

61853-9

61853-9

No. 06-1-03538-7
COA# 60134-2-1

61853-9

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

RAYMOND D. MCCOY,

APPELLANT,

v.

STATE OF WASHINGTON,

RESPONDENT.

RECEIVED
COURT OF APPEALS
DIVISION ONE
JULY 17 2008
LM

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

THE HONORABLE PARIS K. KALLAS, JUDGE

RECEIVED
COURT OF APPEALS
DIVISION ONE
JULY 17 2008

BRIEF IN SUPPORT OF APPELLANT'S
PERSONAL RESTRAINT PETITION
PURSUANT TO (RAP) 16.3)

Raymond D. McCoy
Appellant
D.O.C. 270764-H4-LB-52-1
Stafford Creek Correctional Center
Aberdeen, Wash 98520

TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES:..... II, III, IV

A. ASSIGNMENT OF ERRORS.....1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS.....1

C. STATEMENT OF THE CASE.....3

D. ARGUMENT.....6

Issues:

1.) SUMMARY OF THE ARGUMENT..... 6

2.) SUMMARY OF THE ARGUMENT.....20

3.) SUMMARY OF THE ARGUMENT.....26

4.) SUMMARY OF THE ARGUMENT.....28

5.) SUMMARY OF THE ARGUMENT.....32

E. CONCLUSION.....37

TABLE OF AUTHORITIES

PAGES:

STATE CASES:

1.	Evans V. Superior Court, 11 Cal. 3d 617, 114 Cal. Rptr. 121 (1974).....	8
2.	Harrison V. Whitt, 40 Wash.App 175, 177 698 P.2d 87, review denied, 104 Wn.2d 1009 (1985).....	31
3.	Pepper V. J.J. Wlecome Constr.Co., 73 Wash.App 523 547-48, 871 F.2d 601, review denied, 124 Wn.2d 1029 (1994).....	31
4.	Preston Mill Co. V. Department of Labor & Indus., 44 Wn.2d 532, 536, 268 P.2d 1017 (1954).....	30
5.	State V. Badda, 63 Wn.2d 176, 385 P.2d 359 (1963).....	36
6.	State V. Boot, 40 Wn.2d 215, 697 P.2d 1034 (1985).....	8,20
7.	State V. Coe, 101 Wn.2d 772, 789, 684 P.2d 688 (1984).....	36
8.	State V. Gates, 28 Wash. 689 695 P. 385 (1902).....	28
9.	State V. Hewett, 86 Wn.2d 487, 492 n.4, 545 P.2d 1201 (1956).....	27,31
10.	State V. Hilliard, 89 Wn.2d 430, 573 P.2d 22 (1977).....	7,10,19
11.	State V. James, 30 Wash.App 520, 523, 635 P.2d 1102 (1981).....	7
12.	State V. Ortiz, 34 Wash. App 694,699, 664 P.2d 1267 (1983).....	7
13.	State V. Smith, 36 Wash. App 133, 672 P.2d 759 (1983).....	7
14.	State V. Williams, 49 Wn.2d 345, 360, 301 P.2d 769 (1956).....	27,31

FEDERAL CASES:

1.	Bake V. Bardo, 177 F.3d 149 (3th Cir 1999).....	36
2.	Boles V. Foltz, 816 F.2d 1126, 1132 (6th Cir (1987).....	36
3.	Holsclaw V. Smith, 822 F.2d 1041 (11th Cir 1978).....	37
4.	GARY V. Klauser, 282 F.3d 633, 639 (9th Cir 2002).....	18
5.	Grant V. City of Long Beach, 315 F.3d 1081 (9th Cir 2002).....	17,18
6.	Jacob V. Horn, 395 F.3d 100 (3rd Cir 2005).....	36

TABLE OF AUTHORITIES' CONT'D

PAGES:

FEDERAL CASES: CONT'D

7.	Jermyn V Horn, 266 F.3d 257, 282 (3rd Cir 2001).....	36
8.	Osborn V. Shillinger, 816 F.2d 612 (10th Cir 1988).....	37
9.	Rice V. Marshall, 816 F.2d 1126, 1132 (6th Cir 1987).....	35,36
10.	State V. Bagley, 641 F.2d 1235 (9th Cir 1981).....	24
11.	U.S. V. GLOVER, 596 F.2d 857 (9th Cir) 444 U.S. 860, 100 S. Ct. 124, 62 L.Ed.2d 81 (1979).....	24
12.	U.S. V. Irwin, 612 F.2d 1182, 1186-87 (9th Cir 1980).....	25
13.	U.S. V. Kilrain, 566 F.2d 979,982 (5th Cir) cert denied, 439 U.S. 819, 99 S. Ct. 80, 58 L.Ed.2d 109 (1978).....	24
14.	U.S. V. Maingan, 618 F.2d 1127, 1133 (1982).....	18
15.	U.S. V. Meinster, 478 F.Supp 1131, (S.D. Fla 1979).....	24
16.	U.S. V. Peele, 574 F.2d 489 (9th Cir 1978).....	10
17.	U.S. V. Sander, 615 F.2d 215, 219 (5th Cir 1978).....	10
18.	U.S. V. Woods, 554 F.2d 242 (6th Cir) cert denied, 430 U.S. 969, 97 S. Ct. 1652, 52 L.Ed.2d 316 (1977).....	24

U.S. SUPREME COURT CASES:

1.	Johnson V. Zerbst, 304 U.S. 458, 463 (1938).....	23
2.	Maine V. Moulton, 474 U.S. 159, 106 S. Ct. 477 (1985)..	21,22
3.	Manson V. Brathwaite, 432 U.S. 98 53 L.ED.2d 140, 97 S. Ct. 2243 (1977).....	8
4.	Massiah V. United States, 377 U.S. 201, 48 S. Ct. 1199 12 L.ED.2d 246 (1964).....	22,25,33
5.	Simmons, V. United States, 390 U.S. 377, 88 S. Ct. 19 L.ED.2d (1980).....	18

TABLE OF AUTHORIES, CONT'D

PAGES:

U.S. SUPREME COURT CASES: CONT'D

6. Spano V. New York, 360 U.S. 315,
79 S. Ct. 1202, 3 L.Ed.2d 1265 (1959).....22

7. Strickland V. Washington, 466 U.S. 668,
687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1980).....32,36,37

8. United States V. Henry, 447 U.S. 264,
100 S. Ct. 2183, 65 L.Ed.2d 115 (1980).....22,23

9. United States V. Wade, 388 U.S. 218,
18 L.Ed.2d 1149, 87 S. Ct. 1926 (1967).....7

10. Wainwright V. Sykes, 433 U.S. 72,
53 L.Ed.2d 594 S. Ct. 2497 (1977).....35

11. In re Winship, 397 U.S. 358, 364,
90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....28

12. Wardius V. Oregon, 412 U.S. 470,
73 L.Ed.2d 82, 93 S.Ct. 2208 (1973).....8,20

STATUTES, RULES, AND OTHERS:

United States Constitution:

Sixth Amendment,.....2,3,7,20,21,23,31,33,34,37

Fourteenth Amendment,.....2,3

Washington State:

Article 1, § 22.....2,33,34,37

Court Rules:

CR 26 (4)(b).....5

CrR 3.5.....32,33

CrR 3.6.....32

CrR 4.7.....7,8,11,13,19,37

CrR 8.3 (b).....5,33

STATUTES:

R.C.W. 58.020.....28

A. ASSIGNMENT OF ERRORS:

1. The May 1-2, 2007 in-court identification of petitioner was tainted by the February 13, 2006 photo-montage created by Detective Aakervik of the Seattle Police Department, which was impermissibly suggestive, undermining the outcome of the jury's verdict and conviction.

2. The testimony of the State's witness, to-wit, jailplant/informant, King County inmate Kevin Scott Olsen, which probative value was outweighed by the danger of unfair prejudice, denied petitioner a fair trial.

3. The rebuttal evidence, to-wit, the surveillance tape from the Key Bank incident, which ultimately convicted petitioner, was misrepresented to the jury, and its prejudicial effect to petitioner, denied petitioner a fair trial.

4. The totality of the circumstance surrounding the evidence viewed in the light most favorable to the State, does not establish a clear and convincing corpus delicti or logical nexus supporting the conviction of three counts of first degree bank robberies, and undermined the jury's verdict and conviction.

5. During the critical stages of petitioner's trial and pretrial proceeding, petitioner appointed counsel's performance fell below a reasonable objective standard, denying petitioner effective assistance and representation of counsel.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS:

1. After conducting a photo-montage identification procedure, on February 13, 2006; February 27, 2006; and March 2, 2006, which none of the victim tellers' positively identified petitioner as the robbery suspect, proceeding Pro-Se, the State denied petitioner's motion for a line-up on

May 15, 2006. With know independent identification other than the photo-montage, did the State denied petitioner due process and equal protection, pursuant to the Sixth and Fourteenth Amendment of the United States Constitution?

2. While in-custody waiting for trial on the February 21, 2006 VUCSA arrest, and the delivery charge, petitioner was charged with two counts of first degree bank robberies. On April 12, 2006 petitioner was granted a motion to proceed Pro-Se. On September 1, 11, 2006 incident to an interview with a F.B.I. informant Kevin Scott Olsen, who alleged that petitioner confessed to robbing four banks. This information was a result of Kevin Olsen assisting petitioner proceeding Pro-Se with legal research and trial strategies, to-wit, work-product. Did the testimony of Kevin Scott Olsen violated petitioner's due process and equal protection, pursuant to the Massiah Doctrine, and denied petitioner the right to effective Pro-Se representation and a reasonable Pro-Se defense, pursuant to the Sixth Amendment of the United States Constitution?

3. Proceeding Pro-Se, Petitioner acquired relevant pretrial evidentiary discoveries, to-wit, video analysis expert, who, after examining the surveillance tape from the February 13, 2006 Key Bank incident, submitted a conclusion and report, and would have testified that the surveillance tape from the February 13, 2006 incident was, (1) Provided little information. (2) Was of poor quality and the system was in disrepair. (3) 90% or more of the alleged activity from the surveillance tape was missing. By the jury not being informed of this expert's testimony, before viewing this tape as rebuttal evidence, denied petitioner due process and equal protection pursuant to Washington State Constitution Article 1, § 22, and the Fourteenth Amendment

of the United States Constitution, also undermining the outcome of the proceedings and verdict.

4. As a result of an alleged demand-note, a montage, dusted palm-print, and the testimony of an informant, the misrepresentation of the evidence, to-wit, the Key Bank's surveillance tape, here, other than the alleged dusted palm-print, petitioner was convicted without any other clear and convincing evidence. Do the record reflects a prima facie showing, that viewing the evidence in the light most favorable to the State, establish each elements or the identity of petitioner beyond a reasonable doubt?

5. For five months Mr. McKay assisted petitioner pursuant to cause number 06-1-03538-7 as stand-by counsel, before taking over as Attorney of record. Mr. McKay was aware of all five Pro-Se assigned expert witnesses who preformed pretrial evidentiary examination of evidence the State were to presented in its case-in-chief as follows: 1.) Demand-note; 2.) Photo-montage; 3.) Palm-print; 4.) Surveillance tape; 5.) Private investgator. By not calling available witnesses during critical stages of defense case-chief, denied petitioner exculpatory due process and effective assistance of counsel pursuant to the Sixth and Fourteenth Amendment of the United States Constitution?

C. STATEMENT OF THE CASE:

On February 9, 2006 petitioner was arrested in Down Town Seattle for allegedly delivering a controlled substance to an undercover Seattle Police Officer. Incident to the arrest, the the arresting officer founded what appeared to be a bank demand-

note on petitioner's personal. See Exs. 1 & 2. On the morning of February 10, 2006 at 11:00am, Officer Sean Hamlin of the Seattle Police Department, also (SPD), e-mailed Detective Rodgers who informed Detective Aakervik, both of SPD, that petitioner was arrested on February 9, 2006, and the arresting officer founded a bank demand-note on petitioner personal. See Ex.3 2 of 5 at 12. As a result of this information, Detective Aakervik stated that petitioner's "identity" matched that of a robbery suspect. At 1:40pm February 10, 2006, Detective Aakervik contacted King County Prosecutor Attorney's Office and spoke with Laura Poellet, briefed her on his investigation concerning petitioner and alleged bank robberies, and requested that she have petitioner held in-custody pending a February 14, 2006 line-up. See Ex.3 3 of 5 at 14-16. On February 13, 2006, Detective Aakervik was informed by the King County Prosecutor Attorney's and King County Jail that petitioner was released from custody February 10, 2006 at 10:30pm. Here on February 13, 2006 at 1:30pm Detective Aakervik created a photo-montage (#55360). See Ex.3 3 of 5 17-22. On February 21, 2006 petitioner was arrested on a \$50,000.00 VUCSA warrant filed on February 15, 2006.¹ On February 27, 2006 and March 2, 2006 Detective Aakervik conducted a photo-montage identification procedure with the montage created on February 13, 2006. While in-custody waiting for

1

It was only after the February 21, 2006 arrest for a \$50,000.00 outstanding VUCSA warrant issued on February 15, 2006, as a result of the February 9, 2006 incident, that petitioner was first informed about the alleged demand-note, which was incorporated in the information for the pretextual and unlawful February 15, 2006 issuing of an arrest warrant. See Petitioner's PRP now pending in this court challenging the State's unconstitutional securing of an arrest warrant, prusuant to cause number 06-1-03538-7

trial from the February 21, 2006 VUCSA warrant arrest, on April 7, 2006 as a result of the Certification For Determination Of Probable Cause filed on March 31, 2006 by Detective Aakervik, Petitioner was charged with two counts of first degree bank robberies. See EX4. On May 15, 2006 proceeding Pro-Se, Petitioner was denied a motion requesting a line-up. See EX5, see also RP (5/15/06) 19.² On February 22,23, 2007 proceeding Pro-Se Petitioner was denied a motion to dismiss pursuant to CrR 8.3 (b) and CR 26 (4)(B). See EX6 also RP (2/23/07) 29-35, and appendixs A&B. Petitioner was brought to trial on May 1, 2007 and convicted of three counts of first degree bank robberies on May 10, 2007. See RP (5/09/07) . On June 8, 2007 Petitioner submitted

2

Through out the remaining of this brief the Verbatim Report Of Proceedings will be referred to as follows: RP 5/15/06, (One volumes of verbatim report of proceedings, also (VRP), before the Honorable Theresa Doyle, reported by Thomas G. Karis); RP 6/1/06, (One volumes of VRP before the Honorable Theresa Doyle, reported by David Pierce); RP 9/15/06, (One volumes of VRP before the Honorable Richard A. Jones, reported by Joanne Leatiota); RP 12/14/07, (One volumes of VRP before the Honorable Laura Inveen, reported by Jane Lamerle); RP 2/22/07, (One volumes of VRP before the Honorable Catherine Shaffer, reported by Pete S. Hunt); RP 2/23/07, (One volumes of VRP before the Honorable Catherine Shaffer, reported by Pete S. Hunt); RP 4/30/07 (One volumes of VRP before the Honorable Paris K Kallas, reported by Pete S. Hunt); RP 5/01/07, (One volumes of VRP before the Honorable Paris K. Kallas, reported by Joanne Leatiota); RP 5/02/07, (One volumes of VRP before the Honorable Paris K. Kallas, reported by Pete S. Hunt); RP 5/07/07, (One volumes of VRP before the Honorable Paris K. Kallas, reported by Pete S. Hunt); RP 5/08/07, (One volumes of VRP before the Honorable Paris K. Kallas, reported by Pete S. Hunt); RP 5/09/07, (One volumes of VRP before the Honorable Paris K. Kallsa, reported by Pete S. Hunt); RP 5/22/07, (One volumes of VRP before the Honorable Paris K. Kallas, reported by Pete S. Hunt); RP 6/08/07, (One volumes of VRP before the Honorable Paris K. Kallas, reported by Pete S. Hunt).

a motion of Appeal to the Court of Appeals Division One. On November 30, 2007 Neilsen, Broman & Koch filed an Opening Brief on behalf of petitioner pursuant to cause number 06-1-03538-7 and COA# 60134-2-1. See Appendix C. On January 22, 2008 petitioner filed a Brief in support of petitioner's STATEMENT OF ADDITION GROUNDS FOR REVIEW. See Appendix D. On January 28, 2008 the State filed its Brief of Respondent. See Appendix E. On February 18, 2008 petitioner filed a Reply to the State's Brief of Respondent. See Appendix F. This Personal Restraint Petition follows.

D. ARGUMENT:

SUMMARY OF THE ARGUMENT.

The record shows no independent origin source or extenuating circumstances that defeats petitioner's constitutional standing and right to an in-custody line-up prior to trial.

1. DO to an alleged deman-note founded on petitioner's persons, incident to a February 9, 2006 VUCSA arrest, petitioner became a suspect into four counts of bank robberies. See Ex.7. Although petitioner was released from custody on February 10, 2006 for the February 9, 2006 VUCSA arrest, on February 10, 2006 Detective Aakervik of the Seattle Police Department attempted to have petitioner held in-custody pending a possible February 14, 2006 line-up. See Ex.3 2 of 5 at 16. On February 13, 2006 (SPD) Detective Aakervik created a Photographic Montage. See Ex8. (#55360).

Also on February 13, 2006; February 27, 2006; and March 2, 2006 Detective Aakervik conducted a photographic montage identification procedure with the following four banks: 1.) Key Bank 02-13-06, Tuan Lee(VT), and Yen Huynh (W). See Ex.3 # of 5 at 22; 2.) Sterling Saving Bank 20-27-06, Marlana Willey (VT), Olga Moore (W), Rudy Elwood (W), Ken Jackson (W); 3.) Washington Mutual Bank 02-27-07, Sarah Trinkwald (W), Shirley So (VT); 4.) U.S. Bank 03-02-06, Eric Van Diest (W),

Jasmine Fung (VT). Other than the Sterling Saving Bank's witness Rudy Elwood who stated she was pretty certain petitioner was the robbery suspect, there were not on positive identification from any of the four victim tellers. See EX.3 4 of 5 at 24-28; nevertheless, on May 15, 2006 petitioner was denied a motion for a in-custody line-up pursuant to CrR 4.7 (b)(2)(i). See Ex.5.

...A defendant is guaranteed no more than a fair identification process that is, a process that is not so impermissibly suggestive as to rise to a substantial likelihood of misidentification. See State V. Ortiz, 34 Wn.App 694, 699, 664 P.2d 1267 (1983). [However] The State has the burden of proving by clear and convincing evidence that an in-court identification of an origin independent of an earlier unconstitutional identification. See State V. Smith, 36 Wn.App, 133,671 P.2d 759 (1983). ...Second, even if the photographic identification was questionable, the in-court identification is proper if it has an independent origin. See State V. Hilliard, 89 Wn.2d 430,573 P.2d 22 (1977) at 493 citing U.S. V. Wade, 388 U.S. 218 87 S.Ct. (1926). Discretion is abused only when no reasonable person would take the the view adopted by the trial court. See State V. James, 30 Wn.App 520, 523. 635 P.2d 1102 (1981).

On May 15, 2006 when asked by the trial court, "...what is your authority for demanding that the State conduct a line-up after the Staste's investigation?", See RP (05/15/06/) 18 at 22-24. Here, petitioner brough to the trial court's attention the substantial risk of an in-court misidentification due to the impermissible and suggestive montage created by Detective Aakervil on February 13, 2006, and petitioner claimed authority under the Sixth amendment and Due Process of the U.S. Constitution. See also RP (05/15/06/) 19 at 1-12.

After asking prosecuting attorney Mr. Ferrell, "...[does] does the court have any authority to order the prosecutor to conduct a line-up?". The trial court denied petitioner's motion for a line-up, stating that, "...I am unaware of any authority, legal authority, that would authorize the court to order the State to do a line-up.", See RP (5/15/07/) 19 at 18-25 and 20 at 1. In State V. Boot, 40 Wn.App 215, 697 P.2d 1034 (1985), Boot argues that the line-up could have provided exculpatory evidence and that the State violated his right to due process by failing to hold the line-up, replying on Wardius V. Oregon, 412 U.S. 470, 37 L. E.d 2d 82, 93 S. Ct. 2208 (1973) and Evans V. Superior Court, 11 Cal. 3d 617 114 Cal. Rptr. 121 (1974). In Wardius, the court held that defendants must have the discovery rights reciprocal to those given the State. In Evans, a trial judge ruled that the defendant was entitled to a line-up, but that the trial court lacked the discretion to compel the State to hold a line-up. The California Supreme Court reversed, finding that the trial court has authority to compel a line-up when necessary to afford due process. See State V. Boot, Supra at 219.

... Because there is an applicable court rule providing for a line-up at the defendant's request, and because the defendant utilized this rule to obtain a discovery order, we need not determine whether there is an independent due process right to a line-up. Boot at 219.

... Wardius requires that reciprocal discovery be available to the defendant and the State. CrR 4.7 complies with Wardius by providing equal access to a court ordered line-up. Boot at 219. [E]ach case must be considered on its own facts,... See Manson V. Brathwaite, 432 U.S. 98, 53 L.Ed 2d 140, 97 S. Ct. 2243 (1977). Here in petitioner's case now before

this court, there is no independent origin or extenuating circumstances that would have defeated petitioner's Standing and right to an in-custody line-up prior to trial.

Do to the results of the February 13,27 2006 and March 2, 2006 pretrial photographic identification procedure conducted by the State, in petitioner's case now before this court, petitioner had Constitutional Standing to demand a line-up indepent to the impermissible suggestive photo-montage identification procedure , prior to an in-court identification, by witnesses who's in-court identification was tainted by the photographic identification procedure conducted by SPD Detective Aakervik on February 13,27 and March 2, 2006. See Ex.3

Here, not only was petitioner denied due process by the denial of a discovery order pursuant to CrR 4.7 (b)(2)(i), See Ex.5, the State was allowed to submit State's exhibit 15 for identification and admittance, to-wit, the February 13,2006 photographic montage to assist the eyewitnesses with their in-court identification of the petitioner, over one year after the commission of the crime. See RP (05-01-07) 24 at 19-23.³

The record reflects a prima facie showing that State's exhibit 1. was admitted without first laying a sufficient foundation. Here, State's exhibit 1. was re-admitted as State's exhibit 15, see RP (05-02-07) 6 at 24-25 and 7 at 1-9, See also RP (05-02-07) 21 at 9-16.

In determing propriety of pre-trial identification procedure, likelihood of irreparable misidentification must be balance against the necessity for

³ Prior to giving up petitioner's Pro-Se status, Mr. McKay, before becoming attorney of record, assisted petitioner proceeding Pro-Se as stand-by counsel, and was aware of petitioner's pretrial motion to suppress Photo Identification to-wit, State's exhibit 15, which the State acknowleged on the record. See RP (12-14-06) 33 at 8-10, see also RP (05-22-07) 6-12 (Portion of the proceedings herein sealed). Petitioner's hearing on a motion for a new trial. Here petitioner argued ineffective assistance of counsel, for not arguing submitted motion to suppress photo ID, pursuant to State's exhibit 15, see also Exs. 8,12.

for Government to use the identification procedure in question. See U.S. V. Peele, 574 F.2d 489 (1978). The State has the burden of proving that the in-court identification has an independent origin of State's exhibit 15, citing State V. Smith, Supra, in dictum. "..., even if the photographic identification was questionable, the in-court identification is proper if it has an independent origin". See State V. Hilliard, Supra.

Here the ultimate issue is, did or could the State show by clear and convincing evidence that it had an origin independent of the Photographic Identification?

Below petitioner, from the record, will establish a clear and convincing prima facie showing that the photo-montage created by Detective Aakervik, which tainted the in-court identification of petitioner, was impermissibly suggestive, and constituted an irreparable misidentification.

1.) Proceeding Pro-Se petitioner required the expert assistance of photo-montage expert Dr. Geoffrey R. Loftus. Who examined the montage in question, referred to as State's exhibit 15, along with the issues raised in petitioner's motion to suppress photographic identification. See Ex.8. During petitioner's trial, Dr. Loftus testified to the followings: (a) That the montage, State's exhibit 15, was biased. (b) That the witnesses described the bank robber as being fairly dark-complexed, and petitioner picture looked the darkest in the montage. (c) Not only was petitioner's picture the darkest, which would draw attention to it in two senses, but it's also the largest. See RP (05/08/07/) 36 at 17-25 and 37 at 1-10.

2.) During petitioner's trial, several State's witnesses gave testimonies consistence with Dr. Loftus's conclusion and analysis of the suggestive and biased montage created and used to conduct a photographic identification procedure with the State's.....

witnesses on February 13, 27, 2006 and March 2, 2006, with each witness making an in-court identification of petitioner which was tainted by the above montage State's exhibit 15, on May 1-2, 2007. The State's eyewitnesses testified as follows:

1.) STERLING SAVING BANK, December 27, 2005

(a) Marlana Willey (victim/teller)

DIRECT-EXAMINATION

(Q): Do you remember if you told Jeff that it could be number five?

(A): I didn't

(Q): You didn't ?

(A): No. ''

(Q): So at some point when did you tell someone that you thought it could be number five?

(A): The next day.

(Q): Who did you tell?

(A): I just told one of the CSRs that works next to me.

(Q): What is a CSRs?

(A): I am sorry, a teller.

(Q): When did you tell me?

(A): Last night

(Q): Were you ever informed of what number whether the actual suspect was in the montage or what number he was at in the montage?

(A): Yes--no. See RP (5/01/07/) 29 at 4-24

The denial of petitioner's May 15, 2006 discovery order pursuant to CrR 4.7 to-wit, motion for a ~~compeal~~ ~~in-custody~~ line-up, undermines the indicia of reliability of Ms. Willey testimony and in-court identification. Here the record on its face reflects a prima facie showing that Ms. Willey in-court identification was tainted by the impermissible suggestive montage (State's exhibit 15), and prosecutorial misconduct, to-wit, leading the witness on direct-examination, See RP (5/02/07/) 27-29. Over a year after the commission of the crime, Ms. Willey was 90% positive that the robbery suspect was someone other than the petitioner, viewing the February 13, 2006 montage, State's EX. 15. See RP (5/02/07/) 30-~~32~~ at 13-17. However, Do to a phone conversation the night before Ms. Willey May 1, 2007 testimony with State's prosecuting attorney Mr. Ferrell, she testified that she changed her mind and petitioner was the person who robbed her on December 27, 2005.

(Q): ...So what is it now, Ms. Willey, where are you at to number one versus number five?
(A): Without --without being a hundred percent sure still, I believe number one.
(Q); Number one.
(A); Can I look at the picture again?
(Q): Let me hand it up to you.
(A): ..., Still not a hundred percent sure, but looking at this [State's Ex.15] right now possibly number five would be what I would pick. Just right now looking straight on. See RP (05/01/07/) 30 at 13-25 and 31 at 1.
(Q): Now, Ms. Willey, do you see the person in-court today that you saw in your branch back in December 2005?
(A): Yes.
(Q): "Yes" what?
(A): I do.
(Q): Where is that person?
(A): He is sitting behind the table.
(Q): Now, this is very important, Ms Willey. Is there any question in your mind about that?
(A): No. See RP (05/01/07/) 33 at 23-24 and 34 at 1-8.

CROSS-EXAMINATION:

(Q): ...So initially when Detective Aakervik showed you that photo montage you were 90 percent certain it was photo number one?
(A): Yes. See RP (05/01/07/) 35 at 14-18.
(Q): ...so would it be fair to say that your memory was probably better closer to the time of the bank robbery than it would be today?
(A): Yes. See (05/01/07/) 36 at 3-6.
(Q): ...,would it be fair say that you are not sure between those two [one and two] photographs?
(A): A hundred percent, no. See RP (05/01/07/) 37 at 14-19.

(b) Ken Jackson (Witness (SSB))

DIRECT-EXAMINATION:

(Q):
(A): ...so probably about two, three minutes later, I would say the person [robbery suspect] came back out, and I said, "Have a good day." He smiled and said, "Have a good day." Right after that, they said he just robbed the bank. See RP (05/01/07/) 45 at 12-16
(Q): ...Just take a second, if you could, do you see the person in court today that you saw in the bank on 12/27 of 2005?
(A): No.
(Q): How sure are you about that?
(A): Again, I'd probably say it's 50/50.

CROSS-EXAMINATION:

(Q): Moments ago, my client [petitioner] passed you in the hall...
(A): Yes.

(Q):

(A): Yes, he did.

(Q): At that time you stated that was not the person who robbed the bank?

(A): Correct.

(Q): Is that still your position?

(A): It's still. RP (5/01/07/) 50 at 7-10 and 50 at 22-25 and 51 at 1-6.

(c) Rudy Elwood (witness (SSB))

CROSS-EXAMINATION:

(Q): Let me show you the same montage. Let me ask you, of those pictures, which individual seems to have the darkest complexion?

(A): That would be--(indication).

(Q): Number five

(A): Correct.²² RP (5/02/07/) 71 at 5-10

(d) Olga Moore (witness (SSB))

DIRECT-EXAMINATION:

(Q): Now, Olga, do you see the person in court today you saw in Sterling Saving on 12/27 of 2005?

(A): Yes, I think so. See RP (5/02/07/) 82 at 23-25.

CROSS-EXAMINATION:

(Q): Nonetheless, out of that group [State's Ex. 15] who would you say has the darkest complexion?

22

Here the May 15, 2006 denial of petitioner's discovery order pursuant to CrR 4.7 for a line-up prior to trial, under minds the integrity of Ms. Elwood's in-court identification. The ultimate issue here is, if her in-court identification had not been tainted by the impermissible suggestive February 27, 2006 photographic montage (State's Ex. 15), could she have been able to positive identify petitioner in a May 15, 2006 line-up? Here Ms. Elwood 's co-worker Mr. Ken Jackson (an African American) not only viewed the robbery suspect at the same time Ms. Elwood, but had a full view and greeded the suspect entering and existing the bank, and testified that petitioner was not the person he, Mr. Jackson, say robbed the bank on 12/27 of 2005.

(A): He.
(Q): Number five?
(A): Yes, this person. RP (5/02/07/) 87 at 11-15.

2.) U.S. BANK February 6, 2006

(a) Jasmine Fung (victim/teller)

DIRECT-EXAMINATION:

(Q): Tell us what happened that day?
(A): ..., and I saw that gentleman, like the gentleman over there,...See RP (5/02/07/) 92 at 23-24 and 93 at 1-13.
(Q): On the front page still, let's go back to the front page, did you note which picture, what number picture?
(A): Yes.
(Q): And what was the number?
(A): Number six. See RP (5/02/07/) 99 at 4-9
(Q): Showing you what has been now admitted as State's Exhibit No. 10, does it say there which number you picked?
(A): Uh-huh.
(Q): Five?
(A): Uh-huh. See RP (5/02/07/) 99 at 25 and 100 at 1-5

CROSS-EXAMINATION:

(Q): Who's got the darkest facial complexion?
(A): This one
(Q): Number five?
(A): Uh-huh.
(Q): In fact, let me hand that up to you. Are any of the other even close, in your opinion, in terms of dark complexion?
(A): Yes.
(Q): Which one?
(A): No, I mean like this is the only one that--
(Q): That you would consider dark?
(A): Yes, uh-huh. See RP (5/02/07/) 103 at 19-25 and 104 at 1-5.

(b) Eric Van Diest (witness (U.S.B))

(Q): Did you ever point at a picture?
(A): There was one that--I don't know how to put it, but there was one that seemed more likely than the others.
(Q): And which number was that?
(A): Number five. See RP (5/02/07/) 156 at 11-16.
(Q): So when you were pointing--let me put 15 up. When you made a point toward number five in the picture, what was it that made you want to point to [State's Ex. 15 number five] that?
(A): The skin tone. See RP (5/02/07/) 157 at 23-25 and 158 at 1-2.

CROSS-EXAMINATION:

- (Q): You stated on direct examination that what stood out to you about the photographs was the skin tone.
- (A): Correct.
- (Q): Would you say that number five is probably the darkest complexion of those photographs?
- (A): In these pictures [State's Ex. 15] yes.
- (Q): Thank you. And that's what initially brought your attention to that photograph?
- (A): Correct. See RP (5/02/07/) 158 at 20-25 and 159 at 1-3.
- ...(Q): So you were both present [Jasmine Fung (Teller) and Mr. Van Diest (witness)] when the Detective was showing this [State's Ex. 15] montage?
- (A): Yes. See RP (5/02/07/) 160 at 11-13.
- (Q): Were you present when she [Jasmine Fung (teller)] gave her opinion?
- (A): I was.
- (Q): So you were present when Ms. Fung made her choice?
- (A): If I remember correctly, she did not pick one either. Yeah, she did not pick one either. See RP (5/02/07) 160 at 17-21.

3.) KEY BANK February 13, 2006.

(a) Tuan Lee (Victim/teller)

DIRECT-EXAMINATION:

- (Q): Tuan, I am going to hand you what's been admitted as State's [Ex.] 15. Do you recall if a detective or police officer ever showed you that [State's Ex. 15] montage?
- (A): No.¹¹ See RP (5/02/07/) 21 at 18-21.
- (Q): Have you been able to look at that [State's Ex. 15] since you have come to court today?

¹¹ Here the record is clear that on February 13, 2006. SPD Detective D. Aakervik #4810 conducted a photographic identification with victim/witness tellers, Tuan Lee and Yen Huynh at the Key Bank as follows:
"... While at the Bank [Key Bank 666 S. Dearborn, Seattle] I showed a montage [#55360, also State's Ex. 15] containing a photo of Raymond McCoy to two victim/witness tellers (separately). Prior to showing them the montage I told them that the montage may or may not contain a picture of the robber. VT Tuan Lee looked at the montage [State's Ex. 15] and pointed to the photo of McCoy. He was not positive and thought the suspect may have been a little younger. Yen Huynh looked at the montage and was unable to make a pick." See Ex.3 3 of 5 at 22, (Continuation Sheet) incident number 05-547018 (Master). "...While investigating the robbery at the bank Detective showed the montage to two victim/witness

- (A): I looked at it [State's Ex. 15] earlier.
(Q): Did you see or are you able to tell whether-or make any estimation whether the person you saw in the bank that day is in that montage?
(A): Yes, I was able to recognize, because I remember the facial structure was quite different from all the others.
(Q): Which picture?
(A): The bottom middle left--bottom middle.
(Q): Bottom middle?
(A): Yeah. See RP (5/02/07/) 21 at 22-25 and 22 at 1-9.

CROSS-EXAMINATION:

- (Q): Would it be fair to say that your memory of events--this occurred in February of last year. This is 15 months later. Would it be fair to say that your memory of events shortly after this incident occurred is better than it is now?
(A): I wouldn't say better. I guess something--when I went into the interview with you, I stated that I could only point out the suspect about 50 to 60 percent. But when I was shown that montage [State's Ex. 15] earlier today, I was able to pick that out right away. So I guess just that's --something of the facial structure that actually strike me.

(b) Yen Huynh. (witness/teller)

DIRECT-EXAMINATION:

- (Q): Did anybody that day show you any pictures, you know, the six montage pictures? Do you remember anybody showing you any picks?
(A): I don't remember I see any pictures.
(Q): Do you recall at any time after the robbery anybody coming back to the bank and showing you a photo montage?
(A): No. See RP (5/02/07/) 53 at 20-25 and 54 at 1-2

³³ CONT'D

tellers. One teller pointed to McCoy's photo in the montage, but was not positive and thought that the suspect may have been a little younger. The second teller was unable to make a pick..." See Ex.4 (Certification For Determination Of Probable Cause) 3 of 4. Here as with victim tellers Ms. Willey (SSB 12-27-05); Ms. Fung (U.S.B 02-06-06); and Mr. Lee (KB 02-13-06), there is no independent origin or extenuating circumstances, that justify the denial of petitioner's May 15, 2006 discovery order for a corporeal line-up prior to trial independent of the impermissible suggestive montage, State's Ex. 15 which tainted the in-court identification of petitioner resulting in a mis-carriage of justice.

...(Q): Showing you what's been marked and identified-- excuse me, marked and admitted as State's Exhibit 15, have you seen this before, before right now?

(A): Yes, I did.

(Q): When did you first take a look at this?

(A): This morning.

(Q): And were you able to tell whether-- you could tell whether the person that you saw in Key Bank that day-- is in this photo montage?

(A): I am not 100 percent sure. Like I said, he had a hat, and I just recognize him because he has black skin, dark skin.

(Q): Which number?

(A): ~~From~~ here, I'd say this one was closest one in my memory.

(Q): The bottom middle?

(A): Bottom middle.

(Q): If we were to --let me take that back from you. It sounds like a lot of this is based on the complexion of the person's skin?

(A): Yes. See RP (5/02/07/) 54 at 8-25 and 55 at 1-3.

...(Q): And you are about 50/50?

(A): 50/50, yeah. I am just not one hundred percent sure that his face. See RP (5/02/07/) 55 at 23-25

CROSS-EXAMINATION:

(Q): I am going to hand you the exhibit that was up there so that you get a really close look at it. Of those six [State's Ex. 15] figures, who would you say has the darkest complexion?

(A): It's the bottom middle.

(Q): No. 5?

(A): No. 5.

(Q): So out of these six picture, one of the reasons that you felt that he most closely resembled the person at the bank was because of his dark complexion?

(A): Yes, sir.

(Q): So you are not say, based on independent recollection, that you remember this is the person who did it. You are kind of using this as a reference point; is that correct?

(A): Yes, sir. See RP (5/02/07/) 57 at 17-25 and 58 at 1-14.

REDIRECT-EXAMINATION:

(Q): Without considering the photos, Ms. Huynh, does this person [petitioner] look like the person you saw?

(A): Not very clearly look like. Like very similar, but I am not sure if its him.

In Grant V. City of Long Beach, 315 F.3d 1081 (9th Cir 2002) the court held:

"...Whether the identification supplied by victim Haines and Dale provide

probable cause for Grant's arrest [or in-court identification] involves two related inquiries: (1) Did the officer employ an identification procedure so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. See Simmons V. United States, 390 U.S. 377, 88 S. Ct. 19 L.Ed.2d (1968). And if so, (2) did the witnesses exhibit sufficient indicia of reliability to protect the integrity of their identification?". See United States, V. Maingan, 618 F.2d 1127, 1133 (1982). Grant, 315 F.3d at 1086.

"...Even though Haines and Dale selected Grant from a arguably suggestive photograph array, their identification may still serve as a basis for probable cause if sufficient indicia of reliability are present. Haingan, 318 F.2d at 113. Indicia of reliability include: 1) the opportunity to view the criminal; 2) the degree of attention paid to the criminal; 3) the accuracy of the prior description of the criminal; 4) the level of certainty; and 5) and the length of time between the crime and the conforntation. See Gary V. Klauser, 282 F.3d 633, 639 (9th Cir 2002) (Citing Manson V. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2242, 52 L.Ed.2d 140 (1977)). Grant, 315 F.3d at 1087. Applying the facts from the Simmons court, in petitioner's case now before this court, 1.) The witnesses/tellers' opportunity to view the robbery suspect, averaged 1-2 minutes, 4-30 seconds, only briefly, and a good side profile; 2.) The witnesses/tellers' degree of attention paid to the robbery suspect, less than two minutes and briefly; 3.) The accuracy of the prior description of the robbery suspect, the witnesses/teller's described the robbery suspect with inconsistance variations of ages and heights; 4.) The Witnesses/teller's gave nò 100% level of unquestionable certainty; 5.) The length of time between the crime and the conforntation, 15-17 months,

which constitutes excessive length of time. Here, on its face, the February 13, 27, 2006, and March 2, 2006 photographic identification procedure and its results, only substantiates petitioner's constitutional standing and due process rights to an independent in-custody corporeal line-up prior to the in-court identification, which constitutional standing was denied petitioner by the trial court on May 15, 2006. See Ex.5. As stated by the State, that "...Ultimately, the only issue in this case is "identity". See RP (05/09/07/) 47 at 18-19. Here, petitioner reiterates, can the State demonstrate from the record, pursuant to cause number 06-1-03538-7, an independent origin or extenuating circumstance justifying their use of State's exhibit 15 to assist witnesses/tellers' with their in-court identification of petitioner? Also, is there clear and convincing evidence justifying the trial court's denial of petitioner's May 15, 2006 discovery order pursuant to CrR 4.7? "..., the in-court identification is proper if it has an independent origin...". State V.Hilliard, Supra. Here in the Hilliard court's at 440 concerning an independent origin, the court held:

"...Here the witness recognized the defendant prior to the assault, and spent several minutes talking with him. The victim had ridden with the defendant for 30 to 45 minutes a few months earlier and was with him on another occasion for about 5 minutes. These factors lead us to conclude that the in-court identification had an independent origin and was properly admitted..."

In petitioner's case now before this court, the record will show, that the only independent origin, pursuant to cause number 06-1-03538-7 is the February 13, 2006 photographic montage identification procedure conducted by Detective Aakervik, which was triggered as a result of an alleged demand-note founded on petitioner's person incident to the February 9, 2006 VUCSA arrest. See Ex.7

"Due Process Clause of its own force does not require State to adopt discovery procedure for the benefit of criminal defendants, but in the absence of a strong showing to State interest to the contrary, any discovery procedure adopted must be a two-way street."

Wardius V. Oregon, 412 U.S. at 2212-13

"State could not, under due process clause force compliance with its notice of alibi [or discovery] statute on the basis of a totally unsubstantiated possibility that the statute might be read in a manner contrary to its plain language, which afforded no reciprocal discovery right to defendant."

Wardius V. Oregon, 412 U.S. at 2214.

According to State V. Boot, Supra at 219 citing Wardius V. Oregon, the denial of petitioner's discovery order for a line-up did not constitute harmless error; therefore, petitioner respectfully requests this court to reverse the conviction pursuant to cause number 06-1-03538-7 and dismiss without prejudice.

SUMMARY OF THE ARGUMENT:

The testimony of the State's witness, informant/jailplant, Kevin Olsen violated petitioner's Sixth Amendment right of the U.S. constitution, and the Massiah's Doctrine. Which danger of unfair prejudice outweighed the Probative value of allowing the self-serving uncollaborated testimony of State's witness Kevin Scott Olsen during petitioner's trial.

2. Five months after adversary proceedings had been initiated against petitioner, the State on September 1, 2006, incident to an interview with a F.B.I. source/informant, to-wit, Kevin Olsen, who allegedly informed the interviewing F.B.I. agents and (SPD) Detective Aakervik that he, Mr. Olsen was housed in the same cell/units at the King County Jail with petitioner Raymond D. McCoy, and that he, (1) Had regular contact with McCoy (petitioner) and knew he (petitioner) was defending himself on bank robbery charges; (2) McCoy admitted to him that he robbed some banks and used the money to buy

cocaine, that he was arrested for narcotics, and the police founded a demand-note on him; and Mr. Olsen informed Detective Aakervik about petitioner's Pro-Se work-product. See Ex.9. On September 21, 2006 the handwritten and recorded statements taken from Mr. Olsen on September 11, 2006 was disclosed to petitioner through stand-by counsel. See Ex.10, also RP (02/22/07/) 34 at 14-18. On December 14, 2006, the facts concerning the circumstance leading to the September 1,11,2006 interviews with Mr. Olsen was disclosed to petitioner. See RP (02/22/07/) 73-74 at 1-11.

As stated by Mr. Olsen in his written and recorded statements, we [petitioner and Mr. Olsen] helped and spend time going over and discussing legal research and trial defense strategies. During these Pro-Se trial preparations, Mr. Olsen was allowed for the purpose of assisting petitioner with defense strategies and trial preparations, to view petitioner's discovery files, to-wit, witnesses statements, police reports, and expert witnesses correspondents pursuant to the robberies allegations. See EX.11

After the interview with Mr. Olsen on September 1, 2006 Mr. Olsen informed the State that he would return back to the Jail and will continue his relationship with petitioner, and contact the State (Detective Aakervik) if he obtain further information. Here the record on its face reflects a prima facia showing that the State was clearly aware of Mr. Olsen's surreptitiously intentions to return back to the Jail as an undisclosed undercover informant, to continue a relationship with petitioner for the purpose of obtaining further information of the pending robberies allegations, pursuant to cause number 06-1-93538-7.

"...Proof that State must have known taht statement from accused in absence of counsel suffices to establish Sixth Amendment violation.". Maine V. Moulton, 474 U.S. 159, 106 S.Ct. 477 (1985). The State was clearly aware that Mr. Olsen

and petitioner was engaged in legal research, discussing defense and trial strategies pursuant to pending robberies allegations. Mr. Olsen also informed the State that petitioner was proceeding Pro-Se. See Ex.9

"...State knew that defendant and co-defendant were meeting for the express purpose of discussing pending charges and planning defense, and thus knew that defendant would make statement that he had constitutional right not to make to State agent prior to consulting with counsel. 474 U.S. at 477."²

"...At the least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." 474 U.S. at 478-79, citing, Spano V. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959); Massiah V. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); United States V. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

In Spano V. New York, Supra, the defendant, who had already been indicted was coercively interrogation by police until the early morning despite his repeated requests to see his lawyer. 474 U.S. at 484. The position of the concurring Justices in Spano was adopted by the court in Massiah V. United States, Supra, ...Massiah made several incriminating statements, and those were brought before the jury through the testimony of the Government agent. We reverse Massiah conviction on the ground that the incriminating statements were obtained in violation of Massiah right.....

² Although petitioner addressed the issues surrounding the note taking during the interviews with Mr. Olsen by Detective Aakervik, See RP (02/22/07/5) 16 at 6-15, petitioner was denied the right to effective cross-examine Detective Aakervik concerning the depths of information pertaining to petitioner's Pro-Se work-product, because all notes was destroyed from both September 1, 11 2006 interviews with the State's witness Mr. Olsen.

under the Sixth Amendment. 474 U.S. at 484-85. We applied this principle most recently in United States V. Henry, Supra, were the court held:

"...Henry was arrested and indicted for bank robbery, counsel was appointed and Henry was held in jail pending trial. Nicholse, an inmate at the same jail and a paid informant for the Federal Bureau of Investigation, told a Government agent that he was house in the cellblock as several Federal prisons, including Henry. The agent told Nicholse not to intiate any conversation and not to question Henry regarding the bank robbery. Nicholse and Henry subsequently engaged in some conversation during which Henry told Nicholse about the robbery. Nicholse testified about these conversation at Henry's trial, and Henry was convicted."

An accused speaking to a known Government agent is typicall aware that his statement may be use against him. The adversary position at that stage are well established; the parties are then "arms' length" adversaries. When the accused is in the company of a fellow inmate who is acting by prearrangement as a Government agent, the same cannot be said. United States V. Henry, Supra, at 2188-89. Here the trial court's ruling that there were a waiver, See RP (02/23/07/) 30 at 6-18, this ruling is contrary to the decision in United States V. Henry, Supra, which states:

"...Moreover, the concept of a knowing and voluntary waiver of Six Amendment right dose not apply in the context of communication with an undisclosed under-cover informant acting for the Government. See Johnson V. Zerbst, 304 U.S. 458, 58 S. Ct. L.Ed 1461 (1938).¹³ Prior to Henry, this court held that

¹³

Here petitioner cites the Henry court in analysis, that petitioner was charged with bank robbery, in dicitum that the F.B.I.'s source/informant Kevin Scott Olsen was housed in the same cellblock with petitioner, and running on all four that

to establish a violation of Massiah defendant must show that he suffered prejudice at trial as a result of evidence obtained from interrogation outside the present of counsel". See United States V. Bagley, 641 F.2d 1235 (9th Cir 1981), Citing U.S. V. Glover, 596 F.2d 857, 862-64 (9th Cir) 444 U.S. 860, 100 S. Ct.124, 62 L.Ed.2d 81 (1979); U.S. V. Irwin, 612 F.2d 1182, 1186-87 (9th Cir 1980) Accord, U.S. V. Sander Supra [615 F.2d 215, 219 (5th Cir 1980)]; U.S. V. Kilrain, Supra, [566 F.2d 979, 982 (5th Cir), cert. denied, 439 U.S. 819, 99 S. Ct. 80, 58 L.Ed.2d 109 (1978)]; U.S. V. Woods, 554 F.2d 242 (6th Cir 1976), cert, denied, 430 U.S. 969, 97 S. Ct. 1652, 52 L.Ed.2d 361 (1977); U.S. V. Meinster, 478 F.Supp. 1131 (S.D. Fla 1979). Here in petitioner's case now before this court, petitioner sustained prejudice, by the State presenting the testimony of jail/plant informant Mr. Olsen to summarize his past and present criminal history before the jury. See RP (05/07/07/) 49 at 1-9. Petitioner sustained prejudice by Mr. Olsen's testimony concerning conversations with Petitioner in-custody, after his (Mr. Olsen) prearrangement with the State on September 1, 2006 pertaining to petitioner's Pro-Se work-product, to-wit, trial preparations and defense strategies. See RP (05/07/07/) 64 at 66

13 CONT'D

Mr. Olsen and petitioner engaged in conversation about the pending robbery charges, and Mr. Olsen testified about those conversations at petitioner's trial. Petitioner would like to point out to the reviewing court, is that the ultimate issues which distinguish petitioner's case from the Henry court, is the third party intrusion into petitioner's Pro-Se work-product. And the danger of unfair prejudice which outweighed the probative value of allowing Mr. Olsen to testify during petitioner's trial.

16-25. Petitioner sustained prejudice by Mr. Olsen testimony which made reference and inference to inadmissible evidence, to-wit, an alleged bank demand-note.²¹ "...If you [Mr. Olsen] could make sure the jury doesn't see the note..." See RP (05/07/07/) 58 at 5-8 and 60 at 10-13.

Here petitioner shows that he suffered prejudice as a result of Mr. Olsen's self-serving uncollaborated testimony. Further, the trial court concedes as much by stating on the record, "...In terms of whether there's been prejudice to you [petitioner], of course there's been material prejudice to you..." See RP (02/23/07/) 35 at 15-19.

The interview with Mr. Olsen on September 11, 2005, allegedly after the September 1, 2006 interview, violated petitioner's Sixth Amendment right, Mr. Olsen testimony pertaining to pending robbery allegations and petitioner's Pro-Se work-product, denied petitioner a fair trial, and constituted a violation of the Massiah Doctrine pursuant to Massiah V. United States, Supra. Therefore petitioner respectfully requests this court to reverse the conviction pursuant to cause number 06-1-03538-7 and dismiss without prejudice.

²¹

According to the State, the alleged bank note recovered from petitioner person on February 9, 2006, See Ex. 1, 2, 7, it was this note the State considered its chief evidence and corpus delicti as the nexus to petitioner and three counts of first degree bank robberies. See RP (04/30/07/) 19 at 1-4 and 24 at 20-22, see also RP (05/08/07/) 159 at 11-16. This evidence presented at petitioner's trial for admission as State's exhibit 1. was denied. see RP (05/01/07/) 15 at 1-3.

SUMMARY OF THE ARGUMENT:

The jury was misled by the mis-representation of the State's rebuttal evidence, to-wit, the Key Bank's surveillance tape, and material facts surrounding the contents of the surveillance tape which was withheld from the jury and prejudicial effects of this withheld information denied petitioner a fair trial.

3. Before resting defense case-in-chief, petitioner was advised by defense counsel to take the stand, and give rebuttal testimony to State's witness/jailplant informant Mr. Olsen. During petitioner's testimony petitioner testified , that on February 13, 2006 arround 10:00am to 10:30am petitioner stopped at the Key Bank to exchange cions for U.S. paper currency. After checking on petitioner's mail at the Social Security Office, which is just above the Key Bank that's located in the same building. See RP (05/08/07/) 96 at 8-10 and 98 at 1-5.³¹

After testifying on May 8, 2007, the State contacted Mr. Eric Blank on the morning of May 9, 2007 requesting the original surveillance tape, which petitioner, proceeding Pro-Se had the trial court release for pretrial examination. See Appendix G. This evidence, to-wit, the Key Bank's surveillance tape was admitted and presented for the jury's viewing as best evidence, in rebuttal to petitioner's testimonial statement about entering the Key Bank on February 13, 2006 to exchange cions for paper currency.

31

Proceeding Pro-Se, petitioner assigned an approved private investigator six months before trial, to contact homeless organizations and detox centers to establish possible alibis, between December, 2005 to February 13, 2006. See Ex.17. Petitioner turnedover documents from DSHS to defense counsel confirming that petitioner had been approved for out-patient substance abuse treatment, starting date: February 10, 2006 ending date: May 10, 2006. See also EX.17.

"To lay a proper foundation for the use of video tape for testimonial (as opposed to merely demonstrative) purposes, the proponent must show that the video in fact shows what it purports to show; it must be clear. State V. Hewett, 86 Wn.2d 487, 492 n.4, 545 P.2d 1201 (1979) (Citing State V. Williams, 49 Wn.2d 345, 360, 301 P.2d 769 (1956)). If it does not show what it purports to show then the video, and testimony derived from it, are not probative."

Here, viewing the evidence here in light most favorable to the State, does the State's exhibit 59, the Key Bank's surveillance tape from the February 13, 2006 supports, (1) The suspect's hand is on or touching the teller's counter; (2) The suspect passed the teller a note and plastic bag, beyond a reasonable doubt?

After giving up petitioner's Pro-Se status, and before trial, petitioner turned over to Mr. McKay (attorney of record) the report from Mr. Eric Blank. See Ex.14. Which concluded, after examining the surveillance tape from the February 13, 2006 Key Bank incident, that, a) The tape gives little information; b) That 90% or more of the recording was missing; and c) The system was in disrepair.

During petitioner's trial, to rebuttal petitioner's testimony, which petitioner testified to stopping at the Key Bank the morning of February 13, 2006; the State presented State's exhibit 59, the Key Bank's surveillance tape, and Detective Aakervik testimony to prove that petitioner wasn't at the Key Bank before the robbery took place at 3:22pm. The prejudice petitioner sustained, by defense counsel not calling Mr. Eric Blank to testify in rebuttal to the presentation of State's exhibit 59, outweighed its probative value. Denying petitioner a

fair trial and misleading the jury by allowing the jury to view the video as best evidence. Therefore, petitioner respectfully requests this court to reverse the conviction pursuant to cause number 06-1-03538-7 and dismiss without prejudice.

SUMMARY OF THE ARGUMENT:

The evidence presented to the fact finder was misrepresented and insufficient, there by, undermining the guilty verdict of three counts of first degree robberies.

4. On Febraury 9, 2006 petitioner was arrested for allegedly delivering a controlled substance to an undercover Seattle Police Officer. Incient to the arrest the arresting officer founded what appeared to be a bank deman-note on petitioner's person. It was this alleged bank deman-note that resulted in, 1.) That petitioner became a robbery suspect; 2.) A photographic montage identification of petitioner; 3.) An alleged match of petitioner's right palm print dusted and lifted from a teller's window/counter top; 4.) The testimony of a jailplant/informant, and 5.) The viewing of a surveillance tape. This evidence convicted petitioner of three counts of first degree bank robberies.

Corpus Delicti. Every person charged with the commission of a crime is presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt. R.C.W. 58.020.

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged. In re Winship, 397 U.S. 358, 364 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). "The corpus delicti of every offense is made up of two elements: First, the existence of a certain act or result forming the basis of the crime charged. Second, the existence of criminal agency as the cause of this act or result. State V. Gates, 28 Wash. 689, 69 P. 385 (1902). Only when these factors are established do we inquire

as to the identity of the person who committed the criminal act." Here in petitioner's case now before this court, the record is clear on its face that the chief evidence originally relied on by the State as corpus delicti to show the criminal agency of first degree robbery, was the alleged bank demand note founded on petitioner, incident to the February 9, 2006 VUCSA arrest. The State concedes as much here on the record that it was in fact relying on this evidence (bank demand-note) as corpus delicti of the offenses charged and a logical nexus to three counts of first degree bank robberies.

"This,...And I believe it was this note on the defendant which really triggered the police officers' focus on him [petitioner] as a suspect in this string of bank robberies..." See RP (04/30/07/) 19 at 1-4. "...And so, again, we're not-- this is very probative critical evidence [alleged bank demand-note State's pretrial exhibit No.1] in this case and we would ask the court to allow this in...". See RP (04/30/07/) 24 at 20-22, "...I think I keep going back to that [State's pretrial exhibit No.1] and I guess I am --we haven't rested yet and I guess just going back to it, I am--I am concerned because it is such compelling evidence, you know, in regard to common scheme or plan that this evidence is so relevant in regard to-- I think the problem that we find ourselves in, if I were sitting on a jury--as a juror in this case, I think this where I come from. If I were sitting as a juror in this case, I think my natural question would be, why did they--A, why did they--what focused their attention on Mr. McCoy; and ultimately, they didn't just pick him out of thin air. ...And I think it really--what it does is it gives the jury such a tunnel vision or telescoped view of the case". See RP (05/08/07/) 159 at 2-19.

Although this alleged demand-note was on the back of a letter from the Social Security Office addressed to the petitioner, Ms. Hannah McFarland, (Handwriting Examiner) would have testified, that after examining the note,

that petitioner was not the author of the alleged bank note. See Ex.15. Although the State witness stated that she would be able to identify the robbery suspect if she were to see him again, on May 15, 2006 petitioner was denied a discovery order requesting an in-custody line-up. See Exs.5&14.

There are no clear and convincing evidence in the record to support the State's claim that the alleged lifted palm-print was lifted from said location. This alleged dusted print from the Key Bank incient was the State's nucleus in its case-in-chief, which resulted in a guilty verdict of three counts of first degree bank robberies. During petitioner's trial the State presented a number of quality photographs of the tellers' counters and windows, but not one photo of the alleged lifted print.²¹ See Ex.16. Also, the alleged lifted print card was not initial by another officer other than the officer who dusted the print, this initialing would have shown the authentication of the alleged dusted and lifted area.

Circumstantial evidence. An insufficiency of the evidence may arise from a lack of presuasive force or the inconclusive nature of the evidence.

Preston Mill Co. V. Department of Labor & Indus, 44 Wn.2d 532, 536, 268 P.2d 1017 (1954). The State is correct that circumstance evidence is as good as

121

The record reflects a prima facie showing that Mr. McKay (then stand-by counsel) before being assigned attorney of record, were clearly aware of petitioner's motion to severance, resevred, and renew a motion to severance, after the State's case-in-chief. See Rp (12/14/06/) 36 at 8-17, and RP (02/23/07/) 43 at 13-24. Defense counsel's failure to renew petitioner's motion to severance, which probative vaule or trial tactics was outweighed by the danger of unfair prejudice, and denied petitioner due process of law pursuant to the Fourteenth Amendment of the U.S. constitution.

direct evidence. But "circumstance evidence" does not mean "inconclusive and unpersuasive direct evidence." The trier of fact cannot resort to mere theory conjecture to choose between equally reasonable inferences from facts, under only one of which the defendant would be liable. Harrison V. Whitt, 40 Wash.App 175, 177, 698 P.2d 87, review denied, 104 Wn.2d 1009 (1985); Pepper V. J.J. Welcome Constr. Co., 73 Wash.App 523, 547-48, 871 P.2d 601, review denied, 124 Wn.2d 1029 (1994). Here the record will show on its face that the chief evidence that turned the petitioner's trial was the jury's viewing of State's exhibit 59. (the Key Bank's surveillance video tape) during rebuttal cross-examination.

Therefore, to lay a proper foundation for the use of video tape to preserve testimonial evidence, the proponent essentially must meet the requirement of State V. Williams, 49 Wash.App 354, 360, 301 P.2d 769 (1956). That is, (1) That the video and audio portion of the video tape are functioning properly; (2) the operator is trained and experienced in the use of video taping equipment; (3) the audio and visual portion of the recording are authentic and accurate; (4) no changes, addition, or deletions have been made; (5) the video tape has been properly preserved; (6) the video portion is clearly visible and the audio portion sufficiently understandable; and (7) the speakers must be identified. See Hewett at 496, Supra, citing State V. Williams, Supra.

Here the record will show that the State did not meet the requirements in State V. Williams, Supra, therefore the admissibility of State's Ex.59 violated petitioner's Sixth Amendment right, and denied petitioner a fair trial.

Therefore, petitioner respectfully ask this court to reverse the conviction pursuant to cause number 06-1-03538-7 without prejudice.

SUMMARY OF THE ARGUMENT:

Petitioner received ineffective assistance of counsel during the critical stages of pretrial CrR 3.5 hearing and trial proceedings.

5. To the extent of defense counsel failure to move the trial court to suppress the alleged statements made to State's witness/informant that petitioner confessed to robbing banks, and the testimony of Mr. Olsen which probative value was outweighed by the danger of unfair prejudice. See RP (04/30/07/) 3 at 21-25 and 4-5. Defense counsel advising petitioner to testify before resting defense case-in-chief. See RP (05/08/07/) 92 at 14-25 and 93 at 1-5, see also RP (05/09/07/) 39 at 18-23. Defense counsel failure to challenge the admissibility of mis-represented and damaging evidence, to-wit, the Key Bank's surveillance tape. See RP (05/09/07/) 12 at 16-25. Defense counsel failure to call or turn over Mr. Eric Balnk (video analysis expert) report and conclusion of his examination of State's exhibit 59. See RP (05/09/07/) 4 at 1-5, denied petitioner effective assistance and representation of counsel.

To prevail on an effective assistance claim, trial counsel conduct must have been deficient in some respect. Strickland V. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Here not only did defense counsel not move to suppress Mr. Olsen's statements, which he alleged petitioner confessed to robbing banks, but advised petitioner to take the stand before resting defense case-in-chief, which consisted of the testimony of Mr. Geoffrey Loftus, who testified on behalf of defense concerning the biased and suggestive photo-montage, which defense counsel also failed to argue petitioner's pending motion to suppress photo ID pursuant to CrR 3.6. See RP (05/22/07/) 6 at 17-19.

Defense counsel (Mr. McKay) failed to call Mr. Eric Blank to give material testimony in rebuttal to the State's mis-representation of the Key Bank's surveillance tape. On December 15, 2006, petitioner's pretrial discovery

record will show that Mr. McKay (than stand-by counsel pursuant to cause number 06-1-03538-7) had a telephone conference with Mr. Eric Blank regarding his examination of the Key Bank's surveillance footage. See Ex.14. First on December 15, 2006 and again on January 1, 2007, regarding the status of, and after preparing memorandum regarding video footage, and suggested cross-examination questions. See against Ex.14. Here from the record petitioner will establish a prima facie showing that, (1) Defense counsel's performance during critical stages of petitioner's trial was deficient; (2) That petitioner was prejudiced by the unprofessional deficient performance.

(a) Although petitioner was denied a motion to dismiss pursuant to CrR 8.3, for Mr. Olsen's (State's witness/informant) third party intrusion into petitioner's work-product, proceeding Pro-Se, this in its self did not bar defense counsel from moving to suppress Mr. Olsen's testimony, which probative value was outweighed by the danger of unfair prejudice, after the trial court open the door for defense counsel to argue the admissibility pursuant to CrR 3.5. See RP (04/30/07/) 4 at 20-21. This trial strategy by defense counsel falls below an objective standard of reasonableness, denying petitioner due process and effective assistance of counsel pursuant to the Sixth Amendment of the U.S. constitution and Article 1, § 22 of the Washington State constitution. As a result of defense counsel's deficient performance petitioner's sustained prejudice, from Mr. Olsen's prejudicial, self-serving and uncollaborated testimony, which was a violation of the Massiah Doctrine pursuant to Massiah V. United States, Supra.

(b) Defense counsel, according to the understanding between petitioner and defense counsel, was to rest defense case-in-chief after the testimony of Mr. Geoffrey Lotus (photo-montage expert), however, during recess before the

completion of Mr. Lotus's testimony, petitioner was advised by defense counsel, against petitioner's better judgement, to take the stand to give rebuttal testimony to Mr. Olsen's statements. This opened the door to evidence which Mr. McKay was clearly aware of the status and circumstance surrounding the evidence used by the State to rebuttal petitioner's testimony which petitioner testified to stopping by the Key Bank on the morning of February 13, 2006. This evidence, to-wit, the Key Bank's surveillance tape, placed petitioner's creditability at issue; nevertheless, without objecting the State was allowed to present this evidence to the jury as best evidence. Here also, the trial strategy by defense to use a State witness, and not call Mr. Eric Blank in rebuttal, during this critical stage of petitioner's trial clearly falls below an objective standard of reasonableness, and constitutes deficient performance, which petitioner sustained prejudice, resulting in a denial of due process and effective assistance and representation of counsel pursuant to the Sixth and Fourteenth Amendment of the U.S. constitution and Article 1, § 22 of the Washington State constitution.

During cross-examination defense counsel allowed the prosecutor, without objecting, to interrogated petitioner about the Key Bank's surveillance tape and Mr. Eric Blank's conclusion and report, which clearly constitutes burden shifting. See RP (05/08/07/) 114 at 5-25 and 115 at 1-11. Defense counsel aware of the circumstance surrounding Mr. Lee's termination for embezzling \$10,000.00 from the Key Bank, which he force balanced his journal not to be detected; however, the State was allowed to submit Mr. Lee's journal. See State's Ex.58. without any objection from defense counsel, to the jury for and during deliberation. See RP (05/08/07/) 126 at 12-15 and 127 at 10-14.

Defense counsel knowing the facts concerning the disrepair of the Key Bank's surveillance tape, without objection allowed Detective Aakervik

on direct-examination to give testimony before the jury about the time functioning and contents of the Key Bank's surveillance tape and Mr. Lee's [journal] balance sheet, misleading the jury with unliable facts and testimony. See (05/09/07/) 26 at 1-18. Here most critical and damaging is defense counsel failure to turn over Mr. Eric Blank's examination report of his examination and conclusion of the Key Bank's surveillance tape. See RP (04-30-07-) 10 at 8-17., here Mr. McKay (defense counsel) knowingly allowed the State to mislead the trial court and the jury to believe that State's Ex.59 (Key Bank's surveillance tape) showed the entire day of February 13,2006. which is contrary to Mr. Eric Blank's examination and conclusions of State's Ex.59, which he reports that 90% or more of the recording from that day is missing. Finally, defense counsel allowed the State's witness Mrs. Yen H. from the Key Bank to commit perjury on direct-examination, without impeaching her creditability, when asked, why she was no longer working at the Key Bank? which she replied, she decided to move on, not that she was clearly terminated for violating company policies:

"...No, your honor, that's related to the investigation of the employees [Mr. Lee and Mrs. Yen H.], and the reason those employee were terminated from the Bank [Key Bank]. It is my understanding that the defendant [petitioner] has sought this information for potential impeachment purposes as well..."

See RP (12/14/06) 9 at 17-22.

In Rice V. Marshall, 816 F.2d 1126, 1132 (6th Cir 1987) the court held:

"...The magistrate found that counsel's failure to object or seek suppression of evidence of the weapon constituted a procedural default which would foreclose consideration of the double jeopardy issue unless "cause" and "prejudice" were established, citing, Wainwright V. Sykes, 433 U.S. 72 53 L.Ed.2d 594 S. Ct. 2497 (1977). The magistrate then found that the

appointed attorney had rendered cause for the procedure default and that Rice was clearly prejudiced by his attorney deficient performance". Rice V. Marshall, Supra. Here before and during petitioner's trial, defense counsel failure to move the suppress the testimony of Mr. Olsen or object to the mis-representation of State's Ex.59, clearly prejudiced and denied petitioner effective representation of counsel pursuant to the Sixth Amendment of the U.S. constitution.

In addition to establishing that his attorney performed deficient, Jacobs must demonstrate that he was prejudice by **counsel's** error. See Strickland, 466 U.S.at 694. The prejudice component requires Jacobs to show "that there is a reasonable probability that , but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. Jacobs need not show that counsel's deficient performance "more likely than not altered the outcome in the case" -- rather, he must show only "a probability sufficient to undermine confidence in the outcome." Id. at 693-94. This standard is not "a stringent one". Jermyn V. Horn, 266 F.3d 257, 282 (3rd Cir 2001)(quoting Bake V. Barbo, 177 F.3d 149 (3rd Cir 1999)). See Jacob V. Horn, 395 F.3d 100 (3rd Cir 2005).

Every defendant has the right to a fair trial, which is guaranteed both by the Federal and State constitution. United States constitution Sixht Amendment; Washington State constitution Article 1, § 22. Cumulative trial error may deprive a defendant of this right. State V. Coe, 101 Wn.2d 772, 789, 684 P.2d 688 (1984); State V. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963). See also Boles V. Foltz, 816 F.2d 1126, 1132 (6th Cir 1987)(ineffective

failure to move to suppress); Holsclaw V. Smith, 822 F.2d 1041
(11th Cir 1978)(failure to argue the insufficiency of the evidence
was ineffective); Osborn V. Shillinger, 816 F.2d 612 (10th Cir
1988)(Abandoned duty to loyalty to client.).³¹

Do to cumulative trial errors presented above by petitioner in this brief, petitioner ineffective assistance claims meets the two elements in Strickland V. Washington, Supra, (1) The defense counsel's performance was deficient; (2) Do to the unprofessional performance of defense counsel, petitioner sustained prejudice, which denied petitioner a fair trial, and violated petitioner's due process and rights to effective assistance and representation of counsel pursuant to the Sixth Amendment of the U.S. constitution and Article 1, § 22 of the Washington State constitution.

Therefore, petitioner respectfully asks that this court reverse and dismiss without prejudice the convictions pursuant to case number 06-1-03538-7.

E. CONCLUSION:

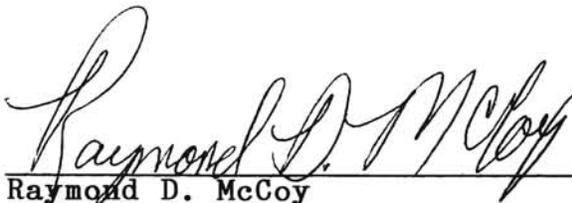
On May 15, 2006 petitioner was denied exculpatory discovery pursuant to CrR 4.7, to-wit, a corporeal lineup. This denial of exculpatory discovery undermined the May 1-2, 2007 in-court identi-

³¹

During direct-examination of State's witness Mr. Daniel Read (support employee) defense counsel failure to ask State's concerning State's Ex.59, (1) Were you able to determine did the suspect's hand ever touched the counter?; (2) Were you able to determine did the suspect passed a note or plastic bag to the teller?; (3) Were you able to determine if the time functioning was current and functioning properly? See RP (05/09/07/) 3 at 23-25 and 4 At 1-5.

fication of petitioner which was tainted by the impermissively suggestive photographic montage created by Detective Aakervik on February 13, 2006. During trial the withheld material facts of the evidence and the prejudicial testimony of Mr. Olsen, denied petitioner a fair trial. The record on its face is sufficient to demonstrate and establish that petitioner recieved ineffective assistance and representation of counsel, and that petitioner was prejudiced by counsel's deficient preformance. View in the light most favorable to the Satae, the evidence relied on can not clearly and convincingly, show a corpus delicti, or logical nexus to support beyond a reasonable doubt each and every element to the crime charged pursuant to cause number 06-1-03538-7. Finally, do to the number of defense counsel's trial errors and mis-representation of the evidence, undermined the confident in the outcome of the trial. Therefore, this court should vacate the prosecution and dismiss.

Submitted: this 12 day of June, 2008


Raymond D. McCoy

Petitioner

PETITIONER'S LIST AND PAGE REFERENCE TO EXHIBITS

PAGES:

EXHIBITS:

- # 1&2, (Officer Wayne Johnson's arrest report and Booking photographs).....4
- # 3, (Detective Aakervik's Continuation Sheet(Master)).....4
- # 4, (Information and Certification of Probable Cause, pursuant to cause number 06-1-03538-7)..... 5,16
- # 5, (Pro-Se requesting order for lineup; order denying motion for a lineup).....5,7,9,19,30
- # 6, (Order denying motion to dismiss; Appendixs A & B (motion and brief in support of motion to dismiss)).....19
- # 7, (Alleged bank deman-note on the back of a Social Security Adminstration letter addressed to petitioner).....6,19
- # 8, (Photo-montage; Pro-Se motion and brief in support of motion to supress photo ID).....6
- # 9, (Detective Aakervik Continuation Sheet of the interviews with Mr. Kevin Scott Olsen on September 1,11, 2006).....21,22
- # 10, (Kevin Scott Olsen's written and recorded statements).....21
- # 11, (Discovery viewed by Mr. Olsen, when assisting petitioner proceeding Pro-Se, see also Ex.3).....21
- # 12, (Pro-Se pretrial motion to renew motion to severance and Pro-Se pretrial evidentiary discovery of State's witnesses Mr. Lee and Mrs. Yen, see also petitioner's brief in support OF PRP at page 34.).....34
- # 14, (Pro-Se motion requesting expert services for pretrial examination of the Key Bank's surveillance tape; report and conclusion from (VIDEO ANALYSIS EXPERT), Mr. Eric Blank).....27,30,33
- # 15, (Ms. Hannah McFarland (HANDWRITING EXAMINER), report and conclusion verifying petitioner was not the author of the alleged bank deman-note).....30
- # 16, (Pat A. Werthiem, (PALM-PRINT EXPERT), conclusion and advice on defense of ligitimate access).....30
- # 17, (DSHS documants of petitioner's ADATSA beginning and ending dates for substance abuse treatment).....27

2006 JUN 17 11:25

Ex 142

Exhibit 142

2008 JUN 17 11:27
FBI - MEMPHIS



SEATTLE
POLICE
DEPARTMENT

STATEMENT FORM

INCIDENT NUMBER 06-056860
UNIT FILE NUMBER

DATE 2/9/2006	TIME 2245	PLACE Seattle PD-East
------------------	--------------	--------------------------

STATEMENT OF COMPLAINANT WITNESS VICTIM OFFICER OTHER

NAME (LAST, FIRST, M.I.) Officer W. Johnson #5653	DOB
--	-----

On the above listed date I was working as an arrest team officer assisting Seattle Police Department West Precinct ACT and DEA with a narcotics buy bust in the area of Pioneer Square. At 2202 hours I was advised by an observation officer that a good buy had just occurred meaning that an undercover officer/agent had just purchased narcotics and had given a good buy signal indicating the completion of the transaction. The observation officer instructed us to move in to locate and arrest the described suspects on South Washington Street in the 150 block. The suspects were standing on the north side of the street near an alleyway. The suspects were described as a B/F wearing a pink hoodie, a tall B/M with a blanket wrapped around his shoulders wearing a hat. Upon arriving in the area, I observed the tall B/M with the blanket on his shoulders standing behind the B/F wearing the pink hoodie. I got out of the vehicle and approached the suspects stating, "Seattle Police, Get down on the ground!" The suspect got down on the ground and I placed him under arrest. As I attempted to handcuff the suspect, I had to move his left hand from underneath his body to handcuff him. Once the suspect was handcuffed I rolled him over to check him for weapons and I located a \$20.00 bill that was underneath his body. I collected the money and compared it to the copy of the buy money that I was given during the briefing. I matched the money to one of the twenties that was on the original handout sheet. I transported the suspect to the Seattle Police West Precinct and conducted a strip search. I did not locate any other items of evidence on his person. I photocopied the twenty that I collected from underneath the suspect and returned it to the operation supervisor. I also located a handwritten note from the suspects left front pants pocket that appeared to be a bank robbery note. I packaged the copy of the buy money and the original handout and the handwritten note for evidence submission. The suspect was identified as McCoy, Raymond D. B/M/08-10-1959. EOS.

W. Johnson #5653

X *W. Johnson #5653*

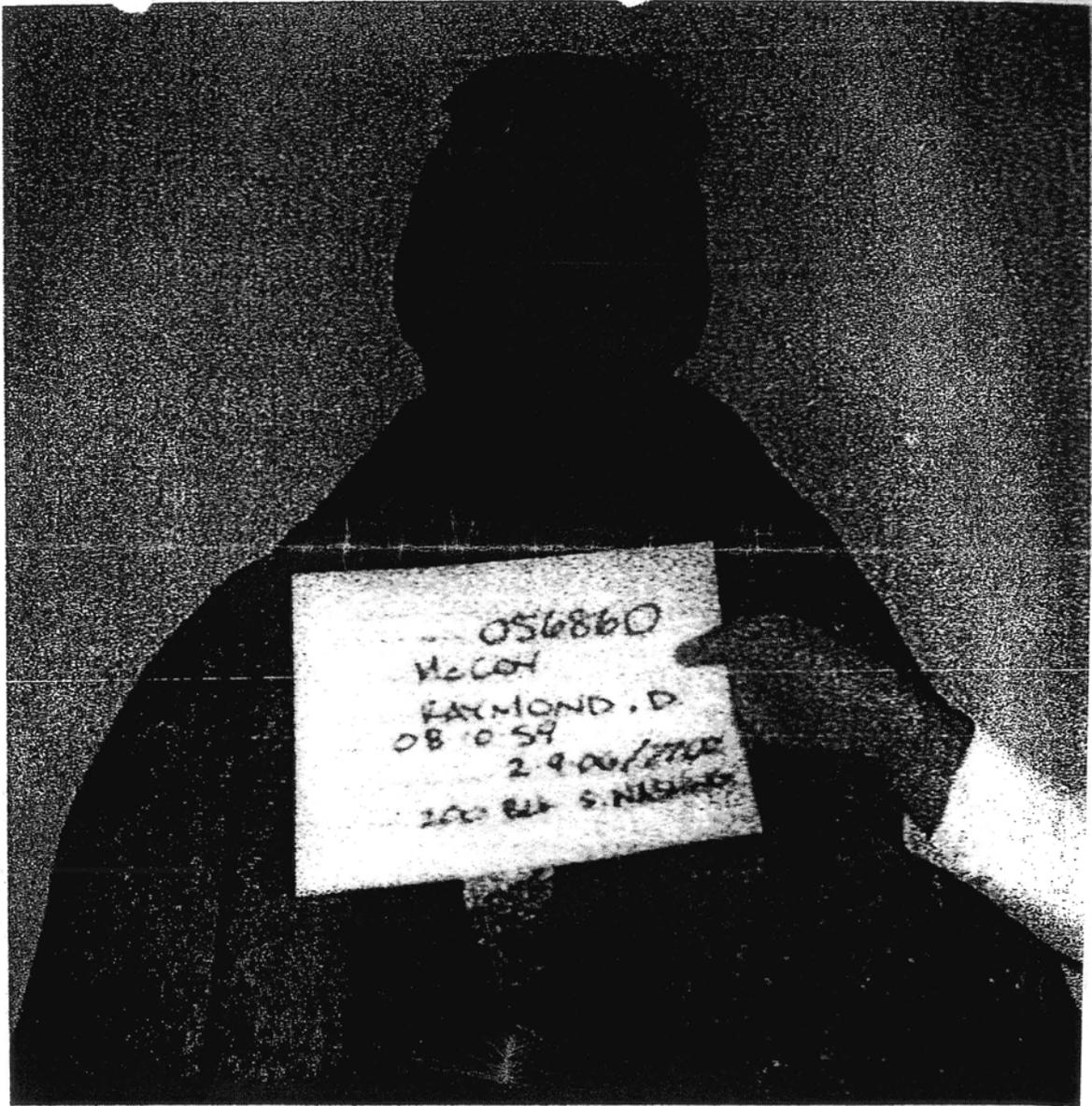
WITNESS	STATEMENT TAKEN BY W. Johnson	SERIAL 5653	UNIT 664
WITNESS	TRANSCRIBED BY (Taped / Translated Statements)	SERIAL	UNIT
		SUPERVISOR	SERIAL

DEFENDANT EXHIBIT

7



Exhibit (K)



056860
McCOY
RAYMOND, D.
08 '0 59
2900/2700
200 BL S. N. 15000



Ex 3

Exhibit 3.

FILED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
2008 JUN 17 AM 11:25



CONTINUATION SHEET

#10

INCIDENT NUMBER 05-547018 (Master)
UNIT FILE NUMBER 91A-SE-92016

ITEM OR ENTRY	INCIDENT INCIDENT AND ARREST ARREST ONLY	FOLLOW-UP TRAFFIC / COLLISION SUPERFORM	OTHER: (specify)	PAGE 2 OF 5
---------------	--	---	------------------	-------------

- 1 12-27-05 1323 hr. A B/M suspect entered the Sterling Savings Bank and made a verbal demand for money. The VT complied and the suspect fled the bank on foot (See SE-16, FD-430 and SPD Incident report for details).
- 2 12-28-05 1400 hr. Received bank surveillance CD from SA Carr. I delivered the CD to the FBI Photo Lab and requested that photos be created.
- 3 12-28-05 1545 hr. E-mail to SPD Communications requesting 911 CD surrounding this incident.
- 4 12-29-05 1345 hr. Created PSVCTF bulletin (05-47) and distributed to SPD via e-mail.
- 5 12-29-05 1400 hr. P/C from SPD Ofc. Danley. He thinks the robber looks like Ronald StClair DOB/10-18-1955.
- 6 12-29-05 1600 hr. P/C to DOC Officer L. Mills. I provided her with Stclair information. She stated that she would contact me later with any information
- 7 12-29-05 1645 hr. P/C from DOC L. Mills. She stated that Stclair is in prison. He was arrested on 11-08-2005 and is scheduled to be released in 2008.
- 8 12-31-05 1110 hr. Attempt robbery at the Washington Mutuai Bank, 1501 4th Ave. The robber was described as a B/M 30-40. (See SPD 05-552486 / FBI 92038 for details). Based on the suspect description, MO & bank surveillance photos this appears to be the same suspect that robbed the Sterling Savings Bank on 12-27-2005.
- 9 01-04-06 1000 hr. Received SPD Fingerprint Analysis Report. "The one card of lifted latent prints is not of comparison value." Placed in file.
- 10 02-06-06 1130 hr. The US Bank, 2401 3rd Ave, Seattle was robbed by a single B/M (See SPD 06-052027 / FBI 91A-SE-92159) for details. Based on the suspect description, MO & bank surveillance photos this appears to be the same suspect.
- 11 02-09-06 1015 hr. Created PSVCTF pattern robbery worksheet. Placed in file.
- 12 02-10-06 ~1100 hr. Received e-mail from Officer Sean Hamlin (via Det Rodgers). He advised that a B/M was arrested last night (02-09-2006) for selling narcotics to an undercover SPD officer. Search incident to arrest officers found a demand note in his possession that stated "ATTENTION THIS IS A HOLD UP PLEASE NO DYE PACKS OR TRACKING DEVICES". The suspect was identified as:

Raymond D. McCoy
B/M 08-10-1959
Height: 602
Weight: 220
LKA: 318 2nd EXT S, Seattle WA

McCoy's physical description appears to match that of the robbery suspect.

2006 FEB 11 11:27 AM
 SEATTLE POLICE DEPARTMENT
 COMMUNICATIONS SECTION

INVESTIGATING OFFICER <i>STRAKER VIK 4810 717</i>	SERIAL	UNIT	INVESTIGATING OFFICER	SERIAL	UNIT	APPROVING OFFICER	SERIAL
--	--------	------	-----------------------	--------	------	-------------------	--------

CONTINUATION SHEET

INCIDENT NUMBER 05-547018 (Master)
UNIT FILE NUMBER 91A-SE-92016

ITEM OR ENTRY	INCIDENT INCIDENT AND ARREST ARREST ONLY	FOLLOW-UP TRAFFIC / COLLISION SUPERFORM	OTHER: (specify)			PAGE <u>3</u>	OF <u>5</u>
13	02-10-06	1320 hr.	P/C to FBI victim coordinator and requested that she contact the V/W's from the three banks and warn them of a possible line-up for Tuesday (02-14-2006).				
14	02-10-06	1340 hr.	P/C to King Co. Prosecutor's Office and spoke to Laura Poellet – she will be handling the first appearance calendar tomorrow. I briefed her on the investigation and requested that McCoy be held until I could do a line-up on Tuesday. She stated that she needed a copy of the report and officer statements and that she would provide the additional information to the judge.				
15	02-10-06	1620 hr.	Detective Rodgers contacted Officer Wayne Johnson at the West Precinct and requested that he fax statements and arrest report to DPA Laura Poellet. He agreed.				
16	02-10-06	~1900 hr.	Detective Rodgers and I responded to the King Co. Jail in an attempt to interview McCoy. McCoy told the jail staff that he did not want to talk to anybody at that time, but to come back maybe tomorrow.				
17	02-13-06	~0930 hr.	P/C from DPA Laura Poellet Tel. 206-296-9502. She stated that McCoy was not on Saturday's calendar.				
18	02-13-06	~0935 hr.	P/C to the King Co. Jail. They stated that McCoy was released on 02-10-06 at about 2230 hr.				
19	02-13-06	0950 hr.	P/C to SPD Narcotics Unit and spoke briefed Det. Steve Smith on my investigation. He stated that he would look into the VUCSA arrest and contact me.				
20	02-13-06	~1030 hr.	Phone message from Det. Smith. He stated that they will be attempting to rush file the VUCSA arrest.				
21	02-13-06	~1330 hr.	Created montage containing photo of McCoy (#55360). Placed in file.				
22	02-14-06	1522 hr.	The Key Bank, 666 S. Dearborn, Seattle was robbed by a single B/M (See SE-16 & LHM for details). Based on the suspect description this appears to be an unknown pattern robber. The suspect presented a demand note that said something to the effect of 'ATTENTION THIS IS A HOLD UP PLEASE REACH INTO DRAWER AND GET YOUR \$100'S AND CAREFULLY PLACE INTO THE PLASTIC BAG'. The suspect took the money and demand note and fled the bank.				
			While at the bank I showed a montage containing a photo of Raymond McCoy to the two victim / witness tellers (separately). Prior to showing them the montage I told them that the montage may or may not contain a picture of the robber. VT - Tuan Le looked at the montage and pointed to the photo of McCoy. He was not positive and thought the suspect may have been a little younger. Yen Huynh looked at the montage and was unable to make a pick.				
			The wording on the demand note was very similar to the wording on the demand note recovered from Raymond McCoy when he was arrested for VUCSA on 02-09-2006 (See 06-056860).				
23	02-21-06	0945 hr.	P/C to the King Co. Jail. McCoy was arrested for an outstanding \$50, 00.00 VUCSA warrant earlier today.				

INVESTIGATING OFFICER	SERIAL	UNIT	INVESTIGATING OFFICER	SERIAL	UNIT	APPROVING OFFICER	SERIAL
STRAKELVIK		4810			717		



CONTINUATION SHEET

INCIDENT NUMBER 05-547018 (Master)
UNIT FILE NUMBER 91A-SE-92016

ITEM OR ENTRY	INCIDENT INCIDENT AND ARREST ARREST ONLY	FOLLOW-UP TRAFFIC / COLLISION SUPERFORM	OTHER: (specify)	PAGE 4 OF 5
24	02-21-06	~1100 hr.	Detective Rodgers and I responded to the King County Jail in an attempt to interview McCoy. McCoy stated that he did not want to talk to the police without an attorney.	
25	02-27-06	1240 hr.	Responded to Sterling Savings Bank, 1406 4 th Ave, Seattle. I contacted and showed montages (#55360) to the listed witnesses. Each witness was interviewed alone and prior to showing the montage I had them read the SPD Montage Identification Sheet.	
			Marlena Willey: Willey reviewed the montage and selected photo #1. She stated that she was about 90% certain of her pick.	
			Olga Moore: Moore reviewed the montage and pointed to picture #5. She stated that she was not certain and did not want to make a definite pick.	
			Ruby Elwood: Elwood reviewed the montage and identified picture #5 (Raymond McCoy) as the robber. She stated that she was pretty certain and signed and dated the photo.	
			Ken Jackson: Jackson reviewed the montage and pointed to picture #6. He stated that he was about 60% certain.	
26	02-27-06	1310 hr.	Responded to Washington Mutual Bank, 1502 4 th Ave, Seattle. I contacted and showed a montage (#55360) to Sarah Trinkwald. Shirley So was not working. I interviewed Trinkwald at her desk and prior to showing the montage I had her read the SPD Montage Identification sheet. Trinkwald reviewed the montage and was unable to make any pick.	
27	03-02-06	1520 hr.	Responded to US Bank, 2401 3 rd Ave, Seattle. I contacted and showed a montage (#55360) to the listed witnesses. Prior to showing them the montage I had them read the SPD Montage Identification Sheet.	
			Eric Van Diest: Van Diest reviewed the montage as thought #5 (Raymond McCoy) looked familiar, but he was not comfortable to make a positive ID.	
			Jasmine Fung: Fung reviewed the montage and pointed to picture #5 (Raymond McCoy). She immediately ruled out all the others in the montage. She continued to look at the photo and stated she wanted to pick #5, but was not 100% certain. After a couple of minutes she signed her name to picture #5, but again stated that she cannot be 100% certain.	
28	03-02-06	1620 hr.	Responded to Washington Mutual Bank, 1501 4 th Ave, Seattle. I contacted Shirley So and prior to showing her the montage I had her read the SPD Montage Identification Sheet. So reviewed the montage and was unable to make any pick.	
29	03-15-06	1400 hr.	Received SPD Fingerprint Comparison Request results for the Key Bank robbery on 02-13-2006 (06-062738). "A match was made of the right palm of Raymond Dwayne McCoy with the latent print card marked 06-062738". Report placed in file.	
30	03-21-06	1055 hr.	Raymond McCoy is still being held in the King County Jail.	

INVESTIGATING OFFICER <i>STRAKERVAK</i>	SERIAL 4810	UNIT 717	INVESTIGATING OFFICER	SERIAL	UNIT	APPROVING OFFICER	SERIAL
--	----------------	-------------	-----------------------	--------	------	-------------------	--------

Ex A

Exhibit 4.

FILED
COURT OF APPEALS, 9th Cir.
STATE OF WASHINGTON
2008 JUN 17 AM 11:25

Pinkette

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

CAUSE NO. 06-1-03538-7 SEA

PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR
CONDITIONS OF RELEASE

The facts are contained in the Certification for Determination of Probable Cause written by Detective D.T. Aakervik regarding Seattle Police Department incident numbers 05-547018, 05-552486, 06-052027 and 06-062738. The events described in the certification occurred in King County, Washington.

REQUEST FOR BAIL

The State requests bail of \$100,000. The defendant has the following criminal convictions: **Felonies** - Theft in the Second Degree (2005, 2003), VUCSA - Possession (2002), VUCSA - Delivery (2000), Forgery (1983), Burglary in the First Degree (1980), Burglary in the Second Degree (1980); **Misdemeanors** - Theft in the Third Degree (2004, 1995), Attempted VUCSA (1999), Assault in the Fourth Degree - Domestic Violence (1996), Possession of Marijuana (1983). He currently is being held in King County Jail on \$10,000 bail on a charge of VUCSA - Delivery (cause number 06-1-01623-4 SEA); trial in that case is scheduled for April 18.

Laura Poellet
Laura E. Poellet, WSBA #29137

FILED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
2003 JUN 17 AM 11:21

FILED

06 APR -5 PM 3: 59

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

RAYMOND DWAYNE MCCOY,

Defendant.

No. 06-1-03538-7 SEA

MOTION, FINDING OF PROBABLE
CAUSE AND ORDER DIRECTING
ISSUANCE OF WARRANT AND
FIXING BAIL

The plaintiff, having informed the court that it is filing herein an Information charging the defendant with the crimes of **Robbery in the First Degree, Count I, and Robbery in the First Degree, Count II**, now moves the court pursuant to CrR 2.2(a) for a determination of probable cause and an order directing the issuance of a warrant for the arrest of the defendant, and

(X) fixing the bail of the defendant in the amount of \$100,000, cash or approved surety bond.

() directing the release of the defendant, after booking, on his or her personal recognizance and promise to appear for arraignment at the scheduled time and date.

In connection with this motion, the plaintiff offers the following incorporated materials: The Seattle Police Department certification or affidavit for determination of probable cause; the Seattle Police Department suspect identification data; and the prosecutor's summary in support of order fixing bail and/or conditions of release.

If the defendant is not in custody, the plaintiff has attempted to ascertain the defendant's current address by searching the District Court Information System database, the driver's license

1 and identicard database maintained by the Department of Licenses, and the database maintained
2 by the Department of Corrections listing persons incarcerated and under supervision.

3 NORM MALENG
4 Prosecuting Attorney

5 By: Laura Poellet
6 Laura E. Poellet, WSBA #29137
7 Deputy Prosecuting Attorney

8 FINDING OF PROBABLE CAUSE AND ORDER FOR ARREST WARRANT

9 The court finds that probable cause exists to believe that the above-named defendant
10 committed an offense or offenses charged in the information herein based upon the police agency
11 certification/affidavit of probable cause incorporated and pursuant to CrR 2.2(a).

12 IT IS ORDERED that the Clerk of this Court issue a warrant of arrest for the above-
13 named defendant; and

14 IT IS FURTHER ORDERED that

15 (X) the bail of the defendant be fixed in the amount of \$100,000,
16 cash or approved surety bond.

17 () the defendant be released, after booking, on his or her personal
18 recognizance and promise to appear for arraignment at the
19 scheduled time and date.

20 () Additional Conditions: _____
21 _____
22 _____

23 IT IS FURTHER ORDERED that the defendant be advised of the amount of bail fixed by
the court and/or conditions of his or her release, and of his or her right to request a bail reduction.
Service of the warrant by telegraph or teletype is authorized.

SIGNED this 5 day of April, 2006. [Signature]
JUDGE

Presented by:
Laura Poellet
Laura E. Poellet, WSBA #29137
Deputy Prosecuting Attorney

CAUSE NO. _____



SEATTLE
POLICE
DEPARTMENT

**CERTIFICATION FOR DETERMINATION
OF PROBABLE CAUSE**

INCIDENT NUMBER	05-547018
UNIT FILE NUMBER	91A-SE-92016

That D.T. Aakervik is a Detective with the Seattle Police Department and has reviewed the investigation conducted in Seattle Police Department Case Number 05-547018;

There is probable cause to believe that Raymond McCoy committed the crime(s) of Robbery.

This belief is predicated on the following facts and circumstances:

(1) SPD 05-547018

On 12-27-2005 at about 123PM a lone B/M entered and robbed the Sterling Savings Bank, 1406 4th Ave, Seattle WA. The suspect approached the victim teller, reached over the counter and said "GIVE ME THE MONEY." The teller was holding money in her hand and reacted as if he were joking. The suspect stated 'THIS IS NO JOKE, THIS IS A ROBBERY, GIVE ME THE MONEY.' The teller complied and the suspect fled the bank on foot.

The robbery was captured on the banks surveillance system and a subsequent audit revealed a loss of \$450.00.

The suspect was described as:

Race: Black
Sex: Male
Age: 40's
Height: 600
Build: Slim
Complexion: Dark
Clothing: Dark jacket & baseball type cap

(2) SPD 05-552486

On 12-31-2005 at about 11AM a lone B/M entered and attempted to rob the Washington Mutual Bank, 1501 4th Ave, Seattle WA. The suspect approached the victim teller, and in a low voice stated "GIVE ME." When the teller asked him to repeat himself the suspect again stated "GIVE ME." When asked to repeat himself a third time the suspect stated "RIGHT NOW, I'M NOT JOKING." At this time the branch manager approached and the suspect fled the bank without any money. The attempt robbery was captured on the bank surveillance system.

The suspect was described as:

Race: Black
Sex: Male
Age: 40's
Height: 602-604
Build: Medium
Complexion: Dark
Clothing: Black windbreaker-type zippered jacket, dark pants, dark Nike cap



SEATTLE
POLICE
DEPARTMENT

**CERTIFICATION FOR DETERMINATION
OF PROBABLE CAUSE**

INCIDENT NUMBER	05-547018
UNIT FILE NUMBER	91A-SE-92016

(3) SPD 06-052027

On 02-06-2006 at about 1130AM a lone B/M entered and robbed the US Bank, 2401 3rd Ave, Seattle WA. The suspect approached the victim teller and produced a demand note that read something to the effect of "PULL OUT MONEY, THIS IS NOT A GAME." The suspect verbally stated "THIS IS NOT A GAME, DO IT! As the teller was collecting the money the suspect became impatient, reached over the counter and grabbed the remaining money. The fled the bank on foot.

The robbery was captured on the banks surveillance system and a subsequent audit revealed a loss of \$2,081.85.

The suspect was described as:

Race: Black
Sex: Male
Age: 35-40
Height: 600
Weight: 170-180
Build: Medium
Complexion: Dark
Clothing: Grey polar fleece type jacket, blue jeans, red Nike cap, glasses

On 02-09-2006 the Seattle Police Department W-ACT team conducted a buy / bust operation in the downtown corridor. At about 10PM a B/M, later identified as Raymond McCoy DOB 08-10-1959, sold rock cocaine to an undercover police officer for \$20.00. McCoy was immediately taken into custody without incident. The pre-recorded buy money (\$20.00 bill) was recovered from McCoy and the crack cocaine field-tested positive for the presence of cocaine. Also located on McCoy was a demand note that read "ATTENTION THIS IS A HOLD UP PLEASE NO DYE PACKS OR TRACKING DEVICES." McCoy was booked into the King County Jail for VUCA Delivery (See SPD 06-056860).

On 02-10-2006 Detective Aakervik of the Puget Sound Violent Crimes Task Force received a copy of the narcotics arrest report and quickly noted that McCoy's physicals closely match that of the robbery suspect. Detectives Aakervik and Rodgers responded to the King County Jail in an attempt to interview McCoy regarding the demand note. McCoy refused to cooperate or leave his cell. Later that evening McCoy was released from jail.

On 02-13-2006 Detective Aakervik created a montage containing a photo of McCoy and made arrangements to meet with victims and witnesses from the three robberies.

(4) SPD 06-062738

On 02-14-2006 at about 320PM a lone B/M entered and robbed the Key Bank, 666 S. Dearborn, Seattle WA. The suspect approached the victim teller and presented a demand note that stated something to the effect of 'ATTENTION THIS IS A HOLD UP PLEASE REACH INTO



SEATTLE
POLICE
DEPARTMENT

**CERTIFICATION FOR DETERMINATION
OF PROBABLE CAUSE**

INCIDENT NUMBER	05-547018
UNIT FILE NUMBER	91A-SE-92016

DRAWER AND GET YOUR \$100'S AND CAREFULLY PLACE INTO THE PLASTIC BAG.' The victim teller complied and the suspect fled the bank on foot.

The robbery was captured on the banks surveillance system and a subsequent audit revealed a loss of \$845.00. Latent prints were lifted from the victim teller's window and submitted into SPD Evidence for analysis.

The suspect was described as:

Race: Black
Sex: Male
Age: 30's
Height: 602
Build: Medium
Complexion: Dark
Clothing: Black jacket

While investigating the robbery at the bank Detective Aakervik showed the montage to two victim / witness tellers. One teller pointed to McCoy's photo in the montage, but was not positive and thought that the suspect may have been a little younger. The second teller was unable to make a pick. The wording on this demand note was very similar to the wording on the demand note recovered from McCoy.

On 02-16-2006 Detective Aakervik received a SPD Fingerprint Analysis Report. One of two cards of lifted prints from the Key Bank robbery (06-62738) was of comparison value.

On 02-21-2006 McCoy was re-arrested for an outstanding \$50,000.00 VUCSA warrant and booked into the King County Jail. Detective Aakervik requested Raymond D. McCoy's fingerprints be compared to the latent prints recovered from the Key Bank robbery.

Detective Aakervik contacted witnesses & victims from the first three robberies and showed them montages containing a photo of McCoy. The results were:

**Sterling Savings Bank, 1406 4th Ave, Seattle
12-27-2005**

One wrong pick
One pointed to McCoy, but was not certain
One picked McCoy

**Washington Mutual Bank, 1501 4th Ave, Seattle
12-31-2005**

Two no picks



SEATTLE
POLICE
DEPARTMENT

CASE REPORT FACE SHEET

INCIDENT NUMBER 05-547018
UNIT FILE NO 91A-SE-92016

CASE REPORT Bank Robbery

DATE

NAME OF BUSINESS AND VICTIM	DATE OF CRIME	NAME OF DEFENDANT	CHARGE
Sterling Savings Bank 1406 4 th Ave Seattle WA 98101	12-27-2005	McCoy, Raymond Dwayne DOB/08-10-1959 SSN:434-02-2733 FBI: 802813V8 SID: WA11364603	
Washington Mutual Bank 1501 4 th Ave Seattle WA 98101	12-31-2005		
US Bank 2401 3 rd Ave Seattle WA 98121	02-07-2006		
Key Bank 666 S. Dearborn Seattle WA	02-13-2006		

LODI

MAR 31 2006

NAMES AND ADDRESSES OF WITNESSES

PHONE NUMBERS

See Appendix A

EVIDENCE CONSISTS OF

EVIDENCE NUMBER

See Appendix B

TO DEPUTY PROSECUTOR:

DATE:

COPIES TO:

PREPARED BY: _____

APPROVED BY: _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No.
)	
vs.)	
<i>Raymond McCoy</i>)	OMNIBUS APPLICATION OF
)	PROSECUTING ATTORNEY AS TO
Defendant.)	DEFENDANT
)	

1. The State of Washington makes the following discovery motions:
 - a. Defendant to state the general nature of defendant's defense.
 - b. Defendant to state whether there is any claim of incompetence to stand trial or change plea.
 - c. Defendant to state whether or not defendant will rely on an alibi and, if so, to furnish a list of defendant's alibi witnesses and their addresses.
 - d. Defendant to state whether or not defendant will rely on a defense of insanity or diminished capacity at the time of the offense.
 - (1) If so, defendant to supply the name(s) of defendant's witness(es) on the issue(s) of insanity or diminished capacity, both lay and professional, whom the defense may call to testify.
 - (2) If so, defendant to permit the prosecution to inspect and copy all medical and other professional reports from any witness(es) whom the defense may call as well as any materials and reports of others which were reviewed by those witness(es).
 - (3) Defendant will also state whether or not defendant will submit to a psychiatric examination by a doctor selected by the prosecution.
 - e. Defendant to furnish results of scientific test, experiments, or comparisons and the names of persons who conducted the tests.
 - f. Defendant to provide in writing discovery of: names, addresses, phone numbers, written summaries of testimony, and written statement(s) or each and every person whom the defense may call to testify.

1 g. Defendant to permit the prosecution to inspect physical or documentary evidence which
2 may be offered by the defense.

3 2. The State of Washington makes these additional applications or motions (check if requested):

- 4 a. Defendant to be fingerprinted.
- 5 b. Defendant to permit taking samples of:
 - 6 blood; hair;
 - 7 saliva; _____
- 8 c. Defendant to provide handwriting exemplar.
- 9 d. Defendant to try on articles of clothing.
- 10 e. Defendant to submit to physical external inspection of defendant's body.
- 11 f. Defendant to appear in a line-up.
- 12 g. Defendant to speak for a voice identification by witnesses.
- 13 h. Defendant to be photographed.
- 14 i. For the court to schedule a CrR 3.5 hearing.
- 15 j. The State will move to amend the information to _____
 16 add: add'l ct Robl^o; Att. Robl^o
- 17 k. _____

18 3. The State of Washington gives the following notice:

19 a. **ALL PRIOR PLEA NEGOTIATIONS AND OFFERS ARE CANCELLED BY THE**
DEFENDANT'S DECISION TO SET A TRIAL DATE IN THIS MATTER. Further,
 20 a plea agreement is only accepted by a guilty plea and may be withdrawn at any time
 21 prior to entry of a guilty plea.

22 b. If the defendant testifies at trial, the State may offer evidence of prior convictions as
 disclosed in the State's discovery. If additional criminal convictions are found, the State
 will advise defendant of such convictions and may offer such convictions at trial.

c. Pursuant to RCW 9A.44.120, the State of Washington intends to offer at trial the hearsay
 statements of _____

 made to _____
 in lieu of testimony of the child at trial and/or in addition to testimony of the child as set
 forth in discovery.

23 DATED: _____ Deputy Prosecuting Attorney

24 White Copy: Court
 25 Canary Copy: Defense
 26 Pink Copy: Prosecutor

1 time, place and occasion that it would be difficult to separate proof of one charge from proof of
2 the other, committed as follows:

3 That the defendant RAYMOND DWAYNE MCCOY in King County, Washington on or
4 about February 14, 2006, did unlawfully and with intent to commit theft take personal property of
5 another, to-wit: money, from the person and in the presence of Tuan Le, against his will, by the
6 use or threatened use of immediate force, violence and fear of injury to such person or his
7 property and to the person or property of another, and that he did commit the robbery within and
8 against a financial institution defined in RCW 7.88.010 or RCW 35.38.060, to-wit: Key Bank;

9
10 Contrary to RCW 9A.56.200(1)(b) and 9A.56.190, and against the peace and dignity of
11 the State of Washington.

12
13
14
15
16
17
18
19
20
21
22
23
NORM MALENG
Prosecuting Attorney

By: _____
Laura E. Poellet, WSBA #29137
Deputy Prosecuting Attorney

1 time, place and occasion that it would be difficult to separate proof of one charge from proof of
2 the other, committed as follows:

3 That the defendant RAYMOND DWAYNE MCCOY in King County, Washington on or
4 about February 13, 2006, did unlawfully and with intent to commit theft take personal property of
5 another, to-wit: money, from the person and in the presence of Tuan Le, against his will, by the
6 use or threatened use of immediate force, violence and fear of injury to such person or his
7 property and to the person or property of another, and that he did commit the robbery within and
8 against a financial institution defined in RCW 7.88.010 or RCW 35.38.060, to-wit: Key Bank;

9 Contrary to RCW 9A.56.200(1)(b) and 9A.56.190, and against the peace and dignity of
10 the State of Washington.

11
12
13
14
15
16
17
18
19
20
21
22
23
COUNT III

24 And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse RAYMOND
25 DWAYNE MCCOY of the crime of **Robbery in the First Degree**, a crime of the same or
26 similar character and based on the same conduct as another crime charged herein, which crimes
27 were part of a common scheme or plan and which crimes were so closely connected in respect to
28 time, place and occasion that it would be difficult to separate proof of one charge from proof of
29 the other, committed as follows:

30 That the defendant RAYMOND DWAYNE MCCOY in King County, Washington on or
31 about February 6, 2006, did unlawfully and with intent to commit theft take personal property of
32 another, to-wit: money, from the person and in the presence of Jasmine Fung, against her will,
33 by the use or threatened use of immediate force, violence and fear of injury to such person or her
34 property and to the person or property of another, and that he did commit the robbery within and
35 against a financial institution defined in RCW 7.88.010 or RCW 35.38.060, to-wit: US Bank;

36 Contrary to RCW 9A.56.200(1)(b) and 9A.56.190, and against the peace and dignity of
37 the State of Washington.

38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

By: _____
Jim A. Ferrell, WSBA #24314
Deputy Prosecuting Attorney

~~EX~~

Exhibit 5.

FILED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
2008 JUN 17 11:25

FILED

KING COUNTY, WASHINGTON

MAY 1 - 2006

SUPERIOR COURT CLERK

BY RONALD E. GERTLER
DEPUTY

THE SUPERIOR COURT
OF WASHINGTON, FOR KING COUNTY

Raymond D. McCoy,
Defendant

NO. 06-1-03538-7

v.

MO/TION DEMANDING
The State Schedule

THE STATE OF WASHINGTON
Plaintiff

A line-up, for an
identification of Defendant
Prior to Trial, pursuant
to CrR 4.7 (a)(3), (b)(I)
(II) (III)

COME NOW, the defendant in the above
Cause Number, proceeding pro-se with
Stand-by Counsel, and do respectfully Move
this Court to order the State to

Schedule a line-up, for the identification
of defendant prior to trial on or about
May 5, 2006, pursuant to the above
Cause number.

Submitted: This 15 day April 2006
May

Raymond D. McLoe
Defendant-Prose

cc. King County Prosecuting Attorney W/554
King County Courthouse MS 5C,
Seattle, WASH 98104-2312

King County Superior Court Clerk 516
Third Avenue RM E 609, MS 6C
Seattle, WASH 98104-2386

FILED

06 MAY 15 PM 4:14

KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CLERK'S MINUTES

SCOMIS CODE: MTHRG

Judge: Theresa B. Doyle
Bailiff: Rasheedah McGoodwin
Clerk: David Witten
Reporter: Thomas Karis

Dept. 13
Date: 5/15/2006

Page 1 of 2

KING COUNTY CAUSE NO.: 06-1-03538-7 SEA

State of Washington v. Raymond D. McCoy

Appearances:

State represented by DPA Jim Ferrell
Defendant present Pro Se, assisted by standby counsel David Seawell

**State of Washington v. Raymond D. McCoy
King County Cause No. 06-1-03538-7 SEA**

MINUTE ENTRY

This cause comes on as Defendant's Motion for a Bill of Particulars

The State and the defendant, assisted by standby counsel, present oral argument.

The Court makes inquiry of the defendant.

The defendant renews a previously made motion for a line up prior to trial.

The defendant and the State present oral argument on this motion.

The Court makes inquiry of both parties.

The Court makes findings, and denies the motion for a line up prior to trial.

The defendant makes a motion for scientific analysis of the fingerprints on the bank demand note, and for the appointment of a private investigator.

The Court finds that motions concerning these matters are to be heard by the Criminal Presiding Court, and declines ruling on these motions.

Concerning the first motion for a Bill of Particulars, the Court makes findings, and denies the motion.

The Orders are signed.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)

Plaintiff/Petitioner,)

NO. 06-1-03538-7 SEA

vs.)

ORDER ON CRIMINAL MOTION

Raymond D. McCoy,)

Defendant/Respondent.)

The above entitled court having heard a motion ^{by Defendant,} ~~for State to~~
Provide a Bill of Particulars; to Order
the State to ~~conduct~~ Conduct a Line-up
and to require State to have handwriting
analysis to be conducted.

IT IS HEREBY ORDERED that Defendant's motions
with respect to the Bill of Particulars
and a line-up to be conducted by the
State are denied.

DATED: 5/15, 2006

[Signature]
JUDGE

Presented by:
[Signature]
[Signature] #24314
Raymond D. McCoy
Defendant - pro se

Ex. 6 & Appendixes A & B

Exhibit 6.

Appendix A & B

FILED
COURT OF APPEALS BY 41
STATE OF WASHINGTON
2008 JUN 17 AM 11:26

FEB 23 2007

SUPERIOR COURT CLERK
EILEEN L. MCLEOD
DEPUTY,

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON

Plaintiff,

NO. 06-1-03538-7 SEA

vs.

ORDER ON CRIMINAL MOTION

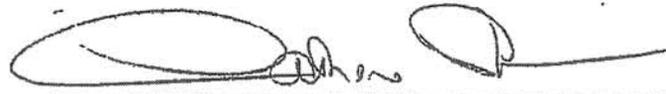
Raymond McCoy,

Defendant.

The above-entitled Court, having heard a motion by defendant to dismiss this case due to alleged misconduct by the state, pursuant to CrR 8.3(b). Defendant also moves to dismiss pursuant to a Knapsal motion. Defendant also moved to sever Ct. III from Ct's I & II.

IT IS HEREBY ORDERED that upon hearing all of evidence and considering the arguments, defendant's motion to dismiss is denied. Court finds no mismanagement or misconduct by the state. Defendant's motion to dismiss on Knapsal grounds is denied. Defendant reserves severance of Ct. III to trial court. Ct. III is currently joined with Ct's I & II for trial.

DATED: FEB 23 2007



JUDGE CATHERINE SHAFFER

Jim Ferrell #24314
Deputy Prosecuting Attorney Jim Ferrell

Raymond P. McCoy
Attorney for the Defendant

Order on Criminal Motion (ORCM)

04/01

143

RECEIVED
2007 JAN 23 PM 2:34
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

COPY RECEIVED
JAN 23 2007
CLERK OF COURT
KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF
WASHINGTON, FOR KING COUNTY

NO. 06-1-03538-7 SEA

BRIEF IN

SUPPORT OF MOTION

TO DISMISS

Raymond D. McCar
Defendant-Prose

FILED 15 ON 11
CLERK OF SUPERIOR COURT
KING COUNTY WASHINGTON
2007 JUN 17 AM 11:55

TABLE OF CONTENT

	Pages
Table of Authorities	ii
A. Issues Pertaining to Errors	2
B. Statement of Facts	3
C. Argument And Authorities	4
D. CONCLUSION	15

Table OF Authorities:

Pages:

STATE V. Cory, 62 Wash. 2d 317, 382 P.2d 1019, 5AL 3d 1352 (1963)	13, 14
STATE V. Firestorm, 129 Wash. 2d 130, 916 P.2d 411 (1996)	6, 9, 10, 14, 15
STATE V. Granacki, 90 Wash. App 598, 959 P.2d 667 (1998)	14,
Hickman V. Taylor, 329 U.S. 495, 511 67 S.Ct 385 91 L.Ed 451 (1947)	4, 5
STATE V. SILVA, 107 Wn. App 605 27 P.3d 663 (2001)	8,
Upjohn Co V. United States 449 U.S. 383, 101 S.Ct 677, 66 L.Ed.2d 584 (1981)	5,
ABA Model Rule 3.4(c)	7,
CR 26 14 Washington Practice Civil Procedure	2, 5, 6, 8, 9, 13 11, 18

THE SUPERIOR COURT OF
WASHINGTON, FOR KING COUNTY

Raymond D. McCoy,
Defendant,

V.

THE STATE OF WASHINGTON,
Plaintiff.

NO. 06-1-03538-7
SUPPLEMENTAL BRIEF
IN SUPPORT OF MOTION
AND MEMORANDUM TO
DISMISS, PURSUANT
TO CrR 8.3(b)

COME NOW The defendant in the above
Cause number, proceeding pro-se with
stand-by counsel, and do submit this
supplemental brief, in support of a motion
and memorandum to dismiss, pursuant to

the above cause number.

A. Issues Pertaining To Error:

1.) Did the State violated CR 26(b)(4) by agreeing with a F.B.I. source, to obtain information from the defendant concerning pending robbery allegations without making the trial court aware?

2.) Did the State violated CR 26(b)(4), after being informed by the F.B.I. source that the defendant was defending himself, and still agreed that the F.B.I. source return back to K. Co. Jail to obtain further information into the pending allegations and report this information back to the state, without resorting to the court for clarification of the defendant's pro-se status or complying with CR 26?

3.) Was the burden of compliance with the rules of discovery, pursuant to CR 26, on the State and not the F.B.I. source?

B.) Statement of Facts:

On September 1, 2006, an interview ~~was~~ being conducted in the F.B.I. building with a F.B.I. source. According to the ~~discovery~~, this F.B.I. source allegedly offered information about the defendant and the pending robbery allegations. The F.B.I. source allegedly stated that he knew the defendant, Raymond D. McCoy, and he knew that the defendant ~~was~~ defending himself on bank robbery charges. That the defendant admitted to robbing four Banks to buy crack. The F.B.I. source also stated that he will return back to the K.C. Jail continue his relationship with

the defendant, obtain further information and contact the State and report this information obtained from the defendant concerning the robbery allegations. The State agreed.

On September 11, 2006, the lead detective Hakerik, who interviewed the F.B.I. source on September 1, 2006, transported the F.B.I. source from the K.C. Jail to the S.P.D. Headquarters to report the information he obtain, which consisted of an eleven page statement.

C.) Argument And Authorities:

In *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct 385, 91 L.Ed. 451 (1947),

the leading case on the work product rule, arguably created three categories of work product, i.e., ordinary factual work product, oral statement memoranda work product, and mental impressions work product. Lewis H. Orland, Observations on the Work Product Rule, 29 Gonz. L. Rev. 281, 294 (1993-1994) (but noting that the decision in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct 677, 66 L.Ed.2d 584 (1981) might be read to combine the latter two categories). CR 26 recognizes two, essentially collapsing the latter two categories. In *Hickman v. Taylor*, *Supra*, upon which both Fed. R. Civ. P. 26(b)(3) and CR 26(b)(4) rest, the

Court noted that relevant and nonprivileged facts hidden in an attorney's file may be discovered if production is "essential to the preparation of one's case." See State v. Firestorm, 129 Wash.2d 130, 916 P.2d 411 (1996).

1) In ordering discovery... the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. CR 26(b)(4). Here, the State did not initially give the trial court an opportunity under CR 26(b)(4) to consider the scope of discovery to be obtained by Mr. Olsen (F.B.I.S.). Knowing that the defendant was proceeding pro-se

the State failed to mitigate the effects of having Mr. Olsen return back into the unit with the defendant, and obtain information, instead of immediately going to a tribunal for clarification of the discovery disclosure rule, violated ABA Model Rule 3.4(c) (knowingly violating an obligation of a tribunal).

II) The State's unilaterally decision to allow Mr. Olsen to obtain information and report back to the State, was a violation of the defendant's protected Sixth Amendment right to effective representation. In addition, our court has held that the right to counsel is violated, if counsel's representation is not meaningful. This rationale

applies with equal force to the issue of Pro-se access to the courts. The right of self-representation guarantee in our state constitution is a substantive right not a mere formality. State V. SILVA, 107 Wb.App 605, 27 P.3d 663 (2001). Here, rather than proceed in accord with CR 26, or turn to the trial court and ask for the court's assistance in determining what was discoverable from Mr. Olsen, the State took it upon themselves to decide that they could engage in an agreement with Mr. Olsen, in bad faith, to obtain information about pending allegations and report back

to the State. Thus, under CR 26(b)(4), material concerning factual information prepared in anticipation of litigation by a party or that party's representative, including Counsel, a Consultant, or an agent, may be ordinary work product which is discoverable only where the showing is made that there is substantial need of the materials in the preparation of the case, and that the substantial equivalent of the materials cannot be otherwise obtained without undue hardship. Where such material is sought through discovery, the determination of whether the substantial need showing has been made is vested within the sound

discretion of the trial judge, who makes that determination, after considering all the facts and circumstances of the individual case. State V. FireStorm, Supra.

III.) On September 1, 2006, Mr. Olsen first informed that State that, (1) He knew the defendant, (2) that he knew the defendant was defending himself, and that the defendant was charged with bank robbery. After the interview with Mr. Olsen on September 1, 2006, the state agreed that Mr. Olsen would return back to the K.C. Jail and obtain information that he would report back to the state concerning the

pending allegation of bank robberies.

14 Washington Practice Civil Procedure Chapter 13.

Subsection 13.13. Work product-Attorney's theories

Strategies, and the like, Hornbook, In Friedenthal

Kane & Miller, Civil Procedure Subsection 7.5 (2d ed.)

(1st hornbook), the authors states: "Thus there is

little doubt today that the work-product doctrine

extends to unwritten as well as to written information.

Further, the current federal rule gives the most

complete protection to information regarding 'the mental

impressions, conclusions, opinions, or legal theories of an

attorney or other representative of a party concerning

the litigation,' whether that information is written

or unwritten.

Textbook, In Haydock, Herr & Stempel, Fundamentals of Pretrial Litigation Subsection 5.7.4(3d ed), the authors state: "Case law has extended the protection afforded a lawyer's mental impressions, opinions, conclusions, and legal theories to oral deposition requests. Courts have established certain guidelines detailing the scope of deposition questioning of a deponent. Those guidelines prohibited questions about any matter that revealed 'Counsel's mental impression' concerning the case, including specific areas and general lines of inquiry discussed by opposing counsel with the deponent, and any facts to which opposing counsel appeared to have attached particular significance during conversation with the deponent." See 14 Washington Practice, Supra.

The burden of compliance with CR 26(b)(4) is on the State not Mr. Olsen. Although the State is stating that Mr. Olsen voluntarily offered to help, the State was obligated to seek an advisory ruling before a Superior Court Judge, with respect to the ethics of entering an agreement with Mr. Olsen to intrude on the defendant's work-product and report the information obtain from the defendant back to the State. This conduct clearly violated CR 26(b)(4). Conduct of that sort on the part of our Government is no doubt extremely rare. But if it does occur a conviction tainted by it cannot stand. *State v. Cory*, 62 Wash. 2d 317,

382 P.2d 1019, 5 A.L. 3d 1352 (1963). The dismissal not only affords the defendant an adequate remedy but discourages "the odious practice of eavesdropping on privileged communication between attorney and client." As the Cory Court noted, there is no way to isolate the prejudice resulting from such an intrusion. See *State v. Grarocki*, 90 Wash. App. 598, 959 P.2d 667. Citing *State v. Cory*, *Supra*. ... Where there is an indication a serious potential exists for abuse of Civil discovery, the Courts are obliged to act. ... WE must continually affirm these principles, until litigation counsel get the unmistakable Message we will apply the principles in

discovery and we will sanction lawyers who do not take us at our word... .

See State V. Firestorm, Supra.

D.) CONCLUSION:

The defendant's right to a fair trial has been denied, do to the State's third party intrusion into the mental-impression work-product of the defendant's pro-se defense. The record would show that, the state was giving notice by the court that any violation of the defendant's work-product would result in a dismissal. There is no way to isolate the prejudice resulting from the information obtained by Mr. Oken

Concerning the pending litigations. Therefore,
the Court in the furtherance of Justice
should dismiss Counts I, II, and III of the
above cause number, pursuant to CrR. 8.3(b).
Submitted: this _____ day of January 2007.

Raymond D. Moran
Defendant

RECEIVED

2007 JAN -2 AM 9:46

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

COPY RECEIVED

JAN 02 2007

CRIMINAL DIVISION
KING COUNTY PROSECUTORS OFFICE

THE SUPERIOR COURT OF
WASHINGTON, FOR KING COUNTY

Raymond D. McCoy,
Defendant,

V.

THE STATE OF WASHINGTON,
Plaintiff.

NO. 06-1-03538-7

DEFENDANT'S MOTION
TO DISMISS PURSUANT
TO CrR 8.3(b), AND
MEMORANDUM IN
SUPPORT.

COME NOW THE DEFENDANT, Raymond
D. McCoy, proceeding pro-se, with stand-by
counsel Robert McKay, and do bring the
following motion and memorandum in
support to dismiss Counts I, II, and

III of the above Cause numbers under
CrR 8.3(b).

A.) MOTION:

(1)

The defense moves for dismissal of
Counts I, II, and III of the above Cause number
with prejudice under CrR 8.3(b), because of
arbitrary action, as the State knowingly
and intentionally agreed to have a FBI
Source, a King County Jail inmate to obtain
information concerning robbery allegations
filed against the defendant.

(2.)

The defense moves for dismissal
(2.)

of Counts I, II, and III of the above cause number with prejudice under CrR 8.3(b), because of governmental misconduct, as the State agreement with a F.B.I. Source, illegally intruded upon Pro-se defendant's right to work product.

(3)

The defense moves for dismissal of Counts I, II, and III of the above cause number with prejudice under CrR 8.3(b), because the State's evidence is insufficient to make out a prima facie case for all the elements of three counts of First Degree Robbery.

(3)

B) PROCEDURAL FACTS:

- 1.) In Cause number 06-1-03538-7 the defendant Raymond Duwayne McCoy is charged with three counts of first degree robbery.
- 2.) Honorable Ronald Kessler, Judge granted the defendant's motion to proceed Pro-se on April 12, 2006. 5-20-06
- 3.) On May 16, 2006 defendant's motion for Bill of Particulars and a line-up pursuant to Cause number 06-1-03538-7 was denied.
- 4.) On December 14, 2006 the State amended information pursuant to Cause number 06-1-03538-7 to add Count III. to-wit First degree

robbery of U.S. Bank, on or about February 6, 2006.

5.) Due to defendant's pro-se investigations and pre-trial evidentiary discoveries, there have been several continuances in this case. Currently, Omnibus is set for January 2, 2007. If this case is to continue, trial is likely to commence early February 2007.

C.) FACTS:

1.) For Count's I, II, and the December 14, 2006 amended Count III, pursuant to Cause number 06-1-03538-7 the defense incorporates by reference the attached Follow-up Report

Of the Certification for Determination of Probable Cause and Copy of Amended Information.

2.) All Counts ARE a result of an alleged note founded on the defendant, incident to a VUCSA arrest at 10:22pm February 9, 2006.

3.) According to Detective Aakervik (Chief investigating officer) the incidents occurred as follows:

12-27-2005
Sterling Saving Bank
1406 4th AVE
Seattle, WA 98101

12-31-2005
Washington Mutual Bank
1501 4th AVE
Seattle, WA 98101

02-16-2006

U.S. Bank
2401 3rd AVE
Seattle, WA 98121

02-13-2006

Key Bank
666 S. Dearborn
Seattle, WA 98134

4.) On 02-10-06 Officer Sean Hamlin (S.P.D.) informed Detective Rodgers, who informed Detective Aakervik about the alleged note founded on the defendant 02-09-06. Detective Aakervik conducted a photo montage on 02-27-06 with witnesses and victim tellers from three of the four above named incidents. On 03-15-06 Detective Aakervik received the results, matching that of the defendant's right-palm from Key Bank. 04-05-06 The defendant was charged with the above allegations.

D.) MEMORANDUM OF POINTS AND AUTHORITIES:

Under CrR 8.3(b):

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b) is designed to protect against arbitrary action or governmental mis-

Conduct. *State v. Starrish*, 86 Wn.2d 200, 544 P.2d 1 (1975); *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A dismissal under CrR 8.3(b) may be justified where the State's misconduct violates the defendant's right to due process. *Starrish*, 86 Wn.2d at 206 n.9; *State v. Cantrell*, 111 Wn.2d 389, 758 P.2d 1 (1988); *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). However, the due process clause does not permit a court to abort criminal prosecution simply because it disagrees with a prosecutor's judgment. *Cantrell*, 111 Wn.2d at 389; see

State v. Dixon, 114 Wn.2d 863, 792 P.2d 137 (1990); State v. Lewis, 115 Wn.2d 294, 298, 797 P.2d 1141 (1990). The Court's role is not to define due process in line with "personal and private notions" of fairness but rather to determine whether the State's conduct violates "fundamental conceptions of justice which lie at the base of our Civil and political institutions." Cantrell, 111 Wn.2d at 389 (quoting United States v. Lovasco, 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d (1977)).

Governmental misconduct "need not be

of an evil or dishonest nature; simple mismanagement is sufficient." Michielli, 132

Wh.2d at 239 (emphasis omitted) (quoting Blackwell, 120 Wh.2d at 831).

A trial court may not dismiss charges under CrR 8.3(b) unless the defendant shows by a preponderance of the evidence (1) "arbitrary action or governmental misconduct" and (2) "prejudice affecting the defendant's right to a fair trial." State v. Rohrich, 149 Wh.2d 647, 654, 71 P.3d 638 (2003).

Dismissal under this rule is an extraordinary remedy and is improper absent

material prejudice to the rights of the accused. Blackwell, 120 Wn.2d at 830; State v. Orwick, 113 Wn.2d 823, 832, 784 P.2d 161 (1989); State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). A trial court's decision on a motion to dismiss under the rule is reviewed for manifest abuse of discretion. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

I.) Did the agreement between the State and FBI source, to obtain information concerning robbery allegations, pending against the defendant constitute governmental intrusion?

According to discovery, on September 1, 2006 an interview was being conducted with a FBI source, at the FBI building, see attached follow-up report at 5 of 6. The F.B.I. Source is a King County Jail inmate, to-wit Kevin S. Olsen. The State is alleging that Mr. Olsen offered information regarding local bank robberies and another inmate - Raymond McCoy. The information provided by Mr. Olsen on September 1, 2006 is the following in part:

1.) He [the FBI Source] stated that he had regular contact with McCoy [the defendant] and that he [the FBI Source] knew he [the defendant] was

defending himself on bank robbery charges.

2.) The FBI source stated that McCoy admitted to robbing bank, and used the money to buy crack cocaine. That McCoy told the FBI source that he [McCoy] was arrested for narcotic and that the police found a note on him.

3.) McCoy told the FBI source, that McCoy's palm-print was lifted from the bank.

4.) McCoy told the FBI source that McCoy was having a handwriting expert examine the note.

5.) "When McCoy discussed possible defenses..."

Other than the allegation in (2) stated by the FBI source, the defendant had a right, as a pro-se defendant, to protection under the "work product doctrine" in reference to information allegedly provided in statements, (1), (3), (4) and (5).

Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravene the public policy underlying the orderly

prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impression of an attorney. See HICKMAN V. TAYLOR, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

Here the FBI source states:

"The Source stated that he would continue his relationship with McCoy and contact us if he obtains further information." The State agreeded. "There can be no question that individuals maintain a first amendment right to associate for lawful political purposes free from

governmental intrusion." NAACP V. Alabama,
360 U.S. 248, 79 S.Ct. 1001, 3 L.Ed.2d 1205
(1958); Bates V. City of Little Rock, 361 U.S.
516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960); Gibson
V. Florida, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d
929 (1963). In the follow-up interview
with the F.B.I. Source conducted on
September 11, 2006 at the S.P.D. Headquarters
by Chief-Investigating Officer Hakervik, the
F.B.I. Source states: "... actually he had
approached me, uh, and explained he'd been, uh,
charged also with bank robbery. And that, uh,
so I said okay I'll befriend with each

other on that, on that, uh, issue there.

And over a period of time of a couple of weeks we got to talking normal oh, uh, back and forth about our cases or the law about our cases." By the State knowingly and intentionally agreed to have a FBI source obtain information concerning pending allegations and contact the state to report such information, constitute arbitrary action.

II.) Did the September 11, 2006 follow-up interview with the F.B.I. source illegally intrude on pro-se defendant's rights and violate the "Work Product Doctrine"?

Ten days after the state agreed with the F.B.I. source to obtain further information

from the defendant concerning the pending allegations, the F.B.I. source was transported from the King County Jail, by Detectives Rodgers and Hakervik to S.P.D. Headquarters to report information he obtained concerning the pending allegations against the defendant.

Historically, a lawyer is an officer of the Court and is bound to work for the advancement of Justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer works with a certain degree of privacy, free from unnecessary intrusion by opposing parties

and their counsel. Proper preparation of a client's case demands that he assembles information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals

in this case (153 F.2d 212, 223) as the
"work product of the lawyer." See Hickman v.
Taylor Supra. The work-product doctrine
protects from discovery an attorney's work product,
so that attorneys can work with a certain
degree of privacy and plan strategy without
undue interference. State v. Pawlyk, 115 Wn.2d 457,
445, 800 P.2d 388 (1990) (quoting Coburn v. Seda,
101 Wn.2d 270, 274, 677 P.2d 173 (1984)). The
doctrine applies to the "research, ... records, cor-
respondence, reports or memoranda, to the extent
that they contain the opinions, theories or
conclusions, of investigating or prosecuting agencies."
CrR 4.7(F)(1); Pawlyk, 115 Wn.2d at 477,
21

Here in this case, on September 1, 2006 the F.B.I. source at the F.B.I building clearly states: "He stated that [he] has regular contact with McCoy and that he knew he was defending himself on bank robbery charges." This indicates that the State was aware of the defendant's pro-se status; Nevertheless, the State agreed to the following: "The source stated that he would continue his relationship with McCoy and contact us if he obtains further information." In *State v. Granacki*, 90 Wash.App. 598, 959 P.2d 667, the Court of Appeals, held that: dismissal was not abuse of discretion as

Sanction for misconduct of lead police detective who, during a recess, read note at defense table about defendant's communications with his attorneys." Also in *State v. Cory*, 62 Wash. 2d 371, 382 P.2d 1019, 5 A.L.R. 3d 1352 (1963). There, the trial court dismissed a criminal case after it discovered that the sheriff had taped conversations between the defendant and his attorney, in the jail.

Viewing *State v. Granacki* and *State v. Cory* supra, in analysis to this case, here the lead police detective Hakervik on agreement with the F.B.I. source, transported the F.B.I.

Source from the King County Jail E-9-U-B
to the S.P.D. Headquarters to report
information he [the F.B.I. source] obtain
concerning the pending allegations against
the defendant. The following is excerpts
from the interview and information reported
to lead officer detective Aakervik by the
F.B.I. source on September 11, 2006:

- 1.) "... that's gonna be his defense anyway..."
- 2.) "... His defense to the note is the fact that..."
- 3.) "... he was working diligently on trying to get that explained away..."
- 4.) "... So he was banking on that issue..."
- 5.) "... that's how he's attacking that basically..."

6.) "... Mostly he is chasing a lot of, a lot of theories..."

7.) "... And so that's one of his major complaints to the court..."

8.) "... although legally he's gonna try to explain it away, but he said that..."

Even "high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of [a] crime and his counsel." For that reason, the Court held that, where the state intrudes on a defendant's right to effective representation by intercepting privileged communications between an attorney and his client, the only adequate remedy is dismissal. See *State v. Granacki*, *Supra*.

As a result of the, agreed to, eavesdropping information reported to lead officer detective Arkenik by the F.B.I. source, pertaining to the robbery allegations against the defendant, "violates not only the defendant's right to effective representation by counsel, but his right to be protected against unreasonable searches and to due process of law." See again State v. Gianacki Supra, This action by the state constitutes governmental misconduct. Further, by the state knowingly and intentionally agreeing in bad faith with the F.B.I. source to intrude into the defendant's work product by eavesdropping and spying, and leaking

2/6

the information back to the State, affects the defendant's right to a fair trial. The defendant's right to effective representation also has been violated, do to the governmental intrusion into the defense work-product, which the State was informed by the F.B.I. Source concerning the defenses, research, opinions, theories, and strategies, to prepare a pro-se defense against the alleged robbery allegations. This clearly constitutes prejudice affecting the defendant's right to a fair trial.

III.) The State's Undisputed Material Factual Allegations Is Insufficient to Establish A Prima Facie Case of First Degree Robberies;

A Washington defendant should initiate the motion by sworn affidavit, alleging there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. State V. Knapstad, 107 Wn.2d 346; 729 P.2d 48 (1986).

A.) The prosecutor described the States evidence as follows:

(1.)
A note found on defendant, written on the back of a letter addressed to Raymond D. McCoy,

(2.)
Photo-montage, with one pick out of ten, identifying the defendant.

3.
Palm-print from Key Bank, which is, in the same building that the note, found on 2-9-06 was addressed to the defendant.

(4)
Alleged Statement from Kevin Olses
Stating defendant Confessed to robbing
four Banks.

Here other than the witness
identification of the defendant from a
photo-montage conducted by Aakervik on
2-27-06, from the 12-27-05 Sterling
Bank incident, and palm-print from the
teller's window lifted at Key Bank, and the
alleged testimony of F.B.I. Source, a
King County Jail inmate, the evidence is
insufficient as a matter of law to prove
that the defendant actually or constructively
committed the alleged three bank robberies.

No rational trier of fact could find beyond a reasonable doubt the essential elements of the crimes, first degree robbery. Nonetheless, the State argues that it is entitled to proceed with the prosecution because the trial court lacks authority to dismiss the case until the State's evidence is presented to the trier of facts. This is an artificial requirement, and the additional expense in keeping this case alive is unwarranted. See State v. Knapstad, Supra.

IV.) The discarded and destroyed writings and jotted down notes taken at the meeting with the F.B.I. Source, constitutes

Mismanagement, and a violation of the defendant's due process pursuant to Brady v. Maryland.

... in the 1963 case of Brady v.

Maryland the United States Supreme Court held that State prosecutors violate a defendant's right to due process when evidence favorable to a defendant is not disclosed. See

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

violation includes three components

1.) evidence favorable to the accused because it is exculpatory or impeaching; 2.) willful or inadvertent suppression of that evidence by the State; and 3.) resulting prejudice.

Applying the three components of a Brady violation to the defendant's due process violation, First, the notes taken at the meeting and interview with the F.B.I. source was favorable to the defendant, also exculpatory and impeaching to show further violation of the "work product doctrine". Second, the state states in response to defendant's motion for discovery of the notes is as follows: "... Any writings or jotted down notes taken at the time, if there ever were any have been discarded and destroyed..." See State's Response To Defendant's Motions, at 3.

Third, although the state states that the defendant's was provided all of the discovery with respect to the detective's interview and meeting with the F.B.I. Source on September 1, 11, 2006, the defendant didn't receive a copy of the Follow-up Report until December 14, 2006, which the court delivered a copy, after the defendant's December 14, 2006 criminal motion hearing requesting that the state disclose, "when did Kevin S. Olsen contact the State."

This delay prejudice the defendant in being on a timely motion before trial in this

Case which constitutes mismanagement
and unnecessary delay of proceedings.

E.) CONCLUSION:

In the furtherance of Justice,
the Court should dismiss Counts I, II, and
III. in the above case number with
prejudice under CR 8.3(b), because of mis-
management, arbitrary act, and governmental
misconduct, which prejudice the defendant
Raymond D. McCoy's right to effective
representation and a fair trial.

Submitted this _____ day of December 2006.

Raymond D. McCoy
Defendant Pro-Se

Ex 7

Exhibit 7

FILED
COURT IN WASHINGTON
STATE OF WASHINGTON
2008 JUN 17 AM 11:26

SOCIAL SECURITY ADMINISTRATION
IMPORTANT INFORMATION

SOCIAL SECURITY
SUITE 401
675 S LANE ST
SEATTLE, WA 98104

DATE: January 10, 2006

RAYMOND DEWAYNE MCCOY
C/O SSA
SUITE 401
675 S LANE ST
SEATTLE, WA 98104

This is a receipt to show that you applied for a Social Security card on January 10, 2006. You should have your card in about 2 weeks.

If you do not receive your Social Security card within 2 weeks, please let us know. You may call, write or visit any Social Security office. If you visit an office, please bring this letter with you. To protect your privacy, we will not disclose a social security number over the telephone.

SSA is required by law to limit replacement SSN cards to three per year and ten per lifetime. Do not carry your SSN card with you. Keep it in a safe location, not in your wallet.

[Handwritten Signature]
Field Office Manager

disclosed

8-24-06

2006 JUN 17 AM 11:26

FILED
COURT OF APPEALS
STATE OF WASHINGTON

ATTENTION
THIS IS A
HOLD UP
PLEASE
NO DYE PA
OR TRACKIN
DEVICES

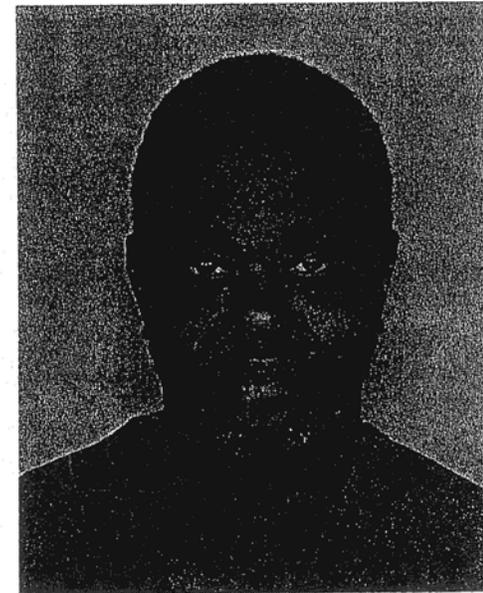
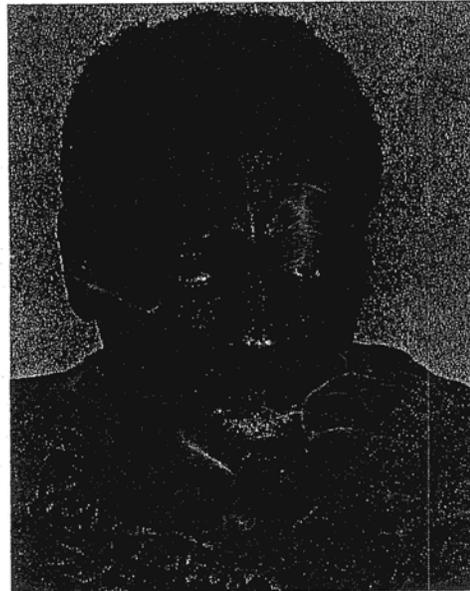
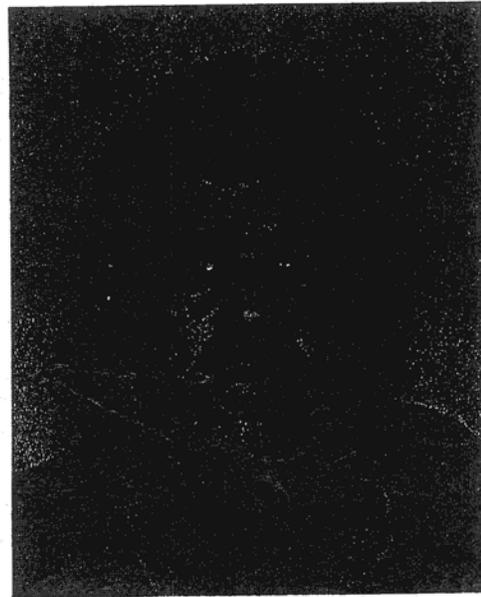
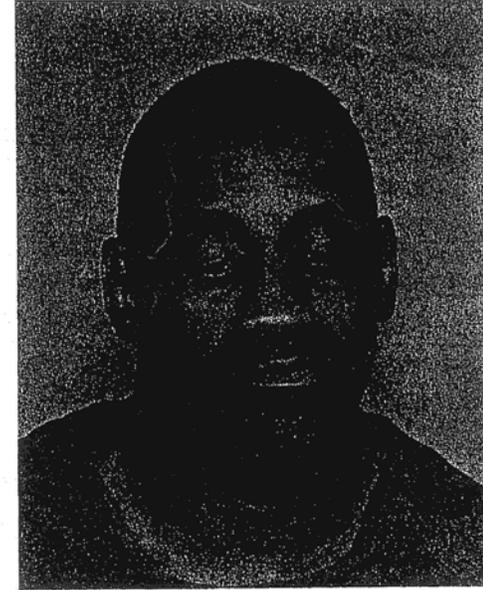
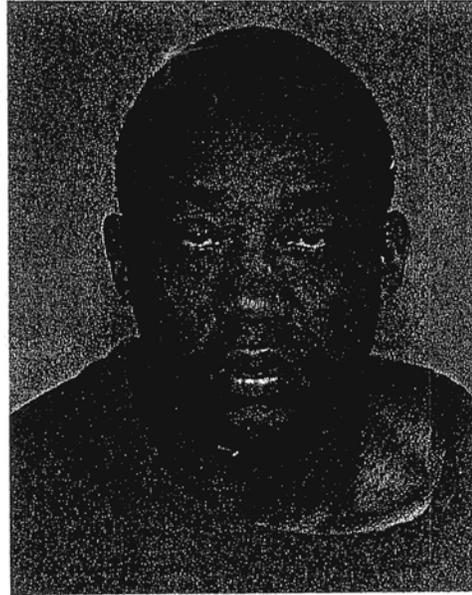
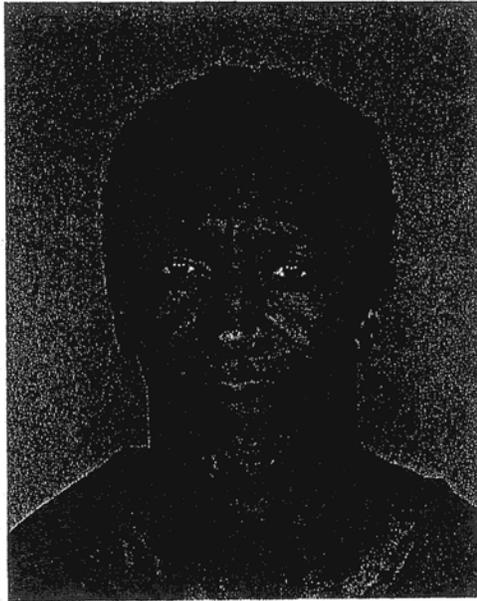
Allegedly founded
on defendant
2-9-06

disclosed
4-20-06

Ex. 8

Exhibit 8

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2008 JUN 17 AM 11:26



FILED
JUN 17 AM 11:26
STATE OF WASHINGTON

55360

CCN/JCN NUMBER	B/A NUMBER	PCN NUMBER
AGENCY: <input type="checkbox"/> UNINCORPORATED KING COUNTY <input checked="" type="checkbox"/> CITY OF Seattle <input type="checkbox"/> OTHER		05 - 547018 91A-SE-92016 CASE NUMBER FILE NUMBER

SUSPECT DATA	DATE OF ARREST/TIME	BOOKING DATE/TIME	ARREST LOCATION In Custody - King County Jail						
	NAME (LAST, FIRST, MIDDLE/JR., SR., 1ST, 2ND) McCoy, Raymond Dwayne					ALIAS, NICKNAMES			
	IDENTITY IN DOUBT? YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	DOB 8/10/1959	SEX M	RACE B	HGT 602	WGT 215	EYES Bro	HAIR Blk	SKIN TONE Dk
	SCARS, MARKS, TATTOOS, DEFORMITIES							ARMED/DANGEROUS YES <input type="checkbox"/> NO <input type="checkbox"/>	
	LAST KNOWN ADDRESS 318 2 nd Ext. South		CITY Seattle	STATE WA	ZIP 98104	RESIDENCE PHONE	BUSINESS PHONE	CITIZENSHIP US	
	OCCUPATION			EMPLOYER, SCHOOL (ADDRESS, SHOP/UNION NUMBER)			SOCIAL SECURITY NUMBER 434-02-2733		
	DRIVER'S LICENSE # MCCOYRD415NS		STATE WA	AFIS #	FBI # 802813V8	STATE ID # WA11364603			
	VEHICLE LICENSE #	STATE	YEAR	MAKE	MODEL	VEHICLE LOCATION	TOW COMPANY		
	PERSON TO BE CONTACTED IN CASE OF EMERGENCY			RELATIONSHIP	ADDRESS		CITY	STATE	PHONE
	1) OFFENSE <input type="checkbox"/> DV INVESTIGATION ROBBERY		RCWORD #	COURT/CAU #		CITATION #			
2) OFFENSE <input type="checkbox"/> DV		RCWORD #	COURT/CAU #		CITATION #				
3) OFFENSE <input type="checkbox"/> DV		RCWORD #	COURT/CAU #		CITATION #				
4) OFFENSE <input type="checkbox"/> DV		RCWORD #	COURT/CAU #		CITATION #				
ANY OTHER ADDITIONAL CHARGES		CRIMINAL TRAFFIC CITATION ATTACHED? YES <input type="checkbox"/> NO <input type="checkbox"/>		ACCOMPLICES					
LIST VALUABLE ITEMS OR PROPERTY LEFT FOR ARRESTEE AT JAIL									
LIST VALUABLE ITEMS OR PROPERTY ENTERED INTO EVIDENCE YES <input type="checkbox"/> NO <input type="checkbox"/> IF YES, DESCRIBE (SIMPLE DESCRIPTION, IDENTIFYING MARKS, SERIAL #)									
TOTAL CASH OF ARRESTEE		WAS CASH TAKEN INTO EVIDENCE? YES <input type="checkbox"/> NO <input type="checkbox"/>		SIGNATURE OF JAIL STAFF RECEIVING ITEM/SERIAL #					
ARRESTING OFFICER/SERIAL # 4810 <i>D. T. Aakervik</i>			TRANSPORTING OFFICER/SERIAL #		SUPERVISOR SIGNATURE/SERIAL #				
SUPERFORM COMPLETED BY (SIGNATURE/SERIAL #) <i>D. T. Aakervik</i> 4810			CONTACT PERSON FOR ADDITIONAL INFORMATION (NAME/SERIAL#/PHONE) Det. D.T. Aakervik #4810 Tel. 206-391-4745 (cell)						

ADULT MIDDLEMEN OR BOOKINGS: Complete to this line. FELONY & ALL JUVENILE BOOKINGS: Complete both sides COMPLETE OBJECTION TO RELEASE ON REVERSE SIDE FOR ALL BOOKINGS.

COURT FILE	SUPERIOR COURT <input type="checkbox"/> IN CUSTODY		COURT CAUSE (STAMP OR WRITE)		06-1-03538-7 SEA				
	FILING INFO <input type="checkbox"/> AT LARGE								
	<input type="checkbox"/> OUT ON BOND				COURT/DIST. CT. NO.		DIST. CT. BOND \$	BOND REQUESTED: \$	SUP. CT. DATE
WARRANT INFO/EXTRADITE	WARRANT DATE		OFF CODE	OFFENSE	AMOUNT OF BAIL \$		FELONY <input type="checkbox"/>	BENCH <input type="checkbox"/>	
							MISD. <input type="checkbox"/>	ARREST <input type="checkbox"/>	
	POLICE AGENCY ISSUING			COURT	WARRANT RELEASED TO: SERIAL UNIT DATE TIME				
	PERSON APPROVING EXTRADITION		SEAKING-LOCAL ONLY WACIC-STATE WIDE <input type="checkbox"/>	NCIC-WILL EXTRADITE FROM ID & OR ONLY <input type="checkbox"/>	NCIC-WILL EXTRADITE FROM OR, ID, MT, WY, CA, NV, UT, CO, AZ, NM, HI, AK <input type="checkbox"/>	NCIC-WILL EXTRADITE FROM ALL 50 STATES <input type="checkbox"/>			
ENTRY	CCN#	0416954		DOE					
	WAC#			TOE					
	NIC#			OP#					
				CLEARANCE					
				DOC					
				TOD					
				OP#					

BIASED LINEUPS

For reasons provided by Mr. McCoy in his brief, the montage appeared to be physically biased. The witnesses indicated the robber as being “dark complected” and Mr. McCoy’s picture is the most dark-complected in the montage. The #1 photo appears to be of someone who is older than in his 40’s. Mr. McCoy’s picture is different from the rest in that it’s larger. Also we return here to the issue of lack of double-blind procedures.

Q. WHAT IS A BIASED LINEUP?

A. One in which the viewer can either obviously or tentatively rule out some of the people shown in the lineup as not being the culprit, or can focus in on the suspect for some reason other than a match between the suspect's appearance and the witness's memory of the culprit.

Actually, let me be just a bit more specific here. Let’s start by defining an *unbiased* lineup.

1. To do this, let’s assume that the suspect is innocent—that the witness, in other words, did not see the suspect commit the crime.
2. Given this to be true, if the lineup is unbiased, then the witness should have no greater probability of incorrectly identifying the suspect than of identifying anyone else in the lineup (i.e., one chance in six if it’s a six-person lineup).
3. A *biased* lineup, in contrast, is one in which for whatever reason, the witness’s chances of identifying the suspect are greater than one in six.

Q. HOW SHOULD YOU GO ABOUT CONSTRUCTING AN UNBIASED LINEUP?

A. To begin with, there are many ways—some subtle, and some obvious—in which a lineup can be intentionally or inadvertently constructed so as to be biased. The first and most important way of avoiding a biased lineup—that is, constructing an unbiased lineup—is that the lineup should be constructed so that all members of it conform to the description of the perpetrator provided by the witness.

Q. WHY IS IT IMPORTANT THAT A THE WITNESS'S ORIGINAL DESCRIPTION BE TAKEN INTO ACCOUNT IN CONSTRUCTING A LINEUP?

A. The witness's description is needed so the lineup can be constructed in such a way as to not allow the witness to rule out members based on their description.

1. So suppose a witness described a culprit as being a white bald man with blue eyes.
2. To be fair, all members of the lineup would have to conform to that description. Otherwise, the witness to the lineup could immediately rule out all members who weren't men or weren't white, or weren't bald, or who didn't have blue eyes.

Q. SO JUST TO BE CLEAR, COULD YOU GIVE AN EXAMPLE OF A BIASED LINEUP?

A. Well, say the witness is certain that the culprit was bald. Now, suppose that a lineup of six people is constructed in which only three of the people were bald, but the other three had long curly hair. Then the viewer would reduce the possible choices from six to three.

1. That is, the lineup would become functionally a three-person lineup rather than the six-person lineup.
2. So, the probability of picking the defendant just by chance would be increased from one in six to one in three.

Q. ARE THERE ANY OTHER IMPORTANT WAYS IN WHICH A LINEUP CAN BE BIASED?

A. Well, research has shown that if one picture in a lineup is different from the others—if it's bigger, if it's smaller, if it's darker, if it's lighter, if it's tilted—whatever—then the viewer's attention will be drawn to that picture and the viewer will be biased toward choosing it.

Q. YOU TALKED EARLIER ABOUT DOUBLE-BLIND PROCEDURES, AND YOU MENTIONED THAT A POLICE OFFICER WHO KNOWS WHO THE SUSPECT IS COULD POTENTIALLY GIVE CUES TO THE WITNESS ABOUT WHO TO CHOSE. WOULD THIS BE AN EXAMPLE OF A BIASED LINEUP?

A. Sure.

Q. LET ME ASK YOU ONE FINAL, SIMPLE QUESTION ABOUT BIASED LINEUPS. WHAT ARE THE CONSEQUENCES OF HAVING A LINEUP THAT IS BIASED IN SOME FASHION?

A. There are two consequences.

1. The first is the obvious one: A biased lineup will increase the chances that the witness will choose the suspect even if the suspect is in fact innocent.
2. The second consequence of choosing the suspect from the lineup is less obvious. Once the witness has chosen the suspect this can (and probably will) trigger a process whereby the witness will reconstruct his or her memory of the original event such that the appearance of the suspect—an appearance acquired from the lineup—now plays a prominent role in the witness's memory for the original event. This reconstructed memory will form the basis for the witness to later (for example at trial) confidently identify the suspect as the culprit. This reconstructed memory is an example of what we term *suggestive post-event information*.

FILED

2006 AUG -1 PM 2:49

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

NO. 06-1-03538-7 SEA

BRIEF IN SUPPORT
OF MOTION TO SUPPRESS

Richard D. McCoy
Defendant Pro Se

BEST AVAILABLE IMAGE POSSIBLE

53

The Table of Contents:

	Pages:
Table of Authorities:	ii
A. Moving Party:	2
B. FACTS:	2
C. ISSUES Pertaining to the Facts:	3
D. Statement of the Facts:	3
E. Argument:	8
F. Conclusion:	18
G. Relief Sought	20

Table of Authorities:

	Pages:
1. State V. Brown, 27 Wn. App. 639, 620 P.2d 529 (1980).	15
2. State V. Christanson, 17 Wash. App. 264, 562 P.2d 671 (Wash. App. (1977)).	13, 14
3. Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967).	20
4.) State V. Nettles, 81 Wn. 2d 205, 500 P.2d 1201 (1976).	12
5.) United States v. Wade, 388 U.S. 218, 87 S.Ct. 1962, 18 L.Ed.2d 1149 (1967).	17, 18

U.S. Constitutions:

1. U.S. Fourth Amendment	10
2. U.S. Fifth Amendment	9
3. U.S. Six Amendment	17, 18

THE SUPERIOR COURT OF
WASHINGTON, FOR KING COUNTY

Raymond D. McCoy,
Defendant,

v.

THE STATE OF WASHINGTON,
Plaintiff.

NO. 06-1-03538-7

BRIEF IN SUPPORT
OF MOTION TO SUP-
PRESS PHOTO I.DEN-
TIFICATION.

COME NOW the defendant in the
above cause number, proceeding Pro-Se
with Stand-by Counsel, and do move
this Court for the relief sought in
part G. of this brief, to suppress
the identification and photo line-up

Conducted by Detective Hakervik of the
S.P.D. on or about February 27, 2006
and March 2, 2006.

A. MOVING PARTY:

Come now Raymond D. McCoy, the defendant
in the above Cause number and do move
this Court for the relief sought in
part G. of this brief.

B. FACTS:

(1) The photo montage created on
February 13, 2006 by Det. Hakervik was
impermissibly suggestive.

(2) Failure to retain defense counsel at
impending identification procedure, violate
defendant's due process.

C. ISSUES PERTAINING TO FACTS:

I.) The February 13, 2006, photo montage created by Det Aakerik, emphasized the photograph of the defendant which creates a substantial risk of misidentification.

II.) The photo-montage line-up of the defendant's photo, conducted on February 24, 2006, by Det Aakerik while the defendant was in-custody along with appointed counsel, violated defendant's due process.

D. STATEMENT OF THE CASE

On February 9, 2006 the defendant was arrested for alleged delivering a controlled substance to one Officer Dan Espinoza. The arresting officer was Wayne Johnson. Search incident to arrest, arresting officer

WAYNE Johnson allegedly found what appears to be a bank robbery note on the defendant's person.

On February 10, 2006, while the defendant was in custody, one officer Sean Hamlin contacted Det. Rodgers to advise him of the alleged bank note and its contents. Also on

February 10, 2006, Det. Hakervik stated that the defendant (Raymond D. McCoy) physical description appears to match that of the robbery suspect.

February 10, 2006 at 1300hr, while the defendant was still in-custody, Det. Hakervik along with FBI Victim Coordinator, attempted to set up

a line-up for the defendant to appear in by February 14, 2006.

February 10, 2006 at 1340hr, Det. Akerrik contacted the King County Prosecutor's Office and spoke with one Laura Poellet informing her on his, (Det. Akerrik) robbery investigation, and requested that the defendant be held until Det. Akerrik do a line-up on February 14, 2006. Prosecutor Laura Poellet informed Det. Akerrik that she needed a copy of the report and officer's statement and that she would provide the additional information to the Judge.

On February 10, 2006 at 1620hr Det. Rodgers contacted Officer WAYNE Johnson of the West Precinct and requested that he (Officer Wayne Johnson) fax statements and arrest reports to DPA Laura Pellet. Also, on February 10, 2006 at 1900hr Det. Rodgers and Det. Adkervik attempted to interview the defendant in-custody, which the defendant declined.

At 2230hr, on February 10, 2006 the defendant was released from custody.

On February 13, 2006 at 0935hr Det. Adkervik was informed that the defendant was

released on February 10, 2006, also
on February 13, 2006 Det. Hakervik.

Created a photo-montage containing
a photograph of the defendant.

On February 21, 2006 the defendant
was arrested for an outstanding
\$50,000 VUCSA warrant.

On February 27, 2006 Det. Hakervik
conducted a photo montage identification
of the defendant. At the time of Det.
Hakervik photo identification, the defendant
was in-custody with an appointed
Counselor.

E. ARGUMENT:

I.) On February 9, 2006 the defendant was arrested and booked into the King County Jail, for allegedly delivering a controlled substance to one Officer Don Espinoza. Search incident, the arresting Officer WAYNE JOHNSON founded what appears to be a bank demand note on the defendant's person. See exhibit #1

Do to this bank demand note, on February 10, 2006, before the defendant was released from custody, the defendant had become a suspect into Detective Akervik

bank robberies investigations. Prior to the defendant's release on February 10, 2006 Detective Hakervik attempted to interview the defendant in-custody. The U.S. Fifth Amendment requires that an individual not be "deprived of life, liberty, or property, without due process of law" nor be compelled to give self-incriminatory testimony. The defendant asserted his Fifth Amendment right by declining Det. Hakervik interviews. See Exhibit #2

On February 10, 2006, before defendant's release, Detective Hakervik contacted King County Prosecutor Laura Poellet, requesting

that the defendant be held in-custody.

"...I briefed her on the investigation and requested that McCoy be held until I could do a line-up on Tuesday...", See exhibit #1.

The U.S. Fourth Amendment states in part,

"...and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The only evidence to substantiate Detective Hakervik request to hold the defendant in-custody, was an alleged bank note, and that the

defendant's physical description match that of the bank's robbers.

As a result of detective Steve Smith of SPD Narcotics Unit, on February 15, 2006 DPA Bianca K. Tse was able to secure a \$50,000 warrant charging the defendant with delivery of a controlled substance.

On February 21, 2006, the defendant was arrested. The informant's report in part, "At the time of the arrest, the suspect had a bank robbery demand note in his pocket. He is currently under investigation for a series of bank robberies in the area." See exhibit #3

"... The photos should be unmarked and of the same size and nature so that the suspect's photo is not accentuated..." see State v. Nettles, 81 Conn.2d 205, 500 P.2d 1201 (1976). The photo of the defendant created on February 13, 2006, is accentuated by the nature in which the defendant's photo is displayed and profiled in the photo-montage by detective Hakerivik. "Though we do not find them exclusive, we adopt the following guidelines for present purposes: (T)he factors to be considered in evaluating the likelihood of misidentification include the

opportunity of the witness to view the
criminal at the time of the crime, the
witness degree of attention, the accuracy
of the witness prior description of the
criminal, the level of certainty demon-
strated by the witness at the con-
frontation, and the length of time
between the crime and the confrontation"

See State v. Christianson 17 Wash. App. 2d,

562 P.2d 671 Wash. App. (1977). Here the

photo-montage was shown to the victim

and three witnesses, pursuant to the above

Case number on February 27, 2006. "An Ident-

Identification procedure violates due process

if, under the totality of circumstances, the procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." See again,

State v. Christianson Supra. After the victim first identified a suspect other than the defendant, the witness identified the defendant as the robber, and will make an in-court identification from the photo-montage conducted by Detective Aakervik on February 27, 2006.

"... Once a witness has identified

a photograph, it is possible that any subsequent identification is that of the photograph and not of the person whom the witness saw." See *State v. Brown*, 27 Wn. App. 639, 620 P.2d 529 (1980).

III.) On February 10, 2006 due to an alleged bank-demand-note, in incident to the defendant's arrest on February 9, 2006, founded by the arresting officers, the defendant became a suspect into Detective Hakelvik bank robberies investigations. Although Detective Hakelvik wasn't able to have the defendant held into custody for

a February 14, 2006 line-up, on February 13, 2006 Detective Aakerik created a photo-montage with defendant's photo.

The defendant was in-custody in the King County Jail on February 21, 2006 and was available for a line-up along with

appointed counsel. Here the photograph identification procedure conducted

by Detective Aakerik on February 27, 2006 violated the defendant's due process.

Also on May 15, 2006, the defendant was denied a criminal motion under

CrR 4.7, requesting that a line-up

be held pursuant to the above case
number; see exhibit

The Court
held in United States v. Wade, 388 U.S.

218, 87 S.Ct. 1962, 18 L.Ed.2d 1149 (1967):

"... No substantial countervailing
policy considerations have been advanced
against the requirement of the presence
of Counsel. Concern is expressed that the
requirement will forestall prompt identi-
fication and result in obstruction of the
confrontation. As for the first, we note
that in the two cases in which the right
to Counsel is today held to apply, Counsel
had already been appointed and no
argument is made in either case that
notice to Counsel would have predu-
dicially delayed the confrontation..."

The defendant had a due process right
under the U.S. Six Amendment to

be informed of the impending photo identification procedure conducted by Detective Hakervik on February 27, 2006.

"And to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this Court has operated in Six Amendment cases..." See also United States v. Wade, Supra.

F. Conclusion:

Although Detective Hakervik was not able to have the defendant held

in Custody pending a possible

February 14, 2006 line-up, the defendant

was in-custody and available along

with appointed counsel for a line-up

on February 27, 2006, the day Detective

Ackerlyk conducted a photo-montage

of the defendant without informing

the defendant's Counsel. "Where there

is a denial of the right to Counsel at

the pre-trial line-up, the trial Court

must suppress all evidence of the identi-

fication which the prosecution seeks to

introduce in its case-in-chief against

The defendant...") see

Gilbert v. California, 388 U.S. 263, 87

S.Ct. 1951, 18 L.Ed.2d 1178 (1967).

G.) Relife Sought:

The identification procedure conducted by Detective Aakerik of the defendant on February 27, 2006 violated the defendant's due process, and tainted any in-court identification which the State may seek as a result of the photo-montage conducted by Detective Aakerik on February 27, 2006.

Therefore, the defendant respectfully move this Court to suppress the pre-trial

Identification procedure conduct on
February 27, 2006 by one Detective Hakevik
of the Seattle Police Department.

Submitted: This 12 day of June 2006

R
Raymond D. McLoey
Defendant-Pro-Se

cc: King County Prosecuting Attorney, 14554
King County Courthouse, MS 5C

King County Superior Court Clerk
Third Avenue RM E609, MS 6C

3. U.S. Bank

SEATTLE POLICE DEPARTMENT
MONTAGE IDENTIFICATION SHEET

INCIDENT NUMBER

06-052027

DATE 3-2-2006 TIME 1525 HRS PLACE H.S. BANIL

Montage Admonition

In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hair styles, beards and mustaches may be easily changed. Also, photographs may not depict the true complexion of a person - it may be lighter or darker than shown in the photograph. Pay no attention to any markings or numbers that may appear on the photos or to any differences in the style of type of photographs. When you have looked at all of the photos, tell me whether or not you see the person who committed the crime. Do not tell other witnesses that you have or have not identified anyone or the composition of the montage.

Montage Identification Statement

Witness or Victim: ERIC VAN DIEST
(NAME)
2401 3RD AVE
(ADDRESS)
206-441-0518
(PHONE)

The above is my true name, home or business address and home or business phone number.

Today I was shown 6 photographs. I identify picture number(s) NO PICK
as the person(s) who ROBBED
(ROBBED ME, ASSAULTED ME, ETC.)

on 2-6-2006 1130 AM at 2401 3RD AVE SEATTLE
(DATE) (TIME) (ADDRESS)

I have signed my name on the picture(s) I identified and placed my initials on the other pictures.
The above statement is true and correct to the best of my knowledge and I am willing to testify
in Court if called to do so.

Witness or Victim: [Signature] 3-2-06
(SIGNATURE) (DATE)

Statement taken by: DET. D. AAKERVIK

Witness: _____

- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/08/2006

ERIC VAN DIEST, [redacted] date of birth May 24, 1979, social security account number 520-03-1332 was interviewed at US BANK, 2401 3rd Avenue, Seattle, WA 98121. VAN DIEST had been working as a personal banker at US BANK for the past six months and his work number is (206) 441-1099. After being advised of the identity of the interviewing agent and the nature of the interview, VAN DIEST provided the following information:

On the morning of February 6, 2006 at approximately 11:25 a.m., an unidentified male entered the lobby on the second floor of US BANK from the main escalator. The man then stopped in front of one of the solitary counters and appeared to be looking down. VAN DIEST makes an effort to acknowledge all customers as they enter the bank. His desk faces the main entrance where the escalator is located.

The unidentified male then walked to a tellers window. VAN DIEST looked away and when he looked up again he saw the unidentified male running toward the exit. VAN DIEST estimated that the entire episode, from the time the man entered the lobby to the time the man left the lobby, lasted approximately two minutes.

The unidentified male may have been wearing a wig. VAN DIEST provided the following description of the unidentified male:

Race:	Black (lighter skinned)
Sex:	Male
Height:	5'9"-6'1"
Age:	27-30
Weight:	180 pounds
Hair:	Black, curly (possibly a wig)
Clothing:	Red baseball cap, red sweatshirt, jeans (possibly brown in color), cheap dark sunglasses with thick plastic
Other:	Possible scar or indentation on left cheek

Investigation on 02/06/2006 at Seattle, WA

File # 91A-SE-92159

Date dictated 02/08/2006

by Patrick J. Garry PJG

038PJG01.302



INCIDENT REPORT

6 FEB 2006 23 01

INCIDENT
 INCIDENT AND ARREST
 ARREST ONLY

INCIDENT NUMBER
06-052027

NOT DISCLOSE
 NOT DISCUSSED
 DISCLOSE

THE PERSON MAKING THIS REPORT HEREBY DECLARES THE FACTS HEREIN ARE TRUE AND CORRECT, AND UNDERSTANDS THAT BY FILING A FALSE REPORT, THEY MAY BE SUBJECT TO CRIMINAL PROSECUTION. X

HAZARD TO OFFICER
 DOMESTIC VIOLENCE
 BIAS CRIME

INCIDENT CLASSIFICATION ROBBERY	TOOL/WEAPON USED	METHOD OF TOOL/WEAPON USE
---	------------------	---------------------------

LOCATION 2301-3 RD AVE	FIRM NAME US BANK	CENSUS 080	BEAT D3
--------------------------------------	----------------------	---------------	------------

TYPE OF PREMISE (FOR VEHICLES STATE TYPE AND WHERE PARKED) BUSINESS	POINT OF ENTRY
--	----------------

DATE/TIME REPORTED 020606-1132 HRS	DAY OF WEEK MON	DATE(S) / TIME(S) OCCURRED 020206-1125HRS	DAY(S) OF WEEK MON
---------------------------------------	--------------------	--	-----------------------

PROPERTY STOLEN / RECOVERED (PROPERTY FORM 5.37.1 MUST BE ATTACHED) NOTHING TAKEN UNKNOWN AT TIME OF REPORT VICTIM FOLLOW-UP LEFT

EVIDENCE SUBMITTED FINGERPRINT SEARCH MADE FINGERPRINTS FOUND LAB EXAM REQUESTED

INJURED - 1
HAS USABLE TESTIMONY - 2
DO NOT DISCLOSE - 3

CODE	C (PERSON REPORTING, COMPLAINANT)	V (VICTIM)	W (WITNESS)	RACE/SEX/D.O.B. (OPTIONAL)	HOME PHONE	HOURS
C/W	FUNG, JASMINE K.			[REDACTED]	[REDACTED]	1 [] 2 [x] 3 [x]
	ADDRESS	ZIP CODE	OCCUPATION (OPTIONAL)	WORK PHONE	HOURS	DAYS
W2	SANCHEZ, PEARL A.			[REDACTED]	[REDACTED]	1 [] 2 [x] 3 [x]
	ADDRESS	ZIP CODE	OCCUPATION (OPTIONAL)	WORK PHONE	HOURS	

NAME (LAST, FIRST, MIDDLE) UNKNOWN	RACE/SEX/D.O.B U/M ~30-40'S	HEIGHT ~6-0	WEIGHT ~200	HAIR	EYES	SKIN TONE	BUILD
ADDRESS	HOME PHONE	WORK PHONE	WORK HOURS	OCCUPATION	EMPLOYER/SCHOOL		

CLOTHING, SCARS, MARKS, TATTOOS, PECULIARITIES, A.K.A.
RED CAP-GLASSES - GREY FLEESE JACKET - JEANS

RELATIONSHIP TO VICTIM

BA/CIT NO. CHARGE DETAILS (INCLUDE ORDINANCE OR R.C.W. NUMBER AND CHARGE NARRATIVES)
AT LARGE

BOOKED Y S C
 CITED K C J

- ADDITIONAL PERSONS - CODE, NAME, RACE, SEX, D.O.B., ADDRESS, INJURY, HOSPITALIZATION, HOME AND WORK PHONES, HOURS, AND IF DISCLOSURE OF NAME IS PERMITTED.
- ADDITIONAL SUSPECTS - DETAIL INFORMATION IN SAME ORDER AS SUSPECT BLOCK.
- VICTIM'S INJURIES - DETAILS AND WHERE MEDICAL EXAM OCCURRED.
- PROPERTY DAMAGED - DESCRIBE AND INDICATE AMOUNT OF LOSS.
- PHYSICAL EVIDENCE - DETAIL WHAT AND WHERE FOUND, BY WHOM, AND DISPOSITION.
- VEHICLE USED BY SUSPECT AND DISPOSITION
- NAME, ADDRESS, PHONE NUMBER OF JUVENILE'S PARENT(S)/GUARDIAN(S). NOTE IF CONTACTED AND IF INCIDENT ADJUSTED.
- LIST STATEMENTS TAKEN AND DISPOSITION.
- RECONSTRUCT INCIDENT AND DESCRIBE INVESTIGATION
- OUTLINE TESTIMONY OF PERSONS MARKED "HAS USABLE TESTIMONY" ON FRONT.

ITEM # 9

On the given date, time and location RO was dispatched and contacted the comp and witness who provided the following details. W1 [teller] stated the suspect approach her counter, handed her a piece of paper that contained a written note and at the same time said, "pull out your money - this is not a game". The paper note said the same words that the suspect spoke. W1 started pulling money out of her draw at which time the suspect reach over the counter into the draw and grabbed some of the money [unknown amount at time of investigation - Est. < 2,500 - bait money included]. The suspect then exited the second floor of the build by way of the escalator. W1 then activated her panic alarm.

W2 [customer] stated as she was pulling into the driveway of US Bank when she noticed the suspect walking as he crossed the path of her vehicle and then he entered the bank's lobby. When W2 entered the building to us the cash machine in the bank's lobby the suspect once again crossed her path running as he exited the building [north doors] in a northern direction. At this time W2 was not aware of the recent incident.

An area search for the suspect produced a negative result. Agent John Nelson of the FBI responded and took over the investigation.

I HEREBY CERTIFY (DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THIS REPORT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF (RCW 9A.72.085)

PRIMARY OFFICER'S SIGNATURE: *V. Minor* SERIAL # 5662 UNIT # 612 DATE SIGNED 2/6/06 PLACE SIGNED SEATTLE, WA

PRIMARY OFFICER'S PRINTED NAME: **V. MINOR** SECONDARY OFFICER: [] SERIAL UNIT APPROVING OFFICER SERIAL: *A/Sn-Chief 6361*

DISTRIBUTION: PRECINCT () CRIMES AGAINST PERSONS N S C JUV COURT UNIT K-9 UNIT PAGE 1 OF 2

Form 5.37A CS 21.924 Rev. 9/01 E W S N CRIMES/PROPERTY VICE/NARC CRIME ANALYSIS OTHER

20.255

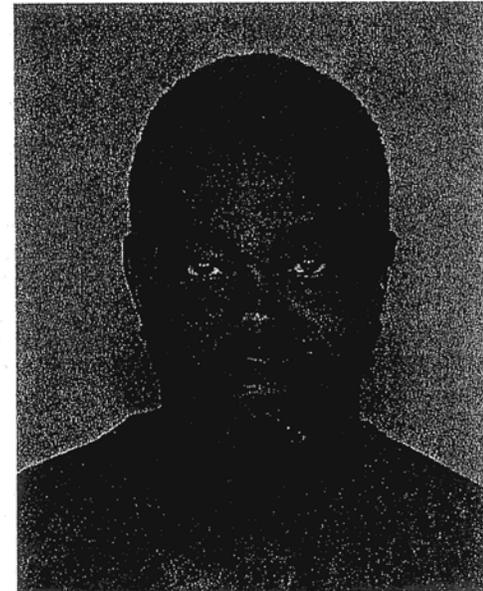
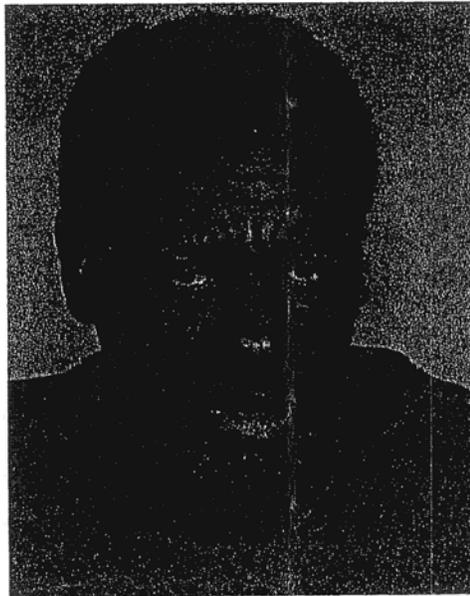
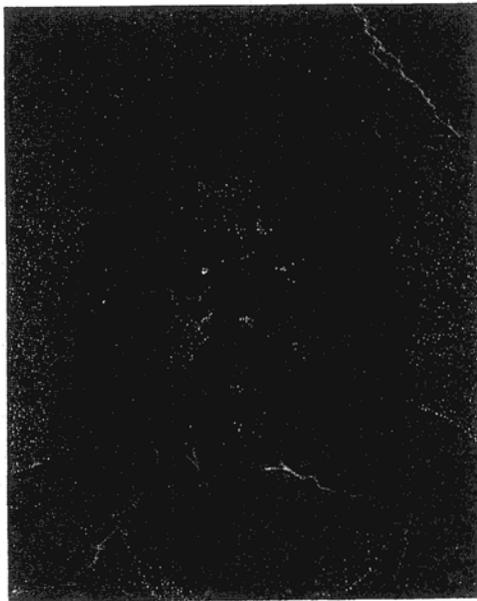
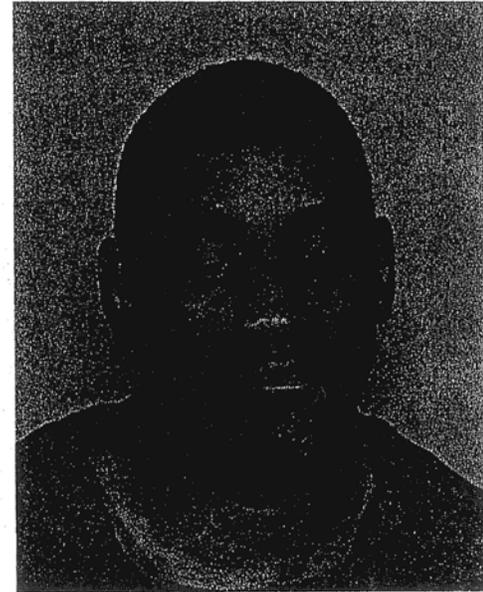
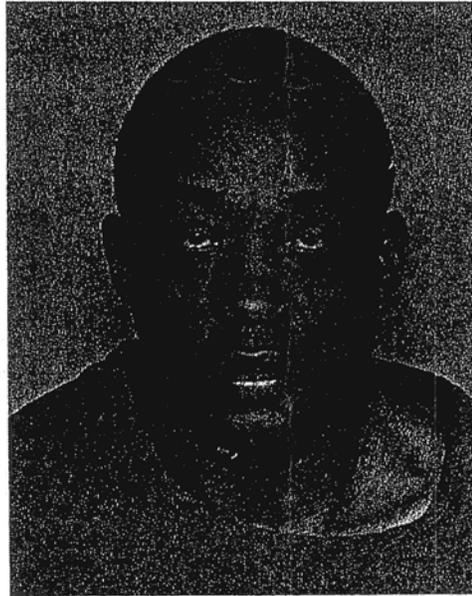
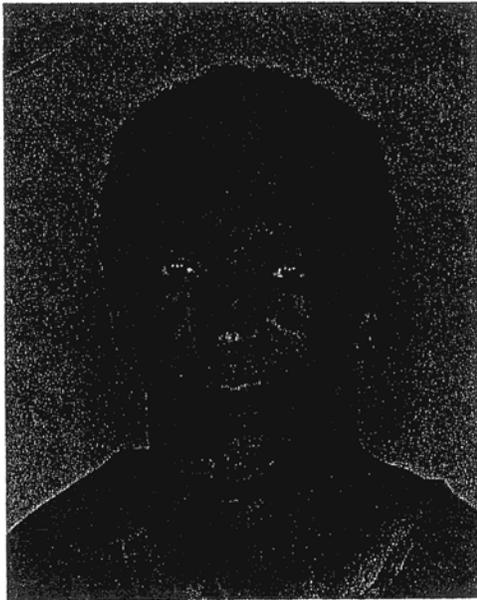


I-04#70/0422 BATTERY STREET

02/06/06

02:31:02

2. Key Bank



1-03 INT. DISTRICT KEY CENTER

32718/06

503-211-48

TITLE
ICE
ARTMENT

INCIDENT REPORT

<input checked="" type="checkbox"/> INCIDENT	INCIDENT NUMBER
<input type="checkbox"/> INCIDENT AND ARREST	06-62738
<input type="checkbox"/> ARREST ONLY	

OFFENSE ID	CAR VIDEO TAPE PLACED IN EVIDENCE <input type="checkbox"/>	THE PERSON MAKING THIS REPORT HEREBY DECLARES THE FACTS HEREIN ARE TRUE AND CORRECT, AND UNDERSTANDS THAT BY FILING A FALSE REPORT, THEY MAY BE SUBJECT TO CRIMINAL PROSECUTION. X	<input type="checkbox"/> HAZARD TO OFFICER <input type="checkbox"/> DOMESTIC VIOLENCE <input type="checkbox"/> BIAS CRIME
------------	--	---	---

DESCRIPTION	TOOL/WEAPON USED Note	METHOD OF TOOL/WEAPON USE Pass
-------------	--------------------------	-----------------------------------

ADDRESS Dearborn St	FIRM NAME Key Bank	CENSUS 091	BEAT K3
VEHICLE TYPE AND WHERE PARKED		POINT OF ENTRY	

REPORTED 1522 Hours	DAY OF WEEK Mon	DATE(S) / TIME(S) OCCURRED 02/13/06 1522 Hours	DAY(S) OF WEEK Mon
<input type="checkbox"/> STOLEN / RECOVERED (PROPERTY FORM 5.37.1 MUST BE ATTACHED) <input type="checkbox"/> NOTHING TAKEN <input type="checkbox"/> UNKNOWN AT TIME OF REPORT <input type="checkbox"/> VICTIM FOLLOW-UP LEFT			

SUBMITTED	<input type="checkbox"/> FINGERPRINT SEARCH MADE	<input type="checkbox"/> FINGERPRINTS FOUND	<input type="checkbox"/> LAB EXAM REQUESTED	INJURED - 1
C (PERSON REPORTING, COMPLAINANT)	V (VICTIM)	W (WITNESS)		HAS USABLE TESTIMONY - 2 DO NOT DISCLOSE - 3

NAME (LAST, FIRST, MIDDLE) Le, Tuan M.	RACE/SEX/D.O.B. (OPTIONAL) A/M/ADULT	HOME PHONE	HOURS 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/>
ADDRESS S. Dearborn St Seattle, WA	ZIP CODE 98134	OCCUPATION (OPTIONAL) Bank Teller	WORK PHONE 206) 585-9344

NAME (LAST, FIRST, MIDDLE) Key Bank	RACE/SEX/D.O.B. (OPTIONAL)	HOME PHONE	HOURS 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/>
ADDRESS S. Dearborn St Seattle, WA	ZIP CODE 98134	OCCUPATION (OPTIONAL)	WORK PHONE 206) 585-9344

HEIGHT 602	WEIGHT 230	HAIR unk	EYES unk	SKIN TONE Dark	BUILD Musc
ADDRESS	HOME PHONE	WORK PHONE	WORK HOURS	OCCUPATION	EMPLOYER/SCHOOL

NOTHING, SCARS, MARKS, TATTOOS, PECULIARITIES, A.K.A.
Blk beanie cap over a blk do-rag, blk leather jkt, blu jeans, mustache

BAVCIT. NO.	CHARGE DETAILS (INCLUDE ORDINANCE OR R.C.W. NUMBER AND CHARGE NARRATIVES)	<input type="checkbox"/> BOOKED <input type="checkbox"/> Y S C <input type="checkbox"/> CITED <input type="checkbox"/> K C J
-------------	---	---

- 1. ADDITIONAL PERSONS - CODE, NAME, RACE, SEX, D.O.B., ADDRESS, INJURY, HOSPITALIZATION, HOME AND WORK PHONES, HOURS, AND IF DISCLOSURE OF NAME IS PERMITTED.
- 2. ADDITIONAL SUSPECTS - DETAIL INFORMATION IN SAME ORDER AS SUSPECT BLOCK.
- 3. VICTIM'S INJURIES - DETAILS AND WHERE MEDICAL EXAM OCCURRED.
- 4. PROPERTY DAMAGED - DESCRIBE AND INDICATE AMOUNT OF LOSS.
- 5. PHYSICAL EVIDENCE - DETAIL WHAT AND WHERE FOUND, BY WHOM, AND DISPOSITION.
- 6. VEHICLE USED BY SUSPECT AND DISPOSITION.
- 7. NAME, ADDRESS, PHONE NUMBER OF JUVENILE'S PARENT(S)/GUARDIAN(S). NOTE IF CONTACTED AND IF INCIDENT ADJUSTED.
- 8. LIST STATEMENTS TAKEN AND DISPOSITION.
- 9. RECONSTRUCT INCIDENT AND DESCRIBE INVESTIGATION.
- 10. OUTLINE TESTIMONY OF PERSONS MARKED "HAS USABLE TESTIMONY" ON FRONT.

ITEM #	DESCRIPTION
5	1) 2 print cards lifted by Ofc Green. Submitted into evidence for processing.
9	On the above date and time, Ofc Maccarrone and I responded to a report of a bank robbery. We contacted C/W Le, who was the teller that the suspect approached. Le stated that the susp passed him a note written on white paper and a white plastic bag. The note said: "Attention this is a hold-up. Reach into your drawer, get all the hundreds and put in it the plastic bag." Le stated that he complied with the susp's demand and the susp took the bag and the note and fled the bank E/B on S. Lane St. Officers in the area stopped several possible suspects, and we took Le by each of them, but all were negative. I checked the teller window where Le was working for prints, and lifted 2 cards, which I turned in to the evidence unit. The FBI and task force units responded and took witness statements. The scene was turned over to them.

I HEREBY CERTIFY (DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THIS REPORT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF (RCW 9A.72.085)

PRIMARY OFFICER'S SIGNATURE <i>A. Green</i>	SERIAL # 6277	UNIT # 612	DATE SIGNED 2/13/06	PLACE SIGNED SEATTLE, WA
PRIMARY OFFICER'S PRINTED NAME A. GREEN	SECONDARY OFFICER L. MACCARRONE	SERIAL UNIT 6112 612	APPROVING OFFICER SERIAL <i>A/Sgt C. Bell 6306</i>	Incident Number 06-62738



SEATTLE
POLICE
DEPARTMENT

STATEMENT FORM

INCIDENT NUMBER 06-062738
UNIT FILE NUMBER

DATE 2-13-06	TIME 1550 HRS	PLACE KEYBANK - 666 DEARBORN
-----------------	------------------	---------------------------------

STATEMENT OF COMPLAINANT WITNESS VICTIM OFFICER OTHER

NAME (LAST, FIRST, M.I.)
LE, TUAN M. DOB [REDACTED]

WIFE: TUAN M. LE
BANK: KEYBANK - 666 DEARBORN
POSITION: TELLER
DURATION: OCT '05
PHONE: [REDACTED] [REDACTED] CELL

SUSPECT:
RACE/AGE/SEX: B/M / LATE 30'S
HEIGHT/WEIGHT: 6'02 - 6'04 / MEDIUM, MUSCULAR
BUILD: MUSCULAR
HAIR: COVERED
EYES: DARK (WAISTE LENGTH)
CLOTHING: SEE (HAT); BLK LEATHER JACKET W/ ELASTIC AROUND BACK
OTHER: GRAY OR DRK ZIP-UP JCKT UNDER, DRK BLU JEANS W/ RED STRIP ON RT THIGH, WHT-TRK SHIRT
WEAPON: NONE SEEN OR IMPLIED
FACIAL: DRK COMPLEXION, UNSHAVEN, MUSTACHE
HAT: BLK KNIT CAP / BEANIE, WITH BLK NYLON DOWRAG UNDERNEATH

I WAS WORKING AS A TELLER AT KEYBANK ON THIS DATE. I HAD NO CUSTOMERS, WHEN THE SUSPECT CAME IN THROUGH THE NORTH DOORS, BEHIND ANOTHER CUSTOMER.

WITNESS	STATEMENT TAKEN BY X [Signature]	SERIAL	UNIT	
WITNESS		SERIAL	UNIT	
TRANSCRIBED BY (Taped / Translated Statements)	SERIAL	UNIT	SUPERVISOR	SERIAL

20-30



SEATTLE
POLICE
DEPARTMENT

STATEMENT FORM

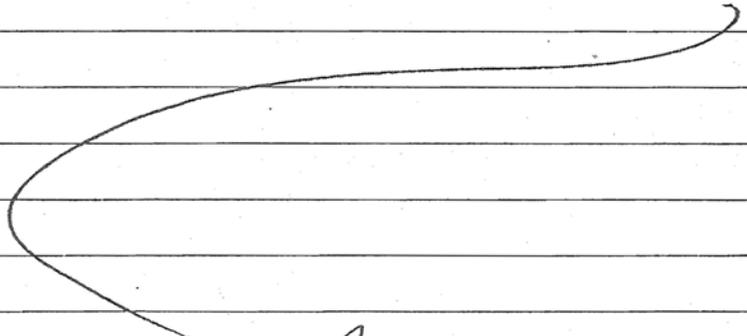
INCIDENT NUMBER 06-062738
UNIT FILE NUMBER

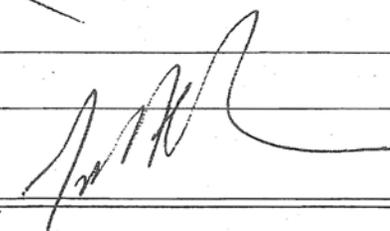
DATE	TIME	PLACE
------	------	-------

STATEMENT OF COMPLAINANT WITNESS VICTIM OFFICER OTHER

NAME (LAST, FIRST, M.I.)	DOB
--------------------------	-----

THE OTHER CUSTOMER WENT TO MY CO-WORKER YEN HUYNH. THE SUSPECT WALKED UP TO YEN & SAID SOMETHING ("HI" I THINK) THEN I ASSISTED HIM. HE PRESENTED A HANDWRITTEN NOTE (BLACK INK, ALL CAPS) WRITTEN ON A PIECE OF TORN WHITE PAPER ABOUT 2" x 3". IT SAID "ATTENTION THIS IS A ~~handwritten~~ HOLD UP PLEASE REACH INTO YOUR DRAWER AND PLACE GET ALL YOUR \$100'S AND CAREFULLY PLACE INTO THE PLASTIC BAG" OR SIMILAR. THE SUSPECT THEN SLID A WHITE PLASTIC BAG WITH GREEN IN THE MIDDLE, TOWARDS ME. I PLACED MONEY INTO THE BAG & SLID IT BACK TO HIM. THE SUSPECT THEN TOOK THE BAG & THE NOTE & WALKED BACK OUT THE NORTH DOORS. HE TURNED E/B ON S. LAKE PAST THE BANK & I LOST SIGHT OF HIM. END OF STATEMENT



WITNESS	X 	STATEMENT TAKEN BY	SERIAL	UNIT
WITNESS		SERIAL	UNIT	SUPERVISOR
TRANSCRIBED BY (Taped / Translated Statements)	SERIAL	UNIT	SUPERVISOR	SERIAL



SEATTLE
POLICE
DEPARTMENT

STATEMENT FORM

INCIDENT NUMBER 06-062738
UNIT FILE NUMBER

DATE 2-13-2006	TIME 1615	PLACE KEY BANK
-------------------	--------------	-------------------

STATEMENT OF COMPLAINANT WITNESS VICTIM OFFICER OTHER

NAME (LAST, FIRST, M.I.)
HUYNH, YEN
666 S. DEARBORN

DOB
[REDACTED]

I HAVE WORKED FOR KEY BANK FOR ABOUT 1 1/2 YEARS. TODAY I WAS HELPING A CUSTOMER AT MY TELLER WINDOW WHEN A B/M APPROACHED THE TELLER (TUAN LE) NEXT TO ME. AS HE PASSED HE SAID HI. I DID NOT KNOW WE HAD BEEN ROBBED UNTIL AFTER THE SUSPECT HAD LEFT THE BANK. THE SUSPECT DID NOT APPEAR NERVOUS OR ANXIOUS & WAS VERY CALM. HE WAS DESCRIBED AS:

B/m mid 30's - 40
602-603
LARGE BUILD
DARK COMPLEXION
CLEAN SHAVEN W/ LT. MUSTACHE
WEARING DARK OR BLACK JACKET, LT. COLORED SNOW TYPE CAP, DARK CLOTHING UNDER JACKET

I THINK I WOULD RECOGNIZE HIM IF I WERE TO SEE HIM AGAIN

WITNESS	X Yen Huynh	STATEMENT TAKEN BY	SERIAL	UNIT
WITNESS		DET. ARIKERAN	4810	717
TRANSCRIBED BY (Taped / Translated Statements)	SERIAL	UNIT	SUPERVISOR	SERIAL

1. Sterling Bank

SEATTLE POLICE DEPARTMENT
MONTAGE IDENTIFICATION SHEET

INCIDENT NUMBER
05-547018

DATE 2-27-2006 TIME 1245 PLACE STEELWORK SAVINGS BANK

Montage Admonition

In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hair styles, beards and mustaches may be easily changed. Also, photographs may not depict the true complexion of a person - it may be lighter or darker than shown in the photograph. Pay no attention to any markings or numbers that may appear on the photos or to any differences in the style of type of photographs. When you have looked at all of the photos, tell me whether or not you see the person who committed the crime. Do not tell other witnesses that you have or have not identified anyone or the composition of the montage.

Montage Identification Statement

Witness or Victim: OLGA MOORE
(NAME)
1406 4th AVE
(ADDRESS)
206-624-6775
(PHONE)

The above is my true name, home or business address and home or business phone number.
Today I was shown 6 photographs. I identify picture number(s) 5 / NO PICK
as the person(s) who ROBBED
(ROBBED ME, ASSAULTED ME, ETC.)
on 12-27-05 1200mat 1406 4th AVE SEATTLE
(DATE) (TIME) (ADDRESS)

I have signed my name on the picture(s) I identified and placed my initials on the other pictures.
The above statement is true and correct to the best of my knowledge and I am willing to testify
in Court if called to do so.

Witness or Victim: _____
(SIGNATURE) (DATE)

Statement taken by: DET. MAKERON
Witness: _____

SEATTLE POLICE DEPARTMENT
MONTAGE IDENTIFICATION SHEET

INCIDENT NUMBER
05-547018

DATE 2-27-06 TIME 1250 HR PLACE STERLING SAVINGS BANK

Montage Admonition

In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hair styles, beards and mustaches may be easily changed. Also, photographs may not depict the true complexion of a person - it may be lighter or darker than shown in the photograph. Pay no attention to any markings or numbers that may appear on the photos or to any differences in the style of type of photographs. When you have looked at all of the photos, tell me whether or not you see the person who committed the crime. Do not tell other witnesses that you have or have not identified anyone or the composition of the montage.

Montage Identification Statement

Witness or Victim: RUBY ELWOOD
(NAME)
1406 4th AVE
(ADDRESS)
206-624-6775
(PHONE)

The above is my true name, home or business address and home or business phone number.

Today I was shown 6 photographs. I identify picture number(s) 5
as the person(s) who ROBBED
(ROBBED ME, ASSAULTED ME, ETC.)

on 12-27-05 12:00pm at 1406 4th AVE, SEATTLE
(DATE) (TIME) (ADDRESS)

I have signed my name on the picture(s) I identified and placed my initials on the other pictures. The above statement is true and correct to the best of my knowledge and I am willing to testify in Court if called to do so.

Witness or Victim: [Signature] 2-27-06
(SIGNATURE) (DATE)

Statement taken by: DET. PAKER

Witness: _____

SEATTLE POLICE DEPARTMENT
MONTAGE IDENTIFICATION SHEET

INCIDENT NUMBER
05-547018

DATE 2-27-06 TIME 1255 HRS. PLACE STEPLIN SANNIS BANK

Montage Admonition

In a moment I am going to show you a group of photographs. This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. Keep in mind that hair styles, beards and mustaches may be easily changed. Also, photographs may not depict the true complexion of a person - it may be lighter or darker than shown in the photograph. Pay no attention to any markings or numbers that may appear on the photos or to any differences in the style of type of photographs. When you have looked at all of the photos, tell me whether or not you see the person who committed the crime. Do not tell other witnesses that you have or have not identified anyone or the composition of the montage.

Montage Identification Statement

Witness or Victim: KEN JACKSON
(NAME)
1406 4TH AVE.
(ADDRESS)
206-624-6775
(PHONE)

The above is my true name, home or business address and home or business phone number.

Today I was shown 6 photographs. I identify picture number(s) #6 60%
as the person(s) who ROBBED
(ROBBED ME, ASSAULTED ME, ETC.)

on 12-27-05 12:00 pm at 1406 4TH AVE, SEATTLE
(DATE) (TIME) (ADDRESS)

I have signed my name on the picture(s) I identified and placed my initials on the other pictures.
The above statement is true and correct to the best of my knowledge and I am willing to testify in Court if called to do so.

Witness or Victim: [Signature] 2/27/06
(SIGNATURE) (DATE)

Statement taken by: ES. MAKERUK

Witness: _____



28 DEC 2005 INCIDENT REPORT

INCIDENT AND ARREST
ARREST ONLY

INCIDENT NUMBER
05-547018

DO NOT DISCLOSE
NOT DISCUSSED
DISCLOSE
CAR VIDEO TAPE PLACED IN EVIDENCE
THE PERSON MAKING THIS REPORT HEREBY DECLARES THE FACTS HEREIN ARE TRUE AND CORRECT, AND UNDERSTANDS THAT BY FILING A FALSE REPORT, THEY MAY BE SUBJECT TO CRIMINAL PROSECUTION.
HAZARD TO OFFICER
DOMESTIC VIOLENCE
BIAS CRIME

INCIDENT CLASSIFICATION: Robbery- Bank
TOOL/WEAPON USED
METHOD OF TOOL/WEAPON USE

LOCATION: 1406 4th Ave
FIRM NAME: Sterling Savings
CENSUS: 081
BEAT: M4

TYPE OF PREMISE: Bank
POINT OF ENTRY: front door

DATE/TIME REPORTED: 12-27-05 1321
DAY OF WEEK: Monday
DATE(S) / TIME(S) OCCURRED: 12-27-05 1321
DAY(S) OF WEEK: Monday

PROPERTY STOLEN / RECOVERED
NOTHING TAKEN
UNKNOWN AT TIME OF REPORT
VICTIM FOLLOW-UP LEFT

EVIDENCE SUBMITTED
FINGERPRINT SEARCH MADE
FINGERPRINTS FOUND
LAB EXAM REQUESTED
INJURED - 1
HAS USABLE TESTIMONY - 2
DO NOT DISCLOSE - 3

PERSON/BUSINESS INVOLVED
Sterling Savings
1406 4th Ave Seattle WA 98101
624-6775
Willey, Marlena S
7248 S. Mullen Tacoma
bank teller

Suspect
NAME: dark wool hat, ear muffs or headphones, purple/blue jacket, jeans, white shoes, wh
RELATIONSHIP TO VICTIM

BAVCIT. NO.
CHARGE DETAILS
BOOKED
Y S C
CITED
K C J

- 1. ADDITIONAL PERSONS - CODE, NAME, RACE, SEX, D.O.B., ADDRESS, INJURY, HOSPITALIZATION, HOME AND WORK PHONES, HOURS, AND IF DISCLOSURE OF NAME IS PERMITTED.
2. ADDITIONAL SUSPECTS - DETAIL INFORMATION IN SAME ORDER AS SUSPECT BLOCK.
3. VICTIM'S INJURIES - DETAILS AND WHERE MEDICAL EXAM OCCURRED.
4. PROPERTY DAMAGED - DESCRIBE AND INDICATE AMOUNT OF LOSS.
5. PHYSICAL EVIDENCE - DETAIL WHAT AND WHERE FOUND, BY WHOM, AND DISPOSITION.
6. VEHICLE USED BY SUSPECT AND DISPOSITION.
7. NAME, ADDRESS, PHONE NUMBER OF JUVENILE'S PARENT(S)/GUARDIAN(S). NOTE IF CONTACTED AND IF INCIDENT ADJUSTED.
8. LIST STATEMENTS TAKEN AND DISPOSITION.
9. RECONSTRUCT INCIDENT AND DESCRIBE INVESTIGATION.
10. OUTLINE TESTIMONY OF PERSONS MARKED "HAS USABLE TESTIMONY" ON FRONT.

ITEM #
1 W-Moore, Olga M W-F
W-Jackson, Kenneth D B-M
W-Elwood, Ruby M W-F Adult
5 Evidence Sheet
9 On 12-27-05 at 1322 hours I responded to a report of a bank robbery that just occurred at Sterling Savings 1406 4th Ave. I arrived and spoke to the bank teller Willey. She said that she had just finished taking a cash deposit and was holding the money in her hand. The suspect approached her counter and reached through the teller window and tried to grab the cash. Willey thought the man was joking, but the man said, "Give it to me. I'm serious, give it to me, this is a robbery." Willey gave the suspect the cash and he turned and walked out. Moore was standing right by Willey and saw the suspect as well. Jackson and Elwood were sitting at their desks, and the suspect passed them walking in and out of the bank. Surveillance photos captured several images of the suspect.

I HEREBY CERTIFY (DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THIS REPORT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF (RCW 9A.72.085)
PRIMARY OFFICER'S SIGNATURE: P. WALL
SERIAL #: 5236
UNIT #: 612
DATE SIGNED: 12-27-05
PLACE SIGNED: SEATTLE, WA
APPROVING OFFICER: [Signature]

MOTION : POST-ALARM - FULL - Normal



PETITIONER'S LIST AND REFERENCE PAGE TO APPENDIXS

PAGES:

APPENDIXS:

A. (Pro-Se motion and brief in support of a motion to dismiss; Order denying motion to dismiss and setting over Pro-Se motion to severance for trial court judge).....5

C. (Brief of Appellant, Nielsen, Broman & Koch, PLLC).....6

D. (Petitioner's (SAG) to brief of appellant).....6

E. (Brief of Respondent).....6

F. (Petitioner's Pro-Se Reply brief).....6

G. (Pro-Se discovery motion pursuant to Key Bank's surveillance tape).....26

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUN 17 AM 11:39

Appendix C

Appendix C

NO. 60134-2-I

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

REC'D

NOV 30 2007

King County prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND D. MCCOY,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION ONE

NOV 30 2007

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

The Honorable Paris K. Kallas, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
Issues Pertaining to Assignments of Error.....	1
B. STATEMENT OF THE CASE.....	1
Procedural history.....	1
The offenses.....	1
<i>Sterling Savings</i>	2
<i>US Bank</i>	2
<i>Key Bank</i>	3
The King County Jail disclosure.....	4
McCoy's testimony.....	5
D. ARGUMENT.....	6
THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTIONS.	6
E. CONCLUSION.....	14

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

★ *State v. Collinsworth*,
90 Wn. App. 546, 966 P.2d 905,
review denied, 135 Wn.2d 1002 (1998)..... 7-9, 11, 12

State v. Gregory,
158 Wn.2d 759, 147 P.3d 1201 (2006)..... F/R6

State v. Hacheney,
160 Wn.2d 503, 158 P.3d 1152 (2007)..... F/M6

★ *State v. Handburgh*,
119 Wn.2d 284, 830 P.2d 641 (1992).....6, 7

✓ *State v. Johnson*,
155 Wn.2d 609, 121 P.3d 91 (2005)..... F/Robbery / Court-mart T.V.7

State v. Parra,
96 Wn. App. 95, 977 P.2d 1272,
review denied, 139 Wn.2d 1010 (1999).....8, 9

✓ *State v. Smith*,
155 Wn.2d 496, 120 P.3d 559 (2005)..... CS/Att / 3rd assault /6

State v. Tvedt,
153 Wn.2d 705, 107 P.3d 728 (2005)..... 12 / F/B W.44 / Gun / Knives13

FEDERAL CASES

United States v. Hill,
187 F.3d 698 (7th Cir. 1999)12

United States v. Clark,
227 F.3d 771 (7th Cir. 2000)13

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

United States v. Graham,
931 F.2d 1442 (11th Cir. 1991),
cert. denied, 502 U.S. 948 (1991)..... 13

United States v. Hopkins,
703 F.2d 1102,
cert. denied, 464 U.S. 963 (9th Cir. 1983)..... 12

United States v. Lucas,
963 F.2d 243 (9th Cir. 1992) 11, 12

RULES, STATUTES AND OTHERS

18 U.S.C.A. § 2113 11

RCW 9A.56.190 7

A. ASSIGNMENTS OF ERROR

1. The state failed to prove the appellant robbed the bank tellers because McCoy used neither force nor the threat to use force.

Issues Pertaining to Assignments of Error

1. The jury convicted the appellant of first degree (bank) robbery despite the absence of evidence showing the appellant used force or threatened to use force when he obtained money from bank tellers. Must the appellant's convictions be reversed and dismissed with prejudice?

B. STATEMENT OF THE CASE

Procedural history

The state charged the appellant, Raymond D. McCoy, with three counts of first degree robbery of a financial institution. CP 41-42. A King County jury found McCoy guilty as charged. CP 132-33, 160. The trial court sentenced McCoy to three concurrent, 150-month standard range terms. CP 164-68.

The offenses

Employees at three Seattle banks identified McCoy as the man who came into their banks and took money from the tellers. The banks

involved, in chronological order of crime, were Sterling Savings, US Bank and Key Bank. CP 41-42.

Sterling Savings

Marlena Willey was the customer services manager at Sterling Savings. RP (5/1) 18-19. Willey was training a new bank teller, Olga Moore, when McCoy approached Willey's teller station. RP (5/1) 18-22, RP (5/2) 76-79. McCoy reached for money Willey was holding. RP (5/1) 21-22, RP (5/2) 77-79. Willey thought McCoy was jesting and pulled the money back. But in a normal tone of voice, McCoy told him it was not joke and to give him the money. RP (5/1) 21-23, RP (5/2) 78. Willey complied. RP (5/1) 23, RP (5/2) 78. McCoy left the bank and police were called. RP (5/1) 23, RP (5/2) 78. Moore described Willey as being "very, very stressed out" after the incident. RP (5/2) 88.

US Bank

Jasmine Fung, a US bank teller, saw McCoy standing in the lobby and called him to her station to offer assistance. RP (5/2) 90-93. McCoy gave her a note telling her to give him money and it was not a game. RP (5/2) 93, 101-02. Fung gave McCoy about \$2,000. (5/2) 93. An officer who responded to the scene described Fung as "a little disturbed" and "a little shaken up" by her experience. RP (5/7) 11-12.

Key Bank

Teller Tuan Le RP observed McCoy walk past fellow teller Yen Huynh and approach his station. (5/2) 8-10, 12-13. McCoy produced a note announcing "Attention, this is a holdup. Please reach into your drawer and place all the 100s into the bag." RP (5/2) 13-15. McCoy slid a plastic bag under a Plexiglas shield that separated bank patrons from the tellers. RP (5/2) 14, 30.

Le read the note several times while he thought of what to do, then complied with the request. RP (5/2) 13. At one point during the exchange, McCoy again told Le, "Hurry up. This is a holdup" RP (5/2) 16.

Fellow teller Yen Huynh described the robber as a tall African-American man. RP (5/2) 50-52. Huynh observed McCoy enter the bank and approach Le's teller station. RP (5/2) 51. Because she was busy with a customer, Huynh did not know what happened between McCoy and Le. RP (5/2) 51-52. Nothing drew her attention to McCoy, who appeared to be a normal customer. RP (5/2) 52. After McCoy left, Huynh whispered to her he was robbed so as not to startle other customers. RP (5/2) 52.

The King County Jail disclosure

Kevin Olsen and McCoy met each other in the King County Jail pending McCoy's trial. RP (5/7) 48-51, 54-55. Olsen was also being held for bank robbery and the two did legal research work together. RP (5/7) 53-54. He estimated he and McCoy conversed about McCoy's case about 10 times. RP (5/7) 71-72. McCoy initiated each conversation. RP (5/7) 72. He admitted to committing several bank robberies. RP (5/7) 70. Olsen took cryptic notes of his conversations that corresponded with the facts of the three robberies. RP (5/7) 58-62. He also wrote one of McCoy's motions for him. RP (5/7) 62-63.

Olsen saw neither the probable cause certificate nor the police reports for McCoy's case. RP (5/7) 63, 98-99.¹ McCoy told him Olsen he left a palm print on the counter at the Key Bank. RP (5/7) 63-64. During a conversation about strategy, McCoy said he was thinking about explaining he left the print because he was at the bank at a different time than the robbery. RP (5/7) 64-65. McCoy also told Olsen he snatched money out of the hand of one of the tellers during one of the robberies. RP (5/7) 70. He further disclosed he was frustrated about one of the robberies

¹ McCoy represented himself when he spoke with Olsen. RP (5/7) 62, RP (5/8) 100-03.

because a teller trainee provided a more certain identification of him than did a more experienced bank employee. RP (5/7) 56-57.

Olsen shared his knowledge of McCoy's cases with FBI agents. RP (5/7) 65-67, 102-03. The agents contacted Seattle Police Detective Dag Aakervik, who was in charge of McCoy's case. RP (5/7) 109, 135. Aakervik later took a taped and handwritten statement from Olsen. RP (5/7) 135-42. Aakervik described Olsen's knowledge of the crimes as "[v]ery detailed." RP (5/7) 141. Olsen received no benefit for assisting the authorities with McCoy's cases. RP (5/7) 67, 142.

McCoy's testimony

McCoy testified he did not rob any of the three banks. RP (5/8) 104. He went to the Key Bank in the morning on the same day as the afternoon robbery. RP (5/8) 96-99. He exchanged coins he panhandled for paper currency. RP (5/8) 98-99. McCoy said he and Olsen helped each other with their cases. RP (5/8) 101-02. Olsen had access to various portions of McCoy's discovery when they worked together. RP (5/8) 103.

D. ARGUMENT

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTIONS.

Robbery is theft plus the taking or keeping of the property of another by the use or threatened use of force in the presence of the owner or superior possessor. *State v. Handburgh*, 119 Wn.2d 284, 291, 830 P.2d 641 (1992). Stated differently, there can be no robbery without force or a threat to use force. McCoy neither used nor threatened to use force against the bank tellers. His convictions for robbery should therefore be reversed.

The State must prove every element of a charged offense beyond a reasonable doubt. *State v. Gregory*, 158 Wn.2d 759, 801, 147 P.3d 1201 (2006). When a defendant challenges the sufficiency of the evidence supporting a conviction, reviewing courts consider the evidence in the light most favorable to the State. *State v. Hacheney*, 160 Wn.2d 503, 512, 158 P.3d 1152 (2007). A criminal defendant's constitutional rights to due process are violated when the trial court enters a judgment of guilt despite the state's failure to meet its burden. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

"A person commits robbery by unlawfully taking personal property from another against his will by the use or threatened use of force to take or retain the property." *State v. Johnson*, 155 Wn.2d 609, 610, 121 P.3d

91 (2005).² Any force or threatened force, regardless of its severity, that induces an owner to part with his property is sufficient to prove robbery. *Handburgh*, 119 Wn.2d at 293; *State v. Collinsworth*, 90 Wn. App. 546, 553-54, 966 P.2d 905, *review denied*, 135 Wn.2d 1002 (1998).

Collinsworth was the first Washington case to apply these legal principles to a bank robbery where there were neither physical nor verbal threats used by the robber. *Collinsworth*, 90 Wn. App. at 551-52. The robber in *Collinsworth* obtained money from five different banks after directing tellers to give him money. *Collinsworth*, 90 Wn. App. at 548-49.

The tellers testified they feared Collinsworth would harm them or others in the bank if they did not comply. *Collinsworth*, 90 Wn. App. at 548-50. Four of the five tellers testified they would have given Collinsworth money regardless of their employers' policy to comply with a robber's request. *Collinsworth*, 90 Wn. App. at 548-50. One teller considered Collinsworth's demand to be an ultimatum or threat to harm others employees or customers. *Collinsworth*, 90 Wn. App. at 548. Another was shocked a robbery was taking place and thought Collinsworth

² In pertinent part, RCW 9A.56.190 defines robbery as unlawfully take[ing] personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.

probably had a gun. *Collinsworth*, 90 Wn. App. at 549. The third teller thought it was possible Collinsworth was armed and complied because he did not want to jeopardize himself or others. *Collinsworth*, 90 Wn. App. at 549. In the fourth robbery, Collinsworth wore a baggy sweatshirt and held one hand near his waist, prompting the teller to worry he might have a weapon. *Collinsworth*, 90 Wn. App. at 550. The final teller gave Collinsworth money because he feared for the safety of others in the bank. *Collinsworth*, 90 Wn. App. at 550.

This Court held Collinsworth's clear demands for surrender of the banks' funds under the circumstances of the case were sufficient to sustain the trial court's findings Collinsworth took the money through the use or threatened use of force. *Collinsworth*, 90 Wn. App. at 548.

This Court's decision in *State v. Parra*³ is in accord. There the defendant quickly entered a credit union with his hand tucked in the front of his pants. *Parra*, 96 Wn. App. at 98. The defendant demanded and received money from two tellers. *Parra*, 96 Wn. App. 1273-74. He did not use or threaten to use force. *Parra*, 96 Wn. App. at 1274. This Court rejected the defendant's claim the state failed to present sufficient

³ 96 Wn. App. 95, 977 P.2d 1272, *review denied*, 139 Wn.2d 1010 (1999).

evidence of force or fear. *Parra*, 96 Wn. App. at 1275. The *Parra* court, following *Collingsworth*, concluded the demands for money from the tellers constituted implicit threats of force. *Parra*, 96 Wn. App. 1276. The defendant's demands, coupled with clear evidence both tellers feared injury and would have complied with the defendant's demands regardless of the bank's policy to acquiesce to such demands, convinced this Court there was sufficient evidence to sustain the robbery convictions. *Parra*, 96 Wn. App. 1276.

These cases illustrate the fact-specific nature of the analysis used to determine whether non-threatening demands for money from bank tellers can constitute threats of force. In each case, the victimized tellers testified to their fear and their willingness to comply with the robbers' demands whether it comported with their employers' policies or not. *Parra* made this clear by considering both the implicit threats found in the demands and the reactions of the tellers to the demands. And the fear expressed by the tellers in *Collingsworth* was part of the circumstances the court considered in finding the evidence sufficient to support the robbery convictions.

The facts in McCoy's case are distinguishable in this respect. None of the tellers from whom McCoy obtained money testified they were

fearful. Nor did any of the tellers or witnesses testify they feared McCoy was or may have been armed with a weapon. Willey, the Sterling Savings teller, testified McCoy made his demand in normal conversational tone that probably would not have been heard at the next teller station. RP (5/1) 22. Moore testified Willey appeared to be very stressed after the incident, but Willey gave no indication she was fearful or concerned while McCoy stood at her station. Similarly, the officer who spoke first with Fung shortly after the US Bank robbery testified Fung appeared "a little disturbed," and "a little shaken." RP (5/7) 11-12. Fung, on the other hand, did not express fear or unease. No one testified Le displayed any signs of fear or worry during or after being robbed at Key Bank. The evidence is to the contrary. Immediately after being robbed, Le had the wherewithal to whisper to colleague Huyhn so as not to alarm customers. Further, Le was protected from harm by a Plexiglas shield. Finally, Le paused before complying with McCoy's request and "contemplate[d] what [he] should do." RP (5/2) 13.

The lack of fear expressed by the tellers in McCoy's case also distinguishes his case from the pertinent federal cases the *Collingsworth* Court looked to for guidance.

In one of the cases, the defendant stepped up to a bank's teller window and placed plastic bags on the counter. He gave the teller a note directing the teller to pull all the teller's money in the bag. The defendant also told the teller to do the same. The teller complied. *United States v. Lucas*, 963 F.2d 243, 244 (9th Cir. 1992). As did the *Collinsworth* Court, the court in *Lucas* held an express threat was not required to establish bank robbery by intimidation. *Lucas*, 963 F.2d at 248.⁴ As in the Washington cases, however, the court also considered the role fear played in rejecting the defendant's sufficiency challenge, specifically noting, "Furthermore, the teller in this case who was approached by Lucas testified that she was terrified." *Lucas*, 963 F.2d at 248.

Indeed, the role of the teller's subjective fear was not lost on the *Collinsworth* Court. In discussing *Lucas*, this Court noted "the defendant's written and oral demands, *in conjunction with* the teller's testimony that she was terrified, constituted sufficient evidence to permit the jury to find

⁴ Bank robbery as set forth in 18 U.S.C.A. § 2113 is committed when an individual "by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank"

a taking by intimidation.” *Collinsworth*, 90 Wn. App. at 552 (emphasis added).

Collinsworth and *Lucas* both relied on *United States v. Hopkins*, 703 F.2d 1102, *cert. denied*, 464 U.S. 963 (9th Cir. 1983). *Hopkins* presented a note to a bank teller that said, "Give me all your hundreds, fifties and twenties. This is a robbery." *Hopkins*, 703 F.2d at 1103. When the teller told *Hopkins* she had no \$100 or \$50 bills, *Hopkins* told her to give him what she had. *Hopkins*, 703 F.2d at 1103. The court found the threats implicit in the note and statement sufficient to prove intimidation. *Hopkins*, 703 F.2d at 1103. Unlike in *McCoy*'s case, however, the teller in *Hopkins* testified she felt "intimidated, frightened, and concerned for her unborn child" during the incident. *Hopkins*, 703 F.2d at 1103.⁵

⁵ Federal courts have held the subjective feelings of a robbery victim are irrelevant to determining whether the element of intimidation has been proven. *See, e.g., United States v. Hill*, 187 F.3d 698, 702 (7th Cir. 1999) (bank teller's subjective feelings are irrelevant). It is important to note, however, in *Hill* and other cases the courts take pains to point out the actual fear instilled in the teller. For example, the *Hill* Court noted the teller testified she was afraid, did not activate the alarm during the robbery because she thought it would be dangerous and did not go back to work after the robbery because she was nervous. *See also United States v. Graham*, 931 F.2d 1442, 1443 (11th Cir. 1991) ("The bank teller's testimony clearly showed that she was intimidated by the note and *Graham*'s subsequent glares and stares. In *Higdon*, the Fifth Circuit defined intimidation as an act that is reasonably calculated to put another in fear. The teller testified at trial that she was so afraid of *Graham*'s demeanor and his note that she did not give him the bait money nor was

Despite holding the subjective feelings are irrelevant in determining whether the evidence supports a finding of “intimidation,” federal courts consistently emphasize and rely upon a victim’s expressed fear.

In McCoy’s case, the victims’ expressed fear is absent. None of the tellers or any of the bank employees expressed fear of being injured. Nor did McCoy act in a way that a reasonable person would be fearful.

Courts must be cautious in determining the sufficiency of the evidence in a case like McCoy’s because of the fine line between robbery and theft. The essential difference between theft and robbery is the use or threat of force. This is what makes robbery a crime against a person as well as a crime against property. *State v. Tvedt*, 153 Wn.2d 705, 711, 107 P.3d 728 (2005).

she able to press the alarm.”), *cert. denied*, 502 U.S. 948 (1991); *United States v. Clark*, 227 F.3d 771, 775 (7th Cir. 2000) (holding courts must consider context of crime in determining whether evidence supports element of intimidation; emphasizing teller “testified that she feared for her safety during and after the encounter . . . and that as a result of the hold-up, was unable to sleep at night.”

Here the required element of force or threat of force is absent. The state therefore proved at most that McCoy committed theft. McCoy respectfully requests this Court to reverse his conviction for robbery and dismiss with prejudice.

D. CONCLUSION

The state failed to prove McCoy used force or the threat of force when he obtained money from three banks. The evidence thus does not support McCoy's robbery convictions. McCoy respectfully requests this Court to reverse his convictions and dismiss with prejudice.

DATED this 30 day of November, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

Appendix F.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUN 17 AM 11:40

CERTIFICATE OF SERVICE

I Raymond D. McCoy today submitted to the Washinton State Penitentiary law library staff, for recording, proceesing, and to be placed into the U.S. Postal Mail Services, a 9 page Pro-se Reply Brief to all parties listed below:

1. Richard D. Jonhson
Court Of Appeals Division One
600 University Street
Seattle, Washington 98101
2. Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
Seattle, WA, 98104
3. Andrew Peter Zinner
Nielsen, Broman & Koch PLLC
1908 E Madison St
Seattle, WA, 98122-2842

After being first duly sworn, on oath, I depose and say: That I am the Appellant, that I have read the Brief, know its contents, and I believe the Brief is true.

Raymond D. McCoy Appellant

Subscribed and sworn to before me this _____ day of _____, 2008

Notary Public in and for the State
of Washington, residing at _____
_____.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

RAYMOND D. MCCOY

APPELLANT,

V.

STATE OF WASHINGTON,

RESPONDENT.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY THE
HONORABLE PARIS K. KALLAS

APPELLANT'S PRO-SE REPLY BRIEF
PURSUANT TO R.A.P. 10.3 (c)

Raymond D. McCoy
Appellant
270764-BMU-3-E14
Washington State Penitentiary
13 13 N. 13th Ave
Walla Walla, Wash 99362

TABLE OF CONTENTS

PAGE:

TABLE OF AUTHORIES	ii
A. RESPONSE IN REPLY	1
B. ISSUES PERTAINING TO REPLIES	1
C. STATE OF THE CASE	2
D. ARGUMENT	2
E. CONCLUSION	8

TABLE OF AUTHORITIES

PAGES:

STATE CASES:

1. In re Bratz, 101 Wn.App 622, 5 P.3d (2000)6

2. Spokane V. Douglass, 115 Wn.2d 171
182, 795 P.2d 693 (1990)6,7

3. State V. Collinsworth, 90 Wn.App 546
966 P.2d 905, review denied
135 Wn.2d 1002 (1998).....3.4.7

4. State V. Decker, 127 Wn.App 427
111 P.3d 286 (2005)6

5. State V. Hauck, 33 Wn.App 75
651 P.2d 1092 (1982)6

6. State V. Jennings, 111 WN.App 54
44 P.3d 1 (2000) review denied
148 Wn.2d 1001 60 P.3d 1212 (2003)6

7. State V. Mahoney, 40 Wn.App 514
699 P.2d 254 (1985)5

FEBDERAL CASES:

1. Maine V. Moulton, 474 U.S. 159 (1985)8

2. Massiah V. United States, 377 U.S. 201 (1964)
argued March 3, 1964 denied May 18, 1964
by vote of 6 to 3.8

3. United States V. Henrey, 447 U.S. 264 (1980)8

RULES, STATUTES AND OTHER:

R.C.W. 9A.56.1903,7

R.C.W. 9A.56.2005,6,7

R.C.W. 9A.56.2105,7

U.S. Cont, 61,5,8

U.S. Cont, 145,6

A. RESPONSE IN REPLY:

1. The State admits that appellant conviction was the result of appellant taking the stand, and the surveillance tape from the Key Bank incident date: February 13, 2006,

2. Nielsen, Broman & Koch denied appellant effective representation by not addressing the identity issues surrounding the May, 2007 in-court identification, or the prejudicial testimony of the jailhouse informant which denied appellant effective assistance pursuant to the Sixth Amendment of the U.S. constitution.

3. The argument Nielsen, Broman & Koch presented on behalf of the appellant, to-wit, "The state failed to prove the appellant robbed the bank teller's because McCoy used, neither force nor the threat to use force.", constitutes ineffective representation, by circumventing the above issues, and laying a foundation for the state's threatened use of force argument. also constitutes a conflict of interest, denying appellant effective assistance pursuant to the Sixth Amendment of the U.S. constitution.

B. Issues Pretaining To Replies:

1. Before closing defense's case-in-chief, appellant was advised by defense counsel to take the stand. The state was allow to present in rebuttal the Key Bank surveillance tape, which the prosecutor personally call, and had appellant's expert witness, Mr. Eric Blank drop off to his office. This surveillance tape was mis-represented to the jury as best evidence, which the state admits on the record that appellant's testimony along with this surveillance tape is what ultimately

convicted the Appellant, not identity or threatened use of force.

2. The State argues that the two teller's and one witness made a positive ID of Appellant during trial. Although Appellant addressed the identification in Appellant's SAG, Nielsen, Broman & Koch denied Appellant effective assistance and representation, by not addressing the constitutional protection from allowing the jailhouse informant prejudicial testimony, or the bias and suggestive in-court identification.

3. The State argues that Appellant admits the truth of all inferences that can be drawn therefrom, which Nielsen, Broman & Koch laid the foundation in support of the State's threatened use of force argument.

C. STATE OF THE CASE

On February 10, 2006, do to a Social Security Receipt addressed to Appellant Raymond D. McCoy containing, according to the State, what appeared to be a bank demand-note on the back of this document addressed to the Appellant, an alleged print dusted from a teller's counter/window, an identification based on a photo-montage, and the testimony of a jailhouse informant, and the mis-representation of rebuttal evidence, to-wit surveillance tape from the Key Bank incident date: February 13, 2006, Appellant was denied a fair trial and convicted of three counts of first degree robberies. This Pro-Se reply follows, the State response to the ineffective assistance and mis-represented brief by Neilsen, Broman & Koch filed on behalf of Appellant on November 30, 2007.

D. ARGUMENT

1. Other than the foundation laid by Neilsen, Broman & Koch, to-wit, the failure to prove force or threatened use

of fear or injury, pursuant to State V. Collinsworth, 90 Wn.App 546, 966 P.2d 905, review denied, 135 Wn.2d 1002 (1998), the State admits on the record, that it was the Appellant taking the stand, and the Key Bank's surveillance tape that ultimately convicted the Appellant. See RP (5/22) 14 at 24-25 and 15 at 1-6. Appellant was denied a fair trial and effective assistance and representation, by the State's mis-representation of the rebuttal evidence, to-wit, the Key Bank surveillance tape. See Appellant's SAG at 17 and attached Appendix B.

2. Neilsen, Broman & Koch, by laying the foundation for the State's threatened use of force, denied Appellant effective representation and assistance, by supporting the State's argument pursuant to State V. Collinsworth, Supra, and RCW 9A.56.190 and circumventing the crux of Appellant's grounds set out in appellant's SAG. First, the identity of Appellant, did the State prove beyond a reasonable doubt that the Appellant was the robbery suspect? Second, was Appellant denied a fair trial, and due process and equal protection by allowing a jailhouse informant to testify about an in-custody relationship dealing with Appellant Pro-Se work-product? Here, in Respondant's brief at 7, is a prima facie showing that the prejudice to Appellant outweighed any probative values of Neilsen, Broman & Koch summarizing the prejudicial statement of the jailhouse informant, to-wit, Mr. Olsen, and allowing the State to circumvent the issues in Appellant's SAG concerning the denial of due process and equal protection, in reference

to the totality of the circumstances surrounding "The King County Jail Disclosure". See Appellant's brief at pages 4-5. See also Appellant's SAG at 4-7 and 15. On May 1-10, 2007, all in-court identification was tainted by the suggestive, bias and prejudicial montage created on February 13, 2006. The in-court identification by the witnesses and teller's on May 2007, was a result of this montage and not the person who robbed the teller's on, December 27, 2005; December 31, 2005 February 6, 2006; February 13, 2006. The question here is, Why was Appellant denied a line-up on May 15, 2006? Which would have been 30days after the Appellant was charged. Now the State claim that the Appellant was positively identified over one year later. The record will show that Appellant was arrested February 21, 2006 , and remained in-custody until he was tried and convicted on May 10, 2007 for three counts of first degree bank robberies, as a result of an in-court tainted identification.

3. The State's response is no more than grandstanding on the foundation laid by Neilsen, Broman & Koch, pursuant to State V. Collinsworth, Supra.

In 1997 Neilsen, Broman & Associates P.L.L.C. now Neilsen Broman & Koch, on behalf of Daniel Collinsworth, pursuant to COA# 66387-4, appealed Mr. Collinsworth five counts of Second Degree Robberies, in the Court Of Appeals Division One. Here the King county Superior Court founded Mr. Collinsworth guilty ruling that the State satisfied the, "Use or threatened use of immediate force, violence or fear of injury", elements of robbery

DEFENDANT TO

pursuant to RCW 9A.56.210, before the 2002 amendment to the Washington State robbery Statute, which added subsection 9A.56.200(1)(b). On June 2, 1998 the Washington State Supreme Court denied petition for review of a decision of the Court Of Appeals, pursuant to COA# 66387-4; Nevertheless, Neilsen, Broman & Koch in its Appellant's brief filed on before of Appellant on November 30, 2007, now before this court, cites State V. Collinsworth, Supra, limiting the crux of Appellant's argument to, "Use or threatened use of immediate force, violence or fear of injury, See Appellant's brief at 1-7 and respondent's brief at 9-10. This representation by Neilsen, Broman & Koch falls below an objective standard of reasonableness, violating Appellant's due process and equal protection pursuant to the Sixth and Fourteenth amendment of the U.S. constitution, denying Appellant effective assistance, and representation of appellant counsel. The State charged Appellant with First degree Robbery, pursuant to RCW 9A.56.200(1)(b), here the Washington State Legislature by amendments of the robbery statute, in adding subsection (1)(b) did not relieve the State of the burden of proving some physical manifestation of force: Robbery in the first degree requires actual infliction of bodily injury during the commission of the robbery if there is no deadly weapon involved; mere fear of injury, even if justified, is not sufficient. See State V. Mahoney, 40 Wn.App 514, 699 P.2d 254 (1985); The mere threatened use of a deadly weapon in the commission of a robbery, unaccompanied by any physical manifestation indicating a weapon, is Second degree robbery. nocy

robbery, not First, In re Bratz, 101 Wn.App 662, 5 P.3d 759 (2000); A person may be found guilty of robbery in the First Degree even though he was not actually armed with a deadly weapon and inflicted no bodily injury if he displayed what appeared to be, but was not a deadly weapon. See State V. Hauck, 33 Wn.App 75, 651 P.2d 1092 (1982); review denied, 99 Wn.2d 1001 (1983); Defendant was properly convicted of First Robbery under RCW 9A.56.200(1)(a) (ii) where the jury had sufficient evidence to conclude that in a flight from a robbery, defendant inflicted injury on the victim arm, which directly cause the victim to flail about and attempt to free himself. The Victim attempt to free himself directly cause his injuries, such that there was a direct causal link between defendant's act and the victim's injuries. See State V. Decker 127 Wn.App 427, 111 P.3d 286 (2005); First Degree Robbery requires some physical manifestation of a possible weapon, something more than a verbal threat. See State V. Jennings, 111 Wn.App 54 44 P.3d 12 (2002), review denied, 148 Wn.2d 1001. 60 P.3d 1212 (2003).

The court held in Spokane V. Douglass 115 Wn.2d 171, 18282 795 P.2d 693 (1990): The challenged law

is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope.

A statute violates Fourteenth Amendment due process protection if it fails to provide a fair warning of proscribed conduct.

Douglass, 115 Wn.2d at 178. Although some uncertainty is constitutionally

constitutionally premissible, a statute is unconstitutionally vague if: (1.)...[it] dose not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2.)...[it] dose not provide ascertainable standards of guilt to protect against arbitrary enforcement, Douglass, 115 Wn.2d ar 178-79. Here the decisions and rulings from both Washington State's Divisions and Supremes court reflects a prima facie showing, that to substantiate a conviction of First Degree Robbery the State must prove. force threat, or injury. on the other hand, as argued by Neilsen, Broman & koch and the State pursuant to State V. Collinsworth. Supra and RCW 9A.56.190 at the most would constitute Thieft or Second Degree Robbery, pursuant to RCW 9A.56.210.' Under RCW 9A.56.200 (1)(b) before considering the use or threatened use of force, the ultimate issue is "identity", "...Ultimately, the only issue in this case is identity...". See RP (5/9) 47. In the fairness of justice, the reviewing court should address this question with strict constitutional scrutiny, which is, "Why was the Appellant denied a line-up on May 15, 2006?". If as stated by the State "...Ultimately, the only issue in this case is identity". See also Appellant's SAG at 12 and attached exhibit 4.

After the beginning of trial on May 1, 2007, Appellant was informed by trial counsel Mr. McKay that the State was offering a year and a Day on all three counts, and would amend from three counts of First Degree Robberies to three counts of Thieft-1, pursuant to cause number 06-1-03538-7SEA.

The State's reference to the "King County Jail Disclosure", See Respondant's brief at 77, and Appellant's brief at 4-5. Here Appellant was denied due process and equal protection by both trial counsel and Nielsen, Broman & Koch, for not only did the probative value of the jailhouse informant testimony was outweighed by the danger of unfair prejudice but was prohibited by the Massiah doctrine, pursuant to Massiah V. United States, 377 U.S. 201 (1964) argued March 3, 1964 denied May 18, 1964 by vote of 6 to 3. The Supreme Court responded, — ... the defendant's own incriminating statement pertaining to charges pending against him could not be used at the trial of those charges..., evidence pertaining to new crimes as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained would be admissible even though other charges against the defendant were pending at the time. This approach was reaffirmed in Maine V. Moulton, 474 U.S. 159 (1985). The Massiah Doctrine would prohibit the government from using such tactics if adversary proceedings had already been initiated against the person, as the court held in United States V. Henry, 447 U.S. 265 (1980). See Appellant SAG at 4-7.

E. CONCLUSION

The in-court identification of appellant should not be overlooked, nor the testimony of the jailhouse informant. It would not be in the interest of justice to allow the State through the foundation laid by Neilsen, Broman & Koch pursuant to State V. Collinsworth, Supra, to hurtle over the issues

presented in appellant SAG, to-wit, 1.) identity; 2.) The King County Jail Disclosure; and 3.) The mis-representation of the rebuttal evidence, to-wit, the Keny Bank surveillance tape. To do so will limit the curx of appellant's appeal to the, use or threatened use of force. For the Reply stated above, inreference to Neilsen, Broman & Koch's brief on behalf of appellant pursuant to COA NO. 60134-2I and the response brief of Respondant, appellant presents his SAG along with this reply brief asking the reviewing court to consider the totalilty of the circumstances pursuant to Cause Number 06-1-03538-7SEA, and conclude that the evidences, and totality of the circumstances, view in light most favorable to the state do not support the guilty verdict of three counts of first degree Robberies. Therefore, the appellant places his mercy on the reviewing court, respectfully asking that the conviction pursuant to Cause Number 06-1-03538-7SEA be vacate,---dismiss, or remanded for a New Trial.

Submitted this _____ day of February 2008.

Raymond D. McCoy, Appellant

Appendix E

FILED
CLERK OF APPELLATE COURT
STATE OF WASHINGTON
2008 JUN 17 AM 11:40

NO. 60134-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND D. McCOY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PARIS K. KALLAS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JIM A. FERRELL
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

RECEIVED

JAN 28 2008

Nielsen, Broman & Koch, PLLC

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
B. <u>ISSUES PERTAINING TO ASSIGNMENT OF ERROR</u>	1
C. <u>STATEMENT OF THE CASE</u>	1
D. <u>ARGUMENT</u>	7
1. THERE IS SUFFICIENT EVIDENCE TO AFFIRM APPELLANT'S CONVICTION FOR ROBBERY IN THE FIRST DEGREE, WITH RESPECT TO STERLING SAVINGS.....	10
2. THERE IS SUFFICIENT EVIDENCE TO AFFIRM APPELLANT'S CONVICTION FOR ROBBERY IN THE FIRST DEGREE, WITH RESPECT TO US BANK.....	12
3. THERE IS SUFFICIENT EVIDENCE TO AFFIRM APPELLANT'S CONVICTION FOR ROBBERY IN THE FIRST DEGREE, WITH RESPECT TO KEY BANK.....	13
E. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

(Handwritten marks: stars and checkmarks next to case names)

Seattle v. Slack, 113 Wn.2d 850,
784 P.2d 494 (1989)..... 7

State v. Ammlung, 31 Wn. App. 696,
644 P.2d 717 (1982)..... 8

State v. Collinsworth, 90 Wn. App. 546,
966 P.2d 905 (1997)..... 9, 11, 12

State v. Duran-Davila, 77 Wn. App. 701,
892 P.2d 1125 (1995)..... 7, 8

State v. Green, 94 Wn.2d 216, *m/B.*
616 P.2d 628 (1980)..... 7, 10

State v. Handburgh, 119 Wn.2d 284,
830 P.2d 641 (1992)..... 8, 11

State v. Hunt, 75 Wn. App. 795,
880 P.2d 96 (1994)..... 7

State v. Pacheco, 70 Wn. App. 27,
851 P.2d 734 (1993), rev'd in part,
125 Wn.2d 150, 882 P.2d 183 (1994)..... 8

State v. Parra, 96 Wn. App. 95,
977 P.2d 1272 (1999)..... 11, 12

Statutes

Washington State:

RCW 9A.56.190 8

Rules and Regulations

Washington State:

RAP 2.5..... 7

A. ASSIGNMENT OF ERROR

Appellant asserts that there was insufficient evidence to support the Appellant's convictions for three counts of Robbery in the First Degree, in that Appellant alleges Mr. McCoy did not use either force or the threat to use force.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

When viewed in the light most favorable to the State, was there sufficient evidence to sustain the three convictions for Robbery in the First Degree, on the issue of whether Appellant either used or threatened to use force to obtain the money, where Appellant made clear, concise and unequivocal demands for the money, and made implicit threats to obtain such money?

C. STATEMENT OF THE CASE

The State charged Appellant with three counts of first degree robbery of financial institutions. CP 41-42. After a jury trial before the Honorable Paris K. Kallas, Appellant was found guilty as charged, of all three counts. CP 132-33, 160. The Court sentenced Appellant to a standard range sentence of 150 months. CP 164-68. The State incorporates herein Appellant's recitation of

the facts concerning The Offenses, as outlined in pages 1 through 5 of Appellant's brief. The State further outlines the evidence produced at trial, below.

Sterling Savings

Marlena Willey, the customer services manager at Sterling Savings Bank in Seattle, was working as a teller at the bank on the day of the robbery, December 27, 2005. RP (5/1) 18-20. She was in the process of training a new hire at the bank, Olga Moore. RP (5/1) 20-21. As Appellant approached Ms. Willey she still had cash in her hand from the previous transaction with another customer. RP (5/1) 20-21. Ms. Willey testified that as Mr. McCoy walked up to her, he reached for the money in her hands. RP (5/1) 22. She held the money away and said, "No." Id. He did it again and she said, "Stop it." Id. Mr. McCoy then said, "This is no joke. This is a robbery. Give me the money." RP (5/1) 22. Ms. Willey testified that when Mr. McCoy said "this is no joke, this is a robbery" she knew it was a real robbery. Id. She then complied with his demand and handed him the money. RP (5/1) 23.

Ms. Olga Moore testified that just before the robbery she was talking with Marlena and a person came to the teller station and when he saw Marlena with the cash he said, "Just give it to

me." RP (5/2) 78. She said that Marlana did not react and he reached over and he said, "I am serious, give me the money." Id. Marlana then complied with the demand and gave the person the money, and the person left. Id. At trial Ms. Moore positively identified Appellant as the person who committed the robbery. RP (5/2) 83. Ms. Moore further testified "everybody was shocked" as a result of the robbery. RP (5/2) 87-88. She said, "Marlana was very, very stressed out. I was shocked." RP (5/2) 88. She also testified that their Branch Manager, Ruby Elwood, was worried about "like the way we feel" and "was worried about our condition." RP (5/2) 88, 77.

Ruby Elwood, the Branch Manager at Sterling Savings Bank on the day of the robbery, December 27, 2005, testified that as Appellant was walking away from the teller station and out of the bank, "My teller had called me and said that she had just been robbed." RP (5/2) 64. Ms. Elwood also testified that she got a good look at the person and saw his side profile, as he had walked past her desk. RP (5/2) 64-65. When asked if she talked with the police when they arrived, she replied, "Well, actually for me, I was more trying to make sure everybody else was okay and make sure everything on this list was taken care of. And so obviously the

police, when they came in, they wanted to talk to the tellers that had been robbed." RP (5/2) 67. Ms. Elwood also positively identified the Appellant during trial. RP (5/2) 72.

US Bank

Jasmine Fung testified that she was working as a bank teller at US Bank on February 6, 2006. RP (5/2) 90-92. Ms. Fung asked Appellant to come over to her teller station in order to help him, and he then passed her a note. RP (5/2) 93. The note directed her to give him all of her money and that "this is not a game." Id. She also said that Appellant said this one time to her as well. Id. When asked what happened then, she replied, "Then I start to give my first and second drawer money to him, and he also reach out to my cartridge to get the money as well." Id. She said that she gave him around \$2,000. On cross-examination Ms. Fung testified that the note said, "Pull all my money--"Pull out the money, this is not a game.'" RP (5/2) 101. Ms. Fung positively identified Appellant in court during the trial. RP (5/2) 101.

Eric Van Diest, another employee at US Bank, was present when the robbery occurred and was seated at a desk nearby, helping a client. RP (5/2) 151-52. He testified that he heard Ms. Fung say, "I was robbed, I was robbed." RP (5/2) 152.

Seattle Police Officer Victor Minor testified that he responded to US Bank on February 6, 2006, and contacted Ms. Fung. RP (5/7) 6-11. When asked to describe Ms Fung's demeanor or actions, he testified, "She appeared to be a little disturbed by the incident. She was willing to talk and stuff like that, but you could just tell that she was a little shaken up by -- from my experience, she was shaken up by the incident that occurred." RP (5/7) 11-12. He went on to explain, "I talked with her briefly, one, because she was a little shaken up; . . ." RP (5/7) 12.

Key Bank

Tuan Le testified that he was working as a bank teller at the Key Bank in the International District of Seattle on February 13, 2006. RP (5/2) 8-11. Mr. McCoy walked past another teller, Yen Huynh, and said "Hi" to her prior to approaching Mr. Le's teller station. RP (5/2) 12-13. Mr. McCoy said "Hi" to Mr. Le and then slipped him a note. RP (5/2) 13. Mr. Le said the card was written in all capital letters and said, "ATTENTION, THIS IS A HOLDUP. PLEASE REACH INTO YOUR DRAWER AND PLACE ALL THE 100s INTO THE BAG." Id. Mr. Le testified, "I basically read the note several times trying to contemplate what I should do, and all I can remember at that time was I just tried to comply with what is

being asked. So I took a few seconds to gather myself and just did as he asked." Mr. Le complied with the demand and provided the cash to Mr. McCoy. RP (5/2) 14. After the note was given to Mr. Le, Mr. McCoy slid a plastic bag under the Plexiglas guards separating customers from tellers. RP (5/2) 14, 30.

When asked how long the entire encounter lasted, Mr. Le testified, "To me, you know, when the incident happened, it lasted forever, but I could say anywhere between a minute to three minutes." RP (5/2) 16. During the incident, Mr. McCoy said to Mr. Le, "Hurry up. This is a holdup. You shouldn't be taking this long." RP (5/2) 16.

Yen Huynh testified that she was working at the bank on this date and said hi to the person who robbed the bank, just as he was walking up to Mr. Le's window. RP (5/2) 51. Ms. Huynh was not paying attention to any of the interactions between Mr. McCoy and Mr. Le, and nothing drew her attention to their interaction. RP (5/2) 51-52. After Mr. McCoy left the bank, Mr. Le gave her a signal that he had just been robbed. RP (5/2) 52. She said that Mr. Le was whispering because she was in the process of helping a customer and they did not want to scare the customer. RP (5/2) 52.

The State incorporates by reference the summaries provided in Appellant's brief, regarding "The King County Jail Disclosure" on pages 4 and 5, and Mr. "McCoy's testimony" on page 5 of that same brief.

D. ARGUMENT

Because due process requires that the State prove its case beyond a reasonable doubt, a sufficiency of the evidence challenge is a question of manifest error affecting a constitutional right and may be raised for the first time on appeal. Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); RAP 2.5(a)(3). An inquiry into the sufficiency of the evidence does not require the reviewing court to make its own determination of guilt beyond a reasonable doubt. Instead, the pertinent question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); State v. Hunt, 75 Wn. App. 795, 806, 880 P.2d 96 (1994). In other words, "[a] claim of insufficiency admits the truth of all of the State's evidence and all inferences that can be drawn therefrom." State v. Duran-Davila, 77 Wn. App. 701, 704, 892 P.2d

1125 (1995) (quoting State v. Pacheco, 70 Wn. App. 27, 38-39, 851 P.2d 734 (1993), rev'd in part, 125 Wn.2d 150, 882 P.2d 183 (1994)) (emphasis supplied).

The Appellant was charged by information with three counts of Robbery in the First Degree, by committing robbery against financial institutions. CP 41-42. Robbery is defined in RCW 9A.56.190, which provides, in pertinent part:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190. "Any force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction." State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992); citing State v. Ammlung, 31 Wn. App. 696, 704, 644 P.2d 717 (1982). "No matter how calmly expressed, an **unequivocal demand for the immediate surrender of the bank's money, unsupported by even the pretext of any lawful entitlement to the funds, is fraught with the implicit threat to**

use force." State v. Collinsworth, 90 Wn. App. 546, 553, 966 P.2d 905 (1997) (emphasis supplied).

The Collinsworth Court noted:

It has long been the rule in Washington that if the taking of the property be attended with such circumstances of terror, or such threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person, it is robbery.

Collinsworth, at 551. The Court went on to rule:

Under the circumstances of this case, the fact that Collinsworth did not display a weapon or overtly threaten the bank tellers does not preclude a conviction for robbery. "The literal meaning of words is not necessarily the intended communication." FN 9 In each incident, Collinsworth made a clear, concise, and unequivocal demand for money. He also either reiterated his demand or told the teller not to include "bait" money or "dye packs," thereby underscoring the seriousness of his intent.

Collinsworth, at 553 (emphasis supplied). The Court concluded:

In this case, Collinsworth expressed his demands for money directly to the teller. Viewed in the light most favorable to the State, the evidence was sufficient to support the trial court's findings that Collinsworth obtained bank property through the use or threatened use of "immediate force, violence or fear of injury."

Collinsworth, at 554. The circumstances of the three bank robberies in this case are remarkably similar to the robberies in Collinsworth; in each case he made a clear, concise and

unequivocal demand for the money and repeated his demand and used language to underscore the seriousness of his intent.

1. THERE IS SUFFICIENT EVIDENCE TO AFFIRM APPELLANT'S CONVICTION FOR ROBBERY IN THE FIRST DEGREE, WITH RESPECT TO STERLING SAVINGS.

When viewed in the light most favorable to the State, the evidence in the Sterling Savings robbery is more than sufficient to sustain a finding of guilty beyond a reasonable doubt. According to the above-stated law, Appellant admits the truth of all the State's evidence and all inferences that can be drawn therefrom. The legal standard is whether "*any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt." Green, at 221 (emphasis supplied).

Appellant made a clear, concise and unequivocal demand for the money from Ms. Willey. Appellant said, "This is no joke. This is a robbery. Give me the money." RP (5/1) 22. When Mr. McCoy said "this is no joke, this is a robbery" she knew it was a real robbery. Id. She then complied with his demand and handed him the money. RP (5/1) 23. This clear language was an implied threat to Ms. Willey. The words, "This is no joke" would lead a reasonable

person to conclude that it was an implied threat. This is a reasonable inference from the evidence brought forth at trial.

Ms. Moore also described the effect that this crime had on Ms. Willey, in that she was "very, very stressed out" after the incident. RP (5/2) 88. An inference from this testimony is that Ms. Willey was placed in fear by Appellant's implied threat. Ms. Moore also testified that "everybody was shocked" as a result of the robbery and that she was shocked. An inference from this evidence is that "everybody" necessarily includes Ms. Willey.

It should be noted however, actual fear by the tellers in cases of this nature is not required, but is one factor for consideration. In State v. Parra, 96 Wn. App. 95, 101-02, 977 P.2d 1272 (1999), the Court cited both Collinsworth and Handburgh and detailed their respective rulings. The Court then observed:

In addition to the fact that Kent's demand for money from the tellers carried with it the implicit threat of force, the evidence clearly supports a conclusion that both Johnson and Wilson were fearful of injury, and would have handed over the money even in the absence of the bank's policy directing tellers to comply with a robber's request. As a result, the evidence was sufficient to support Kent's conviction for second degree robbery.

Parra, at 102. In Parra, the Court simply stated an additional basis to sustain the conviction, the fear of the tellers, in addition to the

implied threat from the clear demand for the money. The Court in Parra does not require the existence of this fear to sustain a robbery conviction. An implied threat, by itself, is enough, as is evident in the actual ruling in Collinsworth. However, as stated previously, there was evidence that Ms. Willey was placed in fear. In either case, there is sufficient evidence to affirm the conviction for Robbery in the First Degree with regard to the Sterling Savings Bank robbery.

2. THERE IS SUFFICIENT EVIDENCE TO AFFIRM APPELLANT'S CONVICTION FOR ROBBERY IN THE FIRST DEGREE, WITH RESPECT TO US BANK.

Ms. Fung was approached by the Appellant and handed a note which clearly and concisely demanded money from her, with the added wording that this was "not a game." RP (5/2) 93, 102. The Appellant said this to her as well. RP (5/2) 93. According to Officer Minor, who took her statement, Ms. Fung appeared to be, "a little disturbed" and a little "shaken up" by her experience. RP (5/7) 11-12.

The clear and concise demand for money, twice, by Appellant, coupled with the advisement that this is "not a game"

constitute an implied threat to Ms. Fung. This evidence, by itself, is enough to sustain the robbery conviction. Furthermore, an inference from her being "shaken up" and "a little disturbed" is that she felt threatened by Appellant and fearful.

There is sufficient evidence to sustain Appellant's conviction for the robbery at US Bank.

3. THERE IS SUFFICIENT EVIDENCE TO AFFIRM APPELLANT'S CONVICTION FOR ROBBERY IN THE FIRST DEGREE, WITH RESPECT TO KEY BANK.

Tuan Le received a clear and concise demand for the money in the form of a note and also verbally. The note said, in pertinent part, "ATTENTION THIS IS A HOLDUP." RP (5/2) 13. Implicit in that clear demand is a threat. The word "HOLDUP" conjures up an image of a forceful robbery. Appellant also at one point said, "Hurry up. This is a holdup. . ." RP (5/2) 16. The use of that phrase again (holdup) and his repeated requests for the money constitute an implied threat. Clearly, an inference from all of this evidence is that Appellant implicitly threatened Mr. Le.

Lastly, Mr. Le's comments that this robbery, when it happened, "lasted forever," indicated Mr. Le's discomfort and

possible fear from Appellant's threats. That is a reasonable inference from that evidence and testimony.

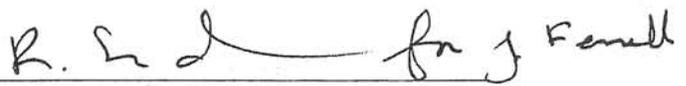
E. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny Appellant's request for a reversal and uphold his three convictions for Robbery in the First Degree.

DATED this 25th day of January, 2008.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JIM A. FERRELL, WSBA #24314
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

~~Hybrid~~

Appendix D.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 17 PM 11:39

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

STATE OF WASHINGTON)

Respondent,)

v.)
Raymond D. McCoy)
(your name))

Appellant.)

No. 06-1-03538-7SEA

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Raymond D. McCoy have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

See Attached Brief in support
of appellant Statement of Additional
Grounds for Review

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement.

Date: January 18, 2008

Signature: Raymond D. McCoy

BRIEF IN SUPPORT OF APPELLANT'S
STATEMENTS OF ADDITIONAL GROUNDS

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY,
The Honorable Paris K. Kallas, Judge,

RAYMOND D. MCCOY,
APPELLANT,
V.
STATE OF WASHINGTON,
RESPONDENT.

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

TABLE OF CONTENTS

	PAGES
A. ASSIGNMENTS OF ERROR:	1
B. Issues Pertainings To assignment Of Error	1,3
C. STATEMENT OF THE CASE	3,4
D. ARGUMENT	4
E. CONCLUSION	23

RULES, STATUTES AND OTHER

RCW'S	1,18,23
CrR	2,3,5,8,22,23
CR	3,5,15,23
ER	15
14Washington Practice, Chapter 13 Civil Procesures	6
United States Constitution	4,14,16,22
Washtoning State Constitution	8

TABLE OF AUTHORITIES

PAGES

WASHINGTON STATE CASES:

1.	State V. Black, 120 Wn.2d 822, 831 845 P.2d 1017 (1993)	5
2.	State V. Garza, 99 Wash.App 291, 99 994 P.2d 868 (2000)	20
3.	State V. Granack, 90 Wash.App 598 959 P.2d (1998)	7
4.	State V. Klinger, 96 Wash.App, 619 (1999) 980 P.2d 282 (1999)	17
5.	State V. Michielli, 132 Wn.2d 229 937 P.2d 587 (1997)	5
6.	State V. Poulos, 31 Wash.App 241 640 P.2d 735 (1982)	12
7.	State V. Rohrich, 149 Wn.2d 647 71 P.3d 638 (2003)	5
8.	State V. Saunders, 91 Wash.App 575 958 P.2d 364 (1998)	6
9.	State V. Thorkelson, 25 Wash.App 615 611 P.2d 1278 (1980)	11

FEDERAL CASES:

PAGES

1.	Callahan V. U.S., 317 F.2d 658 660 (9th Cir 1967)	
2.	Shillinger V. Haworth, 70 F.2d 1132 1140-41 (10th Cir 1995)	
3.	Weatherford V. Bursey, 429 U.S. 545 97 S.Ct. 834, L.Ed.2d 30(1977)	
4.	In re Winship, 397 U.S. 385, 364 25 L.Ed.2d 368 90 S.Ct. 1068 (1970)	
5.	United States V. Booker, 125 S.Ct. 738 160 L.Ed.2d 621 (2005)	

TABLE OF AUTHORITIES

PAGES

FEDERAL CASES: CONT,

6.	U.S. V. Black, 767 F.2d 1334, 1338 (9th Cir)(Black) cert,denied 474 U.S. 1022, 1106 S.Ct 574 88 L.Ed.2d 557 (1985)	9
7.	U.S. V. Cook, 608 F.2d 1145, 118 (9th Cir 1979) cert, denied 444 U.S. 1934 100 S.Ct 706 62 L.Ed.2d 670 (1980)	9
8.	United States V. Gaudin, 515 U.S. 506, 511 132 L.Ed.2d 444 115 S.Ct 2310 (1995)	22, 23
9.	United States V. Irwin, 612 F.2d 1182 (9th Cir 1980)	20
10.	U.S. V. Rich, 580 F.2d 929 934 (9th Cir 1978)	9

A. ASSIGNMENTS OF ERROR:

1. The third party intrusion into petitioner's Pro-Se work-product denied petitioner rights to a fair trial, and effective self-representation, which constitutes a violation of petitioner's constitutional rights pursuant to the Sixth Amendment of the U.S. constitution.

2. The State's delay tactics, in disclosing pre-trial discoveries, impeded upon petitioner's right to proceed to trial in a timely manner, was prejudicial, and constituted mis-management of the case.

3. The in-court identification was tainted by a prejudicial and bias photo-montage, which was impermissibly suggestive, and an impermissibly misidentification of petitioner that resulted in a miscarriage of justice.

4. Court appointed counsel actions fell below an objective standard of reasonableness and, therefore constituted deficient and unreasonable performance, denying petitioner effective assistance of counsel.

5. The evidence relied upon in the State's case-in-chief was insufficient to substantiate a conviction of three counts of first degree bank robberies, or to prove each element beyond a reasonable doubt, pursuant to R.C.W. 9A.56.200(1)(b) and 9A.56.190.

B. Issues Pertaining To Assignments Of Error:

I) The FBI and State informant Mr. Kevin Scott Olsen informed the State, allegedly about information pertaining to the allegations of bank robberies that he inquired in assisting petitioner in preparing

in perparing for trial, proceeding Pro-Se .

(a) Mr. Olsen only informed the State concerning petitioner work-product, which gave the State an unfair advantage, and denied petitioner a fair trial.

II) The State delayed four months before disclosing that the alleged bank note was written on a letter addressed to petitioner. The State delayed disclosing information that the witness was unavailable because of a federal conviction and federal home detension, until after the trial and conviction of petitioner. The State delayed three months before disclosing the facts surrounding the circumstances about the meeting held on September 1, 2006 and September 11, 2006, between the State and Mr. Olsen the jailhouse informant.

III) As a result of an alleged note founded on petitioner incident to the February 9, 2006 VUCSA arrest, petitioner became a suspect into Detective Aakervik of SPD bank robberies investgation. On February 13, 2006 Detective Aakervik created a photo-montage, which was bias, and, impremissible suggestive, resulting in a misidentification and miscarriage of justice.

IV) Court appointed counsel trial tactics denied petitioner equal protection by not moving to supress under CrR 3.5 hearing the State's jailhouse informant testimony, which probative value was substantially outweighed by the danger of unfair prejudice.

V) Other then the alleged palm-print dusted from the Key Bank, which the petitioner never denied being at this particular bank, a in-court Id based on a bias and impremissive photo-montage, and the prejudicial testimony of the jailhouse informant, there is know sufficient, or clear and undisputed evidences, put forward in the State's case-in-chief to substantiate a conviction of three counts

of first degree bank robberies or to prove each element beyond a reasonable doubt.

C. STATEMENT OF THE CASE

On February 9, 2006 petitioner was arrested in Down Town Seattle for allegedly delivering a controlled substance to an undercover SPD Officer, incident to the arrest the arresting Officer found what appeared to be a Bank demand note on petitioner. On February 22, 2006 after being re-arrested for the February 9, 2006 incident, petitioner's was informed, for the first time, of the alleged demand note recovered from the petitioner on February 9, 2006, that the petitioner was under investigation for four counts of first bank robberies. See EX.1 (Summary and request for bail and conditions of release). On April 7, 2006 petitioner was charged with two counts of first degree bank robberies. Counts one, Sterling Saving Bank, December 27, 2005, and count two Key Bank, February 13, 2006. See EX.2 (information by DPA Laura Poellet WSBA#29137). On April 12, 2006 petitioner was granted a motion to proceed Pro-Se. See EX.3. On May 15, 2006 proceeding Pro-Se petitioner was denied a criminal motion, pursuant to cause number 06-1-03538-7 for a Bill of Particular and a request for a line-up. See Ex.4. On September 15, 2006 proceeding Pro-Se, petitioner was denied a criminal motion for a change of venue and severance of counts one and two. See EX.5. On December 14, 2006 petitioner was provided for the ^{1st} time discovery pertaining to the circumstances surrounding the State's jailhouse informant Mr. Olsen also charged with count three U.S. Bank, February 6, 2006 by amended information. See Ex.6, before the Honorable Laura Inveen. See (RP)1 27 at 4-25 and 28 at 1-22. On February 22, 2007 proceeding Pro-Se petitioner's motion to dismiss pursuant to CrR 26(b)(4), CrR 8.3(b)

and Kapstad motions was denied. See (RP)2 and (RP)2A. On March 6, 2007 petitioner unfortunately forfeited his Pro-Se status for reasons stated on the record pursuant to cause number 06-1-03538-7. See EX. 7. On May 10, 2007, over a year after being charged, petitioner was found guilty of three counts of first degree Bank Robberies, and sentenced to 150 months, Mr. Robert S. McKay appointed counsel of record. These Statements of Addiction Grounds follows the appellant's Brief filed on behalf of petitioner by Nielsen, Broman & Koch, Mr. Andrew P. Zinner as counsel, counsel for appellant.

D. ARGUMENT

1. The third party intrusion into petitioner's Pro-Se work-product denied petitioner rights to a fair trial, violating petitioner's constitutional rights pursuant to the Sixth Amendment of the U.S. constitution.

As a result of an alleged note that appeared to be a bank demand note founded on petitioner incident to the February 9, 2006, on April 7, 2006 petitioner was charged with two counts of first degree bank robberies, to-wit Sterling Saving Bank December 27, 2005, and Key Bank February 13, 2006. After informing petitioner on September 21, 2006 about Mr. Kevin Scott Olsen, the jailhouse informant, on December 14, 2006, do to Mr. Olsen alleged information provided to the State between September 1, 2006 and September 11, 2006, asserting that petitioner confessed to robbing banks, the State amended the information adding count three U.S. Bank February 6, 2006. After the Honorable Inveen compelled the State to disclosed to petitioner, for the first time, discovery about the September 1 and 11, 2006 meeting and follow-up with

Mr. Olsen, on February 22, 2007 petitioner moved to dismiss pursuant to CrR 8.3 (b) and CR 26 (b)(4). Governmental misconduct "need not be of an evil or dishonest nature: simple mismanagement is sufficient. See State V. Michielli, 132 Wn.2d 229, 937 P.2d 587 at 239 (emphasis omitted)(quoting State V. Blackwall, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). A trial court may not dismiss charged under CrR 8.3 (b) unless the defendant shows by a preponderance of the evidence (1) "arbitrary action or governmental misconduct" and (2) "prejudice affecting the defendant's right to a fair trial. State V. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A trial court decision on a motion to dismiss under the rule is reviewed for manifest abuse of discretion. State V. Michielli, Supra. Here the record will show that the State's action constituted mismanagement by allowing Mr. Olsen to come back into contact after the first meeting on September 1, 2006. "Now, obviously Your Honor, candidly, the better practice would have been an immediate separation of the [Mr. McCoy and Mr. Olsen] parties". See (RP)2A 27 at 10-17, here the record reflects a prima facie showing that the prejudice outweighed any probative values of allowing Mr. Olsen to continue contact with petitioner after September 1, 2006, than re-contact Mr. Olsen on September 11, 2006 to require about additional information. "...Mr. Olsen on the 11th we [the State] brought Mr. Olsen on September 11th of '06 we brought Mr. Olsen back over to the SPD office this time where he provided a taped statement". See (RP)2 19 at 16-22., "... And I also brought up this that, that I just wanted to know if there was---did he gather any more information from McCoy from the time we first----." See (RP)2 21 at 12-25. Here the state not Mr. Olsen required about petitioner's

and the robberies allegations. 14 Washington Practice Civil Procedure Chapter 13 subsection 13.13 Work-Product Attorney's theories, strategies and the like, Hornbook, In Friedenthal Kane & Miller Civil Procedure subsection 7.5 (2d.ed) West Hornbook, the authors states: " Thus there is little doubt today that the Work-Product Doctrine extends to unwritten as well as written information. Further, the current federal rule gives the most complete protection to information regarding ' the mental impressions, conclusion, opinions, or legal theories of an attorney or other representative a party concerning the litigation whether that information is written or unwritten. Case law has extended the protection afforded a lawyer's mental impressions, opinions, conclusions and legal theories to oral deposition requests. Courts have established certain guidelines detailing the scope of deposition questioning of a deponent. Those guidelines prohibited questions about any matter that revealed counsel's mental impression concerning the case, including specific areas and general lines of inquiry discussed by opposing counsel with the deponent. and any facts to which opposing counsel appeared to have attached particular significance during conversation with the deponent. See again 14 Washington Practice, Textbook, In Haydeck, Herr & Stemple, Fundamental of Pretrial Litigation, subsection 5.7.4 (3d.ed). Here petitioner relies on the author's commentation in reference to the Work-Product Doctrine in 14 Washington Practic Civil Procedure Chapter 13, and asks that the court address the issue of Pro-Se incustody work-product protection for the frist time on appeal. Also that this court will consider petitioner's argument in his motion to dismiss in the trial court, before the Honorable Catherine Shaffer, and make a ruling if it finds any merit in reference to the

responsibilities and constitutional protection afforded an in-custody Pro-Se defendant, to-wit, surrounding the application of the work-product doctrine. See (RP)2A 8 at 1-25 and 9 at 1-11. In the State's response to petitioner's motion to dismiss the state response stated: " At the very most, this court would be in a position to suppress any statement made by the defendant during this time frame from the 1th through the 11th" See State's response to petitioner's motion to dismiss as EX8 4 at 6-10. and 11-13., "...Additionally, the defendant will be unable to prove that his rights or ability to defend himself were compromised in any way..." However, the trial court held, " In terms of whether there's been prejudice to you, of course there's been material prejudice to you". Here the trial court without citing any authorities, but states a subjective ruling denying petitioner's motion on the grounds that in part, "... and that is that there was a waiver in this case...". See (RP)2A 35 at 15-16 Petitioner's rights to a fair trial was denied, and for the state not separating petitioner and Mr. Olsen after September 1, 2006 constitutes mismanagement of the case, which was not harmless but a reversible error. Even "high motives and zeal for law enforcement can not justify spying upon and intrusion into the relationship between a person accused of [a] crime and his counsel". For that reason, the court held that where the state intrudes on a defendant's right to effective representation by intercepting privileged communication between an attorney and his client, the only adequate remedy is dismissal. See State V. Granack, 90 Wash.App 598 959 P.2d 667 (1998). For the reasons stated, petitioner respectfully asks that the conviction pursuant to cause number 06-1-03538-7 be vacated and dismiss without prejudice.

2. Petitioner's rights to effective self-representation proceeding Pro-Se was violated by the State's delay tactics, and eleven hour response to petitioner's criminal motion for discovery disclosure pursuant to CrC 4.7.

Washington State's Constitution Article 1, section 10, Administration of justice provides: Justice in all cases shall be administered openly, and without unnecessary delay.

Although petitioner faced in-custody problems preparing his pro-se defense, the state was not candid with the court or petitioner about the witnesses interviews, to-wit one victim/teller Mr, Lee, which only after trial when petitioner unsuccessfully move the court for a new trial, did the state disclosed the facts concerning Mr. Lee's availability for interviews by the defense. "In fact, we got that on direct during his---during the State's questioning that he was, in fact terminated and convicted and on Federal probation and literally on electronic home detention and on leave from that detention to testify. See (RP)9 13 at 11-18. Here the record will show that proceeding pro-se the petitioner on or about July, 2006, requested an interview with the victim and witness from the February 13, 2006 incident, to-wit, the Key Bank, the request was to set up interviews with both Mr. Lee and Mrs. Huynh, victim/witness. On August 10, 2006, through stand-by counsel, the State informed petitioner that both Mr. Lee and Mrs. Huynh had been terminated from the Key Bank. See EX9. Also in August 2006, the State response to petitioner's request by arranging a phone interview with Mr. Lee, who at the time, according to the State was out the county and agreed to give a phone interview from Vietnam. On August 29, 2006;

September 15, 2006; November 29, 2006; March 14, 2007, petitioner was lead to believe by the state that the witness Mr. Lee was out of the county or was on vacation, only until April 30, 2007 did the state reveal that in fact Mr. Lee was convicted and had been on electronic home detention. See (RP) 3 26 at 4-25. "Because we didn't find anything in our system and the I had communication with his swapped message-- exchanged messages with his federal probation officer to make sure that he could come to the interview last week". See (RP) 3 26 at 18-23. The record here indicates that the state had a line of communication with the witness, to-wit, Mr. Lee but failed to disclose this contact information with the defense, which in this case constitutes mismanagement of the case, and in none compliance with the ruling of the circuit courts which held: Initially we conclude, as we have in the past that "both sides have the right to interview witness before trial.", See United States V. Cook, 608 F.2d 1175, 1180 (9th Cir 1979) cert, denied, 444 U.S. 1034 100 S.Ct 706, 62 L. Ed.2d 670 (1980); Callahan V. United States, 371 F.2d 658, 660 (9th Cir 1967). However, "abuses can easily result when officials elect to inform potential witness of their right not to speak with defense counsel." United States V. Rich, 580 F.2d 929 934 (9th Cir 1978). "Absent a fairly compelling justification, the government may not interfere with defense access to witnesses." United States V. Black, 767 F.2d 1334, 1338 (9th Cir)(Black) cert, denied, 474 U.S. 1022, 106 S.Ct 574, 88 L. Ed.2d 557 (1985).

On September 1, 2006, during an interview with a FBI and State informant, the informant at that time was housed with the petitioner in the King County Jail, Eastnine block, the informant in cell two and

petitioner in cell ten, the informant allegedly offered information concerning the pending robberies allegations, and asserted that the petitioner confessed to robbing banks. The informant also informed the state during the September 1, 2006 meeting, that the petitioner was Pro-Se and that he, the informant, had a research relationship with the petitioner that consisted of legal research of case law, and talking over defense strategies. See ES.10 (September 11, 2006 taped and written statement taken from informant Kevin Scott Olsen). Here as with State's witness Mr. Lee, although the State obtained information from the informant on September 1 and 11, 2006, this discovery was not disclose to petitioner proceeding pro-se, until December 14, 2006. See (RP)1 26-28 at 1-22, See also (RP)2A 73-74 at 1-11. Not only did the State not disclose to the defense contact information to Mr. Lee, the State's witness, but also both Mr. Lee's and Mr. Olsen's criminal history. See (RP)3 31 at 15-23.'

' Through out the remaining of this brief the Verbatim Report of Proceedings will referred to as follows: RP1 (One volumes of verbatim report of proceedings her and after (VRP), from Decmeber 14, 2006 before Honorable Laura Inveen reported by Jane Lamerle); RP2 (One volumes of (VRP) from February 22, 2007 before Honorable Catherine Shaffer, reported by Pete S. Hunt); RP2A (One volumes of (VRP) From February 23, 2007 before Honorable Catherine Shaffer, reported by Pete S. Hunt); RP3 (One volumes of (VRP) from April 30, 2007 before Honorable Paris K Kallas, reported by Pete S. Hunt); RP5 (One volumes of (VRP) from May 1, 2007 before Honorable Paris K. Kallas, reported by Joanne Leatiota); RP6 (One volumes of (VRP) form May 2, 2007 before Honorable Paris K. Kallas, reported by Joanne Leatiota); RP7 (One volumes of (VRP) from May 7, 2007 before Honorable Paris K. Kallas, reported by Joanne Leatiota); RP7 (One volumes of (VRP) from May 8, 2007 brfore Honorable Paris K. Kallas, reported by Joanne Leatiota); RP8 (One volumes of (VRP) form May 9, 2007 brfore Honorable Paris K. Kallas, reported Joanne Leatiota); RP9 (One volumes of (VRP) form May 22, 2007 before Honorable Paris K. Kallas, reported by Joanne Leatiota).

Here petitioner shows from the record a prima facie showing, that the State's conduct pertaining to witnesses, and discovery disclosure, constitutes mismanagement of the case, which delayed petitioner's proceeding pro-se from bring the case to trial in a timely manner, denying petitioner equal protection and due process of law, for these reasons petitioner respectfully asks this court to vacate the conviction and dismiss without prejudice.

3. The in-court identification of petitioner by the victim/witnesses was tainted by a prejudicial and bias photo-montage, which was impermissibly suggestive resulting in a miscarriage of justice.

As a result of an alleged bank demand note recovered from petitioner incident to an arrest on February 9, 2006, for allegedly delivering a controlled substance to an undercover SPD Officer, Detective Aakervik of the Seattle Police Department, on February 13, 2006 created a photo-montage, after unsuccessfully trying to have petitioner held in-custody pending a possible February 14, 2006 line-up. On February 27, 2007 Detective Aakervik conducted a photo-montage ID procedure from the photo-montage created on February 13, 2006, with the victims teller's and witnesses at the following Banks: 1.) Sterling Saving Bank incident date: December 27, 2005; 2.) Washington Mutual Bank incident date: December 31, 2005. Detective Aakervik also conducted a photo-montage ID procedure on March 2, 2006, with the victim/teller's and witnesses from the U.S. Bank incident date: February 6, 2006, also again at the Washington Mutual Bank, Supra. On February 13, 2006 the Key Bank was robbed, in which Detective Aakervik showed the victim/teller and witness the photo-montage he created on February 13, 2006.

Once a suspect is in custody there is less justification for employing the photograph identification procedure since a corporeal line-up is available. See State V. Thorkelson, 25 Wn.App. 615.611 P.2d 1278 (1980); modified 28

Wn.App. 606, 625 P.2d 726 (1981). On May 15, 2006 proceeding pro-se the trial court denied petitioner's criminal motion requesting that the State conduct a corporeal line-up with the victims/teller's and witnesses from the four alleged bank robberies. See EX. 42 (Order on criminal motion, before the Honorable Theresa B. Doyle, Judge). In State V. Poulos, 31 Wn.App. 241, 640 P.2d 735 (1982) the court held: (pre-trial identificatuion of a suspect by means of photographs is proper so long as, under the totality of the circum-^{stances}, the procedure is not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification). Here during petitioner's trial, not only did Mr. Geoffery Loftus (photo-montage expert) testified to the impremissible suggestive montage, created by Detective Aakervik on February 13, 2006, as being biased, See (RP) ^M 36 at 5-25 and 37 at 1-10, but also the victim/teller's and witnesses gave testimonies that the petitioner's photo in the montage was the darkest. The record will show that the teller from the December 27, 2005 incident, Mr. Marlana Willey, three times identified photo number one as the suspect and not petitioner's photo number five, stating that she was 90% sure of her pick; nevertheless, the day before her testimony, she received a call from the prosecutor, and even after taking the stand she selected photo number one. However, during the State's direct-examination, the prosecutor was allow, with know objection from defense counsel to bring the witness around to testify that she was 100% sure the petitioner was the suspect who robbed the Sterling Saving Bank on December 27, 2005. Without any objection from defense counsel, the prosecutor was allow to lead the witness on direct-exam to identify the petitioner's photo number five and not her pick of number one as the robbery suspect. See (RP) § at 21-25 and 28-29 at 1-24. This performance by defense counsel

falls below reasonable standard, denying petitioner effective assistance. Here the record will show that the witness from the Key Bank made an in-court ID based on bias photo-montage. See (RP) 6 57 at 17-25 and 58 at 1-3. The Sterling Saving Bank Witness when asked which person in the montage had the darkest complexion? the response was number five the petitioner. See (RP) 6 71 at 5-13, See also (RP) 6 87 at 7-15. After the State witness Mr. Lee confirmed that he in fact did see petitioner pass him in the hallway in hand cuffs, the prosecutor before calling Ms. Elwood and Ms Moore, witnesses from the sterling Bank, he went out into the hallway to have them both testify that they didn't see the petitioner walk pass them coming into the courtroom, but only when petitioner was coming out of the courtroom. See (RP) 6 9 at 6-7. The record will show that the teller from the U.S. Bank incident date: 2-6-06, that on March 2, 2006, according to Detective Aakervik Continuation Sheet, See EX10 406-5 at 27, "She continued to look at this photo and stated she wanted to pick #5, but was not 100% certain, After a couple of minutes she signed her name to the picture #5, but again stated that she can not be 100% certain." However, again during the prosecutor's direct-examination of this witness, she testified that on the above date in question, 3-2-06, she picked #5, and was 100% sure. Not only do this indicates the prosecutor leading the witness, but Mr. Eric Van Diest, state's witness from the U.S. Bank also, when asked by the prosecutor, "...what was it that made you want to point to [photo #5] that? Which the witness replied, " The skin tone". On cross-examination Mr. Eric

Van Diest testified that both he and Ms. Fung was present during Detective Aakervik showing of the photo-montage, and when asked " so you were present when Ms. Fung made her choice?", Mr. Eric replied, " If I remeber correctly, she did not pick one either. Yeah, she did not pick one either".² Herein light of the bias montage, and inconsistance of the witnesses and tellers, the record here on its face reflects a prima facie showing that the in-court identification of petitioner was tainted by a bias and impremissibly suggestive montage, resulting in a irreparable misidentification and a miscarriage of justice. Therefore, petitioner respectfully asks that this court vacate the conviction and dismiss without prejudice.

4. Court appointed counsel actions felled below an objective standard of reasonableless, and deficient and unreasonable performance, denied petitioner the right to effective assistance of counsel.

Court appointed counsel, to-wit, Mr. Robert S. McKay denied petitioner the right to effective assistance of counsel depriving petitioner due process and equal protection, pursuant to the Fourteenth Amendment; section 1, of the U.S. constitution which provides in part: ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

² (RP)6 160 at 14-21

Here court appointed counsel deprived petitioner of equal protection by not requesting a CrR 3.5 hearing to suppress the testimony of the State's jailhouse informant, which probative values was outweighed by the danger of unfair prejudice. ER 602 provides in part: A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. For the reasons argued above in petitioner's assignment of error one, the information the informant provided to the Detective, other than petitioner's work-product was from the Detective's own source, to-wit, the discovery from his investigation turned over to the petitioner proceeding pro-se. Here during the Detective testimony at petitioner's motion to dismiss, the Detective clearly stated: "...There really wasn't any information for me to gather. Everything Mr. Olsen provided I already knew. There wasn't any information that I needed, even if I wanted to there wasn't any information that I needed to get".³ Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by consideration of undue delay, wasted of time, or needless presentation of cumulative evidence. See ER 403, Exclusion of relevant evidence on grounds of prejudice confusion, or waste of time. Here the informant testimony was not personal knowledge, but only cumulative information from petitioner's pro-se discovery, therefore, the petitioner was

³ (RP)2 36 at 19-23

prejudiced by the informant testimony which exposed the jury to petitioner's in-custody status. Here court appointed counsel closed the door on the trial Judge to determine whether the danger of undue prejudice outweighed the probative value of allowing the witness to testify, exposing the jury to the in-custody relationship between the informant and petitioner. See (RP)3 3 at 21-25 and 4-5 at 1-6. This decision by court appointed counsel denied petitioner equal protection pursuant to the U.S. constitution Sixth, and Fourteenth Amendment. By advising petitioner to take the stand before resting the defense case-in-chief, even after the petitioner expressed there were no need for taking the stand, court appointed counsel stated that petitioner needed to give his side of the story about the relationship between petitioner and the informant, also that the jury had already been informed that I, the petitioner was in-custody, which court appointed counsel, and not the prosecutor open the door allowing the jury to know of petitioner's in-custody status, and criminal history. See (RP)6 35 at 14-25. Where defense counsel elicited defendant telling jury about prior crimes, which would have been excluded if the prosecutor had tried to present to the jury, counsel was ineffective. See State V. Saunders, 91 Wn.App 575 (1998). Here the record will also show that the trial Judge, although defense counsel indicated he may or may not impeach State's witness Mr. Lee See (RP)3 27 at 17-25 and 28 at 1-6, makes it real clear that the Court's Rules and constitution allow for the impeachment

of Mr. Lee. Proceeding pro-se, petitioner turned over an impeachment vehicle, to wit, Corporate Security Investigation Summary, outlining the circumstances surrounding Mr. Lee's determination from Key Bank, for embezzling \$10,000,00. See Appendix A. During cross-examination of Mr. Lee defense counsel knowing the circumstances of Mr. Lee determination didn't impeach; nevertheless, after advising petitioner to take the stand, defense counsel almost immediately impeach petitioner unexpectedly about his criminal history. See (RP)5 92 at 14-25 and 93 at 1-10. In State V. Klinger 96 Wn.App 619 (1999), concerning absence of tactical reason, the court held: Must show counsel felled below objective standard, reasonable probability this changed the result. Counsel's tactics are assumed valid, unless there is an absence of tactical reason for counsel's action. Here not only did defense counsel advise petitioner to take the stand, but failed to turn over or call an expert witness to wit Mr. Eric Blank (Video Tape Analyst Expert) to counter rebuttal the State's mis-representation of the surveillance tape from the Key Bank, and the testimony of the State's witness Mr. Lee testifying, in reference to the suspect hands being on the teller's counter. See Appendix B. This action by defense counsel prejudice the petitioner and effected the outcome of the trial. During re-direct-examination, here defense counsel trial tactics, intentionally asked petitioner a question then cross-up petitioner and leaves petitioner deying-in-the-dust. See (RP)5 121 at 9-21. For the above reasons petitioner asks

that this court vacate and dismiss without prejudice.

5. The evidence relied on in the State's Case-In- Chief was insufficient to substantiate the convictions of three counts of First Degree Bank Robberies, or prove each element beyond a reasonable doubt, pursuant to RCW 9A.56.200(1)(b).

The State's chief-evidence that was used to charge and convict petitioner with three counts of bank robberies was as follows: (1) An alleged bank demand note recovered from petitioner person on February 9, 2006; (2) A latent-print allegedly dusted from one of the teller's window/counter; (3) An in-court identification; and (4) The testimony of a jailhouse informant.

Pursuant to RCW 9A.56.200(1)(b) and the State's jury instructions 16, the statute and instructions stated as follows:

To convict the defendant of the crime of robbery in the first degree..., each of the following elements of the crime must be proved beyond a reasonable doubt; (1...); (2...); (3), That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person; (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; (5) That the defendant committed the robbery within and against a financial institution; (6...).

Other than the above elements(5), that there were three banks, or financial institutions, and (6) that the incident occurred in the state of Washington, the evidences relied on by the State, didn't support the guilty verdict of three counts

first degree robberies. Here concerning the State's chief-evidence relied on. Frist, the alleged bank-demand note, although the trial Judge denied the admission of the alleged note recovered from the petitioner on February 9, 2006, its what resulted in petitioner's trial and conviction on May 10, 2007. "...And I believe it was this note on the defendant which really triggered the police officer's focus on him as a suspect in this string of bank robberies...". See (RP)3 19 at 1-4. "...This is very probative critical evidence in this case and we would ask the court to allow this in.... See (RP)3 24 at 20-22. "...If I were sitting as a juror in this case, I think my natural question would be, why did they---A, why did they--- what focused their attention on Mr. McCoy; and ultimately, they didn't just pick him out of thin air...". See (RP)7 159 at 11-16. Again, if it wasn't for this alleged note there never would have been a trial resulting in a conviction for three counts of first degree bank robberies.

Second, The latent-print allegedly dusted from one of the teller's window, to-wit, the February 13, 2006 Key Bank incident the record do not clearly or convincingly support the state's claim that the defendant's print was lifted from said location 1.) There were no other officer besides Officer Green who initial to verify the alleged lift location, and 2.) although the State in its case-in-chief presented many pictures of the banks and the teller's counters, there is not one picture taken of the alleged dusted latent-print. Only after being informed about petitioner's legitimate access defense through the jail informant, did Detective

Aakervik conducted an investigation into tracking down the
cleaning actual or alleged cleaning person. In State V. Garza, 99 Wash.App
291, 994 P.2d 868 (200), the court held:

The United States Supreme Court subsequently has rejected a per se rule that any government intrusion into private attorney-client communication establishes a Sixth Amendment violation of a defendant's right to counsel. Weatherford V. Bursey, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30(1977). The constitutional validity of a conviction in these circumstances will depend on whether the improperly obtained information has "produced, directly or indirectly any of the evidence offered at trial." Id. at 552, 97 S.Ct. 837. In the wake of Weatherford, federal courts have not been clear as to which party bears the burden of proving prejudice or lack of prejudice or whether prejudice may be presumed in some circumstances. See Shillinger V. Haworth, 70 F.3d 1132, 1140-40 (10th Cir. 1995); ...In United States V. Irwin, 612 F.2d 1182 (9th Cir 1980), the Ninth Circuit court appeared to hold the burden was the defendant's: Prejudice can manifest itself in several ways. It results when evidence gained through the interference is used against the defendant at trial. It also can result from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial.

Here the state presented a clearing record, which the clearing person testified that the bank surveillance cameras

was on during the time he allegedly was clearing the teller's counter in question. See (RP)7 29 at 2-7. Here the same surveillance tape was used, although Mr. Blank (Video tape analyst expert) after examining the tape on behalf of the defendant, to-wit, myself proceeding pro-se, reported that the tape in question shows little information and up to 90% of the activities is miss viewed from the surveillance tape in question, again this tape was used to impeach my testimony that I was at the bank on February 13, 2006 arround 10:00am to 10:30am. This viewing of this mis-represented surveillance tape by the jury, according to the prosecutor and defense counsel is what convicted petitioner. See(RP)9 14 at 24-25 and 15 at 1-6.

As stated in Mr. Blank report, defense counsel was aware of his conclusion, and the suggested questions for cross-exam. The record will show that the trial Judge open the door for the defense to call for defense's expert witness, to-wit, the testimony of Mr. Blank, See (RP)8 42 at 17-19. Instead, defense counsel called the State's witnesses, Detective Aakervik, and Mr. Read (a support employee). See(RP)8 37 at 2-6 and 28 at 17-25 and 29-31 at 1-16, as lay-rebuttal witnesses, when defense had available expert rebuttal testimony from Mr. Eric Balnk.

Thrid, the state argued that in each one of the bank robberies the defendant was identified. Here the records speaks for itself. Only the witness that the state was able to lead into identifying the petitioner as the robbery suspect. Here with EX.4 the record shows that the State denied petitioner's request for a

line-up with all victim/teller's and witnesses from the four robberies incidents on May 15, 2006. This would have clarified any and all identification issues, but instead, petitioner's conviction was based on a bias and prejudicial photo-montage.

Fourth, although the trial court Judge dismissed the alleged bank-note, which the State's informant would have testified, asserting that the petitioner confessed to having someone else, to-wit, Ms. Mary Young, write the note. Petitioner's expert handwriting examiner Ms. McFareland would have testified that petitioner or Ms. Young wasn't the author of the alleged bank-demand note. See (RP)3 11 at 16-25, and 12 at 1-11. By defense counsel not moving the court, pursuant to CrR 3.5 to suppress the prejudicial testimony of the State's informant, See (RP)3 4 at 15-25 and 5 at 1-10, denied petitioner effective assistance, and representation pursuant to Six Amendment of the U.S. constitution. It has been settled throughout our history that the constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). It is equally clear that the "constitution gives a criminal defendant the right to demand that the jury find him guilty of all the elements of the crime with which he is charged". United States V. Gaudin, 515 U.S. 506, 511, 132 L.Ed.2d 444, 115 S.Ct. 2310 (1995). These basic precepts, firmly rooted in the common law, have provided the

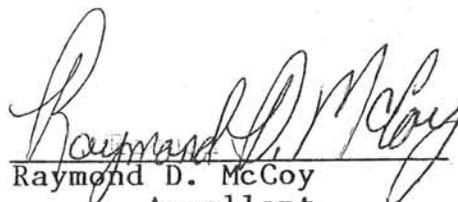
basis for recent decisions interpreting modern criminal statutes and sentencing procedures. See United States v. Booker, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), citing In re Winship and U.S. v. Gaudin, *Supra*. For the reasons stated above, and according to the record pursuant to the above cause number, the evidences relied upon and the mis-representation of the facts, to-wit, the contents of the surveillance tape, the evidence here use to convict petitioner was insufficient to substantiate the conviction of three counts of first degree bank robberies, or prove beyond a reasonable doubt each and elements of the crimes pursuant to RCW 9A.56.200(1)(b), and for these reasons petitioner asks that this court vacate and dismiss without prejudice.

EMPHATIC CONCLUSION

Petitioner was denied equal protection and due process of law when the trial court, 1) denied petitioner's criminal motion for a line-up on May 15, 2006; 2) The trial court, criminal presiding Judge, denied petitioner's motion to dismiss pursuant to CrR 8.3(b) and CR 26(4)(b). on February 23, 2007 without balancing the record with any judicial controlling authorities. Finally, the evidence presented in the State's Case-In-Chief was insufficient to withstand the check and balance of constitutional scrutiny of the elements to charge and convict pursuant to RCW 9A.56.200(1)(b). Therefore, in the fairness of justice, the conviction pursuant to cause

number 06-1-03538-7SEA should be vacate and dismiss without prejudice.²²

Submitted this 18 day of Janury 2008


Raymond D. McCoy
Appellant

²² Petitioner submits Appendixs A&B to assist the court with petitioner's ineffective assistance and representation, error and assignment of error. Although defense counsel failed to turn over the report from Mr. Blank or use the impeachment vehicle, to-wit, Investigation report on State's witness Mr. Lee. Petitioner ask that the Appeals Court consider these appendixs under the res gestae exception.

THE SUPREME COURT

STATE OF WASHINGTON



RONALD R. CARPENTER
SUPREME COURT CLERK

SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY

TEMPLE OF JUSTICE

P.O. BOX 40929
OLYMPIA WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

July 1, 2010

Raymond D McCoy 270764 H5 b 124
Stafford Creek Correctional Center
191 Constantine Way
Aberdeen, WA 98520

RE: Supreme Court No. 84405-4
Court of Appeals No. 61853-9
COPY REQUEST

The Supreme Court is in receipt of your letter dated June 23, 2010 requesting copies in the above-mentioned cause. Your letter detailed a request for all appendix and exhibits. The Supreme Court Clerk's Office requires pre-payment for all copy requests, even for indigent parties. The rate is 30 cents per page, plus postage and sales tax. The total fee for your copy request is as follows:

<u>259</u> pages @ \$.30 per page =	\$77.70
\$5.70 postage	
+ \$7.01 sales tax(8.4%)	
\$90.41 TOTAL	

We accept payment by check or money order only, in the exact amount. Please submit payment to Washington State Supreme Court, PO Box 40929, Olympia, WA 98504.

Sincerely,

Washington Supreme Court
Receptionist

Summeray of Post
Conviction Proceedings

FILED
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
2008 JUN 17 AM 11:39

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

In the Matter of the Personal)
Restraint of:) No. 61293-0-1
)
RAYMOND McCROY,) ORDER OF STAY
)

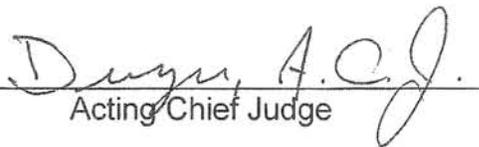
Petitioner.)

Raymond McCoy was convicted of first-degree robbery and delivery of substance in lieu of controlled substance in King County Nos. 06-1-03538-7 SEA and 06-1-01623-4 SEA. McCoy now files this personal restraint petition collaterally attacking those convictions on various grounds. The record, however, shows that McCoy appealed his convictions in No. 58423-5-1, State v. McCoy, (consolidated with No. 58898-7-1), and No. 60134-2-1, State v. McCoy. Although this court recently affirmed the judgment and sentence entered on McCoy's conviction under the Uniform Controlled Substances Act in No. 58423-5-1, the case has not yet been mandated. Nor has McCoy's direct appeal in No. 60134-2 been heard or decided. Therefore, any consideration of his personal restraint petition would be premature. RAP 16.4(d).

Now, therefore, it is hereby

ORDERED that consideration of McCoy's personal restraint petition is stayed pending the issuance of the mandates in State v. McCoy, Nos. 58423-5-1 and 60134-2-1.

Done this 15th day of April, 2008.



Acting Chief Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 APR 15 AM 10:34