don't have to be unanimous as to "no".

Mr. Crow's instruction attempted to cure the prejudice of the jury attempting to persuade each other, and to conform out of fatigue, by adding "If you are not unanimously satisfied beyond a reasonable doubt that "yes" is the correct answer to the question in a special verdict form, you must answer "no" on that special verdict form. (See instruction "30" in Appendix "A"). This doesn't stop them from believing they must still be unanimous as to

"no". In fact this will cause the jury to feud even more, because now if they don't agree as to "yes" unanimously by default, they think they must agree unanimously to "no" so this will cause the jurors who think "yes" to argue their perception even more & feel more obligated to persuade the other jurors & results in the few "no" individuals to eventually conform. Where as a simple sentence telling them they don't have to be unanimous as to "no" will allow the "yes" folks to say "yes" & the "no" folks to say "no" & everybody's opinion respected & justified & nobody feels obligated to persuade the others.

CONCLUSION

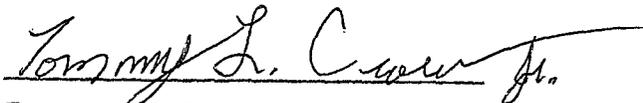
Mr. Crow asks that all factors found by special verdict be vacated and to be re-sentenced.

CONCLUSION

For the cumulation of the errors presented in this case Mr. Crow prays he receive justice State v. Saunders, 120 Wn. APP. 800,826 86 P.3d 232 (2004).

Sincerely Submitted,

This 20th Day of December, 2011


Tommy L. Crow Jr.

EXHIBIT

1

EXHIBIT

#21 T.C.

I have a somewhat good idea?

We need to figure out some how to get Chris to say or we say that Chris had a seizure during the fight cause you know as well as me that Chris don't remember what he does for at least $\frac{1}{2}$ hr to 45 min he could get off on a small charge and he has seizures and that is a medical cause he would probably go to Western state for a few years we can't take the charge either of us cause we have too many points against us they want to give us too much time but Chris having no record would get maybe at much as 5 yrs to 7 yrs w/ good time be out in 3-5 yrs so talk to Chris and see what he says or do you have any other idea I was too drunk to remember much that night but bits and pieces we need to figure something out or we are gonna fry please get back 2 me on this when you can figure something out you know me or Chris least myself don't know the Justice system so we don't all need to go down but one has to bite the bullet and Chris has no record but we do I think they would give Chris Manslaughter 1st 5-7 yrs cause he has seizures and he could play that off cause all we want to do was just

Beat them Around a bit And destroy their
Camp So they would move the only reason
I Burned their tent was Cause I found my
stuff in there Wink Wink. And also to
get them to Move So they wouldnt rob us
Again I talk to you tomorrow or write me
to tell me what's up we need to stick
together now to help us. All Well
talk to you later

#33



P.S talked to Q-tip he said stick together
And we can beat this so let's forget everything
till now let's think like the 3 Amigos
Also you met my Ex wife And Seen my
Kids she was Outside Grocery Outlet Remember
Sunshine the kinda thick girl w/ 3 kids that's my
family she finally got of Me! And has Been
Clean for 5 yrs she wants me Back So do My Sors!

10 #

#21

①

Tom,

You Probably dont want to hear this But I talked with scotty yesterday and he told me what went on that night when we were over at that Snuffys + Karens Camp we had a few Beers you kept tripping over little stumps cause you couldnt see so they told you to sit down to stop stumbling you told them no then you tried to see where I was to get a Cigarette you then walked thru the firepit At their Camp they put you out on your pants leg then told you again to sit down you told Karen to fuck off where leave me or my Brother alone they then told you to leave cause that was wrong to say, then you tried to Apologize but It was to late they wanted you to go you then said come on Bryan lets leave I didnt want to go cause I was Enjoying there Company I've know Karen for years she hadnt seen me in a while you then got mad and tried to fight everyone there makin threats + such finally they I got you to Calm down some and talk sense they then walked you out of camp to the main trail you somehow made it back to our Camp and got Chris and told him you were pushed in a fire You werent Bad you walked and fell in it your self, then I made it down to Pops Camp with Scotty to take pops some Beer + Bullshit with him cause Karen + her man + Snuffy were going to bed them about 20 min or 30 min Later Chris shows up and says Who pushed my Brother in the fire Scotty tried to tell him you did yourself to let him explain (scotty) how they helped you to get out of the fire Chris didnt listen to reason and jump the

makin then
A Bowl

→

③

P.S. Scotty is known for one thing and that
is Not to Lie.

(2)

gun and started Beating Scotty Cause Scotty
Asked him what are you going to do with that
meaning the Bat that's when Chris hit him in the
head and then in the upper Body and such. he says
I didn't hit him at all I swung the Bat but was too
fucked up to hit him (Remember I took that acid
that night and was gone) he then remembers you
coming back and saying I told you I'd be back to
get you later and he screamed Please don't hurt
me anymore but you climbed in the tent and started
to punch him in the jaw breaking his jaw* Pop's
then said leave his camp that minute Cause what
we did was wrong you guys told him to stay out
of it it's none of his business but it went on in his
camp if you recall he had fighting talked about home
for 25 days before you got out and was tired on all the
"drama bullshit" as he put it. So what I'm trying to say
is if you were to have sat down and realized what
was going on or have had Chris ask me what happened
None of this would have happened But for one
thing I didn't kill Norm and you know
that or did I have anything to do
with Pop's Death I only lit the
tent before they were in there you need to
as well as Chris to tell the truth! As
of now my girls + son are going to have no
father to raise them Cause you did something
wrong. My Ex wife + kids came to see me 2 wks
ago she wants me back and my kids want
their Daddy Just tell the truth
Tom, same with Chris tell him I know you
can talk with him

made him
split himself

Be
A
true
friend
brother
tell
the
truth!

Rouan

(3)

EXHIBIT

2

EXHIBIT

To whom It May Concern;

I, Tommy Crow do hereby declare under penalty of perjury that the following is a true transcription of the photo copies of the original letters written by Bryan Eke to Anthony Mckague, which are attached to the transcription.

Tom Crow

(Anthony McKague)

Jailhouse Informant

I'll be going to Max soon is there anything you want me to say to Tommy? Is there anything I can do? Just let me know. I'll do what ~~you~~ I can. Bad. If there is anything I need to know let me know so I know what to say.

(Bryan Eke) Co-Def

Say nothing to Tom but ^{unknown} () my attorney tell him what you know and that they were talking about how they put the bodies in the fire. After it was lit.

And are trying to get me in more trouble by saying that it was lit afterward. Anything else to just clear my name would help.

events of 1000 xom of end of ad
of 1000 xom of end of ad
job not at all my attorney
today I will work for you
on take my attorney
ID card with me for
And he is trying to get me in trouble
by saying that I am not
anything else to just
my name would

events of 1000 xom of end of ad
of 1000 xom of end of ad
job not at all my attorney
today I will work for you
on take my attorney
ID card with me for
And he is trying to get me in trouble
by saying that I am not
anything else to just
my name would

pg 54-55 Being Coached 2/26/09

Jailhouse Interview: In the paperwork it say you lit the tent on fire. Why? Wasn't it two different occasions. But what Really went on?

Co-def: pretty much Cause the other person in the tent Besides pops took somethings of mine that my grandma gave me Before she died Saw them in the tent and without thinkin Just did it impulsively not Really thinkin Just was so mad Lit it but not in Relation to what was happening that night but Seein the stuff that was taken Just set me off

In the paper work it say you
took off the stuff I want to know
occasions. But what really went
pretty much. Cause the other person in the
Besides Pap took some things of mine
my grandma gave me before she died
them in the tent and without think
did it impulsively. Not really think
was so mad. Let it be not in re
to what was happening that night
See in the stuff that was taken for
me off.



(Left side of page) ...
 pretty much (was the other person in the car)
 Besides god took some kind of ...
 was to be ...
 them in the ...
 did it ...
 was so ...
 to what was ...
 seen the ...
 was off

if you want me to help you get off I need to know what to say! I'm very smart & I know how to ~~win~~ ^{win} a lawyer

Tell him that you have heard them talk about getting a story together to go against me and tell him that whatever tom tells chris chris does it just show him proof they are out to set me up also tell him that they are sending notes to collaborate a story that makes me guilty so then I don't know of anything else just tell him of what you heard and of the letters he'll know what to do cause I don't want you to get in trouble so that's all I can think of I'm not very smart didn't go past the 7th grade so I'm considered dumb I guess.

I know that part. But I barely know anything about the case and Woodrow said that I need to know. I hate Chris and Tom so if you give me what you want I'll testify for you and not look like a fool

That Chris + Tom + Myself went over to ask Pops about telling on Chris + Tom about beating up a guy named Scottie from there Chris + Tom beat up Pops + a guy named Norm for the reason that Pops told the police about the assault so they were going to take care of them (also are you going back to Frank maybe I can have statements of them sent to you to read I'm not good at explaining things very well then you could get an idea from the statements about the case it's really just about Tom + Chris getting even for something that didn't happen to Tom (he claims he got thrown in a fire + burned went and got Chris + tried to save something about Tom getting burned.

Admin.'s Follow-up/Response, if Necessary: _____

Brian

I have to do what my attorney
has told me and just hang out and
stay out of stuff until the 29th please
be patient it will work out and I will
help I gave you my word but I have to
wait until the 29th => please hang in there
I have to do what he tells me who is
your attorney in case you or I get
moved so I can still contact him
and get him a letter or talk to him
I will do this for you I promise
my word is my word it's all I have in here
but it's good and I will stand by it please
believe that I do follow through I just
have to do what I have been advised
to do

THANKS

You know who

who A.A.

Please destroy this letter or give it
back

IF YOU GET Brian's Laundry next time take it
all and good job if you did Haha

Admin.'s Signature: _____

EXHIBIT

3

EXHIBIT

Olympia Police Department

- Suspect
- Victim
- Witness

Case # 08-2501 Exemplar
Date of Statement: 02-06-09
Time of Statement: 1333

Name of Person Being Interviewed: Brian Dana Eke

Date of Birth:

Address:

Interviewing Officer/Detective: Detective Sam Costello

Location of Interview: Thurston County Sheriff's Office

Also present Detective Russ Gies

-
- 1 Q Okay. So this is on. Um, this will be...uh, the handwriting exemplar for, uh, Brian Eke.
2 The time is, uh, 1:33 PM. The date is February 6, 2009. Statement's being re-, or the, this
3 is being, uh, completed at the Thurston County Sheriff's Office. Present in the room are
4 Brian Eke, myself Sam Costello with the Olympia Police Department, and Detective
5 Russ Gies with the Olympia Police Department. Uh, Brian, is this statement being, this
6 statement's being recorded. Is that with your permission?
- 7 A Yeah.
- 8 Q Okay. Um,...what I'm gonna do is I'm gonna read you your rights. You've been read
9 your rights before. Is that correct?
- 10 A Yes.
- 11 Q Okay. And just so that we're very, very clear, you're represented by an attorney.
- 12 A Mm hmm.
- 13 Q Okay. And it's with regard to, uh, two counts of murder at this point. Right?
- 14 A Yeah.
- 15 Q Okay. Um,...and so I'm gonna read this and I'm gonna explain that to you on the, on the
16 recording. Uh, this will be the statement of Brian Eke. And I'm gonna read these Miranda
17 rights to you. You have the right to remain silent. Anything you say can be used against
18 you in a court of law. You have the right at this time to an attorney of your own choosing,
19 and to have him or her present before and during questioning or the making of any
20 statements. If you cannot afford an attorney, you're entitled to have one appointed for
21 you by the court without cost to you, and to have him or her present before and during
22 questioning or the making of any statement. You have the right to exercise any of the
23 above rights at any time before or during any questioning and the making of any
24 statement. Do you understand that?
- 25 A Yeah.
- 26 Q Okay. I'm not gonna ask you any questions.

1 A Yeah.

2 Q All right? I'm reading you these per pre-, mostly just for protocol reasons. So...I'm not
3 gonna ask you if you want to make any statements. Because I don't intend to ask you
4 anything with regard to this case. Um,...did you have a chance to read through this?

5 A Yeah. Uh,...

6 Q Okay.

7 A It says the...this matter having on the motion of...James Powers...and, and, and whatnot.

8 Q Okay. Look...

9 A It doesn't make sense to me. I, I,...

10 Q Okay. Let me, let me tell you basically what, and I'll, let me just read it into the record
11 here.

12 A Okay.

13 Q And then, and then I'll kind of tell you what it says. Uh, just for the record, my
14 understanding was that your attorney was gonna come up here and explain what, at some
15 point was gonna explain this to you.

16 A Yeah.

17 Q And, and did that, did that ever happen?

18 A No. He never told me anything about this.

19 Q Did the private investigator ever speak to you about this?

20 A Hm mm.

21 Q Okay. Um, let me read this onto the record. And this is, uh, the Order for Handwriting
22 Exemplar. It's been signed, um,...by a Superior Court judge. It's also been signed by
23 your attorney, Richard Woodrow, and the Prosecutor, uh, James Powers. Uh, it reads
24 State of Washington vs. Brian...Brian Dana Eke. And, uh, let me just read the order. This
25 matter, having come upon the motion of James C. Powers, Deputy Prosecuting Attorney,
26 in and for Thurston County, State of Washington, for an order for a handwriting exemplar
27 from the defendant, Brian Dana Eke, and the defendant being present personally and
28 through his attorney, Richard Woodrow, and the court having examined the files and
29 records herein, including the declaration of James C. Powers submitted in support of the
30 motion, and being fully advised in the premises of this, of that motion. It is hereby
31 ordered that pursuant to CR...R 4.7B2, uh, Roman number 7 (VII), the defendant, Brian
32 Dana Eke, shall provide specimens of his handwriting in a, in a, in a handwriting
33 exemplar form provided either by Olympia Police Detective Sam Costello, or by another

1 authorized person, or another person authorized by Detective Costello to obtain these
2 handwriting specimens from the defendant. It's dated uh, February 5th of 2009. And
3 again, signed by a Superior Court judge. And basically what that order is, Brian, is for
4 you to provide to us a handwriting sample.

5 A Okay.

6 Q Uh, and so what I, what I have here, is I have two things. Onc, I have some things, uh,
7 that I have typed out, uh, and I'm not gonna talk with you about where they came from.
8 I'm not gonna ask you any questions about them. It would be better if you just didn't say
9 anything about where these came from. Because you may or may not recognize the things
10 that are typed on this page. In addition to that, I also have a s-, more standard, uh,
11 exemplar form, and it's, uh,...it's something that may take just a little while. Um, now
12 I'm gonna ask you...when you write in the jail, have you ever just written with the lead
13 of a pencil?

14 A No.

15 Q So you always use the whole pencil.

16 A Yeah. I always use a whole pencil whenever I,...why would I use just a little piece of a
17 lead?

18 Q Well, I, it, it's...sometimes people use just the lead.

19 A Oh.

20 Q You're saying that you've never used that.

21 A No.

22 Q Okay.

23 A I've always just used a pencil.

24 Q Okay. So what I'm gonna do...is I'm gonna hand these to you. Do you understand the
25 order?

26 A Yeah. I, I,...I, I, I somewhat understand it. They just, they want me to write
27 my...something down on a piece of paper.

28 Q Right. They, they want, what, what basically what I'm looking for pursuant to this court
29 order is....a sample of your handwriting.

30 A Okay.

31 Q Um, and it's gonna be a fairly lengthy sample of your handwriting. So, uh, it's actually
32 gonna be you reproducing this, this...this, and this.

- 1 A Oh, wow. You aren't...
- 2 Q It could take...it could take a little while.
- 3 A Yeah.
- 4 Q Okay. So what I'm gonna do is I'm gonna give you this paper to write on.
- 5 A Okay.
- 6 Q Okay. You can use that pencil. And I'm gonna hand this to you. And what I'm gonna ask
7 you to do, Brian, is just write, you don't need to write "question" you don't need to write
8 "answer" you don't need to write "question" you don't need to write "answer" like this.
9 But, what I would have you do is write...these sections. This one and then this one, this
10 one, this one, this one...the text of it. Okay?
- 11 A So you want me to, to...just copy it, or...?
- 12 Q Yep. I just want you to write what's, what's here in your own handwriting on this page.
- 13 A Oh, okay.
- 14 Q Make sense?
- 15 A I guess so.
- 16 Q Okay.
- 17 A So it's kinda like a, a...I don't know...and you just want me to just...
- 18 Q Yep.
- 19 A ...word for word...
- 20 Q Start with the word "how".
- 21 A Oh, okay.
- 22 Q And just go down. Just, the only things that I want you to skip on the page are where it
23 says "question"...
- 24 A Question...
- 25 Q ... "answer, question, answer". I don't want you to write the que-, that word or that word
26 or that word or that word. But, I want you to write all the text in between. All the words
27 in between there, I want you to write out.
- 28 A All right.

1 Q Okay?

2 A That sounds all right, then.

3 Q All right. Are you okay for just a second? (talking to Gies) (Costello has left the room).

4 A Oh, is that that buzzing?

5 Q (Gies): Hello? (answering phone). He-, hello? (unintelligible).

6 Q (Costello): Now when you get right down to here, where it starts with the number
7 (sounds like). Right here, stop.

8 A Oh, Okay.

9 Q Because I'm gonna ask you to do it a different way.

10 A (mumbling to self).

11 Q (Gies): (unintelligible).

12 Q (Costello): (unintelligible). Once you get to that, if you would, uh, it's underlined, go
13 ahead and underline it when you're done writing it.

14 A Yeah, that's what I did with the...

15 Q Okay.

16 A ...(unintelligible) all thing.

17 Q Yep. Okay.

18 A (mumbling to self).

19 Q Where you at now?

20 A Uh,...right there.

21 Q Can you go sharpen that? Can you go find a place to sharpen that...for him?
22 (unintelligible). Where you at now?

23 A Uh, right here.

24 Q Okay. So...start on another page. And if you haven't done this before, uh, it's gonna be a
25 little weird. But, what I want you to do is write with this, just this lead right here.

26 A (laughing). Well, that's gonna be comical.

- 1 Q Yeah, it might be. That's why I don't want you to write a whole bunch with it so. If
2 you're gonna have to grab it between your fingers...
- 3 A Oh, good gosh. I don't even know if I can.
- 4 Q Well, I'll only ask you to write that one like that. Give it your best shot.
- 5 A Now where, where did, uh,...
- 6 Q Right here.
- 7 A Oh, start right there?
- 8 Q There you go. Yep.
- 9 A All right.
- 10 Q And just this last portion here. Starting with "never" and...
- 11 A And...
- 12 Q ...ending with "real."
- 13 A And ending with real.
- 14 Q Yep.
- 15 A Oh, gosh. Come on, stupid little thing. Stay right there.
- 16 Q Your hand tired?
- 17 A Yeah, it's hurting like no end. I haven't wrote this much in a long time. Ah.
- 18 Q If it gets to be too painful, let me know.
- 19 A No. I'm not, well, I, I'm always dealing with pain. So...I can deal with a ton of pain.
- 20 Q Well, I don't want to cause you a whole bunch of pain. I mean, I, I can work with that, if
21 you wanted to go on from there. In fact, why don't we just do that. From here, it would
22 be, it'd be easier actually to write with a regular pencil.
- 23 A Yeah. That's a hell of a lot easier. I,...
- 24 Q Okay. Why don't you...
- 25 A Um,...
- 26 Q ...start from where you left off, and just write with the pencil.

1 A All right.

2 Q (Gies): Docs it say where he left off?

3

4 Q (Costello): I have it. Plus you can tell.

5 Q (Gies): (unintelligible) notes (sounds like).

6 Q (Costello): Mm hmm.

7 Q (Gies): forty-six minutes (unintelligible).

8

9 Q (Costello): Get it?

10 A Yeah, I'm done with that page.

11 Q Okay. What I want you to do now is start on this page. And this is like filling out a, if
12 you've ever been to the doctor or whatever. It's just like filling a form out like that. Why
13 don't we use the pencil, and it's just...you know, name, city, date of birth, all that stuff.
14 It'll ask you all that stuff. And so just answer it like you're answering the question. Says
15 name, write your name down. If it says sex, write your sex down. if it (unintelligible)
16 your telephone, write your telephone number down.

17 A Okay.

18 Q (unintelligible)

19 A Do I do late, first and middle?

20 Q However you want to do it.

21 A Oh, okay.

22 Q Whatever you like.

23 A Do I use the same pencil or...?

24 Q Yep.

25 A Oh, all right.

26 Q Want you to use the same pencil.

27 A Ah. What do I put for a telephone number, because I don't have a telephone number.

- 1 Q That's fine. Don't put anything.
- 2 A Oh, okay.
- 3 Q You can just skip to the next line.
- 4 A I don't know about an address. What about a...
- 5 Q Do you know your mom's address?
- 6 A Yeah, I know my mom's address.
- 7 Q Put, write that down.
- 8 A Oh, okay.
- 9 Q It's more about the writing than it is the address. (whispering) (unintelligible) came to a
10 spot where this, if the recording (unintelligible) out, we'll stop. (unintelligible) start over.
- 11 Q (Gies): the way it is...
- 12 Q (Costello): yeah, yeah. Mm hmm. You can skip that part if you don't remember.
- 13 A Yeah, I don't remember. It was, oh, gosh, oh... '02 or '03 to '06.
- 14 Q You can put that if you want.
- 15 A Yeah, I know it was... I think it was '02 when I started there and I quit there in '06. Oh,
16 that's when I, I don't know if you remember, I had that white Ford pickup. That was in
17 like '96 to like 2002, I think. I don't know. You guys...
- 18 Q That's fine.
- 19 A ...pulled me over in it like a hundred times.
- 20 Q Okay. That's fine. So it's...the next line.
- 21 A Oh, name of nearest relative. Oh, uh, the months and years, I don't know what the...
- 22 Q Like, uh, January, February, March, April, May...
- 23 A Oh, they want me to write down...
- 24 Q Yep.
- 25 A ...all the months of the year?
- 26 Q Yep.

1 A Oh, okay. All the way out or...?

2 Q All the way out, yep.

3 A All right.

4 Q Same with that. Days, days of the week. Just...

5 A What do I do now?

6 Q Yep, just capital letters. Just, uh, like capital A, B, you know...

7 A Oh, okay.

8 Q (unintelligible).

9 A What do they mean by cash?

10 Q Just write that word out.

11 A Oh, write the word out?

12 Q Yep.

13 A Oh, okay. I didn't know if they wanted the money (unintelligible) or...

14 Q Yeah, but that's okay. And the same for the rest of those.

15 A Oh, spell out the word or...?

16 Q Yeah, just spell out the word.

17 A Oh.

18 Q No, no, that's fine. Uh, you're okay there. But the next one, just go ahead and spell it out.

19 A Oh, okay. What's the date?

20 Q 2-6.

21 A 2-6?

22 Q Yep.

23 A Gosh it's (unintelligible) six?

24 Q '09.

- 1 A Yeah, I've been writing all my little kites, when I write a kite, still in '08. I'm not used to
2 it being... oh, there's more.
- 3 Q Oh, yeah. There's a lot more. There's that whole page there and then... yeah. Here, we
4 can slip this part down here. And we'll, we gotta do this page, okay...
- 5 A All right.
- 6 Q Right here. And then here. We'll...
- 7 A Oh...
- 8 Q ...so this...
- 9 A ...wow.
- 10 Q ...this will take a bit. So...
- 11 A (mumbling).
- 12 Q Same thing over again.
- 13 A Oh, okay.
- 14 Q I know that seems redundant, but...
- 15 A Hey, whatever. I, I,... beats sitting in a cell with about fifteen other people.
- 16 Q Fair enough.
- 17 A That some of them, ooh, man. They're just terrible. Oh gosh, five Washington cities?
18 What city... we've got... Olympia...
- 19 Q Didn't know I was gonna give you a geography test.
- 20 A Yeah. I was gonna say, I, damn. I didn't go past the ninth grade, so huh uh. Olympia,
21 Tumwater... this is actually pretty easy, because then you got Lacey, all the places that
22 I've lived.
- 23 Q It gets harder.
- 24 A Tenino. Uh, ... Olympia, Lacey, Tumwater, Tenino... there's another one, I know. Yelm,
25 yeah. All right. Oh (unintelligible) states, oh, good gosh. Um, let's see (sounds like), I'll
26 start off with... Washington, and then, uh, ... oh, man (unintelligible) state, Idaho.
27 (unintelligible). Uh, ... (unintelligible)
- 28 Q That's pretty good. No?

- 1 A Haha, five European countries, oh, gosh.
- 2 Q Hey, if they're not European, I'm not gonna tell anybody.
- 3 A Well, I'll try. I, I,...I know...France. I know I think that's one. Uh, uh,...Greece, yeah,
4 that's another one. And, uh,...England, yeah, yeah, there's another one. England, uh,
5 Germany, yeah. Because Grandpa was in the German war. And then...France, Greece,
6 England, Germany, uh,...uh, I don't know if it's a...but, yeah, Italy, I don't know if
7 that's a European country. Is it?
- 8 Q Fair enough.
- 9 A All right. Five business.
- 10 Q They can be anything you want.
- 11 A Like what kind of a business...
- 12 Q Name it.
- 13 A ...or...
- 14 Q Name it. Whatever you can think of.
- 15 A I don't know. What do they mean by a business, like what...
- 16 Q Just whatever. Uh, Costco is a business.
- 17 A Oh, Costco, so...all right. Gosh. Costco. Costco. Uh,...hmm...(unintelligible) and I,
18 uh,...(unintelligible) uh,...oh, yeah. Take Five (sounds like). I don't know how to, how
19 do you, uh,...Cabela's, how do you spell Cabela's?
- 20 Q Ah, just throw it down there.
- 21 A All right. I'll try. CA-...-Pella. That's my favorite little store. And they opened one
22 finally here, but I haven't been over, been able to go see it yet.
- 23 Q All right.
- 24 A (unintelligible).
- 25 Q This is the last, uh, last page. So what we're gonna do is you can see it's kind of upside
26 down here, so start up here, okay, with, uh, 8765 Bellevue Way, and then when you're
27 done with these, you just copy them, just how they're written. Flip it over, copy just how
28 they're written here.
- 29 A Oh, all right.

- 1 Q (unintelligible) you do need to get that done though, (unintelligible) the bottom of that
2 page.
- 3 A Oh, I gotta sign this?
- 4 Q Yeah, yeah.
- 5 A Oh, okay. (unintelligible). Is there another pencil...
- 6 Q Yeah.
- 7 A (unintelligible). (unintelligible)
- 8 Q Yeah. Oh, yeah, yeah, yeah.
- 9 A Oh, one thing, did they ever tell you about, uh,... gosh, it has to be way back
10 in...September or...August or September of last year, about Chris's coat?
- 11 Q (No verbal response).
- 12 A Because I had told my attorney to contact you about Chris's black Dickey's coat. Did
13 they ever contact you about that?
- 14 Q No.
- 15 A Oh, man. Because what, uh, when we left and, and whatnot, and afterwards, when we
16 were walking toward Safeway and whatnot, he took off his black Dickey's coat and
17 threw it over the fence there. My attorney said that he went out there and seen the coat,
18 it's underneath a tree down there.
- 19 Q Okay.
- 20 A And that was like four or five months ago. And I tried to send a kite down to you guys at
21 O.P.D, but I've, (unintelligible) you never got it.
- 22 Q Okay. Well, I'll talk to your attorney about it.
- 23 A Yeah. Because I, I,...
- 24 Q Or (unintelligible) the prosecutor will talk to your attorney about it.
- 25 A Yeah. Because I, I,...I told him that was the, uh,...oh, gosh. When I was over in the,
26 uh,...E tank with Tom or whatnot, he mentioned that, uh,...they'll never find Chris's
27 black Dickey's coat, and that's when I thought, well, wait a minute. I didn't even, totally
28 forgot about the...him having on that black Dickey's coat.
- 29 Q Well, while it's this way, you might as well sign it and date it, because it's on the
30 right...down here at the bottom.

- 1 A Oh,
- 2 Q You'll flip it over and finish it. Another ten minutes or so. That's the end of it. Once
3 you're done with that section, then we're done.
- 4 A Ah. Gonna say, my hand, it, it, it's about just...
- 5 Q I can imagine.
- 6 A ...cramped.
- 7 Q Imagine so.
- 8 A Mom would be impressed that I'm actually writing this much, because...well, as you
9 know, there's not a whole lot that goes exciting in the jail. So I write her a letter about
10 once a month saying well, it's...I watched this TV show or...read this in the newspaper
11 or when I call her on the phone, it's...yeah, not too much to talk about. But, my sister, I
12 did find out from my mom, she had a thyroid thing and whatnot. And I haven't been able
13 to get a hold of my mom in the last couple of days. And I'm hoping everything went all
14 right with the...the surgery. They were supposed to cut in her neck or something like that
15 to remove the...some kind of a something in there.
- 16 Q The tank you're in now, are you able to make phone calls?
- 17 A Yeah. I'm over in, uh, C tank. They got me on my, uh,...anti depressants, my, uh,...blood
18 pressure pills, and then, uh, uh,...uh,...like a respiradol, it's like a sleeping agent and
19 whatnot. And it only took them about five...maybe seven months to get me on them.
20 Because I was trying to...let the jail here know that I had...well, at least I hoped they
21 were still out at my, my campsite, all my pills and whatnot. And do you know, by chance,
22 if you know what happened to my wallet?
- 23 Q I don't know. They may be in evidence.
- 24 A Oh, I hope that yeah. Because I had, uh,...some money in my wallet and, uh,...my, of
25 course my driver's license, which I have a driver's license now. I bet you're amazed by
26 that. But, yeah, I got my driver's license and then my social security and birth certificate.
27 And I told my mom, I says, well, I don't know what happened to it. And my mom's, well,
28 you didn't have it on you, I said no, I didn't. Which I should have. That's a g. Yeah, I
29 was gonna say that little lead's about dead. Whoo.
- 30 Q Okay.
- 31 A Man.
- 32 Q All right. So that'll be, uh, the end of the exemplar, you, uh, just for...the purpose of the
33 recording. What we got done was the typed, uh, the typed thing that I, uh,...showed you.
34 You produced that mostly with a regular jail pencil and partially with a lead. Is that right?

1 A Yeah.

2 Q Okay. And the part that, why don't you read the part that you produced with a lead.

3 A Uh, never brought Chris or Tom to my place, and introduced them to Pops and Norm,
4 should've just let them.

5 Q Okay. And the remainder of that was, or the remainder of everything that you completed,
6 uh, other than that right there, was completed with a jail pencil. Right?

7 A Yeah.

8 Q Held in your fingers.

9 A Write...writing with a lead, now that's damn near...that's impossible, almost.

10 Q Okay. So...

11 A (unintelligible) give you...

12 Q Uh, the...

13 A ...(unintelligible)

14 Q ...and you, you, you, what we have here is the, it says, uh, Crime Laboratory Division,
15 uh, Washington State Patrol here on the top, you've done that page. Right?

16 A Yeah.

17 Q Okay. And then...the page that's marked page two.

18 A Yep.

19 Q You wrote that?

20 A Did that one too.

21 Q And then the one that says page three.

22 A Page three, yep.

23 Q Okay. And that was it. Right?

24 A Yeah. Well, and then the...

25 Q Uh, uh,...

26 A Oh, I didn't do page four.

1 Q That...

2 A Nope.

3 Q Okay. All right. I think that accounts for it the time is now, uh,...oh, did we ever, uh, to
4 your knowledge ever turn off the recording?

5 A Oh, I didn't even know it was still running.

6 Q Yep.

7 A All right.

8 Q It was.

9 A Uh,...

10 Q Well, and then we didn't ask you any questions. Is that...

11 A No.

12 Q ...are we all in agreement?

13 A (unintelligible).

14 Q Okay. All right. The time is now 2:53 PM. Time, or the date is, uh, February 6th, 2009.
15 This'll be the end of the...

16

17 [End of Transcript]

18 SAC:LTS/LP

19 REVIEWED BY: 

CRIME LABORATORY DIVISION



Agency Case # 2008-2501

Laboratory Case #

U.S. Supreme Court decision 384 U. S. 757 (1966) ruled that "The privilege against self-incrimination offers no protection against compulsion to submit to fingerprinting, photographing or measurements, to write or to speak for identification."

WRITE - DO NOT PRINT

Name EKE Bryan D. Sex M Telephone # (360)

Address 528 CourtSide ct S.W. City Olympia State W.A.

Birthplace Olympia State W.A. Birthday

Color of Hair Blonde Color of Eyes Blue Age 34 Height 6'3" Weight 204

Highest Grade Completed 9th Name of School Tumwater High School City Tumwater

Current Occupation Logger Previous Jobs Cement Work

Present Employer (or last) Olympic tree Services From 02 To 06

Name of Nearest Relative Carolyn L EKE Relationship MOM Telephone # 352-9824

Address of Above 528 CourtSide ct. City Olympia State W.A.

Emergency Notify Carolyn L EKE Relationship MOM Telephone # 352-9824

Address of Above 528 CourtSide ct. City Olympia State W.A.

Months of the Year JANUARY Febuary March April, MAY June July August September October November December

Days of the Week Sunday Monday Tuesday Wednesday Thrusday Friday Saturday

Capital Letters (cursive) A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z

Small Letters (cursive) a b c d e f g h i j k l m n o p q r s t u v w x y z

Write the Following

10 Ten 1 One 2 Two CASH Cash 5 Five Nine Nine Three Three Fourty Forty Twelve Twelve Eighteen Eighteen Sixty Sixty Thousand Thousand Eleven Eleven Seventeen Seventeen Dollars Dollars Hundred Hundred Twenty Twenty thirty one Thirty-one Fifty Four Fifty-four

What hand are you writing this exemplar with? Right hand

Signature Bryan D. EKE Date 2/6/09

Print Full Name BRYAN. D. EKE (First, Middle, Last) Date 2/06/09

PRINT — DO NOT WRITE — PRINT

Capital Letters A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z

Small Letters A, b, c, d, e, f, g, h, i, j, k, l, m, n, o, p, q, r, s, t, u, v, w, x, y, z

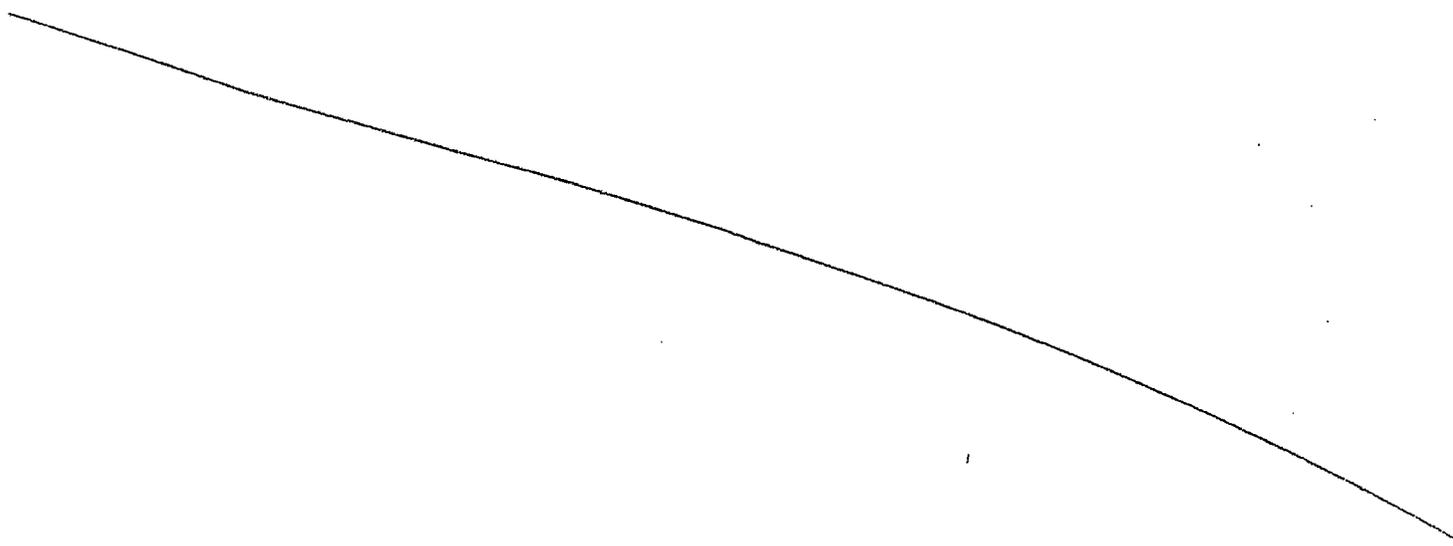
Months of the Year JANUARY, FEBRUARY, MARCH, APRIL, MAY, JUNE, JULY, AUGUST, SEPTEMBER, OCTOBER, NOVEMBER, DECEMBER

Days of the Week SUNDAY, MONDAY, TUESDAY, WEDNESDAY, THURSDAY, FRIDAY, SATURDAY

Print the names of:

| 5 Washington Cities | 5 U. S. States | 5 European Countries | 5 Businesses |
|---------------------|----------------|----------------------|--------------|
| 1) Olympia | (1) Washington | (1) France | (1) Lotco |
| 2) Tumwater | (2) Idaho | (2) Greece | (2) J&I |
| 3) Lacey | (3) Oregon | (3) England | (3) Madsen's |
| Tenino | (4) ALABAMA | (4) German | (4) Big 5 |
| 5) Yelm | (5) Florida | (5) Italy | (5) Kapela's |

Use this space for dictated material.



Print Name: BRYAN D. EKE
Printed Name: BRYAN, D. EKE
Date: 2/6/09

| | |
|--------------------|-----------------------|
| Witnessed by: Sign | <u>S. A. Costello</u> |
| Print | <u>Sam Costello</u> |
| Agency: | <u>Olympia PD</u> |
| Date: | <u>2-8-09</u> |

8765 Bellevue Way E
8765 Bellevue Way E

Howard U. Zimmerman
Howard U. Zimmerman

Majestic Pizza
Majestic Pizza

Wenatchee Apple Farm
Wenatchee Apple Farm

Everett R. Jefferson
Everett R. Jefferson

Fairbanks, ALASKA
Fairbanks, Alaska

Yakima Cherry Orchard
Yakima Cherry Orchard

Edward Albert King
Edward Albert King

6336 Dayton N
6336 Dayton N

Fred Meyer @ Target.com
FredMeyer@Target.com

Olympia Credit Union
Olympia Credit Union

2439 Penny S.W
2439 Penny SW

Benjamin's Bar & Grill
Benjamin's Bar & Grill

342nd Montlake Blvd
342nd Montlake Blvd

4475 63rd street N
4475 63rd Street N

Oliver Quincy Graham
Oliver Quincy Graham

Seattle, Washington
Seattle, Washington

Xavier University
Xavier University

Alfred Michael McCoy
Alfred Michael McCoy

What Are you doing
What are you doing?

Spokane Expressjet
Spokane Expressjet

Hook & Ladder Restaurant
Hook & Ladder Restaurant

Give me that now!
Give me that now!

Fort Vancouver
Fort Vancouver

Kirkland's Best Coffee
Kirklands Best Coffee

Nordstrom Food Inc.
Nordstrom Food Inc.

I won 1st Place
I won 1st Place

Tukwila Apparel Shop
Tukwila Apparel Shop

How are you Today
How are you today?

Jason G. Dudley
Jason G. Dudley

609 Hobbs Rd Apt #573
609 Hobbs Rd Apt #573

4870 Kennenwick Ave
4870 Kennenwick Ave

Lexmark Inkjet
Lexmark Inkjet

George Kelly @ Xerox.com
GeorgeKelly@Xerox.com

1215 # Perry Loop NW
1215th Perry Loop NW

Richard & Pasco
Richard & Pasco

Jack Bradley Johnson
Jack Bradley Johnson

596th Terrace St SE
596th Terrace St SE

Snoqualmie Inn
Snoqualmie Inn

Jennifer D. Youngberg
Jennifer D. Youngberg

Zillah Railroad Co.
Zillah Railroad Co.

Lets go to Costco
Lets go to Costco

Elizabeth Dee Vaughn
Elizabeth Dee Vaughn

Issaquah Tool Supply
Issaquah Tool Supply

Tacoma Quicktube
Tacoma Quicktube

Signature Bryan D. EKE

Date 2/6/09

CASE-SPECIFIC DICTATED MATERIAL

Dictated Signatures/Endorsements

Dictated Amounts (e.g., Three thousand five hundred eighty three, \$793.50)

SEE ATTACHED TYPED EXEMPLAR AND
CORRESPONDING SUSPECT WRITING

Dictated Pay to the Order Of:

Questioned Text

Dictated Signatures/Endorsements

Sign: _____
Printed Name: _____
Date: _____

Witnessed by: Sign E.A. Castell
Print Sam Castell
Agency: Olympia PD
Date: 2-6-09

CRIME LABORATORY DIVISION



Agency Case # 2008-2501

Laboratory Case # _____

J. S. Supreme Court decision 384 U. S. 757 (1966) ruled that "The privilege against self-incrimination offers no protection against compulsion to submit to fingerprinting, photographing or measurements, to write or to speak for identification."

WRITE — DO NOT PRINT

Name Anthony James McKague Sex male Telephone # 858-7162
 Address 17340 Sargeant Rd #8 City Rochester State WA
 Birthplace Madigan S. I. Lewis Army State Washington Birthday 12-24-1983
 Color of Hair Red Color of Eyes Blue Age 25 Height 5'7 1/2 Weight 161 1/2
 Highest Grade Completed 12 Name of School Yelm High School City Yelm
 Current Occupation _____ Previous Jobs _____

Present Employer (or last) _____ From _____ To _____
 Name of Nearest Relative Rob McKague Relationship Father Telephone # 858-7162

Address of Above 17340 Sargeant Rd #8 City Rochester State WA

Case of Emergency Notify Rob McKague Relationship Father Telephone # 858-7162

Address of Above 17340 Sargeant Rd #8 City Rochester State WA

Months of the Year November October December
January February March April May June July August September

Days of the Week Monday Tuesday Wednesday Thursday Saturday Sunday

Capital Letters (cursive) A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

Small Letters (cursive) a b c d e f g h i j k l m n o p q r s t u v w x y z

Write the Following

| | | | | | | | |
|---------|----------|--------|------------|------------|-----------|-------|-------|
| ten | one | two | Cash | five | nine | three | forty |
| Twelve | Eighteen | Sixty | Thousand | Eleven | Seventeen | | |
| Dollars | Hundred | Twenty | Thirty-one | Fifty-four | | | |

What hand are you writing this exemplar with? Right hand

Signature [Handwritten Signature] Date 1-30-09

Print Full Name Anthony James McKague
(First, Middle, Last)

Date 1-30-09

PRINT — DO NOT WRITE — PRINT

Capital Letters A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

Small Letters a b c d e f g h i j k l m n o p q r s t u v w x y z

Months of the Year January February March April May June July August
September October November December

Days of the Week Monday Tuesday Wednesday Thursday Friday Saturday Sunday

Print the names of:

5 Washington Cities

5 U. S. States

5 European Countries

5 Businesses

- 1) Yelm
- 2) Wacey
- 3) Olympia
- 4) Kenino
- 5) Kanier

- (1) California
- (2) Washington
- (3) Oregon
- (4) Idaho
- (5) Texas

- (1) Canada
- (2) Ireland
- (3) Germany
- (4) France
- (5) Mexico

- (1) Baskin Robbins
- (2) Target
- (3) Safeway
- (4) Q.F.C
- (5) Fred Meyer's

Use this space for dictated material.

Signature: [Signature]
 Printed Name: Anthony James McKague
 Date: 1-30-09

Witnessed by: Sign F.A. Castell
 Print Sara Castell
 Agency: Olympia PD
 Date: 1-30-09

8765 Bellevue Way E
8765 Bellevue Way E

Howard U. Zimmerman
Howard U. Zimmerman

Majestic Pizza
Majestic Pizza

Wenatchee Apple Farm
Wenatchee Apple Farm

Everett R. Jefferson
Everett R. Jefferson

Fairbanks, Alaska
Fairbanks, Alaska

Yakima Cherry Orchard
Yakima Cherry Orchard

Edward Albert King
Edward Albert King

6336 Dayton N
6336 Dayton N

FredMeyer@Target.com
FredMeyer@Target.com

Olympia Credit Union
Olympia Credit Union

2439 Penny SW
2439 Penny SW

Benjamin's Bar & Grill
Benjamin's Bar & Grill

3422nd Montlake Blvd
3422nd Montlake Blvd

4475 63rd Street N
4475 63rd Street N

Oliver Quincy Graham
Oliver Quincy Graham

Seattle, Washington
Seattle, Washington

Xavier University
Xavier University

Alfred Michael McCoy
Alfred Michael McCoy

What are you doing?
What are you doing?

Spokane Expressjet
Spokane Expressjet

Hook & Ladder Restaurant
Hook & Ladder Restaurant

Give me that now!
Give me that now!

Fort Vancouver
Fort Vancouver

Kirklands Best Coffee
Kirklands Best Coffee

Nordstrom Foods Inc.
Nordstrom Foods Inc.

I won 1st Place!
I won 1st Place!

Tukwilla Apparel Shop
Tukwilla Apparel Shop

How are you today?
How are you today?

Jason G. Dudley
Jason G. Dudley

609 Hobbs Rd Apt #573
609 Hobbs Rd Apt #573

4870 Kennewick Ave
4870 Kennewick Ave

Lexmark Inkjet
Lexmark Inkjet

George Kelly @ Xerox.com
George Kelly @ Xerox.com

12153 Perry Loop NW
12153 Perry Loop NW

Richard & Pasco
Richard & Pasco

Jack Bradley Johnson
Jack Bradley Johnson

596th Terrace St SE
596th Terrace St SE

Snoqualmie Inn
Snoqualmie Inn

Jennifer D. Youngberg
Jennifer D. Youngberg

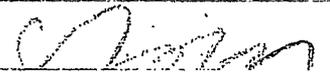
Zillah Railroad Co.
Zillah Railroad Co.

Lets go to Costco!
Lets go to Costco!

Elizabeth Dee Vaughn
Elizabeth Dee Vaughn

Issaquah Tool Supply
Issaquah Tool Supply

Tacoma Quickie
Tacoma Quickie

Signature 

Date 1-21-09

EXHIBIT

4

EXHIBIT

**Olympia Police Department
Follow-Up Report**

Reporting Officer: S.A. Costello
Date of Report: 2-9-09

Case # 2008-2501

Follow-Up Investigation-

On 2-6-09 I conducted follow-up investigation into this case. Senior Deputy Prosecutor J. Powers advised me that one of the suspects in these crimes, identified as Bryan D. Eke, had been corresponding in writing with another inmate identified as Anthony J. McKague (see previous follow-up report). On the listed date at about 1530 hours I secured Eke from the TCSO Jail and escorted him to the Thurston County Sheriff's Office where I spoke with him. Present at that time were Eke, Detective R. Gies and I.

The contact was pursuant to a court order issued in Thurston County Superior Court directing Eke to provide samples of his handwriting for analysis against writings thought to be attributed to him which were turned over by Anthony J. McKague. Eke's attorney, Mr. R. Woodrow, was aware of the order and chose not to be present when I contacted Eke. I presented Eke with the order and he had some difficulty understanding it because of the legal manner in which it was written. He further told me that he had not heard anything about this from his attorney. He was compliant however and stated that he'd do anything he was supposed to. I explained that the order meant that a judge had ordered him to provide samples of his handwriting and that his attorney was aware of the order and that I was talking to him. Eke agreed to provide the samples. It should be noted that the contact with Eke was recorded using a digital recorder for purposes of propriety. A transcript of that recording will be attached to the report.

At about 1535 hours I advised Eke of his Miranda Warnings and then stated several times very clearly that I did not intend to ask him any questions and that it would be best if he did not say anything at all to me about the case. The one question I did ask Eke is whether he ever wrote anything in the jail with just a pencil lead. Eke said that he had never used only the lead. He admitted that he'd written things in jail but said he'd used one of the small issued jail pencils to complete all of that writing.

At the request of the handwriting analysis expert, Commander J. Upton with the Lacey Police Department, I typed out portions of the original documents authored by Eke and McKague. This was to offer a non-handwritten sample of the questionable writing to Eke so that he might reproduce it without viewing the questioned writing. I also requested that Eke complete the WSP handwriting exemplar minus the last (page 4) page which is case specific and was unnecessary because it had been completed with the typed examples offered to Eke described above.

Eke began on the typed exemplar I'd produced at about 1540 hours using a small jail issued pencil which he used for much of the completion of both writing samples. Eke wrote very, very slowly at first and began writing more fluidly as he wrote more. He completed most of the typed

exemplar using the small pencils alternately. Detective Gies sharpened one of the two smaller pencils twice as Eke wrote. At one point (noted below) I had Eke use just a pencil lead which I broke out of a pencil (as McKague had demonstrated) to write a short section of the typed exemplar. Eke complained after writing the short segment that his fingers hurt from doing it that way. He did not want to continue that way.

Once the exemplars were complete, I seized the used pencils, leads and related paraphernalia which has been logged as evidence at OPD. Logged as evidence were:

- Pencil #1 used intermittently to complete samples marked E1b-E6b
- Pencil #2 used intermittently to complete samples marked E1b-E6b
- Pencil #3 and associated lead; lead broken out to complete small section marked E6c

I placed the exemplars and evidence in a temporary evidence locker at the OPD Detective facility until 2-9-09. I then used temporary markings (stickers) to correlate the original documents, the typed exemplar, the handwriting samples provided by Eke, and the WSP exemplar. The documents are marked in two ways. I placed small orange decals on the documents which indicate how one piece of writing corresponds to another (as detailed below). The other tags (pink, purple, yellow, and blue) are used to indicate the overall content in each document. The documents and writing are detailed as follows:

Multi-colored tags:

Blue= original documents as presented by Attorney Carl Hack and attributed to Bryan Eke and Anthony McKague.

Yellow= document which contains sample questions and answers taken from the original documents which was presented to Eke for him to reproduce.

Pink= Eke's handwriting as completed pursuant to the typed text he was given in the yellow tagged document.

Purple= WSP handwriting exemplar completed by Eke.

Green= envelope containing additional documents attributed to Eke and McKague not used in this examination.

Orange tags (as marked):

- 1a typed correlates with E1b completed by Eke
- 2a typed correlates with E2b completed by Eke
- 3a typed correlates with E3b completed by Eke
- 4a typed correlates with E4b completed by Eke
- 5a typed correlates with E5b completed by Eke
- 6a typed correlates with E6b completed by Eke
- E6c completed with the small lead by Eke

So, to be clear, the documents marked 1-6 with orange stickers are the original documents obtained from Mr. Hack. They correspond with the typed exemplar marked with orange stickers marked 1a-6a. 1a-6a correspond with the samples marked 1b-6b provided by Eke. 6c is a short sample of Eke's writing with only the pencil lead.

Status: Refer to the Thurston County Prosecuting Attorney's Office ATTN: Senior DPA
Jim Powers for review and addition to the main case file.

PROPERTY REPORT

DO NOT DISCLOSE
PAGE 1 OF 2

AGENCY **OLYMPIA POLICE DEPARTMENT**

CASE # **2008-2501**

SUBJECT TYPE (COMPLAINANT) V (VICTIM) A (ASSOCIATE) W (WITNESS) S (SUSPECT) O (OTHER)
M (MISSING) P (PARENT) R (RUNAWAY)

RELATED CASE #

PROPERTY CODE (27) 01-STOLEN 02-RECOVERED 03-EVIDENCE 04-LOST OR MISSING 05-FOUND 06-SEIZED
07-DAMAGED 08-COUNTERFEIT 09-BURNED 10-SAFE KEEPING 11-UNKNOWN 12-NONE 20-INVESTIGATIVE

PROPERTY DESCRIPTION FOR PROPERTY CLASS CODE

- | | | |
|-----------------------------|--------------------------------|----------------------------------|
| 01 AIRCRAFT | 15 HVY CONSTRUCT/ INDUST EQUIP | 29 STRUCTURES SINGLE DWELLING |
| 02 ALCOHOL | 16 HOUSEHOLD GOODS | 30 STRUCTURES OTHER DWELLING |
| 03 AUTOMOBILE | 17 JEWELRY | 31 STRUCTURES OTHER COMMERCIAL |
| 04 BICYCLES | 18 LIVESTOCK | 32 STRUCTURES INDUSTRIAL /MFG |
| 05 BUSES | 19 MERCHANDISE | 33 STRUCTURES PUBLIC / COMMUNITY |
| 06 CLOTHING / FURS | 20 MONEY | 34 STRUCTURES STORAGE |
| 07 COMPUTER HARDWARE/SOFTWR | 21 NEGOTIABLE GOODS | 35 STRUCTURES OTHER |
| 08 CONSUMABLE GOODS | 22 NON NEGOTIABLE GOODS | 36 TOOLS POWER / HAND |
| 09 CREDIT / DEBIT CARDS | 23 OFFICE EQUIPMENT | 37 TRUCKS |
| 10 DRUGS / NARCOTICS | 24 OTHER MOTOR VEHICLES | 38 VEHICLE PARTS /ACCESSORIES |
| 11 DRUG PARAPHERNALIA | 25 PURSES / WALLETS | 39 WATERCRAFT |
| 12 FARM EQUIPMENT | 26 RADIO /TV / VCR | 88 PENDING INVENTORY |
| 13 FIREARMS | 27 RECORDINGS AUDIO / VIDEO | 98 SPECIAL |
| 14 GAMBLING EQUIPMENT | 28 RECREATIONAL VEHICLES | 99 OTHER |

TOTAL VALUE TAKEN

TOTAL VALUE RECOVERED

TOTAL DAMAGE

SUBJ TYPE **S** SUBJ # **1** LAST NAME **EKE** FIRST **BRYAN** M **D** EVIDENCE LOCATION **OPD #1**

EVIDENCE # **1** PROPERTY CODE **03** PROPERTY TYPE **K** PROPERTY CLASS **99** INITIAL VALUE # RELATED OFFENSES

OWNER IF DIFFERENT THAN ABOVE **OPD** INSURANCE POLICY

QUANTITY **1** DESC **PENCILS/WRITING IMPLEMENTS USED BY EKE TO COMPLETE EXEMPLARS**

YEAR MAKE MODEL COLOR CONDITION

SERIAL # OAN REGISTRATION #

REG TYPE (CIRCLE ONE) BIKE GUN MISC SNOW (SNOWMOBILE) STATE DATE EXPIRATION

RECOVERED VALUE RECOVER LOCATION (CIRCLE ONE) 1 Family Residence 2 Apartment Complex 3 Housing Project 4 Commercial/Ind
5 Park/Playground 6 Shopping Mall/Center 7 Woods 8 Water N Not Applicable
9 Other (LIST)

RECOVERY CODE 1 STOLEN LOCAL/RECOVERED LOCAL 2 STOLEN LOCAL/RECOV OTHER 3 STOLEN OTHER/RECOV LOCAL

RECOVERY DATE **2-6-09** REFER OTHER JURISDICTION () Y () N DATE OWNER NOTIFIED HOW NOTIFIED (CIRCLE ONE) LET LETTER PER PERSON TEL TELEPHONE TWX TELETYPE

SUBJ TYPE **S** SUBJ # **1** LAST NAME **EKE** FIRST **BRYAN** M **D** EVIDENCE LOCATION **OPD #1**

EVIDENCE # **2** PROPERTY CODE **03** PROPERTY TYPE **K** PROPERTY CLASS **99** INITIAL VALUE # RELATED OFFENSES

OWNER IF DIFFERENT THAN ABOVE **OPD** INSURANCE POLICY

QUANTITY **1** DESC **EXEMPLARS FOR EKE**

YEAR MAKE MODEL COLOR CONDITION

SERIAL # OAN REGISTRATION #

REG TYPE (CIRCLE ONE) BIKE GUN MISC SNOW (SNOWMOBILE) STATE DATE EXPIRATION

RECOVERED VALUE RECOVER LOCATION (CIRCLE ONE) 1 Family Residence 2 Apartment Complex 3 Housing Project 4 Commercial/Ind
5 Park/Playground 6 Shopping Mall/Center 7 Woods 8 Water N Not Applicable
9 Other (LIST)

RECOVERY CODE 1 STOLEN LOCAL/RECOVERED LOCAL 2 STOLEN LOCAL/RECOV OTHER 3 STOLEN OTHER/RECOV LOCAL

RECOVERY DATE REFER OTHER JURISDICTION () Y () N DATE OWNER NOTIFIED HOW NOTIFIED (CIRCLE ONE) LET LETTER PER PERSON TEL TELEPHONE TWX TELETYPE

OFFICER NAME **S. COITELLO** OFF # **1949** DATE **2-9-09** SUPERVISOR ENTERED BY

EXHIBIT

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EXHIBIT

February 29, 2011

Ronald E. Sergi
Attorney at Law
c/o Mason County Superior Court
Post Office Box X
Shelton, Washington 98584

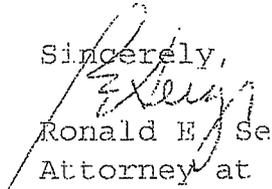
Mr. Tommy L. Crow, Jr.
DOC# 473446
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, Washington 98326

Dear Mr. Crow:

Thank you for your latest correspondence. I do not have any hand writing expert reports, nor do I have letters purported to be from you or letters written purportedly by Aaron Adams or Anthony McKague actually written by Brian Eke. I know for a fact I did not receive any hand writing expert reports. If there was one done, Assigned Counsel would have had to pay the expert who performed the analysis. Since I had nothing to do with that analysis I have no record of it. Perhaps Mr. Meyers could tell you what happened to it if it existed.

I am sorry I can not help you with this request.

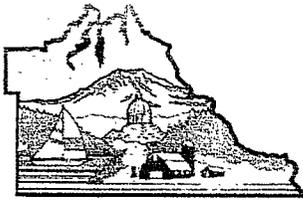
Sincerely,


Ronald E. Sergi
Attorney at Law

EXHIBIT

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EXHIBIT



THURSTON COUNTY
WASHINGTON
SINCE 1852

BETTY J. GOULD
COUNTY CLERK
And Ex-Officio Clerk
of Superior Court

Linda Myhre Enlow
Chief Deputy Clerk

February 14, 2011

Mr. Tommy L. Crow
#773446
1830 Eagle Crest Way
Clallum Bay, WA 98326

Re: Public Disclosure Request
State of Washington vs. Tommy Lee Crow, Jr.
Thurston County Cause No. 08-1-00585-6

Dear Mr. Crow:

Our office is in receipt of your Request for Public Disclosure Records dated February 6, 2011, and received by this office on February 8, 2011, which requests:

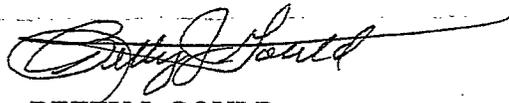
1. *"Any and all letters written by Bryan Eke for cause #08-1-00585-6."*
ANSWER: There are no such documents contained in the case file.
2. *"Report and findings of Handwriting Analysis done on any and all letters turned in against Bryan Eke for cause #08-1-00585-6 and statement of how many pages there were."*
ANSWER: There are no such documents contained in the case file.
3. *"Any and all letters turned in against Bryan Eke for cause #08-1-00585-6."*
ANSWER: There are no such documents contained in the case file.
4. *"Copies of letters written by Bryan Eke to Aaron Adams for cause #08-1-00585-6."*
ANSWER: There are no such documents contained in the case file.
5. *"Copies of letters written by Bryan Eke to Athony McKague for cause #08-1-00585-6."*
ANSWER: There are no such documents contained in the case file.
6. *"Copy of signed verdict forms by the jury for cause #08-1-00585-6."*
ANSWER: **Public Disclosure Request.** The application of the public records statute to judicial records was resolved by Nast v. Michaels, 107 Wn.2d 300 (1986). The Court held that the statute did not apply to judicial records (case files) held by the county clerk. Disclosure of judicial records is governed by a limited common law right of access as determined by the court on a case-by-case basis. The verdict forms total five (5) pages and the cost for copies is \$2.50 (\$.50 per page).

7. *"Copies of the 4 CD's listed as evidence in cause #08-1-00585-6."*

ANSWER: Public Disclosure Request. The application of the public records statute to judicial records was resolved by Nast v. Michaels, 107 Wn.2d 300 (1986). The Court held that the statute did not apply to judicial records (case files) held by the county clerk. Disclosure of judicial records is governed by a limited common law right of access as determined by the court on a case-by-case basis.

Very truly yours,

THURSTON COUNTY CLERK



BETTY J. GOULD

/ajw

EXHIBIT

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EXHIBIT

STATE OF WASHINGTON

DECLARATION OF CHISTOPHER DURGA

COUNTY OF Walla Walla

On this date of 15th December 2010

I, Christopher Durga, declare the following: On the night of March 28, 2008, I was visiting with David Miller, Norman Peterson, Tommy Crow, and Bryan Eke. During that visit on 3/28/08, Mr. Eke told me and Mr. Crow that he was informed by Mr. Peterson, that David Miller was the one that told police about Mr. Eke and Me (Durga) assaulting Scott Cover. Mr. Eke said we should beat Mr. Millers' ass to teach him a lesson. Mr. Peterson and Mr. Crow left to get some beer, and while they were gone Mr. Eke and I assaulted Mr. Miller. Mr. Crow did not assault Mr. Miller in any way shape or form and was not present at the time of Mr. Millers' death.

I notified the prosecutor about the above mentioned information prior to trial and was told that if I did not testify that Mr. Crow was involved in the assault on Mr. Miller, he would make sure I got an exceptional amount of time. I felt threatened and intimidated by the prosecutor.

I do not want or need an attorney to represent me in this matter, but if the police, prosecutor, or anyone else wants to interview me or ask me about the facts stated in this declaration, I will be cooperative with them as long as a representative of Tommy Crow is present at the interview to insure I won't be intimidated or threatened again.

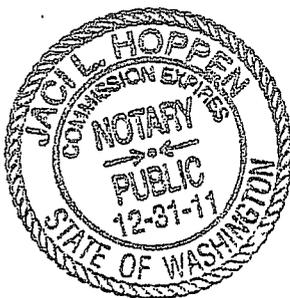
Under the penalty of perjury, under the laws of the United States of America and the State of Washington that the facts stated in this declaration are true and correct, I am over the age of 21 years, and I am competent to testify to these facts for which I have firsthand knowledge.

Jaci Hopper
Notary of the State of Washington

Chris Durga
Signature

12-31-11
Commission Expires

Chris Durga
Printed Name



EXHIBIT

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EXHIBIT



JOHN D. SNAZA
Sheriff

THURSTON COUNTY SHERIFF'S OFFICE

WASHINGTON
SINCE 1852

Tim Braniff, Undersheriff
Dave Pearsall, Chief Deputy
Brad Watkins, Chief Deputy
Todd Thoma, Chief Deputy
Joan Plaja, Fiscal Manager

2000 Lakeridge Drive SW • Olympia, Washington 98502-6045 • (360) 786-5500

May 24, 2011

Tommy Crow #773446
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Dear Mr. Crow:

This is sent in response to your Public Disclosure Request dated May 18, 2011 and received by Thurston County Corrections Facility on May 20, 2011.

Your request is for "a copy of the attorney check-in log an attorney has to sign before visiting an inmate at Thurston County Jail, the attorney I need a log of is Ron Sergi logging in to see inmate Tommy Crow for the months of November 1, 2008 to February 28, 2009. I would like the dates and time he visited me in RE: cause #08-1-00585-6."

We do not have a document that an attorney is required to sign before they enter the facility to visit an inmate. Therefore, there is no document responsive to this request.

The Visitor Logs for the time frames you have requested are enclosed along with a Redaction Log for information that required redaction. We anticipated that your request was closely related to this information. Cause numbers for attorney visits are not tracked.

If you have any further questions or need clarification, please make contact with our office.

Thank you.

Sincerely,

James Downing, Captain
Thurston County Corrections

JD/vw
cc: PDR file



EXHIBIT

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EXHIBIT

CELTIC INVESTIGATIONS

FRED DOUGHTY Private Investigator

(360 507-5306 celticamerica@gmail.com P.O. Box 14663 Tumwater, WA 98511

TO: Tommy Crow and his legal counsel.

RE: Thurston County Superior Court Cause No. 08-1-00585

DATE: May 23, 2011

Mr. Crow,

The following was taken from my original notes. You will also find copies of three of my reports that I had sent to Mr. Sergi of interviews with: Chris Durga, Bryan Eke, and Sam Willie. Since these three reports were written shortly after the original interviews they may have more information than my original written notes. The reason for that is because when writing these reports I often recall additional information from the interview that I had not written down. Therefore, I would consider the three reports more comprehensive than the notes I wrote during the interview.

In addition, I transcribed for you, from my notes, points of interest that I found in police reports and transcribed statements gathered by law enforcement. These "points of interest" can be a.) "contradictions" I found in police reporting or witness statements; b.) potential facts that might be helpful for your defense attorney; c.) areas where law enforcement faulted in their reporting or investigation process; d.) questions that need to be answered; e.) and simply to assist your attorney streamline his/her work.

Dec. 5, 2008 Interview of Tommy Crow at Thurston County Jail with Attorney Ron Sergi
Anthony has two confessions.

Brian admitted lighting the tent on fire.

Brian wrote letters (writing back and forth)

Tommy got letters while in the hole @ Friday, Saturday, Sunday, Monday.

Only one in cell. pass it under door.

No problems in past (with Brian)

After he (Brian) lit the tent on fire he knew he fucked up. He (Brian) went back and lit the fire, ran up and swishing feet to cover his tracks. The next day he pretended to be upset.

He (Tommy) didn't know these guys before.

Dec. 8, 2008 Notes from police reports. (Points of Interest)

Fire department extinguished the fire. Who? Evidence lost or changed?

Pg 3, par: 1, ankle broken "prior"evidence of that?

Pg 9, par 2: Dr. Lacsina unable to conclude if Miller was dead when the fire was burning.

Pg 10: Miller reported Durga and Eke as being dangerous to Officer Henry~not Tommy Crow.

Pg 11, par: 2 "Tom" implicated via Dawson. Where? What?

Pg 11, par: 4: A male contacted~identified as Kelly Crow?

Pg 12: Transients intoxicated (witnessed) when contacted.

Pg 12: Were Crow, Eke, and Durga intoxicated when taken to Olympia P.D. for statements. (of course!)

Pg 13: (Eke interview) (about 1 hour "pre-interview) Notes? What was said?

Pg 14, par: 2: Durga not drinking that night.

Pg 14, par 4: Eke angry at "Pops" over beer and kicked him.

Pg 14, par: 5: Eke and Durga shared tent.

Pg 14, par 6: Eke describes Durga choking Miller while Crow used some type of 3-4 foot tall cylindrical weapon???

Pg 15, par: 1: Eke eludes to kicking victims

Pg 15, par: 2: Eke says Crow dragged Peterson away from tent.

Pg 15, par: 3: Eke said assault lasted "one hour"???

Pg 15, par 6: Eke's clothing had blood.

Pg 16, par: 3: Crow not intoxicated at time of interview (NOT!!)

Pg 16: "Pre-interview"???

Pg 16, par 6: Crow verifies argument between Eke and "Pops" but doesn't say anything about stolen beer or Eke kicking Pops.

Pg 16, par: 6: Crow verifies Durga not drinking~doesn't drink beer.

Pg 17, par: 7: Durga admits he does not drink and was sober.

CHECK VICTIMS' SIZE/WEIGHT VS CROW'S.

Pg 18, par: 2: Crow's clothing collected~any evidence?

Pg 18, par: 3: Durga admits anger toward Miller.

Pg 18, par: 4: Durga says Eke spoke about burning the bodies.

Pg 18, par: 5: Durga said Crow punched Miller once and he (Durga) began punching Miller and Miller fell into the campfire~Durga choked Miller and then dragged him into tent.

Pg 19, par: 2: Durga changes stories of how Peterson was "rendered unconscious."

Pg 19, par: 2: Eke was at tent when fire started and Crow did not have a lighter.

Pg 20, par: 2: Eke~Carhart jacket~blood.

Pg 20, par: 6: Durga/Eke campsite identified (not Crow)

Witness Mark Urbach witnessed Durga and two others confront Miller earlier on March 28th, 2008. Durga threatened Miller. Crow was identified as one of the three via montage.

Witness Sam Willie said he discovered bodies, preserved scene, was wearing boots (only pair)

Witness Simmons identified Durga, Crow, and Eke as confronting him about the "Cover case"

Witness Stroman called 911 after finding bodies. Stroman lives in woods near bodies with Justin Van Horn. Stroman names Crow, Eke, Durga for the first assault (Cover) but did not witness it.

Pg 25, par: 6: Eke reinterviewed in jail~cops believe he isn't telling total truth as agreed by the attorney. Pre-interview notes?

Pg 26, par: 4: Eke claims Crow told Durga that he needed to go deal with Pops.

Pg 26, par: 4: Eke said he went to keep "Durga" from going too far.

Pg 27, par: 1: Describes Durga and Eke attacking and choking Pops but nothing about Crow.

Pg 27, par: 3: Eke accuses Crow.

Pg 28, par: 1: Eke finds some of his stolen property in tent and burns tent.

Pg 28, par: 2: One of the three suspects watch tent burn down.

*Pg 28, par: 6: Stick with blood found~evidence linked to Crow?

Pg 29, par: 2: T.V. have shoe prints?

Question: Why drag a body to a campfire to burn bodies and then have more bodies to the tent to burn again?

Note: Autopsy report on Peterson~No blunt trauma to head as described by Eke. Only ankle, not fatal. Blunt force to legs contributing factor?

Question: Who used stick?

Question: Eke gave false info~why?

Note: Examiner: Molly Ivanovich. (Last name is the same as TCSO Det. Chris Ivanovich)

Peterson: 0.17 alcohol, positive= Cannibas.

WSP Report

Pg 1 describes body configuration (last paragraph)

Was Peterson dragged into the tent first? His arm was under Miller's shoulder.

Note: If both victims were dragged into campfire and head down (as Durga said) wouldn't there be smoke in lungs if they were still alive?

Note: Durga statement: It appears the detective may have made a deal (promise) with Eke (page 4 thru page 5, line 5, Detective cut off Eke so he wouldn't report was said.

Eke downplays statement, said he was very drunk and accidentally kicked both victims.

Eke's 2nd Statement: Eke had spoke to detectives about one hour prior to going on tape.

Durga statement (3-28-08) page 2, line 6...35 minutes before tape started.

Durga claimed to had known Crow 5 years.

Durga claimed Tom and Bryan were fighting with Norm (pg 10)

Durga said Norm was knocked out but snoring and said "Let's drag them by the tent and get out of here."

*Is Eke saying Durga and Crow put victims in fire to give excuse why they were burned?

*How far was the tent from the campfire.

Durga said he and Crow were about 15 feet away from tent while it was on fire and Eke was in front of it with a lighter. (pg 11 & 12)

Norm was snoring in the tent (Pg 18)

Page 19: Durga said Bryan had said "Best way to get rid of a body is burn it," and Tom was "just going to leave them there."

DURGA INTERVIEW ON 10-15-08

Pg 22: Tom hit Pops and Tom fell down, so drunk.

Pg 23: Tom~drunk.

Pg 23: Eke (kind hearted) yet talks about burning bodies.

Pg 25: Crow is so drunk he has to be helped to walk.

Pg 28: Durga now says all three dragged Norm to tent.

Pg 30: Nobody was put in campfire.

Pg 40: Crow was with Durga as they left. Eke was behind.

Pg 42: Eke tried to hide foot tracks.

December 11, 2008 TCSO Jail with Mr. Sergia INTERVIEW OF AARON ADAMS

Got notes from Eke asking to make up stories how to testify. His mom would pay him \$15,000.00. (no note of that), letters to say that he was involved in the assault but not there, coat~that Crow told me to put it there.

Eke said it was accidental but lit the tent on fire.

He (Eke) was moved into my cell 2 or 3 days before Thanksgiving.
He (Eke) was flicking a lighter and "poof" it went.
Eke said Tommy and Chris kicked the shit out of them and threw them face down on the fire.
Then they (Durga & Crow) drug them into the tent.
Chris and Tom had been smashing them with their knees and breaking hips.
Tom Crow said the only thing he is guilty is getting in a fight with Norm.

February 27th, 2009 INTERVIEW OF CHRIS DURGA TCSO Jail.

Durga was there at Scott Cover's beating with Eke, David Miller, "Sam I Am."
Crow came after everything was done.
Scott had pushed Tommy in fire earlier in the night.
Bryan Eke hit Scotty over a coat.
Bryan said the coat had been given to him by grandma.
Prior (before Norm and Pop's beatings) Tom, me (Durga), and Eke around 1:00 a.m. walking towards camp.
Went (all 3) over there (Pops' camp) to ask why Pops was snitching me (Durga) off.
Bryan and Tommy woke me up before we went over there.
No drugs. no drink (Durga).
Both Crow and Eke had a buzz from drinking. Tommy was staggering, Bryan a (unknown word) normal.
Durga has known Tommy about 5 years and Bryan about 4 years.
Durga had never had a problem with Pops.
Went straight there (all three), both Norm and Pops were both there drinking, someone called Pops (?) Pops came out, Tommy asked him why he snitched on his brother.
Pops said something, Tommy took a swing, missed, and fell.
I (Durga) put Pops in a sleeper.
Bryan took Norm, they walked away before going after Pops and came back about 5 minutes.
They (Bryan and Norm) weren't talking when they left.
I hit him (Pops) in the side of his left face, spun him around and got him into a sleeper hold.
Norm and Eke were behind the tent~they didn't see.
Durga was squeezing about 1-1 ½ minutes.
He (Pops) grabbed Chris's hand but didn't say anything. He (Pops) passed out.
But before this Tom came back and tried to grab Norm but fell and warned him not to snitch but I think Norm over-powered him. And then Bryan came over and stood over them~and then Bryan grabbed Norm from behind~like a bear-hug. Eke maybe trying to get Norm on the ground. Someone knocked him (Norm) out.
Durga never saw anyone with sticks or bat.
Miller started snoring.
This took place in front of the tent.

No campfire, not going. (Fire)
Campfire looked all dark.
I moved him (Pops) about four feet so he wouldn't be in the snow.
Someone knocked Norm out.
I tried dragging Norm but couldn't, I asked Tommy but he couldn't.
I asked Bryan and we all drug him to the tent about 10-15 feet.
He (Norm) was snoring loud.
Pops crawled up into a ball-fetal (position).
Me (Durga) and Tommy left back to camp.
Bryan stayed behind~don't know why.
Bryan caught up with us about 5 minutes (later) along the main trail.
Bryan kind of passed them (Durga and Crow) up dragging his feet and told them they needed to do the same so cops wouldn't catch them.
Bryan never said anything about it.
No one ever said anything about hurting anyone.
The next morning cops talked to them. (Durga, Eke, Crow).
A neighbor told Durga at the Grocery Outlet.

END OF CHRIS DURGA INTERVIEW

February 27th, 2009 INTERVIEW OF BRYAN EKE w/Attorney Woodrow, TCSO Jail
Woodrow received letters, will get copies.
Known Durga since about 2004-2005
Known Crow~2004-2005
Known Cover about 2006
Not present when Scott Cover got beat.
Called Miller. "Dave."
Known Dave about 1 ½ - 2 months.
No problems with Dave, got along great.
Known Norm since about 2004.
Got along great with Norm.
9:30-10:00 p.m. night before, sitting around camp with Tom and Chris. I was drinking beer.
Confronted group behind Taco Truck about Scotty.
We discussed (Tom, Chris, Eke) confronting Pops. Told them he didn't have opinion about it.
I mentioned to Chris the best way to get rid of a body to get rid (Tom's idea) of it.
We discussed going over and discussing this problem. I was on the trail about 30 seconds behind (behind Crow and Durga) and we stopped at Mud Bay Road.
Got to camp and Tom and Chris confronted Pops.
Tom hit Pops and hit him in face two times.

Chris got behind and got him in a choke hold, choking him about 1-2 minutes. Tommy tried to kick his mid-section and legs.

Eke was standing by the tent 8-10 feet away.

Started to go through the tent looking for my stolen property.

Chris put him down on the ground. The fire was about 2 or 3 feet away.

Chris drug him into the fire facedown and stood on the back of shoulders. no response.

Tommy was standing around~watching from about 1-3 feet away screaming out antics. "I thought we were family," "Why did you turn us in?"

Eke was half way watching (in tent) could hear what was going on.

Eke was pissed off at them and left on the trail for about 5 minutes. noticed Norm and Eke told him what was going on.

I think they killed him put him in the fire.

He ran up trailhead and dropped his beer.

Eke yelled at him not to go.

Tom took a limb and hit him in the head.

I was still coming up the trail.

Tom was hitting him and did a knee-drop (chest), sounded like a stick breaking.

Tom kicked him hard several times, knees down, moaning sound but not moving, gurgling.

Eke was about 15 feet away.

Not certain about Chris~not involved.

Tom drug Norm to fire, in the fire face down, Chris had drug Pop out. Both had been in the fire about 30 seconds, standing on Norm's shoulder with one of his feet. not sure, maybe right foot.

Chris made comments that Pops was cooking and smelling like chicken.

Tom looked at Eke and told Eke to light the tent of fire.

Bluish colored rain top over tent~Eke lit it with a lighter that Tom had given him earlier on the trail, said he would need it later.

Rain Tarp went 5-15 seconds and started dripping plastic on the tent.

By the time the tent was beginning to burn Chris had Pops pulled up into the tent part way and Tom put Nor on the right side of Pops, kind of half on half off.

Tom told Eke he'd better not tell anyone or he'd kill him, family, and tell the cops he had full involvement.

Eke went to service road 2-3 minutes about 60 yards away, couldn't see what was going on at the tent.

When Eke left the top and front was burning good.

When Pops and Norm were in fire, no signs of life.

After being drug to ten their faces were burned and clothing smoldering around the chest area.

Left about two minutes after they were drug into tent.

Don't remember if the fire had reached them, tent plastic material may be coming down on them.

Eke was wearing~Carhart big overalls, black boots, regular t-shirt, grey sweatshirt w/Marina symbol, green and oatmeal colored flannel. Camo symbols on hat.

Chris was wearing~Regular t-shirt, black Dickies pants, no hat, flannel pajama bottoms, under, black military boots.

Tom was wearing~ Blue jeans, blue and white Wilson tennis shoes, dark olive jacket w/writing.

Eke smoked a little weed the afternoon before, ½ joint with "Sam I Am."

Eke drank about thirteen 24 ounce cans of beer, a few shots of R&R whiskey with Norm about 10:30-11:00 a.m. the day before.

Chris, no drugs, pretty much sober.

Tommy hit from the same joint.

Letters~only wrote to Anthony "A.J.", 99% true, doesn't remember what wasn't.

END OF BRYAN EKE NOTES

March 10, 2009 INTERVIEW OF SAM WILLIE JR.

Interview, Room #353 Red Lion Motor Inn, Olympia

Knew Norm and Pops about three years.

Knew Bryan Eke about 3-4 weeks.

Knew Chris Durga about 3-4 weeks.

Met Tom later, about 2 weeks.

Prior to the deaths there were no of a problem.

Drank a few times together with them but never hung out with them.

Some discovered them,(victims) prior to discovering them (victims) Sam saw them (all three) (Eke, Durga, and Crow) the afternoon before between 1-3 p.m. or later over by Harrison (Avenue) and Division (Street) by Jackson Hewitt Tax Services. they were just walking by, joked around a little bit and they went on their way.

They (Eke, Durga, and Crow) seemed fine.

Prior to that Sam had never heard them say anything like they would hurt anyone.

Sam was at Scott Cover's camp when he got beat us but was passed out in his tent, he did not know who did it. Scott did not say anything about it.

To this day Sam doesn't know who did this (Scott Cover beating), just hearsay but I don't (know).

The day it happened (deaths) Sam saw Bryan, Chris, and Tom together by Jackson Hewitt (afternoon) and Sam told them what happened. They seemed surprised and went on their way. Nobody has bribed or threatened Sam. (To give statement or testify).

Sam usually checked on Pops every day.

Sam lived with Charles, Dave, and Regina about ¼ mile past Pops.

Didn't know where Norm was staying~he had just gotten out of jail a few days earlier.

Don't know why this happened.

Don't know why Scott was beat up.

Wasn't at the Taco Truck incident.

Bryan had spoken of taking acid before.

Sam had smoked wee with them on occasion.

Tom and Chris called each other brothers.

Chris was very quiet, never said much.

Tom had a big mouth.

Sam left town a couple weeks later, didn't know who did it until the paper came out.

Found bodies about 8-8:30 a.m. with Dirty Dave.

Sam didn't know anyone who had a problem with Bryan, Chris or Tommy.

The three were always together.

Scotty was staying at Sam's camp when he got beat up. Sam was so drunk he doesn't know who was there.

END OF SAM WILLIE INTERVIEW

March 10, 2009 INTERVIEW OF ANTHONY McKAYGUE / TCSO Jail

Anthony was in the hole with Bryan Eke in December 2008 six days one time, 7 days another time, 5 days another time, and three the next.

During that time Bryan said (through) notes that Bryan and Chris went over there to beat up Pops for telling on Chris but didn't exactly tell Tommy what they were going there for. (All on paper)

Tommy tried to swing on Pops but missed and fell in the bushes.

Chris punched Pops a couple of times and got him in a choke hold~Tommy noticed Norm and beat him up.

After that Tommy left and told Chris he was getting out of there.

Tommy was shit-faced drunk.

Tommy left and then Chris caught up~Chris had seen the tent catch fire but it went out.

About five minutes later Bryan came up swishing his feet and told them he was getting rid of the tracks.

Then Bryan left camp (3 guys) and Chris and Tommy went to sleep.

Chris had Pops in a choke hold and Bryan kicked him the face.

Bryan said it was Chris that beat up Scott~Chris said it was Bryan.

Anthony is in the same tank with Chris.

Anthony had been in the same tank with Tommy about 1-2 months ago.

Bryan and Tommy had been in the same tank.

Anthony had gotten Bryan and Tommy mixed up when he first told police who had Pops in a choke-hold and when he got kicked-but I (Anthony) changed that.

END OF ANTHONY MCKAYGUE INTERVIEW

March 10, 2009 AARON ADAMS INTERVIEW Thurston County Jail

Aaron was passing notes between Tommy and Bryan around the 1st part of September.

About a dozen or more (notes) between the two by sliding them under the door.

Aaron was in the hole with Chris about 1-1 ½ months ago.

Tommy never tried to threaten or bribe Aaron.

Tommy told him that he got in a fight with Norm or Pops but when he left they were in the tent, beat up, but okay.

Bryan told him (Aaron) verbally that he tried lighting the tent of fire but nothing else.

Bryan told him (Aaron) verbally that his mom would give him (Aaron) \$15k if he would testify on his behalf.

Most of the notes Aaron flushed down the toilet because he didn't want any part of it.

The notes did not reveal anything about Tommy doing anything.

Aaron didn't read the notes between the two.

Bryan tried to get Aaron to say that he was there and that they were walking back towards the Safeway.

Aaron told him (Bryan) that he couldn't say that.

Chris or Tommy had never made any attempts to say something that was not true. (to Aaron)

Aaron does not know if there is anything on any kite that he wrote that is not true.

Tommy said that he knocked his (?) ass out and we drug him in the tent but he was alright.

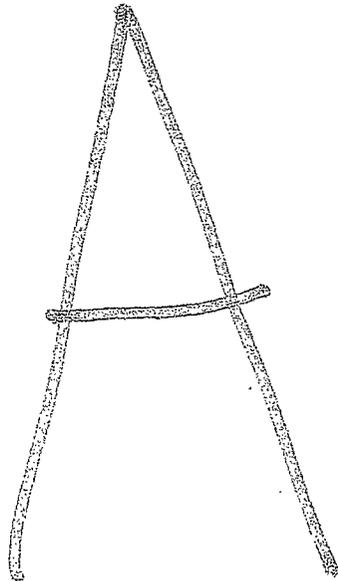
Aaron doesn't know anything about Scotty.

Aaron doesn't know why they were mad at Pops.

END OF INTERVIEW WITH AARON ADAMS

END OF NOTES

APPENDIX



23

FILED
SUPERIOR COURT
THURSTON COUNTY WA

'09 MAR 20 P12:20

DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON _____
DEPUTY

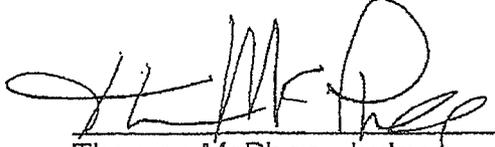
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON)
)
) Plaintiff,)
 vs.)
)
 TOMMY LEE CROW, Jr.,)
)
) Defendant.)
 _____)

NO. 08-1-00585-6

COURT'S INSTRUCTIONS
TO THE JURY
(Original Set)

Dated March 19, 2009



Thomas McPhee, Judge

Instruction No. 1

Here are my instructions. The order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but during your deliberations, you must consider the instructions as a whole.

Charges have been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charges. The filing of a charge is not evidence that the charge is true. Your duty is to decide the facts in this case based solely upon the evidence presented to you during this trial. It also is your duty to accept the law as explained in these instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law in these instructions to the facts you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

[Instruction No. 1, page 2]

In order to decide whether any proposition has been proved, you must consider all the evidence I have admitted that relates to the proposition. Each party is entitled to the benefit of all the evidence, whether or not that party introduced it.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that evidence is not admissible, or if I have directed you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

The law does not permit me to comment on the evidence in any way. It is improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

The lawyers' statements during this trial are intended to help you understand the evidence and apply the law. However, the lawyers' remarks, statements, and arguments are not evidence or instructions. You should disregard any remark, statement, or argument that is not supported by the evidence or by these instructions.

[Instruction No. 1, page 3]

During the trial, the lawyers may have objected to evidence offered by the other side. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Instruction No. 2

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining a unanimous verdict.

Instruction No. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

Instruction No. 4

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

However, you are not required to accept such opinion evidence. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of witness's information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

Instruction No. 5

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Instruction No. 6

A defendant is not compelled to testify, and the fact that a defendant has not testified cannot be used to infer guilt or prejudice him in any way.

Instruction No. 7

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

Instruction No. 8

Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

Instruction No. 9

Evidence that a witness has been convicted of a crime may be considered by you in deciding what weight or credibility should be given to the testimony of the witness and for no other purpose.

Instruction No. 10

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by evidence beyond a reasonable doubt.

Each crime charged by the State includes one or more elements which are explained in a subsequent instruction. The State has the burden of proving each element of a charged crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Instruction No. 11

A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

Instruction No. 12

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

Instruction No. 13

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or, result when he is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

Instruction No. 14

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with knowledge or intent.

Instruction No. 15

A person commits the crime of intentional murder in the second degree when, with intent to cause the death of another person, he causes the death of such person.

A person commits the crime of felony murder in the second degree when he commits assault in the second degree and in the course of and in furtherance of such crime he or an accomplice causes the death of a person other than one of the participants.

Instruction No. 16

A person commits the crime of assault in the second degree when he assaults another by strangulation

"Strangulation" means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe.

Instruction No. 17

A "participant" in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice. A victim of a crime is not a "participant" in that crime.

Instruction No. 18

To convict the defendant, Tommy Lee Crow, Jr., of the crime of murder in the second degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the period of March 27-28, 2008, the defendant committed intentional murder in the second degree in that:

(a) Christopher Durga acted with the intent to cause the death of David Miller;

(b) David Miller died as a result of Christopher Durga's acts; and

(c) The defendant, Tommy Lee Crow, Jr., with knowledge that it would promote or facilitate the commission of the crime of murder, aided Christopher Durga in intentionally causing the death of David Miller, and was therefore an accomplice to the commission of murder in the second degree.

OR IN THE ALTERNATIVE

(2) That during the period of March 27-28, 2008, the defendant committed felony murder in the second degree in that:

(a) Christopher Durga committed assault in the second degree by the strangulation of David Miller;

(b) That the defendant, Tommy Lee Crow, Jr., with knowledge that it would promote or facilitate the crime of assault, aided Christopher Durga in the strangulation of David Miller, and was therefore an accomplice to assault in the second degree;

(c) That Christopher Durga, acting as a participant in the crime of assault in the second degree, caused the death of David Miller in the course of and in furtherance of that crime; and

(d) That David Miller was not a participant in the assault in the second degree;

AND

(3) That the acts occurred in the State of Washington.

If you find from the evidence that either alternative elements (1)(a) (b) and (c) or alternative elements (2)(a) (b) (c) and (d) have been proved beyond a reasonable doubt, and that element (3) has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. (1) and (2) are alternatives and only one need be proved. In order to return a verdict of guilty, you must unanimously agree that alternative elements (1)(a) (b) and (c) have been proved, or that alternative elements (2)(a) (b) (c) and (d) have been proved.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of the elements of (1) and as to any of the elements of (2), or as to element (3), then it will be your duty to return a verdict of not guilty.

Instruction No. 19

To convict the defendant, Tommy Lee Crow, Jr., of the crime of murder in the second degree as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the period of March 27-28, 2008, the defendant committed intentional murder in the second degree in that:

(a) The defendant either acted with the intent to cause the death of Norman Peterson or acted as an accomplice to Bryan Eke intentionally causing the death of Norman Peterson; and

(b) Norman Peterson died as a result of the defendant's acts or the acts of Bryan Eke to which the defendant was an accomplice;

OR IN THE ALTERNATIVE

(2) That during the period of March 27-28, 2008, the defendant, committed felony murder in the second degree in that:

(a) The defendant, acting as a principal or accomplice, committed assault in the second degree by the strangulation of Norman Peterson;

(b) The defendant or another, acting as a participant in the crime of assault in the second degree, caused the death of Norman Peterson in the course of and in furtherance of such crime; and

(c) Norman Peterson was not a participant in the assault in the second degree;

AND

(3) That the acts occurred in the State of Washington

If you find from the evidence that either alternative elements (1)(a) and (b) or alternative elements (2)(a) (b) and (c) have been proved beyond a reasonable doubt, and that element (3) has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. (1) and (2) are alternatives and only one need be proved. In order to return a verdict of guilty, you must unanimously agree that alternative elements (1)(a) and (b) have been proved, or that alternative elements (2)(a) (b) and (c) have been proved.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of the elements of (1) and as to any of the elements of (2), or as to element (3), then it will be your duty to return a verdict of not guilty.

Instruction No. 20

It is a defense to a charge of felony murder in the second degree, based upon committing assault in the second degree, that the defendant:

- (1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
- (2) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and
- (3) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
- (4) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

Instruction No. 21

Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

Physical injury means physical pain or injury, illness, or an impairment of physical condition.

Instruction No. 22

A person commits the crime of arson in the second degree when he knowingly and maliciously causes a fire or explosion that damages any building or property.

Instruction No. 23

Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person.

Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another.

Instruction No. 24

"Damages", in addition to its ordinary meaning, includes any charring, scorching, burning, or breaking, and includes any diminution in the value of any property as a consequence of an act.

"Building", in addition to its ordinary meaning, includes any dwelling or any other structure used for lodging of persons.

Property means anything of value.

Instruction No. 25

To convict the defendant, Tommy Lee Crow, Jr., of the crime of arson in the second degree as charged in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That during the period of March 27-28, 2008, Bryan Eke caused a fire;
- (2) That the fire damaged a building or damaged any property;
- (3) That Bryan Eke acted knowingly and maliciously;
- (4) That the defendant, Tommy Lee Crow, Jr., with knowledge that it would promote ^{or} ~~or~~ facilitate the commission of the crime of arson, solicited, encouraged, requested, or aided Bryan Eke's commission of the crime of arson in the second degree, and was therefore an accomplice to the commission of arson in the second degree; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 26

If you find the defendant guilty of the crime of murder in the second degree, as charged in Count 1, then you must determine if the following aggravating circumstance exists as to that charge:

Whether the defendant committed this crime against a victim who was acting as a Good Samaritan.

The State has the burden of proving the existence of this aggravating circumstance beyond a reasonable doubt.

Instruction No. 27

A Good Samaritan is a person who comes to the aid of an injured, stranded, or otherwise imperiled person.

Instruction No. 28

If you find the defendant guilty of the crime of murder in the second degree, as charged in Count 2, then you must determine if the following aggravating circumstance exists as to that charge:

Whether the defendant's conduct during the commission of this crime manifested deliberate cruelty to the victim.

The State has the burden of proving the existence of this aggravating circumstance beyond a reasonable doubt.

Instruction No. 29

"Deliberate cruelty" means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime.

Instruction No. 30

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence, these instructions, and three verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms.

You will also be given special verdict forms for the crimes charged in counts 1 and 2. If you find the defendant not guilty of these crimes, do not use the special verdict forms.

If you find the defendant guilty of count 1, you will then use the special verdict form I-A. In special verdict form I-A you will fill in the blank with the answer "yes" or "no" according to the decision you reach.

If you find the defendant guilty of count 2, you will then use the special verdict forms 2-A. In special verdict form 2-A you will fill in the blank with the answer "yes" or "no" according to the decision you reach.

Because this is a criminal case, to answer a special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you are not unanimously satisfied beyond a reasonable doubt that "yes" is the correct answer to the question in a special verdict form, you must answer "no" on that special verdict form. The presiding juror must sign the special verdict forms.

When the verdict forms are completed, notify the bailiff. Then you will be brought into court and your verdicts will be read.

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SUPERIOR COURT
THURSTON COUNTY, WA

'09 MAR 20 P12:20

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NO. BY 08-1-00585-6

DEPUTY

VERDICT FORM - COUNT 1

IN THE SUPERIOR COURT OF
WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON,

Plaintiff,

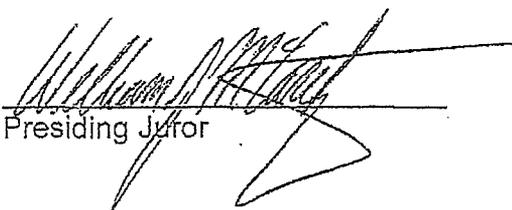
vs.

TOMMY LEE CROW, Jr.

Defendant.

We, the jury, find the defendant Tommy Lee Crow, Jr., GUILTY
(Write in "not guilty" or "guilty")
of the crime of MURDER IN THE SECOND DEGREE as charged in Count 1.

DATE: March 20 2009


Presiding Juror

FILED
SUPERIOR COURT
THURSTON COUNTY WA

'09 MAR 20 P12:20

RECEIVED

BY _____
NO. 08-1-00585-6 DEPUTY

IN THE SUPERIOR COURT OF
WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

TOMMY LEE CROW JR.
Defendant.

SPECIAL VERDICT FORM 1-A

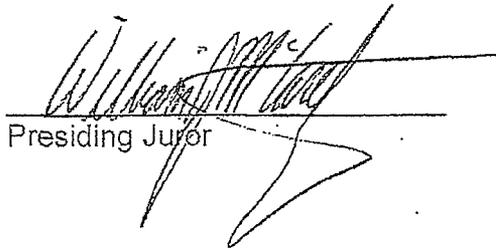
We, the jury, having found the defendant guilty of murder in the second degree,
as charged in Count 1, return a special verdict by answering as follows:

QUESTION:

Did the defendant commit the crime against a victim who was acting as a
Good Samaritan?

ANSWER: YES (Write "yes" or "no")

DATE: March 20 2009


Presiding Juror

FILED
SUPERIOR COURT
THURSTON

'09 MAR 20 P12:20

BET. J. & G. J. S. C. J. S.

BY _____ DEPUTY

NO. 08-1-00585-6

VERDICT FORM - COUNT 3

IN THE SUPERIOR COURT OF
WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff,

vs.

TOMMY LEE CROW, Jr. Defendant.

We, the jury, find the defendant Tommy Lee Crow, Jr., GUILTY
(Write in "not guilty" or "guilty")
of the crime of ARSON IN THE SECOND DEGREE as charged in Count 3.

DATE: March 20 2009

William H. Crow
Presiding Juror

APPENDIX

B

- 1 A Uh, yeah, later that day, I'd say about 5:00 in the afternoon and whatnot.
- 2 Q So between the time that this happened and the time you got arrested, you guys didn't
3 talk about it at all.
- 4 A No.
- 5 Q Okay. No conversation at all.
- 6 A Hm mm.
- 7 Q So you wake up in the morning and there's no conversation about all this that occurred
8 the night prior.
- 9 A No. Pretty much when we got woke up the next morning, there was, uh, uh,...oh, gosh, I
10 should know her name. An officer, and, and some other lady was there at our tent. Uh,
11 they woke us up the next morning.
- 12 Q Mm hmm.
- 13 A And pretty much asked us, uh, a series of questions. And that's when, uh, Tom told the,
14 the officers, because they wanted to pretty much the...officer knew me, because of all the
15 time of drinking up there and telling me to...
- 16 Q Mm hmm.
- 17 A ...I need to move on. And then, uh, he told the lady, well, I already know Mr. Eke. And,
18 and then, uh, he mentioned that he knew Chris Durga as well. And then he says well, I
19 don't know this one right here. And he asked Tom what was his name was, and that's
20 when Tom told him his name was Kelly Crow. And he gave him a birthdate, uh,
21 of...eleven something, uh, of '67 or something like that.
- 22 Q Okay.
- 23 A And, and pretty much the guy come back saying well, you have a suspended license and
24 whatnot, and then it, he looked at him kind of odd, like he didn't believe him. But, then at
25 the same time, I guess he gave him the benefit of the doubt.
- 26 Q Okay.
- 27 A And then pretty much after that, the cops left, and that's when Tom says well, we gotta
28 get out of here. And I says, well, why. And then he says, well, pretty much, I gave them a
29 fe-, a fake name. I said, well, whose name did you give? And he says well, I gave him my
30 brother's name.
- 31 Q Okay. So, so...okay. So you knew that prior to being in any patrol car with him like you
32 said earlier.

- 1 A Yeah.
- 2 Q Um,...you remember you and I talked that night. Right? You admitted part of this. Right?
- 3 A Yeah.
- 4 Q I mean, because it's different now than it was then.
- 5 A Oh, yeah.
- 6 Q Okay. This is the truth?
- 7 A Mm hmm.
- 8 Q And that was part, part the truth.
- 9 A Partly the truth, yeah. I, I just, I didn't want to get blamed for something I didn't do.
- 10 Q Sure, I understand. So once you were in jail, have you had any contact with, uh,...either
- 11 of the two of them?
- 12 A Uh, I was in the same...tank, as, as Tom was. And I, I tried to get moved out of there a
- 13 series of times. And, and everybody just kept saying, oh, no, you're safe. You're not on
- 14 the same level as him. And, and pretty much, Tom just kept telling me that I need to keep
- 15 my mouth shut. You remember what I told you already. You need to stick by that or
- 16 otherwise something will happen.
- 17 Q Well, what did he tell you?
- 18 A Uh, he didn't pretty much tell me anything directly. Because, uh, of everybody else in the
- 19 tank and whatnot. I could've called him as a witness. But, all Tom just kept saying is you
- 20 remember the night of what happened, you remember what I told you. Just remember
- 21 what I told you.
- 22 Q And what, what's that?
- 23 A Pretty much if I went to the police or talked to the police, that he would kill me or, or find
- 24 out where my family was and kill them.
- 25 Q All right. You ever had any written correspondence with either of the two of them?
- 26 A Uh, Tom wrote me a couple, uh, uh, of statements and whatnot.
- 27 Q Okay. Do you think Pops or Norm deserved any of this?
- 28 A No. They didn't deserve e-, even anything remotely close to this. About the worst thing
- 29 that they deserved is, is...to maybe get scared to...why they, they went to the cops or
- 30 whatnot. But, anything of what aroused of why they got what they got, no.

- 1 Q So you've, uh, been talking on the phone in the jail?
- 2 A Yeah.
- 3 Q Who do you talk to?
- 4 A Uh, my mom and my sister.
- 5 Q Okay. One of the, one of these calls that you had with your mom, oh, shoot, it must've
6 been last weekend,...mentioned something about your, your meds. Do you remember
7 that?
- 8 A Yeah.
- 9 Q Do you remember what you said?
- 10 A Uh, about my medication...
- 11 Q Mm hmm.
- 12 A ...about me being on the antidepressants or...
- 13 Q Well, you said your meds needed to get upped. Do you remember why?
- 14 A Oh, because of my nightmares.
- 15 Q Well, what are your nightmares about?
- 16 A Pretty much, uh, uh, of how I could've stopped Pops from burning. Pretty much, uh, uh,
17 I've...I just keep having it replay over in my head what I could've done better to stop
18 Pops and, and Norm from getting hurt the way they did.
- 19 Q Okay. But, burning...explain to me about the burning, what do you mean about the
20 burning?
- 21 A Oh, pretty much the, uh,...Norm is sitting there, he's burning, and, and he's...writing
22 with his finger in blood, he's trying to write and tell me something. But, I can't see what
23 he's writing.
- 24 Q Who?
- 25 A Norm is.
- 26 Q When...
- 27 A When in...
- 28 Q Hmm? When?

1 A Oh, this is in my dream.

2 Q Ah.

3 A And, and pretty much Pops is sitting there and he's trying to talk to me, but I can't hear
4 him saying anything, and he's on fire as well.

5 Q So these are in your dreams.

6 A Yeah, these are all in my dreams. That's why I have to take all these meds that I'm
7 taking, is because I can't deal with the dreams.

8 Q Okay. All right. So did you ever, you, you didn't ever see anybody burning. Did you? Or
9 did you?

10 A No. I didn't ever see nobody burn. No. See pg 52 - pg 53

11 Q All right. Because if you did, you should just say.

12 A No. I didn't see anybody burn.

13 Q It's reasonable to believe that maybe you were standing there watching these bodies burn.
14 And it's okay if that's what happened, Bryan.

15 A No. I, I didn't...

16 Q But, you just need to...

17 A ...even want to...

18 Q ...be straight about it.

19 A Oh. I know. But, I didn't want to stand around there and see nobody burn.

20 Q All right.

21 A I, I'd be in a lot worse position I am right now. I, I would, I would be...

22 Q How so?

23 A Probably in Western State, because I couldn't deal with it.

24 Q Okay. All right. Do you know anybody named Aaron Adams?

25 A Yeah. I know Aaron Adams.

26 Q (unintelligible)

27 A He, he's...he was in, uh, F tank with us down in the maximum...uh, place down here.

1 Q Mm hmm.

2 A That's...

3 Q But, what do you know about him?

4 A Uh,...

5 Q Why would I be asking you about Aaron Adams?

Why Ask
ABOUT ADAMS

6 A I don't know. Well, he pretty much, uh, uh, was writing me a bunch of little letters and
7 whatnot. Asking me if he wanted me to tell him anything that he wanted to tell you guys
8 to, to testify against them or whatnot.

9 Q He was writing you these letters, or you were writing him these letters?

10 A He was writing me letters.

11 Q Asking what...just...

12 A Uh, is there anything that you want me to tell your prosecutor, or is there anything you
13 want me to tell your attorney, about what happened.

14 Q Okay. And what did you, what was your response to him?

15 A Um, pretty much no. I, I didn't have anything that I wanted him to tell or nothing.

16 Q Okay. Did you ever offer him anything to testify for you?

17 A Offer him,...as what?

18 Q Did you ever offer him anything to be a, a te-, a witness for you?

19 A Well, no. I don't have anything to offer him. So no.

20 Q Okay. Mr. Powers?

21

22 Q (Powers): Bryan, let me start by saying that I've been listening to you talk about the
23 nightmares that you've had, how hard it's been for you after this...

24 A Mm hmm.

25 Q ...thinking about what happened. And, uh, I'm just gonna throw something out to you.
26 Um, because you talked about using medication to try and deal with this.

27 A Mm hmm.

- 1 Q And obviously you can't do anything about what happened now.
- 2 A Yeah.
- 3 Q We all know that. But, there's one thing it seems to me that you can do. And, uh, whether
4 it'll give you some peace or not, I don't know. But, you know, there's, there's other
5 chances that all, you always have to do the right thing.
- 6 A Mm hmm.
- 7 Q And, um, I would suggest that the right thing now, the best thing you could do for Pops
8 and Norm is just simply to tell the truth.
- 9 A Yeah.
- 10 Q You know. No matter where it lies. Just be truthful about everything.
- 11 A Mm hmm.
- 12 Q And, uh, note that at part of this interview you were saying some things that apparently
13 were not true. About why you burned that tent. And then you came around to recognizing
14 the need to tell the truth.
- 15 A Yeah.
- 16 Q Would that be correct?
- 17 A Yeah.
- 18 Q Okay. And so I just want you in this, the rest of this interview, just to be straight out with
19 us about the truth. And, and no more of those lies. I don't know if that'll give you some
20 peace or not. But, I hope that it will. Okay? Regardless of what happens with the trial.
- 21 A Mm hmm.
- 22 Q So, ...let me ask you about...that night and, uh, you being back there at your camp...
- 23 A Mm hmm.
- 24 Q ...uh, before you guys left to go over to where Pops and... as it turns out, Norm was at.
- 25 A Mm hmm.
- 26 Q So...who was having some discussions there with each other before you all left? Who
27 was talking with each other there?
- 28 A Chris and Tom were talking to each other.

1 November 5, 2008

Olympia, Washington

2 MORNING SESSION

3 Department 8

Hon. Anne Hirsch, Presiding

4 APPEARANCES:

5 The Defendant with his counsel, Samuel Meyer,
6 Attorney at Law; Mark Thompson and James Powers,
7 Deputy Prosecuting Attorney of Thurston County,
8 Representing the State of Washington

9 Pamela R. Jones, Official Reporter

10 * * * * *

11 MR. THOMPSON: If the parties could just
12 briefly address the Court, wasn't sure whether to
13 put this on the record, No. 9 and No. 11, State vs.
14 Tommy Crow. Mr. Meyer can address what is going on,
15 but this was going to be a C-1, a continuance of one
16 week, but they're asking for 8:30 setting, and,
17 again, Mr. Meyer can explain to the Court if the
18 Court has any inquiries.

19 MR. MEYER: And, Your Honor, Mr. Crow is
20 a co-defendant to Mr. Eke who was before you
21 earlier. A conflict has developed based on
22 witnesses who may be testifying in this case as to
23 where I believe that I'm going to have to withdraw
24 on this, and the Office of Assigned Counsel has
25 secured alternative counsel, and so we'll come
before the court, and that counsel can -- I think
it's more convenient for him to be here at 8:30 next

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November 12, 2008

Olympia, Washington

MORNING SESSION

Department 8

Hon. Anne Hirsch, Presiding

APPEARANCES:

The Defendant with his counsel, Samuel Meyer and
Ronald Sergi, Attorneys at Law; Joseph Wheeler and
James Powers, Deputy Prosecuting Attorney of
Thurston County,
Representing the State of Washington

Pamela R. Jones, Official Reporter

* * * * *

MR. WHEELER: Your Honor, No. 8 and No.
9, State vs. Tommy Crow.

MR. SERGI: Good morning, Your Honor.
I'll defer to Mr. Meyer.

MR. MEYER: Your Honor, currently I'm
the attorney of record for Mr. Crow. He has two
charges, two cause numbers, and this case is been
around a while but the charges are quite serious and
an issue has developed in the jail with regard to
potential witnesses, which is presented without
getting specific on details, but that's the long and
the short of it is that presents a conflict for me,
and it's my belief that based on the way things have
developed I'll be unable to continue to represent
Mr. Crow in this matter. And I think I've spoken
with the Office of Assigned Counsel, and they

1 contacted Mr. Sergi who is ready to come into this
2 case, for both cases actually.

3 THE COURT: This case is extremely old.
4 Mr. Powers?

5 MR. POWERS: Yes, Your Honor. I think
6 that what Mr. Meyer has referred to is, in fact, a
7 conflict. I've been dealing with this for over a
8 month now and I've put a lot of thought into it and
9 reviewing developments as they've occurred, and it's
10 just clear to me that there's no way that Mr. Meyer
11 can represent Mr. Crow under the circumstances that
12 exist with regard to information obtained from
13 another inmate in the jail who will be shortly here
14 after interviewed about that and who is himself
15 facing potential charges as a result of all this, so
16 I think substitution of counsel is necessary.

17 Now, at the same time, Your Honor, I'll note
18 that there are three defendants here, and one of the
19 three has pled guilty. Your Honor knows this,
20 presided over that hearing. And that individual
21 gave a very, very lengthy statement, over 100 pages
22 of transcribed statement consequently, and in that
23 statement made many references to Mr. Crow as well
24 as another individual, Mr. Eke, and as a result that
25 the Court will be hearing this morning a motion from

1 you -- well, let's go ahead and do the First Amended
2 Information first.

3 MR. MEYER: And Your Honor, if you've
4 made a ruling with regard to my status, I can either
5 slowly back away from the podium or --

6 THE COURT: Mr. Crow, you're following
7 all of this?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Counsel, Mr. Meyer, is
10 really ethically prohibited from continuing in his
11 representation of you, and because of what I heard
12 from him and Mr. Powers as well, I'm going to grant
13 Mr. Meyer's motion to withdraw. I'll appoint new
14 counsel today, and that will be Mr. Sergi.

15 MR. MEYER: One last thing, Your Honor,
16 and I apologize for interrupting. I'll get the
17 Office of Assigned Counsel to get the necessary
18 paperwork to reflect your order here with regard to
19 me withdrawing. We'll do an order of withdrawal and
20 substitution that appoints Mr. Sergi.

21 THE COURT: Will you include some
22 findings in that as well?

23 MR. MEYER: You bet.

24 THE COURT: Mr. Sergi, go ahead.

25 MR. SERGI: Apparently, Mr. Crow

1 course, but Mr. Crow wanted an opportunity on Saturday
2 to speak with his mother and brother on their visitation
3 because he can't contact them by phone at this time to
4 discuss what his -- what he should do. That was another
5 basis for a short continuance of this matter from
6 Mr. Crow's perspective.

7 Mr. Crow's asking if he can address the Court. I
8 don't know if the Court would allow him or not. I would
9 suggest that he not, but --

10 THE COURT: It's not my practice to allow a
11 defendant who's presented by counsel to speak because
12 there are obvious difficulties or dangers in that.

13 So Mr. Crow, if there's anything else you want
14 Mr. Sergi to say, will you let him know that. I would
15 not be hearing from you.

16 MR. SERGI: Your Honor, Mr. Crow wanted to
17 express his concerns about me not having gone down to
18 see him except for up -- the first time he says that I
19 went down to see him was two weeks ago. I'll leave it
20 at that. And he's registered that complaint with
21 Assigned Counsel as well with Ms. Harrison because I
22 received an e-mail from her either at the beginning of
23 this week or late last week saying Mr. Crow expressed
24 concerns you haven't been down to see him. I e-mailed
25 her back, and so he wanted that put on the record also.

1 MR. POWERS: About a half hour,
2 Your Honor.

3 THE COURT: About what?

4 MR. POWERS: A half hour.

5 THE COURT: Oh.

6 MR. POWERS: I'm going to be asking that
7 the court allow splitting up his testimony.

8 THE COURT: I see. All right. That is
9 probably going to be all right. I'll check.

10 You may bring the jury in.

11 (Whereupon, the following proceedings
12 were held in open court, in the
13 presence of the jury:)

14 THE COURT: Please be seated, ladies and
15 gentlemen. Welcome back to court.

16 As you will recall, yesterday we began
17 hearing evidence from witnesses and worked a
18 little late to conclude the last witness that we
19 heard. And she was dismissed at the end of the
20 day, so we're ready to begin with new witnesses
21 this morning.

22 Before we begin with the testimony of the
23 next witness, I'm going to read to you a document
24 called, "Stipulation of the Parties."

25 "Stipulation" means agreement. It's a process in

1 this case by which the parties and the court have
2 worked together to shorten the evidence by
3 agreeing to certain matters that the State would
4 otherwise have to prove beyond a reasonable doubt.
5 By this agreement, which is self-explanatory -
6 I'll read it to you in a moment - that requirement
7 has been supplanted by the agreement. Now, let me
8 begin by reading the formal document to you.

9 "It is hereby stipulated and agreed to by
10 the plaintiff, State of Washington, through
11 Deputy Prosecuting Attorney James C. Powers and
12 stipulated and agreed to by the Defendant,
13 Tommy Lee Crow, Jr., through his attorney,
14 Ronald E. Sergi, that the following is true and
15 correct:

16 (1) That the deceased body which was
17 located by Olympia Police investigators in the
18 wooded area north of the 3400 block of
19 Harrison Avenue in Olympia, Washington, on
20 March 28, 2008, and which was originally
21 designated as both "the north body" and
22 "John Doe 1" was the body of Norman L. Peterson,
23 date of birth September 18, 1961. That
24 identification was made by means of a fingerprint
25 obtained from one of the fingers of Mr. Peterson's

1 left hand.

2 (2) That the deceased body which was
3 located by Olympia Police investigators in the
4 wooded area north of the 3400 block of
5 Harrison Avenue in Olympia, Washington, on
6 March 28, 2008, and which was originally
7 designated as both "the south body" and as
8 "John Doe 2" was the body of David N. Miller, date
9 of birth September 1, 1956. That identification
10 was made by forensic dental expert Dr. Gary Bell
11 by comparing jaw and teeth from the south body,
12 John Doe 2, to the known dental records of
13 David N. Miller."

14 Ladies and gentlemen, that concludes my
15 reading to you of the stipulation which you may
16 consider in your evidence.

17 Mr. Powers, are you ready to proceed with
18 the calling of the next witness?

19 MR. POWERS: Yes, Your Honor.

20 THE COURT: You may do so.

21 MR. POWERS: At this time the State
22 would call Lisa Chase to the stand.

23 THE COURT: Please come forward, ma'am,
24 right over here. Stop about there and raise your
25 right hand.

1 other questions of the witness, Your Honor.

2 THE COURT: How long do you anticipate
3 that you are going to cross-examine this witness,
4 Mr. Sergi?

5 MR. SERGI: I think I have two questions
6 for the gentleman, Your Honor.

7 THE COURT: All right. Then we'll
8 proceed.

9 CROSS-EXAMINATION

10 Q. (By Mr. Sergi) Good afternoon, sir.

11 A. Good afternoon.

12 Q. You testified that when you received the material,
13 the clothing, whatever, that you do a screening --
14 a visual screening.

15 A. Yes.

16 Q. And is that done with just the naked eye, or high
17 intensity lighting or microscope or --

18 A. It can be done with oblique lighting, shining a
19 light at an oblique angle to help illuminate the
20 stain, as well as a microscopic assistance.

21 Q. And did you use a microscope or just naked eye
22 with the light?

23 A. I believe it was naked eye and lighting.

24 Q. Okay. And then I've gone beyond my two questions,
25 but I only have one more. Nothing tested -- that

1 you tested showed any DNA on Mr. Crow of
2 Mr. Miller or Mr. Peterson's; is that correct?
3 A. Sorry. Can you repeat that?
4 Q. Mr. Crow was one of the referenced samples --
5 correct? -- as a suspect?
6 A. Yes.
7 Q. And on Mr. Durga's pants there was Mr. Miller's
8 DNA. On the -- let me get it straight here. And
9 on Mr. Eke's shirt and Mr. Eke's coveralls there
10 was a positive match for Mr. Miller's blood;
11 correct?
12 A. Yes.
13 Q. And on Mr. Durga's pants there was a mixture of
14 DNA, but out of that mixture you were able to pull
15 out Mr. Miller's.
16 A. Yes.
17 Q. And nothing that you tested related back to
18 Mr. Crow vis-a-vis Mr. Miller or Mr. Peterson's
19 blood; is that correct?
20 A. None of the evidence and none of the clothing that
21 was reported to be from Mr. Crow bore any
22 indications of blood. Does that answer your
23 question?
24 Q. I believe so. And one more. I apologize.
25 The wooden stick -- item 88, the wooden

1 receive about this case to the evidence and
2 testimony that you hear here in the courtroom.

3 So with all of those instructions, have a
4 pleasant weekend, and we shall see you again at
5 9:00 a.m. on Tuesday morning. You are excused.

6 (Whereupon, the following proceedings
7 were held in open court, outside
8 the presence of the jury:)

9 THE COURT: Please be seated, ladies and
10 gentlemen. There was a side bar conducted this
11 afternoon at the time of discussion -- at the time
12 of offering Exhibit 117 and 118 wherein Mr. Sergi
13 wished to offer an objection which I heard off the
14 record at side bar and ruled on and admitted the
15 exhibit. Mr. Sergi, would you care to repeat that
16 objection, please?

17 MR. SERGI: Yes, Your Honor. As being
18 unduly prejudicial, and Mr. Crow feels -- or
19 thinks that because he was thrown in the fire a
20 couple weeks before that, that there may be some
21 residual evidence from that that was left on the
22 shoes that are prejudicial to him now, as far as
23 the allegation of the footprint on the back. And
24 so that was the basis for the objection.

25 THE COURT: All right. And I understood

1 all share the same class characteristic. So you
2 might have 30,000 shoes that are similar in tread
3 design and size.

4 Q. Okay.

5 A. And at that point a conclusion would be made that
6 it's possible that the known shoe made the
7 impression; it's also possible that it didn't.

8 One other conclusion would be that -- an
9 exclusion, as I've talked about, that they're
10 dissimilar. And so you could conclude that
11 there's no way that this shoe made this
12 impression.

13 Q. Okay. Now, you've indicated that you received a
14 request for impressions analysis from the Olympia
15 Police Department. This process that you just
16 described for impressions analysis, is this the
17 process that you followed in responding to that
18 particular request from Olympia Police?

19 A. Yes, it is.

20 Q. Okay. Now, you've indicated that in that process,
21 your first step is to look at the questioned
22 impression; is that right?

23 A. That's correct.

24 Q. All right. So in regard to this particular
25 request, was that also your first step?

1 Q. Well then, that leads me to my next question,
2 Mr. Hamburg. With regard to the shoes that we've
3 been talking about here and the image that is
4 shown in these photographs, what conclusion did
5 you reach as regards whether or not these shoes
6 could have made the impression that's visually
7 shown on those photographs?

8 A. I concluded that neither of the shoe can be
9 eliminated as a possible source of that
10 impression.

11 Q. Okay. And what does that mean? What -- explain
12 your conclusion a little bit.

13 A. That means that this shoe or another similar shoe
14 of similar design and size created the impression.

15 Q. Okay. And to be able to -- if it was not this
16 shoe -- well, let me clarify one point, then.
17 With regard to the features of the chevrons on the
18 bottom of this shoe, did you see anything
19 inconsistent with it having caused -- with one of
20 these shoes having caused that impression?

21 A. No. Not inconsistent.

22 Q. Okay. Well, I'll leave it at that.

23 Let me show you a couple of other things,
24 then. Mr. Hamburg, maybe we can -- we can put
25 these shoes in the bags and get them out of your

1 seeing Mr. Crow's pants burnt or his shoes being
2 burnt from being put into a fire by Mr. Cover?

3 A. There was a -- a small -- about maybe the size of
4 a 50-cent piece burn on his pant leg and a tiny
5 little mark on his shoe that was burnt.

6 Q. Did you have any communications in the jail with
7 other inmates?

8 A. As in --

9 Q. Well, let me hand you what's been marked as
10 Exhibit No. 141. Are you able to identify that?

11 A. No. I mean, it's a bunch of writing here on a
12 piece of paper.

13 Q. Is that your handwriting?

14 A. I don't recognize it as my handwriting.

15 Q. Do you know Mr. McKegnee (phonetic)?

16 A. Who?

17 Q. Anthony McKegnee (phonetic) down in the jail?

18 A. I don't know of an Anthony McKegnee (phonetic).

19 Q. McKague. I'm sorry. I mispronounced his name.

20 A. I know an A.J.

21 Q. McKague?

→ 22 A. That might be his last name. I know an A.J.

23 Q. Did you communicate with him about this case?

24 A. He asked me bits and parts about it, but I didn't
25 really talk to him about it. No.

1 A. My camp.

2 Q. Okay. And who came to your camp at that time?

3 A. Tommy.

4 Q. And when Tommy came to your camp, what was his
5 mood at that point in time?

6 A. He was drunk.

7 Q. Well, my question is, what was his mood?

8 A. Kind of pissy, I guess.

9 Q. Okay. And did he ask you to do something when he
10 got back and he was in that mood?

11 A. Yeah. He asked me to go get Bryan.

12 Q. All right. And where did he direct you to go in
13 order to get Bryan?

14 A. He didn't say.

15 Q. Well, how did you know to go to Pops' camp?

16 A. Because I was going to go there and ask Pops
17 where's Bryan at.

18 Q. Okay. So what is it that you did at that point in
19 time?

20 A. I left to go get Bryan.

21 Q. Where did you proceed to at that point?

22 A. To go to Pops'.

23 Q. And when you got there, what did you see?

24 A. Bryan hit Scotty with the baseball bat.

25 Q. All right. And when you saw Bryan hit Scotty with

1 meant to do that. And I can do that right here
2 right away.

3 MR. SERGI: Actually, I have a copy of
4 that e-mail, Your Honor, if the court would like.
5 It's not a copy, but I have a hard copy.

6 THE COURT: Yeah. I mean, I saw the
7 WPIC, and I read the comment about the *Bashaw*
8 case. I think it's nuts, but that appears to be
9 the rule.

10 MR. POWERS: *Bashaw* or *Goldberg*,
11 Your Honor?

12 THE COURT: Oh. I didn't -- I haven't
13 considered *Goldberg*.

14 MR. POWERS: Well -- and that's my
15 e-mail, Your Honor. It addressed the two. So the
16 court's familiar with how the decision of *Bashaw*
17 ended up. And *Goldberg* is where *Bashaw* starts up.
18 And in *Goldberg* you had an aggravating
19 circumstance alleged for Aggravated First Degree
20 Murder. And the consideration was with regard to
21 the special verdict instruction with that kind of
22 aggravating circumstance. And in that case the
23 complication there is that the jury instruction on
24 the special verdict that was given in *Goldberg* did
25 not require the jury to be unanimous if they chose

1 "no" instead of "yes." It said, you know, that to
2 say "yes," you have to be unanimous. It didn't
3 say that about saying "no." But the court --
4 practically speaking, when the jury was having
5 difficulty in determining whether or not it was
6 "no" and they were kind of deadlocked on that
7 issue, the court forced the jury to go back in and
8 deliberate further, just like you would on a
9 general verdict situation with a deadlock. And
10 that's what the Supreme Court considered, what
11 about that. And the court said, no, that was
12 error to do that. It shouldn't have required the
13 jury to go back once it was clear that there was
14 not unanimity on "yes," that should have been the
15 end of it.

16 But with *Bashaw*, you know, the *Bashaw* court
17 looked at *Goldberg*, and they really narrowly
18 considered that decision. And what they relied
19 upon was the fact that that jury instruction given
20 to the jury in *Goldberg* didn't require unanimity
21 for "no," the wording didn't. And the court in
22 *Bashaw* looked at that and said, well, the *Goldberg*
23 decision is because that's how the jury
24 instruction was worded. But if the jury
25 instruction is worded to require unanimity, then

1 under the law that should be followed. It wasn't
2 meant to be a decision based upon what's -- what
3 can be done, but just what was done in that case.

4 Now, I read *Goldberg*, and I have a real
5 problem with that. Because there is a passage in
6 *Goldberg* -- I mean, it's true. It's true that the
7 court in *Goldberg* looks at the fact that there
8 was -- that the jury instruction of that case was
9 worded that way. And partly they do rely on that;
10 that's true. But also, and I guess, you know, if
11 you look at it as a narrow -- in a narrow sense in
12 terms of what the actual holding is, you could say
13 that this is dicta. But, nevertheless, there's a
14 fairly substantial comment made directed at the
15 court rule that applies to jury deliberations and
16 in regard to special verdicts.

17 And in *Goldberg* the court looks at that
18 court rule and says this court rule allows the
19 court to require the jury to continue deliberating
20 on a general verdict, you know, if they're
21 deadlocked. It does not give the court the
22 authority to do that on a special finding. And it
23 says it right there in the decision. I look at
24 that, and I say oh, my gosh. You know, the court
25 is telling us that this rule cannot be used to say

1 that there is authority to require unanimity on a
2 "no" answer. And yet the court in *Bashaw* sort of
3 ignores that, you know, and says well, you know,
4 we're not bound by that, which they're not, I
5 guess, in a strict sense, but acts as if that
6 wasn't even said and just focuses on the fact
7 that, well, this decision is based upon the
8 wording of that instruction in that case. If we
9 don't have that problem in the wording, then we
10 shouldn't, you know, feel that that's an issue.

11 Well, that's fine for *Bashaw*, but what
12 about, you know, the bigger issue here as to what
13 the court's authority is or is not or what the
14 proper wording should or should not be. If you
15 think in those terms, then I think it becomes
16 problematic to do what *Bashaw* requests, and that
17 is to require unanimity for "no." But I don't
18 know. You know, I don't think it's a settled
19 issue.

20 And so what I came down with is, if the
21 defense, on behalf of the defendant, asks the
22 court for an instruction which does not require
23 unanimity as to "no" -- and that could be done in
24 one of two ways. Either it's done as it was in
25 *Goldberg* and where the wording only required

1 unanimity as to "yes" and didn't really say
2 anything about "no," or it could be that you
3 provide for a not unanimous alternative in the
4 special verdict instruction, as is done in some
5 instances. Either way, if the defense is asking
6 for basically a form of special verdict which does
7 not require unanimity as to "no," I'm not going to
8 object to that, because I am concerned about the
9 unsettled nature of the law here.

10 It seems to me that if the defense wants
11 that, then there can be no error in giving it,
12 because that is to the defendant's benefit. If
13 the court refuses to give that --

14 THE COURT: Refused to give what?

15 MR. POWERS: I'm sorry.

16 THE COURT: Sorry.

17 MR. POWERS: If the court refuses a
18 request for an instruction which allows the jury
19 to not be unanimous as to "no" and still say "no,"
20 if the jury -- if the court refuses the
21 alternative, even though it's requested by the
22 defense, if the end -- if it turns out that that's
23 error, well then that could be a problem.

24 THE COURT: All right. Thank you.

25 Mr. Sergi?

1 MR. SERGI: Your Honor, certainly if
2 they're unanimous as to "yes," then that would be
3 the answer. And, of course, we're talking about
4 the aggravating circumstances. We're not talking
5 about the --

6 THE COURT: Correct.

7 MR. SERGI: -- underlying crimes. So I
8 think that's resolved. If they aren't unanimous
9 and can't reach a decision and are essentially
10 hung as to the aggravating circumstances, "yes" or
11 "no," I think that the court would probably
12 consider saying that the answer was "no," because
13 they weren't unanimous.

14 Another thing I could foresee, I guess, is
15 them being hung and the court directing them to go
16 back and deliberate some more and then still being
17 hung, and then where are we at as far as the
18 aggravating circumstances. Would we reimpanel
19 another jury to hear that or not? You know, I
20 could not foresee that happening, but it's a
21 potential.

22 So I think that the court could probably
23 construct an instruction that says that they have
24 to be unanimous as to the "yes" and not unanimous
25 as to "no." So that's where I'm at on that.

1 THE COURT: Is that how you are
2 requesting the jury be instructed here?

3 MR. SERGI: Well, I think that makes
4 sense. You know, but I --

5 THE COURT: But I want to hear it
6 specifically.

7 MR. SERGI: I'm not the final arbiter of
8 it.

9 THE COURT: I know that. But what is
10 your request?

11 MR. SERGI: I would ask the court to
12 consider adding language to that instruction that
13 requires them to be unanimous as to a "yes" here,
14 and that if they're not unanimous, then the answer
15 would, by default, essentially, be "no."

16 THE COURT: All right. I think that
17 that is clearly an appropriate statement of the
18 law. The court, the judge, does the sentencing,
19 not the jury. And the judge can sentence a person
20 to an exceptional sentence only if there are
21 aggravating circumstances. If the jury -- but the
22 jury determines aggravating circumstances. And if
23 the jury determines aggravating circumstances,
24 then the court may consider an exceptional
25 sentence. And that determination by the jury must

1 be unanimous. But if the jury cannot unanimously
2 conclude that there are aggravating circumstances
3 here, then the court cannot sentence the defendant
4 to an exceptional sentence. And it matters not
5 whether the jury is unanimous that there aren't --
6 that there is the absence of aggravating
7 circumstances or whether they're simply unable to
8 reach a collectively unanimous decision on that
9 matter. The only thing that matters is whether
10 they are unanimous in their decision that
11 aggravating circumstances exist.

12 It seems to me that under those
13 circumstances, the form requested by the defendant
14 is appropriate. And since the State, I understand
15 it, is not going to object to that change, I'm
16 going to give it in that manner.

17 MR. SERGI: Thank you, Your Honor. I'm
18 sorry. I --

19 THE COURT: In addition to the change --
20 in addition to that change, I've also changed,
21 slightly, the instructions that I have submitted
22 to you this morning from those that I submitted
23 last night. I corrected three typographical
24 errors, one in spelling and then two in just the
25 structure of placement of commas, and then I guess

1 more importantly, in the front end definitions, I
2 made them gender specific, because we're gender
3 specific later in the instructions. And so I've
4 excised out phrases such as "his or her" and
5 included only the male gender. And I'll explain
6 that to the jury before I read the instructions.
7 That's my intention. Otherwise they're identical.

8 So, Mr. Powers, any other issues to raise
9 at this time?

10 MR. POWERS: No, Your Honor. No other
11 issues.

12 THE COURT: Do you anticipate, then,
13 when I request formal exceptions to the
14 instructions with the changes I indicated, that
15 you will take no exceptions?

16 MR. POWERS: Yes. I intended to say
17 that.

18 THE COURT: Mr. Sergi?

19 MR. SERGI: Since we are talking about
20 the aggravating portion of the jury deliberations,
21 I think we talked about this early, or close to
22 it, about a bifurcation of the main trial and the
23 aggravating circumstances part of it. And the
24 only reason I bring this up is to make a record of
25 it, you know, that I certainly thought about

1 A. He said they were talking to him at first.

2 Then -- then that's where it all started.

3 Q. What did he say that he did at that point in time?

4 A. He said that he tried to take a swing, but he
5 missed, and he fell into the bushes.

6 Q. All right, Mr. McKague. If you'd turn to page 26.

7 Well, before you do that, do you, on occasion,
8 have contact with Mr. Durga?

9 A. Yes.

10 Q. Fairly frequent contact with him?

11 A. Yes.

12 Q. Recent contact with him?

13 A. Yes.

14 Q. Thank you.

15 Turn to page 26. And so I'm going to ask
16 you to look at lines 24 to 32 on that page.

17 A. All right.

18 Q. Now, my question to you is what Tommy told you
19 that he did when he first was over there and with
20 Pops at Pops' camp. Now, you indicated that he
21 told you that he took a swing. And what else did
22 he tell you about that swing after you've looked
23 at this passage there? Is your memory refreshed
24 about what else he told you about that swing?

→ 25 A. Yes. I -- I told you guys a week ago that he

1 swung and connected and fell into the bushes. But
2 last week I told you that was -- it was somebody
3 else who said that, not Tommy, that Tommy missed.

4 Q. Well, let's -- let's talk about your statement
5 here. Your statement here is that -- and I'm
6 going back to the page that I was referring to in
7 that section. It says,

8 "And Tommy, I guess, swung on Pops while he
9 was in the chair, hit him, and flopped over."

10 And is that what you said?

11 A. Yes. I said that in the statement.

12 Q. Okay. Is this a subject that you discussed with
13 Mr. Durga?

14 A. Quite a while ago.

15 Q. Uh-huh. Now, what did Mr. Crow say happened after
16 he swung on Pops?

17 A. He fell into the bushes.

18 Q. What did he say happened next?

19 A. He got up, and that's where Norm came into the
20 picture or something.

21 Q. And what did he say happened to Pops when -- after
22 he swung?

23 A. Chris started swinging on him and got him in a
24 choke hold.

25 Q. Chris started swinging on who?

1 what?

2 A. That's what I'm assuming.

3 Q. Okay. Now, how often would you communicate with

4 Mr. Eke with these letters?

5 A. Well, when I was in the hole.

6 Q. And how many letters did you get from him?

7 A. Hum, about seven.

8 Q. Now, if you'd turn to page 11, line 6, please.

9 A. Okay.

10 Q. If you could just review lines 6 through 19,

11 please.

12 A. (Witness complies.)

13 Q. Does that refresh your memory?

14 A. Yes.

15 Q. Did Mr. Eke tell you why he went over to

16 Mr. Miller's camp?

17 A. Yes.

18 Q. And why was that?

19 A. He said he went over there at first to talk to

20 him. Then another time he said he went over there

21 to talk to him about Scotty or something, a guy

22 whose name was "Scotty."

23

24 (Conclusion of Volume 7 of Proceedings.)

25

1 March 19, 2009

Olympia, Washington

2 AFTERNOON SESSION (continued)

3 Q. (By Mr. Sergi) And in your conversations with
4 Mr. Eke, did you receive more than one "story"
5 about the events that transpired at Mr. Miller's
6 camp?

7 A. Yes.

8 Q. And how many different versions did Mr. Eke tell
9 you?

10 A. Three, maybe four.

11 Q. And each one was different?

12 A. Yes.

13 Q. Did -- when you received these letters from
14 Mr. Eke, did he suggest that -- that you know the
15 whole story, at least from his side of it, so that
16 you'd be capable of being able to discuss it?

17 A. Yes.

18 Q. And was he trying to -- the information that you
19 were receiving from him, it was three different
20 versions --

21 A. Yes.

22 Q. -- but the letters were trying to get you to say
23 one version.

24 A. Yes.

25 MR. SERGI: Thank you, sir.

1 THE COURT: Mr. Powers, redirect?

2 MR. POWERS: Nothing further,

3 Your Honor.

4 THE COURT: All right. Ladies and
5 gentlemen, we'll have you return to the jury room
6 now. This will be a regular 15-minute recess.

7 (Whereupon, the following proceedings
8 were held in open court, outside
9 the presence of the jury:)

10 THE COURT: You may remove the witness.
11 Mr. Powers, do you have any other evidence to
12 present?

13 MR. POWERS: No, Your Honor. The
14 State's going to rest at this time.

15 THE COURT: All right. And Mr. Sergi?

16 MR. SERGI: Your Honor, as I stated
17 yesterday, and this is for the benefit as far as
18 preserving a record, Mr. Crow. I talked to
19 Mr. Adams, and my opinion is that he doesn't add
20 anything. In fact, he adds to the State's case if
21 he were to testify. And it's over Mr. Crow's
22 objection that I'm not going to be calling him as
23 a witness.

24 THE COURT: All right. And is it
25 correct that you are not going to call your

1 there. But there's nothing about this little --
2 this little bit of story there that just suddenly
3 pops into his version of this event, this
4 ludicrous little bitty thing here.

5 And what I bring that up to make a point
6 about is that it is something to keep in mind with
7 regard to Christopher Durga's testimony; that in
8 the midst of events which may in fact reflect
9 reality, Christopher Durga is a witness who is
10 quite capable of implanting these little bits of
11 fantasy. And I submit that you see evidence of
12 that in a number of aspects of his story about the
13 events or what happened on the evening that
14 Mr. Miller and Mr. Peterson died, and I will refer
15 to that later.

16 But I have one other reference to Mr. Durga
17 and Mr. Eke collectively, because I don't want to
18 suggest that I'm singling Mr. Durga out. The
19 State believes that it's important for all of you
20 to use caution with regard to the testimony of
21 either one of these individuals. Neither one of
22 these individuals, unfortunately, came up to this
23 witness stand to simply tell the truth. And the
24 State submits that that was pretty apparent. Each
25 of them brought a bias, if you will, or a -- I'm

1 trying to think of the word, a mission, so to
2 speak, as sort of a -- I can't think of the word.
3 But they had an intent or a thing of their own
4 that they were concerned about with regard to
5 their testimony.

6 Each one of them had a different kind of
7 motive, if you will. For Mr. Eke it's himself.
8 For Mr. Durga, what came through loud and clear
9 was perhaps a little bit for himself, but mostly
10 for his brother, the person on trial here today,
11 Mr. Crow, the individual with whom Mr. Durga has
12 this tight relationship to the point that for
13 years they have liked to call each other as if
14 they were biological brothers, which of course
15 they're not. This is a relationship that goes
16 back a long time. And keep in mind that
17 Mr. Durga's a young man. We don't know a lot
18 about his past. We didn't hear a lot about that.
19 But we know enough to know that he's a person
20 who's been homeless for a few years, not much
21 going on in his life, not much stability in a life
22 like that. But the one thing that he has had
23 consistently throughout this period of time is his
24 brother who has been with him, was with him as a
25 brother, apparently before they were homeless,

1 because he gave a more extensive period of time to
2 that relationship, and that both of them then
3 became homeless by his testimony about a
4 year-and-a-half ago and had been together through
5 that experience. And so as you think about this
6 young man and his life at the time last year when
7 these events occurred, what appears to be one of
8 the most stable aspects of that life is his
9 brother. And perhaps even today.

10 And so that's the sort of -- I still can't
11 think of the darned word, but that's the sort of
12 thing that each one of these brings. They bring
13 their own sort of -- gosh, I wish I could think of
14 the word, but their own mission, their own -- you
15 know, they had something in mind here, and it's
16 not the truth. And if the truth gets in the way
17 of what it is that is of concern to them, then the
18 truth is going to have to go away. And we see
19 that over and over again, the State submits, in
20 their testimony, in both of their testimony, not
21 just in one.

22 But at the same time, by considering their
23 testimony in the light of all the other evidence
24 you have, it is possible to glean the truth out of
25 all of this. That's a bit of an aside. And I'll

1 wasn't upset about that.

2 Mr. Durga says, oh, yeah, I wasn't upset
3 about it. Mr. Crow, he wasn't upset about it.
4 But Mr. Eke, he was kind of upset about it. It's
5 a -- this is a pattern. I mean, you have a kind
6 of taking of sides here. And we see that
7 throughout the testimony here, not because it's
8 the truth, but because that's where the biases are
9 coming from. Mr. Eke is sort of the outsider in
10 this group here. He's the -- you know, he's not
11 the -- he's not one of the brothers. So we've got
12 the brothers together. And when you hear
13 Mr. Durga's testimony, you hear a constant theme
14 of protecting my brother. On the other hand, you
15 know, that doesn't mean that we can necessarily
16 trust Mr. Eke's testimony, because we're hearing
17 the constant theme of him of protecting himself.
18 But that breakdown is repeated over and over
19 again, you know, in the testimony of both of them.
20 And that's just an example.

21 Well, the truth is, they're all concerned.
22 How do we know that? Because they're all out on
23 the street checking up on this. It's not just one
24 of them or two of them. It's all three of them.
25 And they're out there right away. And they're

1 discussing among themselves. I'm just in my bunk.
2 I'm in the -- in my tent. I'm just listening.

3 What did we hear from Mr. Eke? It's
4 Mr. Crow and Mr. Durga. And I'm just standing by,
5 and I'm just kind of listening.

6 And what do we hear Mr. Crow's version
7 through Mr. McKague was? It's Mr. Eke and
8 Mr. Durga, and they're the ones who are really
9 doing the planning.

10 Obviously everybody's doing this
11 (demonstrating). But what can we glean from all
12 of this testimony? Again, it's the three of them.
13 They've all started down that road earlier in the
14 day, reacting to learning about the police taking
15 ahold of that bat. And now this is the next step.
16 And they're all three part of it. And they can
17 say oh, it's the other two. They were doing all
18 the talking and whatever. When anybody leaves
19 that camp to carry out the act, it's all three of
20 them.

21 Mr. Crow's with them. As Mr. Crow himself
22 acknowledges in a statement to Mr. McKague, they
23 leave for the purpose of beating up Pops. And
24 that's what each of these individuals has
25 acknowledged. When you get done with the

1 discussion, no matter who's doing the talking,
2 that's what the discussion's about. That's the
3 decision that's made. That's the mission. That's
4 what they're off to do is to assault Pops Miller.

5 So when we talk about whether or not this
6 defendant is an accomplice to the crime of assault
7 that is occurring on Pops Miller, the
8 strangulation of Pops Miller, we start with this
9 point. Because he goes there to be present there
10 with the knowledge that this is what's going to
11 happen. He's a part of it. This is a concerted
12 effort by the three of them. And when he gets
13 there, what does he do? By Mr. Durga's testimony,
14 by Mr. Eke's testimony, he takes the lead. And
15 there's nothing inconsistent about it from what he
16 talked about with Mr. McKague; that is, Mr. Crow.

17 He takes the lead. He jumps in front. He
18 confront Pops Miller. He accuses him of being the
19 snitch. He initiates the assault. He throws the
20 punch. He starts this whole thing going. And
21 that's by everybody's testimony.

22 Now, we've heard some testimony about,
23 well, he threw that punch and he missed. And
24 then -- I heard Mr. Durga say that. And I
25 reminded him from his prior testimony that he had,

1 on a number of occasions, acknowledged that in
2 fact Mr. Crow threw that punch and hit him, the
3 left side of the face, which of course is the side
4 of the face where the bones were broken in his
5 face, and that that was the start of things.

6 And we had Mr. McKague come here and say,
7 well, yeah, I did tell you that he'd hit him, but
8 now I think maybe he said he missed him. But when
9 we get back to Mr. Durga and I say, well, didn't
10 you say that he had actually hit him?

11 Well, I think I saw something like he hit
12 him.

13 Well then, what did you see?

14 And he shows us with his fist against the
15 cheek, which of course is hitting him. A lot of
16 game playing going around with this testimony.
17 But the end of it all is that Mr. Crow starts it
18 off. And really, that's true whether he connects
19 or doesn't connect. He initiates that assault.
20 He gets it going. And that's a signal for his
21 brother, Mr. Durga, to step in.

22 Now, Mr. Durga -- Mr. Crow doesn't have to
23 do too much else with Mr. Miller, because his
24 little brother there takes over now that Mr. Crow
25 has initiated the action. And he does pretty much

1 what needs to be done to put an end to Mr. Miller
2 at that point in time. But this -- can there be
3 any doubt from that testimony that I've just
4 summarized that Mr. Crow is a part of it? He's an
5 accomplice to it. He gets it going.

6 And what does he know? Well -- because
7 that's the other part of this, knowledge that
8 would promote or facilitate the crime of assault.
9 He knows there's going to be an assault. That's
10 why they go there. And that's -- throughout all
11 of the testimony that we've heard from these
12 individuals, that's why they go there. He knows
13 what's going to happen. And that's why he does
14 what he does. The end result of that is what
15 Christopher Durga does, which results in the death
16 of David Miller.

17 THE COURT: Ladies and gentlemen, let's
18 stand and take a stretch break. Counsel, may I
19 see you at side bar, please?

20 (Whereupon, an unreported discussion
21 was held at side bar.)

22 THE COURT: Please be seated, ladies and
23 gentlemen. Just for your information, we were
24 discussing when I would take the recess. And I'm
25 going to do that at some logical place to break

1 between 2:30 and 2:40. And you have been at it
2 since 1:00, so I think a recess that gets you
3 recharged would be in order here pretty soon. It
4 won't be long.

5 MR. POWERS: Ladies and gentlemen, I
6 have taken the alternative of Felony Murder,
7 because the State would submit that Felony Murder
8 in the context of this Count 1 is pretty
9 straightforward. Christopher Durga's admitted to
10 what he did. He caused the death. As to
11 Mr. Crow's involvement in that, we have all of
12 this evidence about how this all originated and
13 the leadership that Mr. Crow had in causing this
14 to come about.

15 Now, Intentional Murder. I'll turn to
16 that. This is the alternative where the first
17 question that must be asked is, did
18 Christopher Durga, as the principal who caused
19 Mr. Miller's death -- did Christopher Durga do
20 that with the intent to kill. Now, there's a
21 couple of things I ask you to consider in this
22 regard, because this is something that has to do
23 with Mr. Durga's intent and then, you know, what
24 it is that Mr. Crow knows about it. And it's not
25 necessarily that straightforward when you're

1 himself admits. Not to help Mr. Miller, like he
2 says, of course, but that's his role. Mr. Miller
3 gets a little edge on the fight with Mr. Durga,
4 and there's Mr. Eke's opportunity to do his part.

5 And Mr. Crow now has Norman Peterson on the
6 ground. And he's holding him and pinning him down
7 on the ground. And now the next step is going to
8 take place, and Mr. Eke comes right along there to
9 do his backup role again.

10 And we hear that Mr. Crow told Mr. McKague
11 that he proceeded to cause Mr. Peterson, Norman
12 Peterson, to at that point in time be knocked out.
13 Well, unconscious or knocked out, these are terms
14 we heard from Mr. Durga, as well. And what they
15 mean in this case, folks, from what we know from
16 the medical evidence is, it means dead.

17 And so the State submits that the evidence
18 in this case, taken as a whole, you know, in this
19 particular count, Count 2, Mr. Peterson is alleged
20 to have been killed by either Mr. Crow acting as
21 the principal or as the accomplice. And the
22 evidence, the State submits, pretty much indicates
23 Mr. Crow as the principal. You know, Mr. Durga
24 says, well, it was Mr. Eke who did most of what
25 was done to Mr. Peterson. But that's not what

1 Mr. Durga himself described. It is Mr. Crow who
2 takes the lead, who initiates the action on
3 Mr. Peterson, who gets him down, who holds him
4 down.

5 Now, Mr. Eke says straight out, Mr. Crow
6 strangled Mr. Peterson. Well, of course, that's
7 Mr. Eke. We know that. But what about Mr. Durga?
8 Brother to brother, he sees all these details
9 happening. We get to the critical point in time,
10 and now of course if it's Mr. Eke who does it,
11 doesn't he have every reason to tell us and say,
12 well, it was Mr. Eke. It was Eke who strangled
13 Norman Peterson. Because, of course, every
14 opportunity he gets he wants to say it was Eke
15 this or that.

16 He's asked the question, well, who did most
17 of the violence against Mr. Peterson? Oh, it was
18 Mr. Eke, you know, even though that's not the
19 picture that he describes. But he doesn't say
20 that. He says, well, I couldn't see. And then
21 today he started to say, well, I turned my head.
22 And I said, well, yesterday you didn't say
23 anything about turning your head. You said these
24 two guys were both hovering over Mr. Peterson.
25 You couldn't tell. Because that is what he said.

1 So he suddenly just can't see what's happening.
2 And then a moment later -- or not a moment, but
3 the next opportunity he has to see Mr. Peterson,
4 Mr. Peterson is unconscious.

5 Well, the State submits that the evidence
6 that I've just summarized, if you look at it taken
7 as a whole, this is Mr. Crow. That's who has made
8 Mr. Peterson unconscious. But what if it isn't?
9 What if, in fact, Mr. Eke inexplicably suddenly
10 steps out of his supportive role and for whatever
11 reason jumps in there and strangles Mr. Peterson?

12 Well, we've heard from Mr. Durga who
13 certainly has no motive to exaggerate when it
14 comes to Mr. Crow's situation that Mr. Crow is
15 right there. He's so close to what the action is
16 that Mr. Durga says he can't see who's doing what.
17 So if it is Mr. Eke who is strangling Mr. Peterson
18 at that point in time, Mr. Crow, the defendant
19 here, is right there in it, right there in it.
20 And that's accomplice liability. And the State
21 submits it's accomplice liability to murder,
22 because this is the witness to a murder who now
23 has to be done away with.

24 This is not just an assault. But if it is
25 an assault, if you disagree with the conclusion

1 the State submits that can be drawn and should be
2 drawn beyond a reasonable doubt based upon this
3 evidence, then clearly it's an assault by
4 strangulation, whichever one of those individuals
5 does it, and the other -- and again, Mr. Crow is
6 right there in it. And so at the very least, at
7 the very least this evidence, without any doubt,
8 surely shows Mr. Crow's involvement in the death
9 of Norman Peterson, assault by strangulation,
10 which he aids by knocking him to the ground and
11 pinning him to the ground and holding him to the
12 ground for whatever happens, if in fact it's not
13 him who does it. What more aid could there be
14 than that? It's accomplice liability, at the very
15 least, to assault by strangulation as a result of
16 which Norman Peterson dies. That, ladies and
17 gentlemen, is Felony Murder as an accomplice,
18 which at the very least is shown here in this
19 case.

20 The State submits that looking at this
21 evidence carefully, it's a whole lot more in terms
22 of what Mr. Crow here does and his involvement in
23 that role. But -- at the very least. And that's
24 Murder in the Second Degree beyond a reasonable
25 doubt.

1 in regard to the State's burden to prove the
2 charges beyond a reasonable doubt, still focusing
3 on these murder counts, and one of those is
4 Instruction No. 14, which is referred to as a
5 voluntary intoxication instruction.

6 And what it says in its first sentence, of
7 course, is very important, and that is that just
8 because a person's intoxicated, that's not a
9 defense to anything; that it's not a defense to a
10 crime to say well, you know, before I went out and
11 did it, I went out and got intoxicated. I wasn't
12 sober. No act committed by a person while in a
13 voluntary state of intoxication is less criminal
14 by reason of that condition.

15 The significance that intoxication can have
16 is that you have to determine whether the State
17 has proved beyond a reasonable doubt certain
18 elements of the offense. And some of those
19 elements have to do with mental states. You know,
20 we talk about intentional murder, intentional
21 assault, intentionally strangling somebody.
22 Accomplice liability requires knowledge that the
23 acts will promote or facilitate the crime that's
24 being committed. These are all mental states.
25 And so where intoxication is to be considered is

1 whether or not there's such intoxication present
2 where the indication is of such intoxication that
3 the State is unable to prove that this individual
4 had the capacity to be able to form intent or
5 knowledge or to have these mental states that are
6 requirements for the charges, for the conviction.
7 And that's the significance of this instruction.
8 That's what this is about is the -- is, do we have
9 evidence of intoxication such that there's any
10 question about Mr. Crow's capacity to intend an
11 assault, to intend a murder, to know his actions
12 as an accomplice, to promote or facilitate the
13 crime being committed.

14 For Mr. Eke, of course, he's got no reason
15 to be protective of Mr. Crow. He's on the other
16 side of that little setup. He, you know, doesn't
17 indicate any kind of real intoxication on the part
18 of Mr. Crow, at all. Mr. Durga, on the other
19 hand, brother to brother, makes quite a bit of
20 this and tries to suggest that, well, Mr. Crow,
21 you know, he was stumbling. He could hardly
22 stand. He could hardly walk. He could hardly do
23 any of these things. But, you know, the thing
24 about Mr. Durga that I have to keep coming back to
25 is, just like when Mr. Durga said, you know, well,

1 Mr. Eke was the one who did all those things to
2 Mr. Peterson, when in fact he had just described
3 Mr. Crow doing them all, almost all of them. That
4 same kind of thing applies here, too.

5 Mr. Durga's very quick to try and portray
6 his brother as, well, he's very drunk, very drunk.
7 But what is it from Mr. Durga's own testimony that
8 we know that Mr. Crow did? Well, we know that he
9 goes over there with the others for the purpose of
10 committing an assault. And then when he gets
11 there, Mr. Crow -- Mr. Durga says that Mr. Crow's
12 not the first in line, but he jumps to the front.

13 He gets to the front of both of them, and
14 he takes the lead. And he calls out
15 Mr. Peterson -- or Mr. Miller from the tent. And
16 then he confronts Mr. Miller with being a snitch.
17 And so apparently Mr. Crow, this defendant, has no
18 problem in being conscious of what it is he's
19 there for. He's not confused about that. He's
20 capable of this purposeful mental action in the
21 sense that he has now stepped forward. He has
22 taken the lead. He has engaged in this
23 confrontation with Mr. Miller. He's accused him
24 of being a snitch.

25 He then takes the action of initiating the

1 assault that they went there to commit. And he
2 does all of that. And are we to see anything in
3 there as an indication that he's too intoxicated
4 to form an intent to do something or to have
5 knowledge of what's taking place around him? Is
6 there anything about that that suggests such a
7 thing?

8 And then, of course, the next step along
9 the line, after Mr. Durga has done his work, is
10 for Mr. Crow to step in and do his with regard to
11 Mr. Peterson. And we hear -- and remember what
12 you heard about Mr. Peterson. He's a big guy, a
13 big man. He was somewhat intoxicated at the time,
14 but a good-sized man. And what does Mr. Crow get
15 over there and do? He grabs him, and he does a
16 leg sweep according to Mr. Durga. This guy who
17 supposedly can't hardly stand up straight without
18 falling takes this big man, and he takes one leg
19 while I guess he balances himself on the other
20 leg, and he uses enough force in that one leg to
21 sweep the legs out from underneath Mr. Peterson
22 and knock him to the ground. And we are to think
23 that he's too intoxicated to even form the mental
24 ability to intend something or know something?

25 He proceeds, then, to get Mr. Peterson down

1 the snitch. Talking about burning bodies.

2 Ladies and gentlemen, you know, this is a
3 case that one could easily get pretty emotional
4 about, because it's got some horrendous facts to
5 it. But I -- I hope that you have seen that in my
6 presentation to you today, that I have not tried
7 to argue it along those lines. And I don't expect
8 or ask that anybody evaluate the case along those
9 lines, although that would be easy to do. But,
10 you know, the case needs to be evaluated on the
11 basis of the evidence, rationally considered on
12 the basis of the evidence, holding the State to
13 its burden to prove every element of either
14 alternative or any of these charges beyond a
15 reasonable doubt. That's the way our system
16 works. That's the way it should work. It has to
17 work. And that's all I'm asking you to do,
18 evaluate the facts.

19 We've had a lot of lies on the stand from
20 these individuals involved that we've heard about.
21 But you can glean the truth. It's there to be
22 gleaned. It's there to be seen. Put it together.
23 The State submits that when it comes together,
24 Mr. Crow over here is guilty of two counts of
25 Murder in the Second Degree and one count of Arson

1 March 20, 2009

Olympia, Washington

2 MORNING SESSION

3 Department 2 Hon. Wm. Thomas McPhee, Presiding

4 APPEARANCES:

5 The Defendant, Tommy Lee Crow, Jr., with
6 his Counsel Ronald E. Sergi, Attorney at Law;
7 James Powers, Deputy Prosecuting Attorney
8 of Thurston County, representing
9 the State of Washington.

10 Kathryn A. Beehler, Official Reporter

11 --oOo--

12 (Whereupon, the following proceedings
13 were held in open court, outside
14 the presence of the jury:)

15 THE COURT: I'm now going to interrupt
16 the morning calendar to deal with a matter in the
17 State v. Crow case.

18 MR. SERGI: Good morning, Your Honor.

19 THE COURT: You and your client can be
20 seated at counsel table. Counsel, I have received
21 a question from the jury. And in an abundance of
22 caution, I have decided that it should be
23 addressed here in open court with the defendant
24 present, although it's a pretty straightforward
25 question. The question is:

"In deciding on Murder in the Second
Degree, do we need to specify intentional versus

1 felony on a verdict form? If so, do we need a
2 different form."

3 The answer to that is clearly "no," and an
4 answer in that respect may be all that needs to be
5 responded to. An alternative answer would be "no,
6 but as instructed in instructions" -- I think
7 they're 12 and 13, or whatever the elements
8 instructions were -- "the jury must be unanimous
9 on whichever form it returns a verdict."

10 So, with that in mind, do you want to think
11 about it, or are you ready to respond at this
12 point?

13 Mr. Sergi?

14 MR. SERGI: I think that the courts
15 either way, just sending them back a note or "no"
16 with your -- you know, the instructions are in
17 there, follow them or find them, I guess, is what
18 the problem is.

19 MR. POWERS: I like the court's second
20 session, actually. That unless the defense has
21 some objection to it, it does repeat something
22 that is already in there, of course, in the
23 original instructions. But given the fact that
24 they have raised this question about how they
25 should proceed in dealing with the alternatives,

1 it certainly can't help but be of benefit to the
2 defendant to remind them of the necessity of being
3 unanimous. So it seems to be a good idea.

4 THE COURT: All right. I think that
5 that second proposal is certainly not changing any
6 of the instructions that they have been given but
7 reminding them and avoiding any issue that may
8 arise in their mind about the requirement that
9 they be unanimous. If they find the defendant
10 guilty on any of the homicide charges, that they
11 be unanimous on the theory that they return the
12 verdict on.

13 I'm going to craft an answer here and
14 present that to you for your review. And I'll
15 take a few minutes and do that now.

16 MR. POWERS: Thank you, Your Honor.

17 MR. SERGI: Your Honor, I'm sorry. Are
18 we done with Mr. Crow?

19 THE COURT: No. I will be back in just
20 a moment or two --

21 MR. SERGI: Okay. Thank you.

22 THE COURT: -- with that answer.

23 MR. SERGI: Thank you.

24 (Whereupon, a recess was taken.)

25 / / /

1 (Whereupon, the following proceedings
2 were held in open court, outside
3 the presence of the jury:)

4 THE COURT: Please be seated. Counsel,
5 after further review of the matter in my mind, I
6 have determined to answer this question "no"
7 without further explanation. I do so because
8 while my suggestion or proposed alternative answer
9 makes some sense if the jury has determined that
10 Mr. Crow is guilty of Murder in the Second Degree,
11 there is an equally possible situation here where
12 the jury has determined that he is not guilty of
13 one theory and unable to reach a decision on
14 another theory. Under those circumstances, to
15 answer anything other than "no ," I think, would
16 run a substantial risk of error. So I'm going to
17 simply answer the question "no."

18 MR. SERGI: And I think that's certainly
19 within the trial court's discretion.

20 THE COURT: And I'll give this to the
21 bailiff for delivery to the jury.

22 THE BAILIFF: Thank you, Your Honor.

23 THE COURT: That will conclude our
24 hearing today. Mr. Crow may be returned to
25 custody. Thank you for bringing him up so