

NO. 55217-1-I

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

REC'D

MAY 02 2008

King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ATIF RAFAY,

Appellant.

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

The Honorable Charles W. Mertel, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellants' motion to suppress their statements to RCMP undercover officers.

2. Use of appellants' statements at trial violated the Fifth and Fourteenth Amendments to the United States Constitution and article 1, § 9 of the Washington Constitution.

3. In its order denying appellants' motion to suppress, the trial court erred when it entered finding of fact 15, and conclusions of law 1 and 6.<sup>1</sup>

Issues Pertaining to Assignments of Error

1. The Fifth and Fourteenth Amendments to the United States Constitution prohibit the introduction at trial of any government-coerced confession. This prohibition applies regardless of the defendant's citizenship, the country in which the statements were obtained, or the particular offending government. Canadian authorities obtained incriminating statements from Sebastian Burns and Atif Rafay by making them believe they faced imminent arrest, prison, and ultimately death if they did not incriminate themselves. Did the introduction of these statements at appellants' trial violate their state and federal constitutional rights?

2. In denying appellants' motion to suppress, the trial court failed to engage in the proper analysis and relied on a

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<sup>1</sup> The court's written findings and conclusions are attached to this brief as an appendix.

Canadian court that considered limited evidence and employed a vastly different legal standard. Did the court err in denying the defense motion?

3. The trial court failed to enter detailed findings and conclusions on appellants' Fifth and Fourteenth Amendment claim. Moreover, the few findings and conclusions addressing the claim are not supported by the facts or applicable law. Are the court's findings and conclusions erroneous?

**B. SUPPLEMENTAL STATEMENT OF THE CASE**

Prior to trial, the defense moved to suppress all evidence stemming from the RCMP investigation under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. CP 3750-3784, 3795-3805, 3825-3891. These motions included an assertion under the Fifth and Fourteenth Amendments that the boys' statements were coerced through threats and inducements, rendering them involuntary and inadmissible. CP 3774-3777, 3834-3847; 36RP 127-135.

Atif Rafay's opening brief contains a comprehensive 37-page discussion of the RCMP undercover operation. In summary, through threats and promises, RCMP officers were able to convince the boys to make incriminating statements for use against them in the United States. See Brief of Appellant, at 44-81. As discussed below, RCMP witnesses told the same story during a multi-week pretrial hearing on the motions to suppress. Ultimately, the trial

court found the boys' statements voluntary. CP 4981-82, 4984.  
Atif now adds this ruling to the list of serious mistakes at his trial.

C. ARGUMENT

ADMISSION OF THE BOYS' STATEMENTS TO  
UNDERCOVER RCMP OFFICERS VIOLATED THE FIFTH  
AND FOURTEENTH AMENDMENTS AND ARTICLE 1, § 9  
OF WASHINGTON'S CONSTITUTION.

The Fifth Amendment to the United States Constitution provides that no "person shall be compelled in any criminal case to be a witness against himself," and the Washington Constitution, article 1, § 9, provides that "no person shall be compelled in any criminal case to give evidence against himself."<sup>2</sup> The Fourteenth Amendment to the United States Constitution provides that States may not "deprive any persons of life, liberty, or property, without due process of law[.]"

Both the Fifth and Fourteenth Amendments prohibit the use of involuntary statements at trial. Oregon v. Elstad, 470 U.S. 298, 306-07, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985) (Fifth Amendment prohibits the State's use of compelled testimony); Payne v. State of

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<sup>2</sup> The protections offered by article 1, § 9 are co-extensive with Fifth Amendment protections. State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). There being no additional benefit from the Washington Constitution, this brief focuses on the federal provision.

Arkansas, 356 U.S. 560, 561, 78 S. Ct. 844, 2 L.Ed.2d 975 (1958) (“use in a state criminal trial of a defendant’s confession obtained by coercion – whether physical or mental – is forbidden by the Fourteenth Amendment.”).

The test for voluntariness is whether an individual’s “will was overborne in such a way as to render his confession the product of coercion.” Arizona v. Fulminante, 499 U.S. 279, 288, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). Stated another way, “[i]s the confession the product of an essentially free and unconstrained choice by its maker?” Schneckloth, 412 U.S. at 225 (quoting Culombe v. Connecticut, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L.Ed.2d 1037 (1961)). “[A]ny doubt as to whether the confession was voluntary must be determined in favor of the accused.” Bram v. United States, 168 U.S. 532, 565, 18 S. Ct. 183, 42 L.Ed. 568 (1897); see also Fulminante, 499 U.S. at 287 (describing question as “a close one” but reversing).

In deciding whether a statement was coerced, courts examine the totality of circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S. Ct. 2041 (1973); State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). This requires consideration of any promises or threats and whether there is a causal

relationship between these inducements and the statements obtained. Fulminante, 499 U.S. at 287; Broadaway, 133 Wn.2d at 132. "Coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." Fulminante, 499 U.S. at 288 (quoting Blackburn v. Alabama, 361 U.S. 199, 80 S. Ct. 274, 4 L.Ed.2d 242 (1960)).

The prosecution, as proponent of a defendant's statements, bears the burden to prove voluntariness by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 487-89, 92 S. Ct. 619, 30 L.Ed.2d 618 (1972). Substantial evidence must support the trial court's findings of fact or they are deemed erroneous. Broadaway, 133 Wn.2d at 131. The ultimate issue of voluntariness, however, is a legal question. Fulminante, 499 U.S. at 287. And this Court reviews legal questions de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

In order to clarify what *is* relevant to Atif's claim, it may be useful to briefly discuss what is *not* relevant to that claim:

First, Judge Mertel focused on the fact neither Atif nor Sebastian was in custody when speaking to the RCMP officers. CP 4577 (finding of fact 1); 36RP 129. But custody is a prerequisite

only to Miranda<sup>3</sup> warnings. A statement may be involuntary under the Fifth Amendment regardless of custody status. See Johnson v. State of N.J., 384 U.S. 719, 730, 86 S. Ct. 1772, 16 L. Ed.2d 882 (1966) (claim of coercion available to those not falling under Miranda protections); United States v. Walton, 10 F.3d 1024, 1028 (1993) (distinguishing claims); United States v. Conley, 859 F. Supp. 830, 835 (W.D.Pa. 1994) (same); see also Fulminante, 499 U.S. at 282-83 (defendant not in custody on charge to which coerced statement pertained).

Second, the “silver platter doctrine” does not apply to Atif’s claim. At one time, that doctrine allowed federal courts to consider evidence obtained by state authorities using means that, if engaged by federal officers, would violate the Fourth Amendment. State v. Fowler, 157 Wn.2d 387, 396 n.5, 139 P.3d 342 (2006). But the United States Supreme Court abolished the doctrine in 1960 after recognizing the Fourth Amendment also applied to the states through the Fourteenth Amendment. See Elkins v. United States, 364 U.S. 206, 208, 213-14, 80 S. Ct. 1437, 4 L.Ed.2d 1669 (1960). The doctrine survives only in a very limited form in some federal

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<sup>3</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

courts. For example, it has been applied when foreign officials obtain evidence using tactics that, if used in the United States, would violate the Fourth Amendment. Fowler, 157 Wn.2d at 396 n.5 (citing Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968)).

Whatever remains of the doctrine, however, it has never applied to violations of the Fifth Amendment. This is because under the Fourth Amendment, a violation occurs only when the evidence is obtained. Thus, there is no additional injustice under that amendment when another jurisdiction uses that evidence. Under the Fifth Amendment, however, a violation does not occur until the evidence is actually used against the defendant at trial:

The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial. The Fourth Amendment functions differently. It prohibits "unreasonable searches and seizures" whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is "fully accomplished" at the time of an unreasonable governmental intrusion.

United States v. Verdugo-Urquidez, 494 U.S. 259, 264, 110 S. Ct. 1056, 108 L.Ed.2d 222 (1990)(citations omitted); see also Schneekloth, 412 U.S. at 308 (Fifth Amendment serves "to protect the fairness of the trial itself."); United States v. Bin Laden, 132 F.Supp.2d 168, 181-185 (S.D.N.Y. 2001) (non-resident aliens are

entitled to Fifth Amendment protections at all trials in the United States based on expansive language of Fifth Amendment, widespread acceptance of premise, and purposes undergirding the Amendment).

This distinction in purpose leads to another important distinction between the Fourth and Fifth Amendments. With its lone focus on deterring police misconduct, only the Fourth Amendment requires the involvement of United States authorities in obtaining the evidence. The Fifth Amendment requires “coercive police activity.” Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L.Ed.2d 473 (1986). But under its broader protections – assuring the fairness of the trial itself – it does not matter which government coerced the defendant’s statements.

This has long been the rule. One of the United States Supreme Court’s earliest opinions on voluntariness under the Fifth Amendment is Bram v. United States, 168 U.S. 532, 18 S. Ct. 183, 42 L.Ed.2d 568 (1897). Bram was the first officer of a United States ship bound from Boston to South America. While at sea, three persons on board were murdered, including the ship’s captain. Upon discovery of the bodies, the ship headed for port in Canada. Suspecting Bram’s involvement, the ship’s crew turned him over to the local authorities, where a Canadian detective questioned him. Bram, 168 U.S. at 534-37.

At the request of the United States, Canada extradited Bram to Boston for trial. At that trial, the prosecution used Bram's statement to the Canadian detective to prove his guilt. Bram was convicted and appealed, claiming his statement was coerced and involuntary, thereby violating his Fifth Amendment rights. Specifically, Bram was left alone in a room with the detective, stripped of his clothing, told that another witness had seen him commit the murders, told that the detective was convinced he had committed the murder, and told that it would be better for him to identify any accomplices. Bram, 168 U.S. at 185-186, 194.

The Supreme Court concluded that Bram's statement had been coerced in violation of the Fifth Amendment and reversed his conviction. Bram, 168 U.S. at 561-65, 569. Bram's significance lies not in the particular circumstances of the questioning in that case, but in the fact the Fifth Amendment protected Bram even though United States authorities played no role in obtaining the statement. Rather, Bram's statement was made to Canadian authorities in Canada -- just like the statements from Atif and Sebastian.

Since Bram, several Circuit Courts of Appeal have recognized that the Fifth and Fourteenth Amendments do not permit the use of coerced statements obtained by foreign governments. See United States v. Yousef, 327 F.3d 56, 144-45 (2nd Cir.) (statements taken by foreign police "admissible if voluntary"), cert. denied, 540 U.S. 933 (2003); United States v.

Welch, 455 F.2d 211, 213 (2nd Cir. 1972) (although Miranda warnings are not required where defendant questioned on foreign soil by foreign authorities, “[i]f the court finds the statement involuntary, it must exclude this because of its inherent unreliability.”); United States v. Martindale, 790 F.2d 1129, 1132 (4th Cir.) (statements to foreign authorities in a foreign jurisdiction admissible “so long as the trustworthiness of the confession satisfies legal standards”), cert. denied, 479 U.S. 855 (1986); Kilday v. United States, 481 F.2d 655, 656 (5th Cir. 1973) (statements to Argentina authorities admissible because not coerced); Brulay v. United States, 383 F.2d 345 (9th Cir.) (“It is not until the statement is received in evidence that the violation of the Fifth Amendment becomes complete. For this reason we believe that if the statement is not voluntarily given to a United States or foreign officer, -- the defendant has been compelled to be a witness against himself when the statement is admitted.”), cert. denied, 389 U.S. 986 (1967); United States v. Mundt, 508 F.2d 904, 906 (10th Cir. 1974) (statement to Peruvian police voluntary and therefore admissible), cert. denied, 421 U.S. 949 (1975).

Several federal district courts have recognized the same prohibition. See United States v. Karake, 443 F.Supp.2d 8, 49-53 (D.D.C. 2006) (for Fifth Amendment, voluntariness is test for admissibility of statements made abroad to foreign officials; often mistakenly confused with “shocks the conscience” test applicable

only to Fourth Amendment); United States v. Marzook, 435 F.Supp.2d 708, 743-744 (N.D.Ill. 2006) (statements made to foreign police must be voluntary to be admissible in U.S. courts); Bin Laden, 132 F.Supp.2d at 182 n.9 (citing cases involving statements to foreign authorities on foreign soil and holding “that the extraterritorial situs of interrogation is not dispositive since the Constitution is violated when a defendant’s compelled statement is used against him as evidence, and not when he is coerced into making it in the first place.”); United States v. Hensel, 509 F. Supp. 1364, 1375-76 (D.C.Me. 1981)(statements to RCMP admissible only because voluntary).

In the end, the Fifth and Fourteenth Amendments treat Atif Rafay as they would any other individual tried in a United States court. Regardless of the individual’s ties to this country; regardless where the statement was obtained; regardless of which police agency obtained it; and regardless of the involvement or lack of involvement by law enforcement in this country, ultimately the test is simply voluntariness.

Returning to that test, the question is this: under the totality of the circumstances, were the boys’ statements to the RCMP “the product of an essentially free and unconstrained choice” or were they instead the result of threats and promises rendering those statements the product of coercion? Fulminante, 499 U.S. at 288; Schneckloth, 412 U.S. at 225; Broadaway, 133 Wn.2d at 132.

Fulminante itself provides the answer. Police suspected that Fulminante killed his 11-year-old stepdaughter, but lacked proof to charge him. Fulminante was serving time in prison on an unrelated case when an undercover police informant – posing as an organized crime figure – befriended him. The informant raised the subject of the child's death several times and Fulminante initially denied any involvement and provided conflicting information on what he thought had happened to his stepdaughter. Fulminante, 499 U.S. at 282-83.

On one occasion, the informant said he knew that Fulminante was getting "some tough treatment" from other inmates because of rumors he had been involved in his stepdaughter's death. The informant promised to protect Fulminante from harm, but only if he provided details of the crime. For the first time, Fulminante made incriminating statements. Fulminante, 499 U.S. at 283. The Arizona Supreme Court reversed: "[T]he confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant's life was in jeopardy if he did not confess. This is a true coerced confession in every sense of the word." State v. Fulminante, 161 Ariz. 237, 778 P.2d 602, 627 (Ariz. 1988). The United States Supreme Court affirmed the reversal of Fulminante's murder conviction. Fulminante, 499 U.S. at 288; see also Payne v. Arkansas, 356 U.S. 560, 564-67, 78 S.

Ct. 844, 2 L.Ed.2d 975 (1958) (statement coerced where officer promised to protect defendant from an angry mob if he confessed).

Similarly, the statements from Sebastian and Atif are the product of coercion; they are the result of promises and threats from undercover RCMP officers. As discussed in the opening brief, the evidence at trial established that by the July 18, 1995, scenario at the Ocean Point Hotel – when Haslett presented Sebastian with the fake BPD memo indicating arrest was imminent – the RCMP had provided information allowing the boys to believe the following:

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

135RP 18-19; 138RP 42-45. And it was only after the boys were placed in this situation that they made statements (albeit conflicting

statements) indicating active participation in the murders. See Brief of Appellant, at 71-81.

The same story was revealed at the pretrial hearing on the defense motions to suppress. Police were not satisfied with the boys' multiple statements professing their innocence and negotiations for additional statements were not fruitful. 16RP 101-02. From the beginning of the operation, the RCMP's goal was to figure out a way in which to obtain incriminating statements from the boys. 11RP 51; 12RP 139, 172. The RCMP gathered as much information on the boys as it could because it wanted to figure out their "potential psychology." 18RP 77. The RCMP "wanted to get into their minds" 15RP 108.

Initially, the RCMP felt the best way to elicit confessions was to entice Sebastian to join the fictitious criminal organization with the prospect of making large amounts of money. 18RP 123; 20RP 18. Sebastian was paid thousands of dollars for his involvement in the organization, which included the fake money laundering activities. 20RP 131-32, 163; 26RP 95; 27RP 58. But when money was not a sufficient incentive, the RCMP changed focus. The RCMP needed something more to grab Sebastian's attention – a logical reason for him to confess. 13RP 130, 134; 14RP 95. The

goal was to place Sebastian in a position where he would have to talk. 21RP 68.

Because the organization had to be of value to Sebastian, the RCMP decided the new inducement would be the destruction of incriminating evidence at the Bellevue Police Department. 20RP 21-23, 136; 27RP 154-55. Sebastian was made to understand that loyalty was essential. 21RP 65. Lying and killing were respected. 24RP 142. The organization used guns and violence to achieve its goals and had "tentacles reaching everywhere." 26RP 48; 27RP 100-113. Haslett and Shinkaruk were murderers and Haslett knew Sebastian was "solid" because he committed the murders in Bellevue. 21RP 181-85; 22RP 105-07; 24RP 116-17; 26RP 52-53, 66; 27RP 144-45.

In the fictitious world created by the RCMP, it was also made clear Haslett would kill to protect his own interests. 28RP 66. Sebastian had significant information about the organization, which made him a potential threat. 28RP 74-76. He was given the impression that he must avoid prison at all costs for his own protection and Haslett's. 22RP 107-111; 27RP 149-154. Conflict with members of the organization could bring harm or death to him and his family. 24RP 113; 25RP 41-43; 27RP 101. And Haslett

specifically indicated he believed the first person Sebastian would “give up” if imprisoned was Haslett himself. 27RP 155. Sebastian believed the organization would put a bullet in his head if he ever crossed its members and that he could “be gotten” in prison. 27RP 173-177; 28RP 42.

The fake BPD memo was an integral part of the RCMP’s plan because it showed the organization had access to important information and the ability to destroy it. It also made Sebastian more dependent on Haslett and Shinkaruk by creating a sense of urgency. 20RP 136-138, 146-47. Haslett’s theme was “Bellevue is coming” and “I’m your man right now, your bread and butter.” 25RP 185; 27RP 116. Haslett tried to convince Sebastian he had no other viable option for avoiding trouble in Washington. 27RP 129. The message was “don’t tell me you didn’t do this because I know you did it and we need to deal with it.” 28RP 72.

Earlier in their dealings, Sebastian had suggested to Haslett and Shinkaruk the murders were hate crimes because the Rafay family was originally from Pakistan. 26RP 57. He had also explained that he and Atif came home to find the family murdered. 22RP 156. But after the BPD memo, the RCMP finally got what it wanted. Sebastian made incriminating statements. 26RP 159.

The following day, Haslett spoke to Atif. It is clear that prior to this meeting, Sebastian and Atif had already discussed Haslett, the organization, and its violent nature; both boys were concerned Haslett could have them killed. 28RP 12-18. Just as he had done with Sebastian the previous day, Haslett warned Atif that he was “close to going to jail” and had Sebastian tell him about the BPD memo. 27RP 25-26. Atif then made incriminating statements as well. 27RP 26-28.

Ultimately, the RCMP’s undercover operation was simply a more elaborate and more expensive version of the operation in Fulminante. Fulminante was led to believe he faced possible physical harm from other inmates based on his involvement in the death of his niece. Sebastian and Atif were led to believe they faced imminent arrest by the Bellevue Police for the murder of Atif’s family and, if arrested, physical harm or death based on the risk they might “give up” Haslett and the organization. Moreover, Haslett only trusted them because he believed they committed the Bellevue murders. Outright denials meant the loss of that trust and the same risks associated with arrest.

Fulminante was led to believe the only way he could find protection was to confess to the undercover officer. Similarly,

Haslett promised Sebastian and Atif that he could destroy any incriminating evidence and keep them out of prison. But, as in Fulminante, the price for protection was a confession.

The Supreme Court found that Fulminante's confession was the product of mental coercion, affirming the Arizona Supreme Court's determination "that it was fear of physical violence, absent protection from his friend (and Government agent) . . . which motivated Fulminante to confess." Fulminante, 499 U.S. at 288. It was also fear of physical violence, absent protection from Haslett, which motivated Sebastian and Atif to confess. Neither statement is "the product of an essentially free and unconstrained choice by its maker." Schneekloth, 412 U.S. at 225. Rather, there is a direct causal relationship between the RCMP's inducements and the statements obtained. Fulminante, 499 U.S. at 287; Broadaway, 133 Wn.2d at 132.

The vast majority of Judge Mertel's written findings and conclusions on the suppression motions address the Fourth Amendment claims. See generally CP 4577-4587. This was also true of his oral ruling, where he devoted little attention to the Fifth and Fourteenth Amendments. See 37RP 22-23. And the very few

written findings and conclusions pertaining to these provisions do not withstand scrutiny.

Finding of fact 15 indicates, "The Court of Appeals for British Columbia further found that there was no duress or coercion employed by the RCMP during the undercover scenarios in order to obtain the defendant's admissions. The Supreme Court did not disturb this finding. This Court agrees with the Canadian courts and finds the same." CP 4582.

But whether a foreign country concludes a statement is admissible under its laws is of no moment. There is no silver platter doctrine under the Fifth Amendment. And, in any event, the test applied to the boys' statements in Canada does not mirror our own. The Canadian court focused on the fact the boys were not in custody (as Judge Mertel did) and that they had not been charged when the statements were made. CP 826-27. The court then examined whether the RCMP's conduct was "shocking," "outrageous," and would "bring the administration of justice into disrepute." CP 826-27, 829. In Canada, the courts approach the issue with the belief they "should not be setting public policy on the parameters of undercover operations." CP 827, 829.

Moreover, much of the evidence considered by the lower Canadian court was in the form of affidavits and documents. Haslett and Shinkaruk were the only live witnesses. CP 818. And it appears the defense was not permitted to introduce all of its evidence on the subject. In the Court of Appeals, the writing judge noted that he agreed with the lower court judge who, “[i]n effect . . . said there was no point in leading further evidence on the matter when such evidence could have had no legal relevance and could not result in exclusion of the evidence.” CP 830.

That a Canadian Court found no coercion under a different standard and limited evidence is irrelevant. Under the standards applicable in the courts of *this* country, and in light of the evidence produced in *this* proceeding, the boys’ statements to RCMP officers were indeed the product of duress and coercion. They were involuntary and therefore inadmissible.<sup>4</sup>

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<sup>4</sup> Judge Mertel’s finding that the Supreme Court of Canada did not disturb the Court of Appeals’ ruling on duress is *technically* correct because the Supreme Court never addressed the issue. Rather, the Supreme Court only addressed the Canadian Government’s appeal from a separate Court of Appeals ruling in which the court held that Canada could not return the boys to the United States unless Washington promised not to kill them. See CP 834-865 (Supreme Court ruling); CP 53-81 (Court of Appeals ruling).

Conclusion of law 1 provides "that neither Atif Rafay nor Sebastian Burns . . . is . . . considered one of 'the people of the United States' entitled to the full panoply of rights guaranteed by our Federal and State Constitutions." CP 4583. To the extent this implies they are not entitled to protections at trial under the Fifth and Fourteenth Amendments, this is simply wrong. As previously discussed, the Fifth and Fourteenth Amendments protect all individuals tried in the United States. Judge Mertel even recognized this in his oral ruling. 37RP 22.

Conclusion of law 6 provides, the "defendants' statements and admissions to undercover RCMP officers during the course of the undercover scenarios were not the product of coercion and duress and their admission into evidence will not violate the defendants' due process rights . . . or right against self incrimination guaranteed by the State and Federal Constitutions." CP 4585.

For the reasons already discussed, this conclusion is contrary to the record. The boys' statements were the direct consequence of coercion and duress. The RCMP's admitted goal was to place the boys in a position where they would have to talk. 21RP 68. And it succeeded. The RCMP created a situation where it was impossible to deny involvement in the murders. The boys

had to confess to be safe from Haslett, the organization, prison, and death. While this is apparently permissible in Canada, the Fifth and Fourteenth Amendments to the United States Constitution do not permit jurors to consider evidence gathered in this manner. Judge Mertel erred in failing to exclude the boys' admissions on July 18 and 19, 1995, at the Ocean Point Hotel.

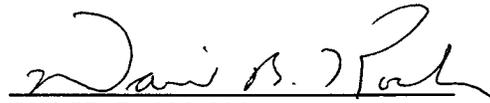
D. CONCLUSION

On this alternative ground, this Court should reverse the murder convictions.

DATED this 2<sup>nd</sup> day of May, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH  
WSBA No. 23789  
Office ID. 91051  
Attorneys for Appellant

## **APPENDIX**

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, )  
)  
Plaintiff, ) No. 95-C-05433-8 SEA  
) 95-C-05434-6 SEA  
vs. )  
) FINDINGS OF FACT AND  
) CONCLUSIONS OF LAW RE:  
GLEN SEBASTIAN BURNS and )  
) ADMISSIBILITY OF AUDIO AND  
11 ATIF AHMED RAFAY, )  
) VIDEO EVIDENCE COLLECTED BY  
12 Defendants, ) THE ROYAL CANADIAN  
) MOUNTED POLICE  
)  
)

14 The court, having heard and considered the testimony of the witnesses presented by the  
15 parties, oral argument of the parties and pleadings and exhibits filed herein and having made oral  
16 findings of fact and conclusions of law in open court on September 30, 2003, now enters the  
17 following written findings of fact and conclusions of law:

18 **Findings of Fact**

- 19 1. All of the electronically recorded statements at issues are non-custodial statements. The  
20 defendants were out of custody when the Royal Canadian Mounted Police (RCMP)  
21 electronically intercepted conversations between the defendants and between the  
22 defendants and third parties. The defendants were out of custody during the RCMP's  
23 undercover scenarios.

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
RE: ADMISSIBILITY OF AUDIO AND VIDEO  
EVIDENCE COLLECTED BY THE ROYAL  
CANADIAN MOUNTED POLICE - 1

Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

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1 2. During the course of the RCMP's investigation including the RCMP's electronic  
2 interception and recording of the defendants' statements and the RCMP's undercover  
3 scenarios, both defendants were citizens of Canada and were residing in Canada. The  
4 interception and recording of the defendants' communications occurred entirely in  
5 Canada and was done entirely by Canadian law enforcement without the participation or  
6 assistance of any Federal or State law enforcement agency in the United States. During  
7 the course of the RCMP's investigation the defendants were not citizens of the United  
8 States. During the course of the RCMP's investigation the defendants were not lawful  
9 resident aliens of the United States.

10 3. On January 11, 1995 Bellevue detectives traveled to Canada to meet with members of the  
11 RCMP. There, Bellevue detectives made a formal request for assistance pursuant to  
12 international treaty for mutual legal assistance in criminal matters (MLAT). Bellevue  
13 detectives sought the assistance of the RCMP in obtaining biological samples from the  
14 defendants for DNA comparison to trace evidence found at the crime scene.  
15 Additionally, Bellevue detectives requested assistance in obtaining financial documents  
16 that might provide evidence of a motive for the murders. Bellevue detectives also sought  
17 the assistance of the RCMP in locating several items of physical evidence including the  
18 murder weapon and a VCR that was purported to have been taken from the Rafay home  
19 during the murders.

20 4. Bellevue detectives did not request the RCMP begin its own investigation of the  
21 defendants nor did Bellevue detectives request the RCMP engage in an undercover  
22 operation or employ wire tap techniques in an attempt to gain admissions from the  
23 defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
RE: ADMISSIBILITY OF AUDIO AND VIDEO  
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CANADIAN MOUNTED POLICE - 2

Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955



1 5. After the January 11, 1995 meeting between Bellevue detectives and the RCMP, the  
2 RCMP opened its own investigation of the defendants for crimes of conspiracy to commit  
3 murder and fraud committed in Canada pursuant to Canadian law. This was done by the  
4 RCMP on its own accord and was not done at the request or with the assistance of the  
5 Bellevue Police Department. The Bellevue Police Department never participated in the  
6 RCMP's investigation of the defendants.

7 6. On April 5, 1995, June 2, 1995 and July 18, 1995 Corporal Dallin of the RCMP applied  
8 for and received authorization from a Canadian court to intercept and record private  
9 communications of the defendants. The applications and authorizations for the  
10 interception and recording of the defendants' private communications was done pursuant  
11 to Canadian law. The RCMP had judicial authorization pursuant to Canadian law to  
12 intercept and record the defendants' communications between April 5, 1995 and their  
13 arrest on July 31, 1995. These judicial authorizations encompassed the entirety of the  
14 electronic interceptions at issue.

15 7. In order to acquire the facts necessary to apply for judicial authorization to intercept and  
16 record the defendants' private communications, Corporal Dallin, and other members of  
17 the RCMP assisting him, traveled to the Bellevue Police Department in late February and  
18 early March 1995. Corporal Dallin and his colleagues from the RCMP spent five days  
19 reviewing the entire investigative file of the Bellevue Police Department. The RCMP  
20 undertook this trip on its own accord. The Bellevue Police Department did not suggest or  
21 request the RCMP to make this trip or review its file.

22 8. Corporal Dallin and the RCMP were solely responsible for the preparation of the  
23 affidavit in support of the electronic interceptions. Other than opening their investigative

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
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Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

1 file to the RCMP, sharing information with the RCMP, and answering questions about  
2 their investigation, the Bellevue Police Department did not make any requests, participate  
3 in or assist the RCMP in making application for judicial authorization for the interception  
4 and recording of the defendants' private communications. The Bellevue Police  
5 Department acted in good faith when they shared information from their investigative file  
6 with members of the RCMP. There was no recklessness or negligence on the part of the  
7 Bellevue Police Department.

8 9. Based upon Corporal Dallin's review of the Bellevue Police Department file and his  
9 review of the RCMP file in this matter, Corporal Dallin acted in good faith and provided  
10 the reviewing Canadian judge with a full and frank disclosure of reliable, relevant  
11 investigative facts and reasonable and logical conclusions from those facts that supported  
12 authorization for interception and recording of the defendants' communications under  
13 Canadian law.

14 10. Notwithstanding the above, Corporal Dallin did make several omissions and  
15 misstatements of material facts in his affidavit. For example, Corporal Dallin omitted  
16 information about other suspects that had been developed and rejected by the Bellevue  
17 Police Department's investigation. Corporal Dallin also omitted information about the  
18 nature and time of sounds heard by neighbors and sound recreation work done by the  
19 Bellevue Police Department that were inconsistent with omitted alibi evidence offered by  
20 the defendants. Corporal Dallin also misstated the time of death as 10:00 p.m. to 12:00  
21 a.m. on July 12<sup>th</sup> through 13<sup>th</sup>, 1994 when the facts suggested a window for time of death  
22 between 8:30 p.m. and 2:00 a.m. on July 12<sup>th</sup> through 13<sup>th</sup>, 1994. Corporal Dallin also  
23 misstated that a six-foot tall person was in the downstairs shower when the evidence was

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
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CANADIAN MOUNTED POLICE - 4

Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

*based upon blood spatter evidence,*

1 that a six-foot person killed Tariq Rafay ~~and the killer then showered in the downstairs~~  
2 ~~shower after the murders.~~ None of these omissions or misstatements of material fact  
3 were made recklessly or intentionally by Corporal Dallin in an attempt to mislead the  
4 reviewing court in Canada.

5 11. Based upon Corporal Dallin's affidavits, a judge in Canada authorized the RCMP,  
6 pursuant to Canadian law, to intercept and record the defendants' communications in two  
7 forms.

8 12. First, the RCMP received judicial authorization to intercept and record private  
9 communications between the defendants and between the defendants and third parties.  
10 To accomplish this the RCMP received judicial authorization to install listening devices  
11 at the home of the defendants and on the telephone located at the defendants' home. The  
12 RCMP received judicial authorization to install listening devices at several additional  
13 locations and telephones associated with the defendants and their associates. These  
14 recorded communications spanned a period of time from April 6, 1995 through the  
15 defendants' arrest on July 31, 1995.

16 13. Second, the RCMP received judicial authorization to intercept and record conversations  
17 the defendants had with members of the RCMP, posing in an undercover capacity, and  
18 communications between the defendants and between the defendants and third parties,  
19 during planned undercover scenarios. These included recorded communications of  
20 defendant Burns, on May 6, 1995, June 15-16, 1995, June 28-29, 1995, July 18-19, 1995  
21 and July 26, 1995; communications of defendant Rafay, on July 19, 1995; and  
22 communications of James Miyoshi on June 15-16, 1995, June 28-29, 1995 and July 26,  
23 1995. All recorded communications between the defendants and RCMP undercover

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
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Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

1 officers during the pre-planned scenarios was done with the consent of the RCMP  
2 undercover officers involved.

3 14. The RCMP conducted the undercover operation in the present case in a manner routinely  
4 used by the RCMP in homicide investigations. Courts in Canada approved the legality of  
5 this technique under Canadian law.

6 15. During the course of the extradition proceedings in Canada, the Court of Appeals for  
7 British Columbia found the undercover technique used by the RCMP and the resulting  
8 interception and recording of the defendants' communications did not violate the  
9 defendants' rights under Canada's Charter of Rights and Freedoms, nor did it offend the  
10 sensibilities of the Canadian citizenry. The Court of Appeals for British Columbia  
11 further found that there was no duress or coercion employed by the RCMP during the  
12 undercover scenarios in order to obtain the defendants' admissions. The Supreme Court  
13 of Canada did not disturb this finding. This Court agrees with the Canadian courts and  
14 finds the same.

15 16. During the course of the RCMP's investigation of the defendants for violations of  
16 Canadian law, the Bellevue Police Department openly and fully shared all relevant  
17 information contained in their file with the RCMP. Similarly, During the course of the  
18 RCMP's investigation of the defendants for violation of Canadian law, the RCMP openly  
19 and fully shared information from its file with the Bellevue Police Department.

20 17. Between January 11, 1995 and the defendants' arrest on July 31, 1995, the Bellevue  
21 Police Department and the RCMP conducted parallel but separate investigations of the  
22 defendants. The Bellevue Police Department never requested that the RCMP conduct its  
23 own investigation. The Bellevue Police Department never requested that the RCMP

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
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Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

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1 intercept private communications of the defendants. The Bellevue Police Department  
2 never requested that the RCMP target the defendants in an undercover operation for the  
3 purpose of obtaining admissions from the defendants. The Bellevue Police Department  
4 never participated in or assisted the RCMP in intercepting and recording the defendants'  
5 communications. The Bellevue Police Department never participated in or assisted the  
6 RCMP in the undercover operation. The Bellevue Police Department never exercised  
7 direction or control over the RCMP investigation. There was no effort by the Bellevue  
8 Police Department or conspiracy with the RCMP to circumvent laws of the United States  
9 or the State of Washington.

10 18. The Bellevue Police Department and the King County Prosecutor's office received  
11 evidence collected by the RCMP during the course of the RCMP's investigation of the  
12 defendants with a good-faith belief the RCMP had complied in all respects with Canadian  
13 law. This evidence included the intercepted communications of the defendants  
14 referenced above.

#### 15 **Conclusions of Law**

16 1. This court concludes as a matter of law that neither Atif Rafay nor Sebastian Burns has  
17 assumed the complete range of obligations that we impose on the citizenry of the United  
18 States or State of Washington and therefore is not considered one of "the people of the  
19 United States" entitled to the full panoply of rights guaranteed by our Federal and State  
20 Constitutions. Atif Rafay and Sebastian Burns were not citizens of the United States or  
21 lawful resident aliens of the United States at the time of the RCMP's interception and  
22 recording of their private communications and undercover scenarios. Neither Defendant  
23 had established sufficient contacts with the United States or the State of Washington

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
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**Norm Maleng**, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

1 necessary for them to derived the protection of the Fourth Amendment to the United  
2 States Constitution, Article 1 section 7 to the Washington State Constitution or RCW  
3 9.73, Washington's privacy act. The interception and recording of the defendant's  
4 private communications occurred entirely in Canada and was accomplished entirely by  
5 Canadian law enforcement without the assistance of any law enforcement officials from  
6 the United States.

7 2. Accordingly, the Canadian recordings will not be suppressed pursuant to the Fourth  
8 Amendment to the United States Constitution, Article 1, Section 7 of the Washington  
9 State Constitution or RCW 9.73.

10 3. This Court may still suppress the intercepted and recorded communications of the  
11 defendants if the methods used by Canadian officials were so extreme that they shock the  
12 judicial conscious of this Court and there suppression is necessary to preserve the  
13 integrity of the criminal justice system.

14 4. More than a violation of Canadian law is necessary to warrant suppression under this  
15 theory. Rather, at a minimum there must be a violation of a fundamental international  
16 norm of decency before suppression is warranted.

17 5. The RCMP did not violate any fundamental international norms of decency when they  
18 conducted their undercover operation and electronic interception and recording of the  
19 defendants' communications. Indeed, the Canadian courts commented approvingly of the  
20 RCMP's conduct of the undercover operation in this case and found no violation of  
21 Canadian law or violation of the sensibilities of the Canadian citizenry. This Court  
22 agrees.

23  
FINDINGS OF FACT AND CONCLUSIONS OF LAW  
RE: ADMISSIBILITY OF AUDIO AND VIDEO  
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Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

- 1 6. The defendants statements and admissions to undercover RCMP officers during the  
2 course of the undercover scenarios were not the product of coercion or duress and their  
3 admission into evidence will not violate the defendants' due process rights, right to  
4 counsel or right against self incrimination guaranteed by the State and Federal  
5 Constitutions. The statements at issue were made in a non-custodial setting. The  
6 defendants were free to leave or not leave. The defendants were free to speak or not  
7 speak. The defendants were free to consult their Canadian counsel or not as they chose.
- 8 7. This Court found that a Franks hearing was not necessary under the facts of this case.  
9 However, this court held a full Franks hearing and concludes that even when the material  
10 facts that were omitted or misstated in Corporal Dallin's affidavit are included and  
11 corrected, the affidavit still provides a sufficient basis to support the conclusion that there  
12 were reasonable and probable grounds to believe a crime had been committed and the  
13 interception of the requested communications would bring to light information helpful to  
14 the investigation. Accordingly, this Court finds the interception and recording of the  
15 defendants' communications complied with Canadian law.
- 16 8. This Court finds Corporal Dallin acted in good faith. Corporal Dallin was not reckless in  
17 his application nor did he act with intent to deceive the Canadian court.
- 18 9. Under the totality of the circumstances, the conduct of the RCMP in applying for  
19 authorization to intercept private communications, intercepting and recording the  
20 communications and the methods used during the RCMP's undercover scenarios do not  
21 shock the judicial conscious of this Court.
- 22 10. The defendants' motion to suppress the electronic interceptions of the defendants'  
23 communications by the RCMP is denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
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CANADIAN MOUNTED POLICE -9

Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

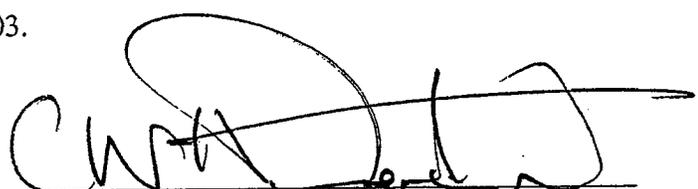
- 1 11. The result is the same even if this Court assumes that both Mr. Burns and Mr. Rafay  
2 derived protections of the Fourth Amendment to the United States Constitution, Article 1  
3 Section 7 of the Washington State Constitution in 1995 and RCW 9.73 when the RCMP  
4 was conducting its investigation.
- 5 12. Here the cooperation and assistance between the RCMP and the Bellevue Police in the  
6 conduct of the interception and recording of the defendants' communications did not  
7 reach the level necessary to transmute the RCMP into an agent of the Bellevue Police  
8 Department. Under the facts of this case, the RCMP's and Bellevue Police Department's  
9 knowledge of each other's investigations and sharing of information did not transform the  
10 investigations into a joint venture or make the RCMP the agent of the Bellevue Police  
11 Department. Accordingly, the Fourth Amendment to the United States Constitution,  
12 Article 1 Section 7 of the Washington State Constitution and RCW 9.73 do not require  
13 suppression of the evidence lawfully collected by the RCMP in the course of their  
14 investigation and turned over to the Bellevue Police Department pursuant to international  
15 treaty.

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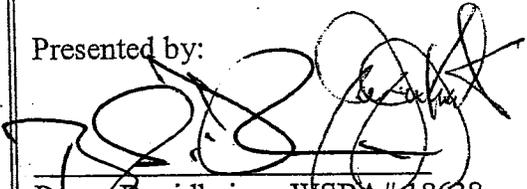
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For the foregoing reasons, the defendants' motion to suppress the intercepted and recorded communications of the defendants is denied. The Court incorporates by this reference the oral findings of fact and conclusions of law entered in open court on September 30, 2003.

Done this 8<sup>th</sup> day of October, 2003.

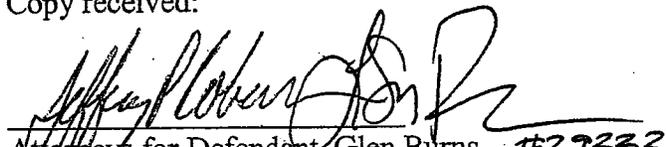
  
The Honorable Judge Charles Mertel

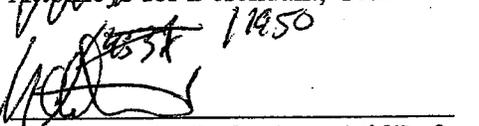
Presented by:



Roger Davidheiser, WSBA# 18638  
James Jude Konat, WSBA# 16082  
Senior Deputy Prosecuting Attorneys

Copy received:

  
Attorneys for Defendant, Glen Burns #27333

  
Attorneys for Defendant, Atif Rafay

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
RE: ADMISSIBILITY OF AUDIO AND VIDEO  
EVIDENCE COLLECTED BY THE ROYAL  
CANADIAN MOUNTED POLICE - 11

Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955