

No. 43693-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

vs.

**Sergey Fedoruk,**

Appellant.

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Cowlitz County Superior Court Cause No. 11-1-00827-1

The Honorable Judge Marilyn K. Haan

**Appellant's Opening Brief**

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### ASSIGNMENTS OF ERROR

1. Mr. Fedoruk was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Mr. Fedoruk was denied the effective assistance of counsel by his attorney's failure to timely investigate an insanity or diminished capacity defense.
3. Mr. Fedoruk's convictions were entered in violation of his Sixth and Fourteenth Amendment right to present his defense.
4. The trial court erred by denying Mr. Fedoruk's motion for a continuance so his attorney could investigate an insanity defense.
5. The trial court infringed Mr. Fedoruk's Fifth Amendment privilege against self-incrimination.
6. The trial court erred by admitting custodial statements made following a failure to scrupulously honor Mr. Fedoruk's initial invocation of his right to remain silent.
7. The trial court erred by admitting Mr. Fedoruk's statements to Deputy Gilchrist.
8. The trial court erred by finding that Mr. Fedoruk's incomprehensible rant in Deputy Robinson's patrol car initiated a generalized discussion about the investigation after he'd invoked his right to remain silent.
9. The trial court erred by finding that Mr. Fedoruk knowingly, intelligently, and voluntarily waived his right to remain silent.
10. The trial court erred by admitting Mr. Fedoruk's statements to officers at the scene.
11. The trial court failed to properly determine the voluntariness of Mr. Fedoruk's statements.
12. The trial court erred by finding that Mr. Fedoruk was not in custody for *Miranda* purposes when questioned at the scene.
13. The trial court erred by adopting Finding of Fact No. 11. CP 7.

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33. The prosecutor committed prejudicial misconduct that violated Mr. Fedoruk's Fourteenth Amendment right to due process.
34. The prosecutor improperly shifted the burden of proof in closing argument.

35. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing argument.
36. The trial judge erred by refusing to instruct the jury on the lesser included offense of first-degree manslaughter.
37. Mr. Fedoruk's murder conviction was entered in violation of his statutory right to have the jury consider applicable lesser offenses.
38. The trial judge violated Mr. Fedoruk's Fourteenth Amendment right to due process by refusing to instruct on the included offense of first-degree manslaughter.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel unreasonably failed to investigate a mental health defense prior to Mr. Fedoruk's trial. Was Mr. Fedoruk denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
2. The constitution guarantees an accused person a meaningful opportunity to present his or her defense. Here, the trial judge refused Mr. Fedoruk's request for a continuance to allow his attorney to investigate an insanity defense. Did the trial judge violate Mr. Fedoruk's Sixth and Fourteenth Amendment rights to due process and to present a defense by unreasonably denying his request for a continuance?
3. Police must scrupulously honor a suspect's invocation of his her right to remain silent. In this case, Chief Civil Deputy Gilchrist interrogated Mr. Fedoruk without readministering *Miranda* warnings after Mr. Fedoruk had unambiguously invoked his right to remain silent. Did the trial court err by refusing to suppress statements made after Mr. Fedoruk invoked his right to remain silent?
4. An accused person's involuntary statements may not be admitted at trial for any purpose. Here, the trial court failed to properly determine

the voluntariness of Mr. Fedoruk's statements, given his mental health problems. Did the trial court err by admitting Mr. Fedoruk's statements without analyzing the totality of the circumstances to determine voluntariness, in violation of his constitutional privilege against self-incrimination?

5. A suspect is in custody for *Miranda* purposes when, considering all the circumstances, a reasonable person in the suspect's position would not feel free to terminate the conversation and leave. Here, Mr. Fedoruk was confronted by five officers, ordered to remove his hands from his pockets, told he could not go inside his house, handcuffed, and questioned. Under these circumstances, was Mr. Fedoruk in custody for *Miranda* purposes?
6. It is misconduct for a prosecutor to shift the burden of proof during closing argument. In this case, the state's attorney improperly shifted the burden of proof by repeatedly asserting that any uncontradicted evidence was agreed, and thus could be taken as fact. Did the prosecutor commit misconduct that infringed Mr. Fedoruk's Fourteenth Amendment right to due process?
7. A prosecutor may only seek conviction based on probative evidence and sound reason, and may not attempt to undermine jurors' feelings about the need to strictly observe legal principles and take appropriate care in deciding a case. Here, the prosecutor urged jurors to focus on the intuition of various witnesses rather than their observations, and asked jurors to put as much faith in their own intuition as in reason and logic. Did the prosecutor commit misconduct that was flagrant and ill-intentioned?
8. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel failed to object to prejudicial misconduct during the prosecuting attorney's closing. Was Mr. Fedoruk denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
9. An accused person is entitled to have the jury instructed on applicable included offenses. Here, the trial judge refused to instruct on the

included offense of first-degree manslaughter. Did the trial judge's refusal to instruct on manslaughter violate Mr. Fedoruk's unqualified statutory right to have the jury consider applicable included offenses, as well as his Fourteenth Amendment right to due process?

### **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Sergei Fedoruk was born in Ukraine in 1973. Forensic Mental Health Report (hereafter "Report"), p. 1, Supp. CP. When he was 18 years old, he was involved in a motorcycle accident and sustained a head injury. Report, pp. 3, 6, Supp. CP. He was twice detained in Ukrainian psychiatric hospitals, once for two months, and once for five months, and was diagnosed with schizophrenia. Report, p. 3, Supp. CP.

He and the rest of his family emigrated to the U.S. in early 2002. Report, p. 2, Supp. CP. Eight days after his arrival in Cowlitz County, he was taken to the emergency room and diagnosed with "Acute Confusion and Agitation of Unknown Etiology," and prescribed the antipsychotic medication Haldol. Report, p. 4, Supp. CP. Hospital personnel requested that he be evaluated for involuntary commitment, but he was found not to qualify. Report, p. 4, Supp. CP.

In 2008, Mr. Fedoruk was found not guilty by reason of insanity of several felony offenses committed in Clark County in 2007. Motion for Continuance filed 6/12/12, Supp. CP. In the fall of 2010, Mr. Fedoruk stopped taking his medication. His family called the police because he was eating dirt

and dog food, licking water—which he believed to be holy water—off the floor, and because he’d become increasingly paranoid. Report, p. 4, Supp. CP. He accused his sister-in-law’s brother Serhei Ishchenko of raping his niece, Rimma, and made a “bomb” (consisting of an empty bottle with wires protruding from it) with which he planned to kill Ishchenko. RP 337, 745-748. Mr. Fedoruk was taken to the emergency room and evaluated. He was found to be gravely disabled and was involuntarily committed. Report, p. 4, Supp. CP. Following his release to a less restrictive alternative, he violated the terms of his release, returned to the psychiatric unit at the hospital, and was subsequently admitted to Western State Hospital. Report, p. 5, Supp. CP.

In summer 2011, Mr. Fedoruk lived with his brother, his brother’s wife Yelena, and their nine children in rural Cowlitz County. RP 441. Yelena’s brother Ishchenko also resided there that summer. CP 436, 441.

The family became concerned when Mr. Fedoruk started acting strangely. RP 106, 493. Toward the end of July, Mr. Fedoruk injured his foot on a bed frame that Ishchenko had left out in the living room. RP 495-496. Mr. Fedoruk expressed anger toward Ishchenko whenever the pain in his foot reminded him of the incident. RP 496. At one point the police were called; however, Ishchenko told the officers that the two of them had prayed together and sorted the issue out. RP 350.

On Friday, July 29<sup>th</sup>, Mr. Fedoruk told his sister Tatyana that he wanted to return to Ukraine. She reminded him that he might be returned to a psychiatric hospital if he went back, and he became explosively angry. RP 342. He followed her into the house and put his hands around her neck as though to strangle her. When she ran outside to get away from him, he followed her, yelling and apologizing at the same time. RP 342.

Late that night, Mr. Fedoruk went into his sister-in-law Yelena's bedroom, woke her up, and told her that her daughter Rimma—who had gone to Portland to spend the night with a friend—was in danger. Yelena assured him that Rimma was fine. RP 343, 442-447, 507. The next day, while Mr. Fedoruk was lying on the ground with the family's goats, Yelena told him she'd bought some meat he'd asked her to get so he could marinate it. He responded angrily, accusing her of being against him. RP 344. Later, she asked if he was taking his medications, but he wouldn't confirm that he was taking them consistently. RP 344.

The next day—Sunday, July 31—Mr. Fedoruk was late to church because he'd been marinating the meat. RP 344, 442, 493. Ishchenko waited for him and gave him a ride to church. Mr. Fedoruk had previously been expelled from church; when he asked the pastor if he could rejoin, the pastor sought to defer any discussion to another time. Mr. Fedoruk became upset and yelled at the pastor. RP 345, 443, 493. Once he'd returned home, he

whispered to Yelena that they “shoot for treason”, and didn’t answer when she asked if he was making a threat. RP 345. He then went outside, wearing his swim trunks inside out, and couldn’t be found when it was time for evening prayers. RP 345, 444, 496.

Some time after midnight, Mr. Fedoruk appeared in his niece Rimma’s room, and asked if she’d been raped the night she’d spent in Portland. He punched the air vigorously, and told her that she should tell him about the rape because he felt strong and could take care of it.<sup>1</sup> RP 346, 518-524, 548, 567. After this encounter, Mr. Fedoruk went up and down the stairs numerous times, and then ran water in the bathroom sink for a long time. RP 347, 526-530, 571-572.

The next morning, Rimma found that Mr. Fedoruk had left some tools hidden under a shelf in her bedroom. When she asked him about the tools, he first told her that he was going camping, and then said that he planned to use them to protect himself against the police. RP 348, 532-540. He’d also taken a cell phone belonging to her friend (who’d spent the night); the phone was later found soaking wet by the swimming pool outside. RP 348, 541, 576-577.

Concerned that Mr. Fedoruk was decompensating, a member of the family called his community corrections officer (CCO), who’d been providing

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<sup>1</sup> He may also have said he was strong enough to kill someone. RP 567.

supervision following the 2008 insanity acquittals. RP 106. The family also expressed concern that they couldn't find Ishchenko. RP 106-108. The CCO assigned to Mr. Fedoruk was not available, so two others went to his home, accompanied by three county sheriff's deputies. RP 102-103, 108-110, 141-142, 168, 171.

Mr. Fedoruk met the five uniformed officers on the porch. RP 114, 167. He was disheveled, dirty, sweaty, and fidgety. RP 111. Officers said he was agitated, and noted that he put his hands into his pockets several times after being told to keep them out. More than once, Mr. Fedoruk turned to go inside, despite repeated directives to stay outside. RP 113, 115, 141-142, 151, 169-170; CP 7. This behavior was unusual: ordinarily, Mr. Fedoruk was cordial and cooperative with his DOC officer. RP 111-113, 142, 163.

After talking to Mr. Fedoruk for a few minutes, the DOC officers decided to handcuff him because he kept putting his hands in his pockets and because of his general twitchiness.<sup>2</sup> RP 118-119, 132, 175. Mr. Fedoruk passively resisted by making his body rigid. After being told that he would be taken for a drug test and then returned home and that he was not being arrested, Mr. Fedoruk relaxed and allowed himself to be cuffed. He sat on the

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<sup>2</sup> The lead officer felt certain that Mr. Fedoruk was on methamphetamine; however, a urine test taken later in the day revealed no controlled substances. RP 120, 126.

stairs, while law enforcement went into the house. The officers found nothing of concern inside. RP 118-120, 143-144, 186.

While Mr. Fedoruk was in handcuffs and sitting on the porch steps, Deputy Robinson asked him about a BMW parked in the driveway. RP 152, 172, 205-206. Mr. Fedoruk said that it was his sister's. When the deputy told him that the car wasn't registered to his sister, Mr. Fedoruk responded that it belonged to her husband, Ishchenko. When asked where Ishchenko was, Mr. Fedoruk said he must be at work. RP 172, 187-188. The deputy questioned how Ishchenko got to work without his car, and Mr. Fedoruk shrugged and said that maybe his wife took him. RP 116-119, 172, 188.

Mr. Fedoruk remained, seated and cuffed and attended by two officers, while the other officers walked the perimeter of the property. A family member ran to them and communicated that he'd found Ishchenko's body. RP 145-147, 190. Ishchenko had been beaten and strangled, and his corpse was poorly hidden amongst brush and branches near a culvert. RP 666-681, 949.

Following this discovery, Mr. Fedoruk was read his *Miranda* rights and placed in the back of one of the patrol cars. RP 173, 191. Mr. Fedoruk interrupted as his rights were administered, first shouting "Court! Court! Court!" when the officer got to the part about his statements being used against him in court, and then asking "Lawyer why lawyer?" when told he had the right to a lawyer. RP 173, 192. When asked if he wished to answer

questions, he said “I don’t want to talk to you.” RP 193. He remained in the car by himself. RP 193.

Around 11:45, Deputy Robinson returned to his car to get some forms. RP 193. While Robinson was at the car, Mr. Fedoruk tensed up, leaned forward, and spoke rapidly in what Robinson later described as a 2-3 minute rant. RP 907-909. The deputy got pen and paper to take notes. RP 193-194. He was unable to capture everything Mr. Fedoruk said, but his notes included the following:

My sister, Tatyana. I ask – I asked my sister; what you want, a big dick or something? And he tell my sister I want sex. I tell just this. I tell smoke dick, Tatyana. I just telling him it’s not big deal. Christian no talk to for this for sex every time. I tell him, look, is my sister, too. And my sister very very mad. She get bitchy and say, anybody call cops? I never touch him. I not touch him, never. I go to property of Tatyana, get goats.<sup>3,4</sup>  
RP 907-909.

When the deputy agreed to talk to his sister Tatyana, Mr. Fedoruk stopped talking. RP 195. About 30 minutes later, Robinson transported Mr. Fedoruk to the police station. RP 195-196.

Robinson told Chief Civil Deputy (now Undersheriff) Gilchrist that Mr. Fedoruk had invoked his right to remain silent, shared Mr. Fedoruk’s

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<sup>3</sup> The statement is taken from Robinson’s testimony, which included interruptions and questions from the prosecutor. RP 907-909.

<sup>4</sup> Christian is the name of another relative.

interruptions during his recitation of the rights, and provided Gilchrist with the statements Mr. Fedoruk had made during his rant in the car.<sup>5</sup> RP 196-197.

Mr. Fedoruk was put into an interview room with two officers. RP 242. *Miranda* warnings were not readministered. RP 242. Mr. Fedoruk said “I don’t want to talk to you,” and pointed to one of the officers, who left the room. RP 243. Gilchrist remained, and questioned Mr. Fedoruk for roughly 90 minutes. RP 249. No recording was made of the interview. RP 244.

After answering questions from the officer for 90 minutes, Mr. Fedoruk asked to use the bathroom. RP 249, 254. He remained in the bathroom for 30 minutes, shouting “hallelujah!” several times. RP 255. When he came out, he told Gilchrist he wanted an attorney. RP 255.

The state charged Mr. Fedoruk with Murder in the Second Degree, with alternatives of both felony murder and/or intentional murder. CP 4. He was initially held by the Department of Corrections; once charges were filed, he was held by the Superior Court. RP 148-150; Order of Release If No Charges filed 8/9/11, Supp. CP.

According to jail staff, Mr. Fedoruk was out of control and needed to be tased and pepper sprayed multiple times while in custody. RP 67. Tasers seemed to have no impact on Mr. Fedoruk. RP 68. When jail staff served a

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<sup>5</sup> According to Gilchrist, Robinson told him that Mr. Fedoruk had been given his rights and agreed to give a statement. RP 241. The court found this immaterial. CP 6-11.

search warrant for the undergarments that Mr. Fedoruk was still wearing three days after being arrested, he intentionally defecated in them. RP 229.

After about four weeks in custody, Mr. Fedoruk slammed his head hard into the floor and tried to bite one of his fingers off. RP 1-12, 22; Order Re Involuntary Medication, Supp. CP. The finger was apparently hanging, loose, and several guards had to work to keep him from completely severing it. RP 24-25; Order Re Involuntary Medication, Supp. CP

Mr. Fedoruk was taken to the hospital and administered antipsychotic medication, including Haldol. Order Re Involuntary Medication, Supp. CP. The emergency room physician noted that Mr. Fedoruk had psychosis and incoherent behaviors. RP 15. Over defense objection, the court ordered him to continue on the medication, authorizing jail staff to forcibly administer it. RP 1-13, 37-38; Order Re Involuntary Medication, Supp. CP.

The court also ordered a competency evaluation for Mr. Fedoruk at Western State Hospital. Dr. Richard Yocum issued a report outlining Mr. Fedoruk's long history of mental health problems. Report, pp. 2-7, Supp. CP. Dr. Yocum also testified at a hearing to determine whether or not Mr. Fedoruk should be held without bail. At the hearing, he said Mr. Fedoruk becomes manic and at risk for violent behavior without his medication.<sup>6</sup> RP 45-49.

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<sup>6</sup> A jail guard confirmed that Mr. Fedoruk became docile after starting his medications. RP 69.

On the day before trial was scheduled to start, defense counsel filed a motion seeking a continuance so that the defense could investigate the possibility of pursuing an insanity defense. Motion for Continuance, Supp. CP. According to defense counsel, the defense had “no basis to pursue a defense of NGI” until the day before the motion was filed. Motion for Continuance, Supp. CP. Defense counsel explained the delay as follows: “The evolution of the defense comes at this point in time due to the Defendant being able to hear the testimony at the 3.5 hearing and the recitation of the states [sic] case in a linear chronological fashion during motions last week;” and “[t]his was the first opportunity to meet with the Defendant to talk about the commencement of the trial with an interpreter after the hearings.” Motion for Continuance, Supp. CP. Counsel attached to his motion a copy of paperwork filed in the 2008 cases that resulted in acquittal by reason of insanity. Motion for Continuance, Supp. CP.

Argument on the motion was held that same day. Defense counsel acknowledged that he’d done little more than talking to family members about Mr. Fedoruk’s mental health history. RP 397. Indeed, the week before (at a hearing on the state’s motions *in limine*), counsel made clear that the defense team had not consulted with a mental health expert.<sup>7</sup> RP 331-355.

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<sup>7</sup> At one point during argument on the motion for a continuance, counsel said “We’ve been pushing an expert to try and get his report ready as hard as possible, and I’d hate for that to be wasted...” RP 404. It appears that counsel was referring to the report of a

The prosecution objected to the requested continuance, arguing that defense counsel had known about Mr. Fedoruk's mental health problems from the outset and had failed to diligently investigate the possibility of an insanity defense. State's Objection to Defense Motion, State's Response to Defense Motion to Continue, Supp. CP. The trial judge found that defense counsel had failed to act with diligence, and denied the requested continuance. Order Denying Defendant's Motion to Continue, Supp. CP.

Prior to trial, the court held a hearing to determine the admissibility of Mr. Fedoruk's statements. The court ruled that all of his statements were admissible.<sup>8</sup> RP 308-311, 327-330. The court held that Mr. Fedoruk was not in custody for *Miranda* purposes until after the discovery of the body, and that he had initiated a generalized discussion about the case during his 2-3 minute rant taken down by Robinson. CP 6-11.

Jury selection commenced on June 13<sup>th</sup> (one day after the continuance motion was denied), and the first witness testified on June 18<sup>th</sup>. RP 434. The state had no direct evidence proving that Mr. Fedoruk killed Ishchenko, but a great deal of circumstantial evidence pointed to him as the culprit. *See* RP

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blood spatter expert, who had been mentioned several times throughout the proceedings. RP 386-388.

<sup>8</sup> The defense stipulated that Mr. Fedoruk's rant to Robinson was spontaneous and admissible. RP 271-272. The court's findings erroneously characterized this stipulation as a stipulation that the statements were knowing, intelligent, and voluntary. CP 6-11.

1771-1810 (prosecution's closing argument). Defense counsel's theory was that Mr. Fedoruk hadn't been involved in Ishchenko's death. RP 1812-1866.

Mr. Fedoruk proposed instructions on the lesser included offense of Manslaughter in the First Degree. Defendant's Proposed Instructions, Supp. CP. The court denied the request, and refused to instruct the jury on the lesser charge. RP 1749-1753; Court's Instructions to Jury, Supp. CP.

During closing, the prosecutor told jurors that Mr. Fedoruk agreed with the state's evidence if he didn't present any evidence to contradict it:

Ishchenko was beaten and/or strangled to death. Both sides can absolutely agree on that fact and there is no contradictory evidence from Dr. Nelson's testimony. You can take it as gospel.  
RP 1776.

[Ishchenko] had a ridge of dots all over his face consistent with hitting a roadway. Agreements. Absolute agreements. There's no contradictory evidence to these things. What does that conclude [sic]? There is also an agreement that there is an assault in that driveway. There is no contradictory evidence that the assault didn't happen there... There's a blank spot [in the spray of blood] here. Maybe Ishchenko's face? Agreement. There is absolute evidence [sic] of an assault in the roadway/driveway... Agreements. No contradictory evidence... We know they are [Ishchenko's] blood. Absolute agreement. No contradictory facts... [The body] was found in a position indicating lividity and rigor. Absolute evidence of fact... He was covered with evergreen branches that were thirty feet nearby. Absolute evidence of fact. Conclusion: Serhiy Ishchenko was murdered.  
RP 1777-1778.

Based on these “agreements,” the state told jurors that their task was to decide the only remaining factual issue: “What does that leave? Identity. Identity is the only issue.” RP 1779.

The prosecutor also urged jurors to consider the “intuition” of several of the witnesses:

Intuition is a powerful thing. Powerful. Yelena wakes up and immediately knows something is wrong. Her intuition has told her something is wrong... Intuition is a powerful thing. She gets those kids, her number one concern, out of the house because intuition is telling her something... Intuition is a powerful thing. Let’s talk more about intuition... And, his intuition said, “Arrest him.” ... Intuition is a powerful thing... Now, if you think about it, the family, they have that intuition, they have that sense that building thing in the gut that says something is wrong... At this point, Richard comes out and that intuition... has kicked in... You remember intuition? Remember how we were talking intuition? ... The whole family doesn’t buy it because their intuition has told them the truth...  
RP 1784-1801.

The prosecutor went on to suggest that jurors should put as much faith in their own intuition as they did in rational thought:

What does your head say? What does your heart say? What does your gut say? It says that the Defendant killed his brother-in-law... What does your head say an abiding belief is? What does your heart say an abiding belief is? What does your gut say an abiding belief is? It is a workable burden... [Defense counsel says] “Your gut feeling is not rational.” It was for [various witnesses.] Their gut was right. And, it is rational.  
RP 1805.

The jury found Mr. Fedoruk guilty of intentional Murder in the Second Degree. RP 1881. Mr. Fedoruk was sentenced to 216 months in prison, and he timely appealed. RP 1887-1911; CP 12-25.

## ARGUMENT

### **I. MR. FEDORUK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY’S LACK OF DILIGENCE DEPRIVED HIM OF THE OPPORTUNITY TO PRESENT A MENTAL HEALTH DEFENSE.**

#### A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

#### B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Likewise, art. I, §22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. art. I, §22. The right to counsel is “one of the

most fundamental and cherished rights guaranteed by the Constitution.”

*United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice - “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.”).

C. Mr. Fedoruk was denied the effective assistance of counsel when his attorney failed to timely investigate an insanity or diminished capacity defense.

To be effective, defense counsel must undertake a reasonable investigation (or make a reasonable decision that particular investigations are

unnecessary). *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008). Any decision not to investigate must be directly assessed for reasonableness.<sup>9</sup> *Id.* A failure to investigate is especially egregious when counsel fails to consider potentially exculpatory evidence. *Id.*, at 1234-35.

In addition, counsel should confer with the accused person without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973); *see also* RPC 1.4.

Finally, counsel must assist the defendant “in making an informed decision as to whether to plead guilty or to proceed to trial.” *A.N.J.*, at 111-12. Counsel must, “at the very least... reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.” *Id.*

In this case, it must have been obvious to counsel from the outset that Mr. Fedoruk had significant mental health issues. In 2008, he had been charged with serious felonies and found not guilty by reason of insanity. Motion for Continuance, Supp. CP. He was under supervision for those

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<sup>9</sup> Furthermore, strategic choices made after less than complete investigation are only reasonable to the extent that professional judgment supports the limitations on investigation. *Foust v. Houk*, 655 F.3d 524, 538 (6th Cir. 2011).

charges at the time of the current offense, which is why his family called the Department of Corrections instead of contacting the police. RP 106.

The court ordered a competency examination at Western State Hospital. Order for Exam at Western State Hospital, Supp. CP. Before that evaluation took place, Mr. Fedoruk bit his own finger off. RP 1-25. The court authorized the forcible administration of medication, and subsequently ordered Mr. Fedoruk held without bail, in part because of his mental health problems. RP 1-25; Order Re: Involuntary Medication, Supp. CP; Findings of Fact and Conclusions of Law Re: No Bail Hearing, Supp. CP.

Dr. Yocum's forensic mental health report was filed with the court on October 6, 2011, following an evaluation at Western State Hospital.<sup>10</sup> Dr. Yocum noted that Mr. Fedoruk had suffered a head injury at age eighteen. Report, pp. 3, 6, Supp. CP. He outlined prior psychiatric hospitalizations, past diagnoses of schizophrenia (from Mr. Fedoruk's time in the Ukraine) and bipolar disorder, prior involuntary commitments, and a long history of prescriptions for antipsychotic medications. Report, pp. 3-6, Supp. CP.

The report also summarized Mr. Fedoruk's erratic and irrational behavior in the jail. Report, pp. 6-7, Supp. CP. Even a casual reading reveals

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<sup>10</sup> The evaluation did not address insanity or diminished capacity at the time of the offense. Report, Supp. CP.

that Mr. Fedoruk's problems were ameliorated by medication. *See, e.g.*, Report, pp. 4, 8, 11, Supp. CP. He had not been taking his medication for months prior to his arrest. RP 344; Report, pp. 5-6, 9, Supp. CP.

Dr. Yocum gave Mr. Fedoruk an Axis I diagnosis of "Bipolar 1 Disorder, Most Recent Episode Manic, with Psychotic Features (by history)." Report, p. 9, Supp. CP. Although Mr. Fedoruk was determined to be competent and "did not present with any symptoms of active psychosis" at the time of his interview, Dr. Yocum cautioned that "it is important to note that Mr. Fedoruk's behavior, and observed mental health symptoms, have changed dramatically since Cowlitz County Jail medical staff forcibly medicated him." Report, p. 11, Supp. CP.

Furthermore, as the prosecutor put it, "the discovery is replete with investigation into the defendant [sic] prior mental instability and includes the police reports and orders involving his not guilty by reason of insanity plea in Clark County." State's Response to Defense Motion to Continue, Supp. CP.

Despite all the information in Dr. Yocum's report and elsewhere in the record, there is no indication that counsel ever consulted with a mental health expert. *See RP, generally; CP generally.* In his June 12<sup>th</sup> written motion, counsel indicated that he had "no basis" to pursue a NGRI plea until the day before (June 11<sup>th</sup>), despite the significant history of mental illness. Motion for Continuance, Supp. CP. During oral argument on the motion, counsel

disclosed he'd done little more than obtaining his client's mental health history from family members, and (in distinguishing a case cited by the prosecution) noted that he hadn't obtained an evaluation for diminished capacity. RP 397.

Mr. Fedoruk's problems and their potential impact on his ability to form intent, his ability to understand the nature and quality of his acts, and to know the difference between right and wrong, was obvious. Counsel's failure to timely investigate an insanity or diminished capacity defense was an egregious lapse of professional judgment. Competent counsel would have consulted with an expert at the very outset, instead of waiting until more than 10 months had passed.

As the state argued and the trial court found, defense counsel was not diligent in investigating a mental health defense on Mr. Fedoruk's behalf. Order Denying Defendant's Motion to Continue, State's Objection to Defense Motion, State's Response to Defense Motion to Continue, Supp. CP. This unreasonable lack of diligence deprived Mr. Fedoruk of the effective assistance of counsel. *A.N.J.*, at 111-112.

Having failed to adequately investigate the case, counsel was in no position to properly assess Mr. Fedoruk's chances at trial, to advise him regarding any plea offers, or to represent him at trial. *A.N.J.*, at 111-112; *Ornoski, supra*. Although the decision to enter a plea of not guilty by reason

of insanity was personal to Mr. Fedoruk,<sup>11</sup> he could not make a knowing, intelligent, and voluntary decision if his attorney failed to adequately investigate the issue.<sup>12</sup> In addition, given Mr. Fedoruk's obvious mental health issues, counsel could not reasonably recommend a trial strategy without first investigating the viability of a diminished capacity or insanity defense.

There is a reasonable likelihood that the outcome of trial would have differed, had Mr. Fedoruk been able to present an insanity or diminished capacity defense. *Reichenbach*, at 130. Accordingly, Mr. Fedoruk was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *A.N.J.*, at 111-112. His convictions must be reversed and the case remanded for a new trial. *A.N.J.*, *supra*.

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<sup>11</sup> *State v. Jones*, 99 Wn.2d 735, 664 P.2d 1216 (1983).

<sup>12</sup> By contrast, the decision to pursue or forego a diminished capacity defense is a strategic decision left to counsel. In this case, counsel's failure to even investigate such a defense was not a reasonable strategy.

**II. IF MR. FEDORUK WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, THEN HE WAS DEPRIVED OF DUE PROCESS BY THE TRIAL JUDGE’S REFUSAL TO GRANT A CONTINUANCE SO HIS ATTORNEY COULD INVESTIGATE A MENTAL HEALTH DEFENSE.**

A. Standard of Review

A trial court’s ruling denying a motion for continuance is ordinarily reviewed for an abuse of discretion;<sup>13</sup> however, this discretion is subject to the requirements of the constitution. *See, e.g., State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). Where the appellant makes a constitutional argument regarding the denial of a continuance, review is *de novo*. *Id.*

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only if it is “trivial, or formal, or merely academic, and [is] not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *State v. Koslowski*, 166 Wn.2d 409, 433, 209 P.3d 479 (2009) (Sanders, J., concurring) (quoting *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)); *see also City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

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<sup>13</sup> A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

B. Under the Fourteenth Amendment's due process clause, Mr. Fedoruk was guaranteed a meaningful opportunity to present his defense.

A state may not "deprive any person of life, liberty, or property, without due process of law..." U.S. Const. Amend. XIV. The due process clause (along with the Sixth Amendment right to compulsory process) guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). An accused person must be allowed to present his version of the facts so that the fact-finder may decide where the truth lies. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

Trial continuances are governed by CrR 3.3. Under that rule, the court "may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). Failure to grant a continuance may deprive a defendant of a fair trial. *State v. Purdom*, 106 Wn.2d 745, 725 P.2d 622 (1986); *see also United States v. Flynt*, 756 F.2d 1352 (9<sup>th</sup> Cir. 1985). Furthermore,

While efficient and expeditious administration is, of course, a most worth-while objective, the defendant's rights must not be overlooked

in the process through overemphasis upon efficiency and conservation of the time of the court.

*State v. Watson*, 69 Wn.2d 645, 651, 419 P.2d 789 (1966).<sup>14</sup>

Factors relevant to the trial court's decision on a continuance motion include the moving party's diligence, due process considerations, the need for orderly procedure, the possible impact on the trial, whether prior continuances have been granted, and whether the purpose of the motion was to delay the proceedings. *State v. Bonisisio*, 92 Wn.App. 783, 964 P.2d 1222 (1998).

For example, in *Flynt*, the defendant sought a continuance to enable him to consult with a psychiatrist in anticipation of presenting a diminished capacity defense to a contempt charge. *Flynt*, at 1356. The trial court refused the request, and the case proceeded to hearing without expert testimony. *Flynt*, at 1356-1357. The 9<sup>th</sup> Circuit Court of Appeals reversed the convictions, finding that

Flynt's only defense... was that he lacked the requisite mental capacity. The district court's denial of a continuance... effectively foreclosed Flynt from presenting that defense.

*Flynt*, at 1358.

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<sup>14</sup> See also *State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980); *State v. Hoggatt*, 38 Wn.2d 932, 234 P.2d 495 (1951).

- C. The trial court infringed Mr. Fedoruk’s constitutional right to present a defense by denying his request for a continuance.

The trial court’s refusal to grant a continuance prevented Mr. Fedoruk from presenting evidence about his insanity at the time of the offense. The factors outlined above weighed in favor of granting the continuance; accordingly, the trial judge should have postponed the trial.

**Diligence.** As noted above, the prosecution argued and the trial court found that defense counsel had not been diligent. Order Denying Defendant’s Motion to Continue, State’s Objection to Defense Motion, State’s Response to Defense Motion to Continue, Supp. CP. If this is correct, then Mr. Fedoruk was denied the effective assistance of counsel, as argued in the preceding section. On the other hand, if defense counsel *was* diligent, then the trial court’s refusal to grant a continuance was unreasonable. Taking defense counsel’s statement<sup>15</sup> at face value at face value, counsel brought a motion as soon as the defense became feasible.<sup>16</sup> Under these circumstances, counsel’s diligence cannot be faulted.

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<sup>15</sup> That there was “no basis” to pursue an insanity defense until after Mr. Fedoruk heard “the testimony at the 3.5 hearing and the recitation of the states [sic] case in a linear chronological fashion during motions last week...” and then met with counsel and an interpreter. Motion for Continuance, Supp. CP.

<sup>16</sup> In a criminal case, the decision to pursue an insanity defense rests wholly with the accused person. *Jones*, at 744-750. It is possible that Mr. Fedoruk withheld permission to pursue an insanity plea until after he’d heard the evidence presented in this way. Even if that is the case, counsel should have investigated the defense despite his client’s initial position, even though the ultimate decision rested with Mr. Fedoruk.

**Due process.** Given the strength of the state's evidence against him, Mr. Fedoruk's only realistic defense rested on his mental state at the time of the crime. By refusing to allow counsel to investigate and pursue an insanity defense, the court deprived Mr. Fedoruk of any meaningful opportunity to present a defense. Accordingly, due process considerations supported the requested postponement.

**Orderly procedure.** Counsel's continuance request came before jury selection commenced. RP 390-420; Clerk's Minutes 6/12/12, 6/13/12, Supp. CP. Although the prosecutor complained that she'd gone to great lengths to coordinate witnesses for the scheduled trial, she did not indicate that witnesses would be unavailable if the trial were to be postponed. State's Response to Defense Motion to Continue, Supp. CP.

Under these circumstances, Mr. Fedoruk's continuance request would not have unduly interfered with the need for orderly procedure.

**Prior continuances.** The trial date had been reset three times as of June 12<sup>th</sup>, the date Mr. Fedoruk made his motion. The continuances were granted twice at the state's request and once at defense request; all three were within speedy trial. Clerk's Minutes 11/16/11, 1/18/12, 3/7/12, Supp. CP. Ultimately, the 10-day murder trial commenced approximately 10 months after Ishchenko was killed.

**Impact on trial.** The evidence sought would have had a significant impact on the trial. If defense counsel had been granted the time to investigate an insanity defense, jurors might well have found Mr. Fedoruk not guilty by reason of insanity.

**Effort to delay.** There was no indication that the continuance was sought in order to delay the proceedings. Mr. Fedoruk remained in custody throughout the duration of the pretrial period; this provided him an incentive to have the trial sooner, rather than later.

**Conclusion.** The denial of the continuance prevented Mr. Fedoruk from presenting his only realistic defense to the charge, in violation of his rights under the Sixth and Fourteenth Amendments. As in *Flynt*, the trial court's decision prejudiced Mr. Fedoruk. *Flynt*, at 1358. The error cannot be described as trivial, formal, or merely academic. Accordingly, his conviction must be reversed and his case remanded for a new trial. *Flynt*, at 1358.

### **III. THE CONVICTION WAS OBTAINED IN VIOLATION OF MR. FEDORUK'S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION.**

#### **A. Standard of Review**

Alleged constitutional violations are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, \_\_\_ Wn.2d \_\_\_, \_\_\_, 291 P.3d 876 (2012). A *Miranda* claim is an issue of law requiring *de novo* review. *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007). Whether or not a person is in custody is a

mixed question of law and fact subject to *de novo* review. *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). The voluntariness of a person’s statement is a legal question, subject to *de novo* review. *State v. McReynolds*, 104 Wn. App. 560, 575, 17 P.3d 608 (2000); *Griffin v. Strong*, 983 F.2d 1540, 1541 (10th Cir. 1993).

Findings of fact are reviewed for substantial evidence.<sup>17</sup> *In re Marriage of Fahey*, 164 Wn. App. 42, 55-56, 262 P.3d 128 (2011), *review denied*, 173 Wn. 2d 1019, 272 P.3d 850 (2012). The absence of a finding on a particular topic must be interpreted as a finding against the party with the burden of proof on that topic. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001).

B. The trial court should have suppressed statements taken after police failed to scrupulously honor Mr. Fedoruk’s initial invocation of his right to remain silent.

The Fifth Amendment to the U.S. Constitution provides that “No person shall... be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth

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<sup>17</sup> Substantial evidence is “evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Id.* It is more than “a mere scintilla” of evidence, and must convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470, 475, 131 P.3d 958 (2006).

Amendment. U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Our state constitution includes a similar provision: “No person shall be compelled in any case to give evidence against himself...” Wash. Const. art. I, §9.

If an accused person invokes his right to remain silent, the police must “scrupulously honor[]” the request to cut off questioning. *Michigan v. Mosley*, 423 U.S. 96, 104-106, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Where the request is not scrupulously honored, subsequent statements cannot be used at trial. *Id.* The critical safeguard associated with the right to remain silent is the right to cut off questioning. *Id.*, at 103.

Officers may only seek a subsequent *Miranda* waiver if (1) all questioning ceased, (2) a significant period elapsed between the invocation of rights and any subsequent attempt to obtain a waiver, (3) *Miranda* warnings are readministered, and (4) the subject of the second interrogation is unrelated to the first. *United States v. Rambo*, 365 F.3d 906, 910-11 (10th Cir. 2004). The second requirement is critical: *Mosley* prohibits “the immediate cessation of questioning, and ... a resumption of interrogation after a momentary respite.” *Mosley*, at 102.

A suspect’s invocation of the right to remain silent “serves as a complete bar to any questioning related to the subject of the initial interrogation for a ‘significant period of time’ ...” *Christopher v. State of Fla.*,

824 F.2d 836, 844 (11th Cir. 1987). During this significant period of time, “the suspect stands in virtually the same position as he would be had he requested counsel: the police are barred from interrogating him.” *Id.*

Because of this equivalence, the circumstances under which interrogation can occur following invocation of the right to counsel become crucial. An accused person who has invoked his right to counsel may not be interrogated unless he himself initiates further communication with the police. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Necessary components of this “‘rigid’ prophylactic rule” are a determination that the accused person “(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.” *Smith v. Illinois*, 469 U.S. 91, 95, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) (quoting *Fare v. Michael C.*, 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)).

The question of initiation and waiver “are separate, and clarity of application is not gained by melding them together.” *Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). In other words, the state must establish both that the accused person initiated another conversation about the case *and* that he knowingly, intelligently, and voluntarily waived his right to remain silent and his right to have counsel present. *Id.*

For purposes of the *Edwards* rule, an initiation “occurs when, without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case.” *United States v. Whaley*, 13 F.3d 963, 967 (6th Cir. 1994); see *Bradshaw*, at 1045-46. But “not every statement from a suspect's mouth shows such a desire.” *Whaley*, at 967.

In this case, Mr. Fedoruk unequivocally invoked his right to remain silent when administered *Miranda* warnings shortly after his arrest: “I don’t want to talk to you.” RP 193. Although he subsequently made statements to Robinson, these statements did not “evinced[] a willingness and a desire for a generalized discussion about the investigation.” *Bradshaw*, at 1045-1046. The statements were incomprehensible, and, at most, confirmed that Mr. Fedoruk suffered from mental health problems. As Robinson described it, Mr. Fedoruk went on a rant that lasted two to three minutes, and included the following statements:

My sister, Tatyana. I ask – I asked my sister; what you want, a big dick or something? And he tell my sister I want sex. I tell just this. I tell smoke dick, Tatyana. I just telling him it’s not big deal. Christian no talk to for this for sex every time. I tell him, look, is my sister, too. And my sister very very mad. She get bitchy and say, anybody call cops? I never touch him. I not touch him, never. I go to property of Tatyana, get goats.<sup>18,19</sup>

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<sup>18</sup> The statement is taken from Robinson’s testimony, which included interruptions and questions from the prosecutor. RP 907-909.

<sup>19</sup> Christian is another relative.

RP 907-909.

Mr. Fedoruk then repeatedly told Robinson to go to Tatyana's, because she was crazy and needed help. RP 908.

Robinson did not ask Mr. Fedoruk if he wished to have a conversation about the offense. Nor did he tell Mr. Fedoruk that he didn't have to speak, or readminister *Miranda* warnings. RP 906-909. *Cf. Bradshaw, at 1046.* Instead, after taking notes of Mr. Fedoruk's rant, Robinson drove Mr. Fedoruk to another location where he was interrogated by Gilchrist—again without any additional warnings. RP 194-196, 242.

This subsequent interrogation was improper unless Mr. Fedoruk (a) initiated conversation within the meaning of the *Edwards* rule, and (b) knowingly, intelligently, and voluntarily waived his right to remain silent. *Bradshaw, at 1045; Smith, at 95.* He did neither. The failure to scrupulously honor Mr. Fedoruk's invocation of his right to remain silent requires suppression of the interview with Gilchrist. *Bradshaw, at 1045.*

First, Mr. Fedoruk did not "initiate" conversation with Robinson within the meaning of *Edwards*. Nothing about his rant can be taken to show "a willingness and a desire for a generalized discussion about the investigation." *Bradshaw, at 1045-1046.* The focus of his rant appears to have been his sister Tatyana. He mentioned only the name a relative called Christian. He did not mention Ishchenko by name; nor is it at all clear that he

meant the pronoun “he” to refer to Ishchenko. Furthermore, even if the word “he” could be taken to refer to Ishchenko, the mere mention of the decedent does not by itself establish a desire for a generalized discussion about the case. The state did not meet its burden of proving initiation.

Second, Mr. Fedoruk did not subsequently waive his right to remain silent.<sup>20</sup> He was not readministered *Miranda* warnings, or even reminded of them. He did not sign a written waiver, or verbally agree to participate in the interrogation. The fact that he answered questions does not necessarily establish an implied waiver. *See Berghuis v. Thompkins*, \_\_\_ U.S. \_\_\_, \_\_\_, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) (outlining when a *Miranda* waiver can be implied following administration of warnings). It certainly cannot be taken to prove a knowing, intelligent, and voluntary waiver.

By interrogating Mr. Fedoruk after he’d asserted his right to remain silent, the police failed to scrupulously honor his invocation. He did not initiate a generalized discussion about the case; nor did he waive his right to remain silent. *Mosley*, at 104-106. Accordingly, any statements he made to Gilchrist should have been suppressed. *Id*; *Tyler*, at 157-158.

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<sup>20</sup> Furthermore, any implied waiver was without effect, because Mr. Fedoruk did not initiate a generalized discussion about the case.

- C. Mr. Fedoruk's statements were involuntary and should not have been admitted at trial.

Before an accused person's statements can be admitted into evidence, the government must establish admissibility under the due process "voluntariness" test. This test "takes into account the totality of the circumstances to examine 'whether a defendant's will was overborne by the circumstances surrounding the giving of a confession.'" *United States v. Gamez*, 301 F.3d 1138, 1144 (9<sup>th</sup> Cir. 2002) (quoting *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (internal quotations and citation omitted)). A statement is involuntary and thus inadmissible unless it is the product of a rational intellect and a free will. *Reck v. Pate*, 367 U.S. 433, 440, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961). State action is a necessary prerequisite for a due process violation; however, a person's mental condition is relevant to the analysis. *Colorado v. Connelly*, 479 U.S. 157, 165, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

The privilege against self-incrimination absolutely precludes use of any involuntary statement against an accused person for any purpose whatsoever. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). The burden of establishing voluntariness rests with the prosecution. *United States v. Jenkins*, 938 F.2d 934, 937 (9<sup>th</sup> Cir. 1991). Here, the state failed to sustain its burden.

When five uniformed officers contacted Mr. Fedoruk on his porch, he was disheveled, dirty, anxious, and fidgety. RP 111, 132. He also seemed unusually erratic. RP 141-142. Family members had summoned police because they were concerned that Mr. Fedoruk was “decompensating.” RP 106. He had an extensive history of mental health problems, was not taking needed medication, and had previously been found not guilty by reason of insanity for several felony offenses. RP 42; Report, pp. 1-13, Supp. CP.

The police undertook numerous actions that may have interacted with Mr. Fedoruk’s mental health problems to render his statements involuntary. The officers made a significant show of force: five uniformed officers came to the house, all of them armed. RP 110, 141, 168. They issued commands to him (requiring that he keep his hands out of his pockets) and detained him (by ordering him not to go back in his house). RP 113-116, 141-144, 151, 170. They handcuffed him, and he was forced to wait while some of the officers searched the grounds. RP 120, 171. His boots were taken from him, and he was held in a police car for at least 30 minutes. RP 191, 195. He was then taken to the police station and interrogated for 90 minutes. RP 249.

Given the officers’ actions and Mr. Fedoruk’s mental instability, his statements cannot said to be the product of a rational intellect and free will. The state presented no testimony—whether in the form of expert opinion or by some other means—establishing that Mr. Fedoruk’s free will and rational

intellect remained intact even in the face of the officers' actions. *See* RP 88-270, *generally*.

Under these circumstances, the prosecution failed to show that any statements he made were voluntarily and freely given; accordingly, the state failed to meet its heavy burden of proving the voluntariness of Mr. Fedoruk's statements. *Jenkins*, at 937. His conviction must be reversed, the statements suppressed, and the case remanded for a new trial. *Mincey*, at 401-402.

D. Mr. Fedoruk's statements should have been excluded because they were the product of custodial interrogation without benefit of *Miranda*.

Whether or not a person is "in custody" for *Miranda* purposes requires examination of the totality of the circumstances, and depends on whether or not a reasonable person would have felt free to terminate the interrogation and leave. *J.D.B. v. N. Carolina*, \_\_\_ U.S. \_\_\_, \_\_\_, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). The analysis is an objective one, and must include any circumstance that would have affected how a reasonable person in the suspect's position would perceive her or his freedom to leave. *Id.*

Here, Mr. Fedoruk was confronted by five uniformed and armed police officers. He was ordered to keep his hands from his pockets, and told he could not go back inside his house. RP 110, 113-116, 141-144, 151, 168, 170. Under these circumstances, a reasonable person would not have felt free to disregard the officers and leave. Accordingly, Mr. Fedoruk was in custody from the

very beginning of the interaction. *J.D.B.*, at \_\_\_\_\_. Any uncertainty was eliminated when the officers put him in handcuffs and required him to wait while some of them searched the grounds. RP 186.

The trial court’s conclusion—that he was not in custody for *Miranda* purposes—is erroneous. Because he was subjected to custodial interrogation without benefit of *Miranda*, his statements should have been suppressed.<sup>21</sup> *J.D.B.*, at \_\_\_\_\_. Accordingly, his conviction must be vacated, the statements suppressed, and the case remanded for a new trial. *Id.*

#### **IV. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.**

##### **A. Standard of Review**

Prosecutorial misconduct requires reversal if there is a substantial likelihood that it affected the verdict. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).<sup>22</sup> Even absent an objection, error may be reviewed if it

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<sup>21</sup> Furthermore, any subsequent statements—including those made to Robinson while Mr. Fedoruk was in the patrol car and the later statements to Gilchrist—were likely tainted by the violation.

<sup>22</sup> Citations are to the lead opinion in *Glassman*. Although signed by only four justices, the opinion should be viewed as a majority opinion, given that Justice Chambers “agree[d] with the lead opinion that the prosecutor’s misconduct in this case was so flagrant and ill intentioned that a curative instruction would not have cured the error and that the defendant was prejudiced as a result of the misconduct.” *Glasmann*, at 714 (Chambers, J., concurring). Justice Chambers wrote separately because he was “stunned” by the position taken by the prosecution. *Id.*

is “so flagrant and ill intentioned that an instruction would not have cured the prejudice.” *Id.*, at 704.

Furthermore, prosecutorial misconduct may be argued for the first time on appeal if it is a manifest error that affects a constitutional right. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Toth*, 152 Wn. App. 610, 615, 217 P.3d 377 (2009). The burden is on the state to show harmlessness beyond a reasonable doubt. *State v. Irby*, 170 Wn.2d 874, 886, 246 P.3d 796 (2011).

B. The prosecutor improperly misstated the burden of proof.

The state and federal constitutions secure for an accused person the right to a fair trial. *Glasmann*, at 703; U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. art. I, §22. Prosecutorial misconduct can deprive an accused person of this right. *Glasmann*, at 703-704.

A prosecuting attorney commits misconduct by making a closing argument that shifts or misstates the burden of proof. *State v. Dixon*, 150 Wn. App. 46, 55, 207 P.3d 459 (2009); *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir. 2006). It is improper even to imply that the defense has a duty to present evidence relating to an element of the charged crime. *Toth*, at 615. Similarly, “[m]isstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt.” *Glasmann*, at 713.

Thus, for example, it is misconduct to urge jurors to find or speak “the truth.” *State v. Lindsay*, 171 Wn. App. 808, 288 P.3d 641 (2012), *as amended* (2013). It is likewise improper for a prosecutor to tell jurors they must “fill in the blank” by articulating their reasonable doubt in order to acquit. *State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). A prosecutor may not tell jurors that the presumption of innocence “kind of stops once you start deliberating,” *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011); nor may a prosecutor tell jurors that acquittal requires jurors to find that state witnesses lied or was mistaken. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

Generally, a prosecutor cannot comment on a lack of defense evidence, because the accused person has no duty to present evidence. *State v. McCreven*, 170 Wn. App. 444, 470, 284 P.3d 793 (2012) *review denied*, \_\_\_ Wn.2d \_\_\_ (2013). A prosecutor can point out that certain evidence is uncontradicted, but cannot suggest that jurors should vote guilty based on an accused person’s failure to present evidence. *State v. Sells*, 166 Wn. App. 918, 930, 271 P.3d 952 (2012) *review denied*, 176 Wn.2d 1001 (2013).

Here, the prosecutor made numerous improper arguments that went beyond pointing out that certain evidence was uncontradicted. For example, the state’s attorney told jurors that a lack of contradictory evidence meant that Mr. Fedoruk *agreed* with the evidence. RP 1776, 1778. According to the

prosecutor, the lack of contradiction allowed jurors to take Dr. Nelson's testimony "as gospel." RP 1776. She claimed that

There is also an agreement that there is an assault in that driveway... Agreement. There is absolute evidence [sic] of an assault in the roadway/driveway...Agreements. No contradictory evidence. RP 1778.

Based on these "agreements," the prosecutor announced that only one issue remained for the jury to decide:

What does that leave? Identity. Identity is the only issue. RP 1779.

According to the state's argument, Mr. Fedoruk had forfeit any right to contest certain elements by failing to present evidence, and the jury was not required to scrutinize any testimony related to these "agreed" matters. This misstated the presumption of innocence, the burden of proof, and the definition of reasonable doubt. *See McCreven, at 470; Sells, at 930.*

These arguments improperly shifted and misstated the burden of proof. They are flagrant and ill intentioned, and are presumed prejudicial. *Glasmann, at 707. 713; Toth, at 615.* Accordingly, Mr. Fedoruk's conviction must be reversed and the case remanded for a new trial. *Glasmann, at 714.*

C. The prosecutor improperly urged jurors to be swayed by factors other than their own rational thoughts about the evidence.

A prosecutor must seek conviction based only on probative evidence and sound reason. *Glasmann, at 704.* It is misconduct to undermine "the

jurors' feelings about the need to strictly observe legal principles and the care it must take in determining... guilt." *Glasmann, at 706.*

Here, the prosecutor urged jurors to focus on family members' "intuition", rather than facts and observations. Indeed, intuition was a major theme that pervaded the state's closing:

Intuition is a powerful thing. Powerful. Yelena wakes up and immediately knows something is wrong. Her intuition has told her something is wrong... Intuition is a powerful thing. She gets those kids, her number one concern, out of the house because intuition is telling her something... Intuition is a powerful thing. Let's talk more about intuition... And, his intuition said, "Arrest him." ... Intuition is a powerful thing... Now, if you think about it, the family, they have that intuition, they have that sense that building thing in the gut that says something is wrong... At this point, Richard comes out and that intuition... has kicked in... You remember intuition? Remember how we were talking intuition? ... The whole family doesn't buy it because their intuition has told them the truth...  
RP 1784-1801.

The prosecutor went on to suggest that jurors should put as much faith in their own intuition as they did in rational thought:

What does your head say? What does your heart say? What does your gut say? It says that the Defendant killed his brother-in-law... What does your head say an abiding belief is? What does your heart say an abiding belief is? What does your gut say an abiding belief is? It is a workable burden... [Defense counsel says] "Your gut feeling is not rational." It was for [various witnesses.] Their gut was right. And, it is rational.  
RP 1805.

By urging jurors to focus on intuition rather than probative evidence and sound reason, and by attempting to undermine the jurors' commitment to

strictly observe legal principles and to take appropriate care in determining guilt, the prosecutor committed misconduct and violated Mr. Fedoruk's right to a fair trial. *Glasmann*, at 704, 709.

The misconduct was flagrant and ill-intentioned. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*, at 714.

D. If the issue is not preserved for review, Mr. Fedoruk was denied the effective assistance of counsel by his attorney's failure to object.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances:

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

*Hodge v. Hurley*, 426 F.3d 368, 386 (6<sup>th</sup> Cir., 2005).

In Mr. Fedoruk's case, defense counsel should have objected to the prosecutor's flagrant and ill-intentioned misconduct. The prohibition against misstating or shifting the burden of proof is well established. By failing to object, counsel's performance fell below an objective standard of reasonableness. At a minimum, the lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

Counsel should also have objected when the prosecutor urged jurors to focus on intuition rather than probative evidence and sound reason. *Glasmann*, at 704. The state's egregious misconduct undermined the jurors' duty to strictly observe legal principles and to take appropriate care in determining Mr. Fedoruk's fate. *Glasmann*, at 706.

Mr. Fedoruk was prejudiced by the error. The prosecutor's improper comments substantially increased the likelihood that jurors would vote guilty based on improper factors. *See Glasmann*, at 704. The failure to object deprived Mr. Fedoruk of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Hurley*, at 386. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

**V. THE TRIAL JUDGE VIOLATED MR. FEDORUK'S STATUTORY AND CONSTITUTIONAL RIGHT TO HAVE THE JURY CONSIDER ALL APPLICABLE INCLUDED OFFENSES.**

**A. Standard of Review**

Ordinarily, a trial court's refusal to give a proposed instruction is reviewed for an abuse of discretion.<sup>23</sup> *State v. George*, 161 Wn. App. 86, 94-95, 249 P.3d 202, *review denied*, 172 Wn.2d 1007, 259 P.3d 1108 (2011). A

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<sup>23</sup> Unless the refusal is based on an issue of law; in such cases, review is *de novo*. *George*, at 94-95.

court necessarily abuses its discretion by infringing constitutional rights.

*Iniguez*, at 280-81. In such cases, review is *de novo*. *Id.*

The evidence is viewed in a light most favorable to the instruction's proponent, and the instruction must be given even if there is contradictory evidence or a defense theory that is inconsistent with the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

B. The court should have instructed on the lesser included charge of first-degree manslaughter.

An offense is an "included offense"<sup>24</sup> if two conditions are met: (1) each element of the included offense must be a necessary element of the crime charged, and (2) the evidence in the case must support an inference that only the lesser crime was committed. *State v. Nguyen*, 165 Wn.2d 428, 434-35, 197 P.3d 673 (2008) (citing *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978)). The right to an appropriate included offense instruction is "absolute;" failure to give such an instruction requires reversal. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

An accused person has an "unqualified right" to have the jury consider any applicable included offenses if there is "even the slightest evidence" that the accused person may have committed only that offense. *Id.*, at 163-164;

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<sup>24</sup> The word "included" is more appropriate than the phrase "lesser included," because the two offenses may carry the same penalty. *Nguyen*, at 434-435.

RCW 10.61.003; RCW 10.61.010. Refusal to instruct on an included offense can also violate the right to due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988). The constitutional right to such an instruction stems from “the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free.” *Vujosevic*, at 1027. See also *Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In capital cases, “providing the jury with the ‘third option’ of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard...”).<sup>25</sup>

If the prosecution files alternative charges, the defendant is entitled to instructions on any included offense of either charge. This is so even if the included offense fails the *Workman* test with respect to one alternative charge. *State v. Schaffer*, 135 Wn.2d 355, 359, 957 P.2d 214 (1998). For example, a defendant charged (in the alternative) with both premeditated murder and felony murder is entitled to instructions on manslaughter, even though manslaughter is not an included offense of felony murder. *Id.*, at 358-359.

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<sup>25</sup> The court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck*, at 638, n.14. Some federal courts only review a state court’s failure to give a included instruction in noncapital cases when the failure “threatens a fundamental miscarriage of justice...” *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990).

Under *Workman*'s legal prong, intentional murder includes the offense of first-degree manslaughter. *State v. Berlin*, 133 Wn.2d 541, 550-51, 947 P.2d 700 (1997). Taking the facts in a light most favorable to Mr. Fedoruk, there was at least "slight[] evidence" that he was guilty only of first-degree manslaughter, and not intentional murder. *Parker*, at 163-164. This is so whether the evidence is examined *de novo* (under Mr. Fedoruk's Fourteenth Amendment right) or for abuse of discretion (under his statutory right).

First, numerous witnesses testified to Mr. Fedoruk's irrational behavior, his distorted thinking, and (after his arrest) his refusal to accept that Ishchenko was dead. RP 255, 341-350, 443, 493, 518-524, 538-541, 551, 565-568, 716-729, 745-748. Given how irrational and distorted his mental state was during the time before and after the offense, it is likely that he acted without intent to kill Ishchenko, even if he had the theoretical capacity to form the requisite mental state. Second, forensic experts were unable to establish which particular act resulted in Ishchenko's death. If Mr. Fedoruk compressed the other man's neck and then inflicted a blow that proved fatal, he was guilty only of manslaughter if he acted without intent to kill.

This evidence, when taken in a light most favorable to Mr. Fedoruk, provides at least slight proof that he did not intend to kill Ishchenko. Under this view of the evidence, Mr. Fedoruk was guilty of first-degree manslaughter, but not intentional murder. Accordingly, the trial judge should have

instructed on the included offense. *Berlin, supra*. The court's failure to do so requires reversal under RCW 10.61 and under the Fourteenth Amendment's due process clause. *Parker, at 164; Vujosevic*. The case must be remanded for a new trial, with instructions to allow the jury to consider first-degree manslaughter as an included offense. *Id; Fernandez-Medina, at 456*.

**CONCLUSION**

For the foregoing reasons, Mr. Fedoruk's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on March 14, 2013,

**BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Sergey Fedoruk, DOC #317936  
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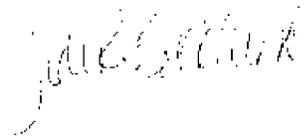
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney  
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 14, 2013.



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Jodi R. Backlund, WSBA No. 22917  
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# BACKLUND & MISTRY

**March 14, 2013 - 6:36 PM**

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