61853-9

61853-9

NO. 61853-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Personal Restraint Petition of

RAYMOND McCOY,

Petitioner.

BRIEF OF RESPONDENT

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A. AUTHORITY FOR RESTRAINT OF PETITIONER

The petitioner, Raymond McCoy, is restrained pursuant to a judgment and sentence filed in the King County Superior Court under cause number 06-1-03538-7 SEA. Appendix A.

B. ISSUES PRESENTED

1.a. Whether two of McCoy's three convictions for bank robbery should be reversed due to a Brady[1] violation because, as to those two counts, the undisclosed impeachment evidence could have made a difference in the outcome of the trial.

b. Whether the third conviction for bank robbery should be affirmed because the evidence of that robbery, which included a palm print on the counter at the victim teller's window that was conclusively determined to be McCoy's, was so overwhelming that any additional impeachment evidence would not have made a difference to the outcome of the trial.

2. Whether it is necessary to address McCoy's remaining claims given the State's concession, and if so, whether they should be rejected in any event.

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

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Raymond McCoy with three counts of robbery in the first degree for a series of bank robberies that occurred in late 2005 and early 2006. Appendix B. A jury trial was held in May 2007 before the Honorable Paris Kallas. At the conclusion of the trial, the jury convicted McCoy of all three counts as charged. Appendix A.

This Court affirmed McCoy's convictions on direct appeal. Appendix C. McCoy subsequently filed a motion under CrR 7.8, which was transferred to this Court for consideration as a personal restraint petition. McCoy then moved to withdraw the petition, and this Court dismissed it without prejudice. Appendix D.

Subsequently, the King County Prosecutor's Office learned that a jail informant, Kevin Scott Olsen, had been paid $1000 by the FBI in November 2006, not long after he provided information in September 2006 that led to his becoming a testifying witness for the State in McCoy's case.[2] As a result of the State's disclosure of this information, McCoy filed another personal restraint petition, and

[2] Olsen had testified at trial that he received no benefits for testifying against McCoy. RP (5/7/07) 67, 80, 101.

this Court ordered a reference hearing to address three factual questions: 1) whether and during what time frame Olsen worked as a paid informant for any government agency; 2) whether Olsen received a benefit for supplying information to the authorities about McCoy or for testifying at McCoy's trial; and 3) whether Olsen lied at McCoy's trial. Appendix E.

As will be discussed further below, it was uncontested at the reference hearing that Olsen was an informant for the FBI and the Puget Sound Violent Crimes Task Force from December 2005 until September 2006, and that Olsen was paid $1000 in November 2006 for supplying information about a number of cases including McCoy's. *See* Appendix F. In a finding that McCoy contests, however, the trial court found that Olsen did not lie at McCoy's trial because Olsen was asked whether he received a benefit for his testimony in McCoy's case rather than for providing information, and because Olsen was asked about receiving leniency on the charges he was facing rather than money or other benefits. Appendix F. In addition, in another finding to which McCoy objects, the trial court found that neither the case detective, Dag Aakervik, nor the trial prosecutor, James Ferrell, had knowledge of the $1000 payment at the time of McCoy's trial. Appendix F.

2. SUBSTANTIVE FACTS

Count I: Sterling Savings Bank

On December 27, 2005, Marlene Willey was training a new teller at Sterling Savings Bank in downtown Seattle. RP (5/1/07) 18-20. Willey was finishing a deposit transaction for the previous customer when a tall black male with a medium-dark complexion wearing a baseball cap approached her teller window. RP (5/1/07) 21-23, 31. The man tried to grab the cash that Willey had in her hand, and she told him to "[s]top it." The man said, "This is no joke. This is a robbery. Give me the money." RP (5/1/07) 22. Willey gave him the money and he left. Willey notified the manager, called 911, and triggered the alarm. RP (5/1/07) 23.

Willey later viewed a photographic montage that included McCoy's photograph in position number 5. Willey selected photo number 1 with approximately 90 percent certainty. RP (5/1/07) 25, 27. But when she saw the montage again during her pretrial interview with the defense investigator, she thought the robber could have been number 5 (McCoy). RP (5/1/07) 28-30. Willey identified McCoy in court with certainty, but agreed that he was the only black male in the courtroom. RP (5/1/07) 34, 41-42.

Olga Moore was the new teller that Willey was training that day, and she was standing next to Willey when the robbery occurred. RP (5/2/07) 76-78. Moore testified that she had selected montage photo number 5 (McCoy) with 95 percent certainty, and that she was "[a]bsolutely certain" that McCoy was the robber after viewing him in court. RP (5/2/07) 82-83. However, the montage itself reflected that Moore had not made a definitive selection when the detective showed it to her. RP (5/2/07) 84. Moore agreed that the person depicted in photo number 5 (McCoy) had the darkest complexion of anyone in the montage, and that McCoy was the only black male in the courtroom. RP (5/2/07) 87, 89.

Kenneth Jackson was working as a personal banker at Sterling Savings Bank on the day of the robbery, and he testified that he saw the robber's face for 3 or 4 seconds. RP (5/1/07) 44-46. Jackson selected montage photo number 6 with 60 percent certainty. RP (5/1/07) 47-48. Jackson viewed McCoy in court and testified that McCoy was not the robber. RP (5/1/07) 50-51.

Ruby Elwood is the branch manager at Sterling Savings Bank. RP (5/2/07) 59-60. Elwood selected montage photo number 5 (McCoy) and testified that she was certain of her pick. RP (5/2/07) 68-70. Elwood admitted that she had seen the robber

only in profile, and that the person depicted in photo number 5 (McCoy) had the darkest complexion of the six people in the montage. RP (5/2/07) 71-72. Elwood identified McCoy in court with certainty. RP (5/2/07) 72. Elwood agreed that McCoy was the only black male in the courtroom, and that she had seen McCoy in handcuffs in the hallway outside the courtroom. RP (5/2/07) 73-74.

Seattle Police Officer Philip Wall lifted a latent fingerprint from Marlene Willey's teller window area; however, the print was not of sufficient quality to be of comparison value. RP (5/1/07) 57.

Count III: U.S. Bank[3]

On February 6, 2006, Jasmine Fung was working as a teller at U.S. Bank in the Belltown neighborhood of Seattle. She had just completed a large deposit when she noticed a man that she identified as McCoy standing in the lobby. RP (5/2/07) 90-93. Fung called him over to her window to help him, and he handed her a note demanding money and stating that "this is not a game." RP (5/2/07) 93. Fung gave him approximately $2000 and he left. RP (5/2/07) 93.

[3] This robbery was originally charged under a separate cause number, and was later joined for trial. The robberies are described here in chronological order rather than in count number order.

Fung spontaneously identified McCoy in court as the robber, and she had selected montage photo number 5 (McCoy) with 100 percent certainty. RP (5/2/07) 92-93, 100. Fung denied that seeing McCoy in handcuffs outside the courtroom had influenced her in-court identification. She agreed that McCoy had the darkest complexion of the six people in the montage. RP (5/2/07) 103.

Eric Van Diest was also working at U.S. Bank the day of the robbery. He did not get a very good look at the robber because he was sitting at a desk helping a customer at the time. RP (5/2/07) 152, 156. Van Diest did not make a montage pick, but stated that the person depicted in photo number 5 (McCoy) was the most likely of the six based on his darker skin tone. RP (5/2/07) 156-58.

Count II: Key Bank

On February 13, 2006, Tuan Le was working as a teller at Key Bank in the Chinatown International District of Seattle.[4] RP (5/2/07) 9-11. At approximately 3:00 p.m., a tall black male walked up to Le's teller window, said "hi," and handed Le a note that stated, "Attention, this is a holdup. Please reach into your

[4] Le admitted that he left his job at U.S. Bank because he had a gambling problem and he stole $10,000 from the bank. Le turned himself in, pled guilty to stealing the money, and was on probation at the time of trial. RP (5/2/07) 32-33.

drawer and place all the 100s into the bag." RP (5/2/07) 13. The robber slid a plastic bag under Le's teller window, and Le put the money in the bag. RP (5/2/07) 14-15. Le noted that the robber placed his hand on the counter during the robbery. RP (5/2/07) 19. After Le put the money in the bag, the robber left the bank and fled southbound. RP (5/2/07) 15. Le notified his supervisor, and she called 911. RP (5/2/07) 15.

Le could not recall whether a detective had shown him the photo montage, but when he looked at it before he testified he was 90 to 95 percent certain that photo number 5 (McCoy) was the robber. Le also identified McCoy in court to the same degree of certainty. RP (5/2/07) 21-22, 31-32. Le agreed that he had seen McCoy in the hallway in handcuffs, and that McCoy was the only black male in the courtroom. RP (5/2/07) 35, 42.

Yen Huynh was also working as a teller at Key Bank that day. RP (5/2/07) 49-50. She was helping another customer when the robber approached Tuan Le's window, which was next to Huynh's window. RP (5/2/07) 50-51. She noted that the robber was a tall black male with a dark complexion wearing a hat. RP (5/2/07) 51-52. Huynh also did not recall being shown the montage by the police. She looked at the montage before she

testified and selected photo number 5 (McCoy) with 50-60 percent certainty due to his "dark skin." RP (5/2/07) 54. Upon viewing McCoy in court, Huynh was "50/50" that he was the robber. RP (5/2/07) 56-57.

Seattle Police Officer Anna Green responded to the reported robbery at Key Bank, and she lifted two latent fingerprints from the counter in front of Tuan Le's teller window. RP (5/2/07) 111-12. Latent print examiner Lloyd Thomas compared the latent prints that Officer Green had lifted to inked fingerprints that he took from McCoy. RP (5/2/07) 133-35. One of the latent prints was not of comparison value, but the other latent print was a conclusive match to McCoy's right palm. RP (5/2/07) 135-37. The bank's janitorial service had thoroughly cleaned the counter in front of the teller stations in the evening on February 12, 2006 after the bank had closed for the day. RP (5/7/07) 19-23, 32, 34, 36.

In an effort to explain the presence of his palm print, McCoy testified that he went to Key Bank at 10:00, 10:30, or 11:00 a.m. on February 13, 2006 to exchange some coins for paper currency. RP (5/8/07) 96, 99; RP (5/9/07) 41. However, the bank's internal business records and the surveillance video established that Tuan Le's teller station was closed until Le reported for work at noon.

RP (5/8/07) 127-28; RP (5/9/07) 14-25. In addition, McCoy could not identify himself in the surveillance video during the time frame in which he claimed he had been in the bank. RP (5/9/07) 41-42.

Kevin Olsen's Trial Testimony

Kevin Olsen was housed in the King County Jail in the same area as McCoy while they were both being detained pending trial. Both Olsen and McCoy were facing first-degree robbery charges. RP (5/7/07) 49-50. Olsen and McCoy became acquainted while doing legal research on their cases. RP (5/7/07) 53-54. While they were incarcerated together, McCoy made a number of incriminating statements to Olsen.

McCoy told Olsen that there were "fingerprint issues and identification issues" in his case. RP (5/7/07) 55. McCoy told Olsen that there were two tellers present during the Sterling Savings Bank robbery, and that the newer teller "was able to pick him out almost to a T," yet the more experienced teller was not sure of her identification. RP (5/7/07) 56-57. McCoy told Olsen that he had left a palm print in one of the banks, and that he was thinking of saying that he had been in that bank on a different day. RP (5/7/07) 63-64. McCoy admitted to Olsen that he had

committed several bank robberies, and that he "had snatched some money right out of the teller's hand" during one of those robberies. RP (5/7/07) 70.

Olsen told FBI Special Agent Alan Distajo and Detective Jon Nelson of the Puget Sound Violent Crimes Task Force about McCoy's admissions during a meeting about an unrelated investigation on September 1, 2006. RP (5/7/07) 65-66, 81-82, 93. Distajo and Nelson determined that fellow Task Force member Detective Dag Aakervik was the lead detective on McCoy's case, so Distajo and Nelson introduced Olsen to Aakervik so that Olsen could report what McCoy had said. RP (5/7/07) 136-38.

During Olsen's trial testimony, he was impeached with numerous convictions for crimes of dishonesty including robbery, forgery, and possessing stolen property. RP (5/7/07) 77-78. Olsen stated that he was hoping for leniency on his pending charges in exchange for providing information about McCoy, but instead, he was sentenced to 195 months in prison. RP (5/7/07) 59, 80, 91. Olsen was questioned repeatedly as to whether he had received any benefits for his "testimony" against McCoy, and Olsen insisted that he had not. RP (5/7/07) 67, 80, 101.

Reference Hearing

In accordance with this Court's order, the reference hearing was held in January 2012 before the Honorable James Rogers. As noted above, uncontested evidence produced at the reference hearing established that Kevin Olsen was acting as a confidential informant for FBI Special Agent Alan Distajo and Detective Jon Nelson of the Puget Sound Violent Crimes Task Force from December 2005 until September 2006, and that Olsen provided information about several cases during that time frame. RP (1/24/12) 14, 21, 64-65, 73; RP (1/25/12) 42-43. It was also undisputed that Olsen received $1000 from the FBI in November 2006, and that McCoy's case was listed on the FBI's paperwork as the sole justification for that payment. RP (1/24/12) 53-54, 67-68; RP (1/25/12) 23; Appendix G. However, the facts as shown by the evidence produced at the reference hearing were not as straightforward as the FBI's paperwork would suggest.

Agent Distajo testified that he decided to request payment for Olsen after Olsen's status as an FBI source was "converted" from confidential informant to cooperating witness when it became clear that Olsen would be testifying at McCoy's trial. RP (1/25/12) 25-27. Although Distajo and Nelson knew that Detective Aakervik

was the lead detective in McCoy's case, neither of them told Aakervik about the $1000 payment, and thus, Aakervik did not inform the trial prosecutor. RP (1/25/12) 53-54; RP (1/26/12) 168, 170, 174, 180, 182, 188, 199. Aakervik testified that someone should have told him because, as the case detective, he "should know everything about the case." RP (1/26/12) 182.

Although the FBI's paperwork reflects that McCoy's case was used as justification for the $1000 payment to Olsen, Agent Distajo, Detective Nelson, and Olsen testified that the payment was actually for all of the information that Olsen had provided over time.[5] Appendix G; RP (1/24/12) 72, 79-80; RP (1/25/12) 42-44, 50-51; RP (1/25/12) 100-02, 121-22, 126, 142, 145. Olsen did not bargain for the payment and did not expect it. RP (1/24/12) 80; RP (1/25/12) 56; RP (1/25/12) 130, 132. Olsen did not believe that the payment was a benefit for providing information specifically about McCoy, and Olsen was adamant that he received no benefits for his testimony aside from the $10 witness fee that is paid to all civilian witnesses by the court. RP (1/25/12) 141-45.

[5] Olsen was also provided meals and chewing tobacco during his meetings with Distajo and Nelson, but they did not consider it a benefit for providing information. RP (1/24/12) 81; RP (1/25/12) 40.

It also came to light during the reference hearing that Olsen had provided false information on September 7, 2006 regarding a wholly unrelated case. RP (1/25/12) 69-71; Appendix H. After failing a polygraph examination, Olsen admitted that he had provided false information regarding the unrelated case in an attempt to "work a deal" on his pending charges. Appendix H. This occurred on the same day as one of Detective Aakervik's meetings with Olsen regarding McCoy's case. RP (1/25/12) 95-97.

Additional facts will be discussed below as necessary for argument.

D. ARGUMENT

1. THE STATE CONCEDES THAT TWO OF MCCOY'S CONVICTIONS SHOULD BE REVERSED DUE TO A BRADY VIOLATION; THE THIRD CONVICTION SHOULD BE AFFIRMED BECAUSE THE UNDISCLOSED EVIDENCE WOULD NOT HAVE AFFECTED THE OUTCOME OF THE TRIAL.

McCoy argues that his three convictions for first-degree robbery should be reversed due to a violation of Brady v. Maryland and its progeny. More specifically, he argues that if the jury had known that Kevin Scott Olsen was paid $1000 and gave false information in a different case, there is a reasonable probability that

the outcome of the trial would have been different. Petitioner's Opening Brief, at 25-58.

The State concedes that McCoy's convictions for the Sterling Savings Bank and U.S. Bank robberies should be reversed because the State agrees that the undisclosed impeachment evidence could have made a difference in the outcome as to counts I and III. But this Court should affirm McCoy's conviction for the Key Bank robbery because the evidence produced at trial was overwhelming, and any additional impeachment of Olsen would not have made a difference in the outcome on count II.

It is well-established that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Brady rule encompasses impeachment evidence as well as exculpatory evidence. Giglio v. United States, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). In addition, the duty to disclose favorable evidence is not limited to evidence possessed by prosecutors; it extends to evidence possessed by law enforcement as well. Kyles v. Whitley,

514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Moreover, when federal agents and local law enforcement officers are working together as part of a "joint investigative task force" in the investigation of the same case, the Brady rule extends to all members of the task force as members of the "prosecution team." United States v. Reyeros, 537 F.3d 270, 281-82 (3rd Circuit 2008); *see also* United States v. Antone, 603 F.2d 566, 569-70 (5th Cir. 1979); United States v. Risha, 445 F.3d 298, 304-06 (3rd Cir. 2006); Diallo v. State, 413 Md. 678, 707-15, 994 A.2d 820 (Md. Ct. App. 2010).

In order to prevail on a Brady claim, a defendant must show three things: 1) that the evidence in question is favorable to the defendant "either because it is exculpatory, or because it is impeaching"; 2) that the evidence was "suppressed by the State, whether willfully or inadvertently"; and 3) that "prejudice must have ensued." State v. Mullen, 171 Wn.2d 881, 895, 259 P.3d 158 (2011) (quoting Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). In this case, the first two parts of the Brady test cannot be reasonably disputed.

The fact that Kevin Olsen was paid $1000 and provided false information in a different case clearly constitutes impeachment

evidence; thus, the first part of the Brady test is satisfied. In addition, although the evidence produced at the reference hearing established that neither Detective Aakervik nor the trial prosecutor had actual knowledge of this impeachment evidence, Agent Distajo and Detective Nelson did have actual knowledge. Distajo, Nelson, and Aakervik worked together on the Puget Sound Violent Crimes Task Force, and Distajo and Nelson introduced Aakervik to Kevin Olsen when they learned that Olsen had information regarding McCoy. Accordingly, given the facts of this particular case, Distajo's and Nelson's actual knowledge is constructively imputed to Aakervik and the trial prosecutor; thus, the second part of the Brady test is satisfied as well. Therefore, the only remaining question is whether the suppression of the impeachment evidence resulted in prejudice.

The question of whether prejudice has been established turns on an analysis of materiality; evidence is "material" for Brady purposes "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." State v. Thomas, 150 Wn.2d 821, 850, 83 P.3d 970 (2004) (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481

(1985), and In re Personal Restraint of Benn, 134 Wn.2d 868, 916, 952 P.2d 116 (1998)). In turn, under the "reasonable probability" standard, "the question is whether the defendant received a fair trial without the evidence – that is, 'a trial resulting in a verdict worthy of confidence.'" Thomas, 150 Wn.2d at 850-51 (quoting Kyles, 514 U.S. at 434)). Put another way, "the reasonable probability of a different result is shown when the State's suppression 'undermines confidence in the outcome of the trial.'" Thomas, 150 Wn.2d at 851 (quoting Bagley, 473 U.S. at 678).

The State agrees that the "reasonable probability" standard for materiality has been satisfied as to the Sterling Savings Bank and U.S. Bank robberies. As the trial prosecutor correctly noted in his closing argument, the sole disputed issue at trial was the identity of the bank robber. RP (5/9/07) 47. With respect to counts I and III, identity was established only by montage picks and in-court identifications of widely varying degrees of consistency and certainty. Therefore, Kevin Olsen's testimony was significant as to those two counts.

Sterling Savings Bank teller Marlene Willey initially selected a filler photo in the montage, later changed her mind, but was certain of her in-court identification. RP (5/1/07) 25, 27, 28-30, 34.

Trainee teller Olga Moore testified that she was certain of her montage pick of McCoy, but the montage itself showed otherwise. RP (5/1/07) 82-84. Personal banker Kenneth Jackson selected a filler photo and testified that McCoy was not the robber. RP (5/1/07) 47-48, 50-51. Branch manager Ruby Elwood was the only witness from Sterling Savings Bank who was certain of both her montage pick and her in-court identification. RP (5/2/07) 68-70, 72.

U.S. Bank teller Jasmine Fung was the most certain of any witness at trial regarding her montage pick and her spontaneous in-court identification. RP (5/2/07) 92-93, 100. On the other hand, Eric Van Diest was helping a customer at his desk, did not get a good look at the robber, and could not make a montage pick. RP (5/2/07) 152, 156-58.

The eyewitness identification evidence regarding counts I and III presented other issues as well. Moore, Elwood, Fung, and Van Diest agreed that the person depicted in montage photo number 5 (McCoy) had the darkest complexion of the six people in the montage, and Willey, Moore, and Elwood acknowledged that McCoy was the only black male in the courtroom. RP (5/1/07) 41-42; RP (5/2/07) 71-74, 87, 89, 103, 156-58. Elwood and Fung

saw McCoy in handcuffs in the hallway before making their in-court identifications.[6] RP (5/2/07) 73-74, 103.

Kevin Olsen testified that McCoy made incriminating statements regarding facts that could have been known only by the robber. For instance, McCoy told Olsen that the trainee at Sterling Savings Bank (Moore) had identified him "almost to a T," whereas the more experienced teller (Willey) could not do so. RP (5/7/07) 56-57. In addition, McCoy told Olsen that he "had snatched some money right out of the teller's hand," which is consistent with Willey's description of the Sterling Savings Bank robbery. RP (5/7/07) 70. McCoy admitted to Olsen that he had committed multiple bank robberies, and that his case involved "fingerprint issues and identification issues." RP (5/7/07) 55, 70. In sum, Olsen's testimony substantially bolstered the State's case regarding McCoy's identity as the robber.

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[6] In addition, this case presented issues of cross-racial identification, which may affect a witness's ability to identify a perpetrator in some cases. *See* State v. Allen, 176 Wn.2d 611, 294 P.3d 679 (2013). Dr. Geoffrey Loftus testified as a defense expert at trial and explained this issue to the jury. RP (5/8/07) 28-29.

Although Olsen was impeached with his many prior convictions for crimes of dishonesty, the suppressed impeachment evidence was of a wholly different quality. The fact that Olsen was paid $1000 for providing information and that he had provided false information in a different case in an effort to "work a deal" would likely have been more damaging to Olsen's credibility in the eyes of the jury than the fact that he had a prison record. In addition, although Olsen's statements that he had not received any benefit for his *testimony* were true, the fact that he *had* received a benefit for providing information would have undermined his testimony to at least some degree.

In sum, the State agrees that on the particular facts of this case, the suppressed impeachment evidence is material, meaning that it is sufficient to undermine confidence in the outcome of the trial, with respect to the Sterling Savings Bank and U.S. Bank robberies. The State agrees that McCoy has established a Brady violation with respect to counts I and III, and thus, that the convictions for those counts should be reversed.

But the Key Bank robbery presents a very different set of circumstances. Although some of the same issues are present with respect to the eyewitness identification evidence,[7] McCoy's identity as the perpetrator of the Key Bank robbery on February 13, 2006 was independently and overwhelmingly established by forensic evidence, video evidence, and business records.

Tuan Le noted that the robber put his hand on the counter in front of his teller window during the robbery. RP (5/2/07) 19. Shortly after the robbery, Officer Green lifted two latent fingerprints from the counter in front of Le's teller window.[8] RP (5/2/07) 111-12. One of those prints was a conclusive match to McCoy's right palm. RP (5/2/07) 135-37. In addition, Key Bank's janitorial service had cleaned the counter thoroughly in the evening on February 12, 2006. RP (5/7/07) 19-23, 32, 34, 36. This eliminated any

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[7] Tuan Le identified McCoy in the montage and in court with 90-95 percent certainty, but he had seen McCoy in handcuffs in the hallway, and he agreed that McCoy was the only black male in the courtroom. RP (5/2/07) 21-22, 31-32, 35, 42. Yen Huynh selected McCoy with only 50 to 60 percent certainty in the montage, and was "50/50" upon viewing McCoy in the courtroom. RP (5/2/07) 54, 56-57.

[8] McCoy suggests that it was not established at trial that the latent prints were lifted from Le's teller station, citing his own testimony. Opening Brief of Petitioner, at 54-55 (citing RP (5/9/07) 39). But Officer Green was very clear that she lifted the fingerprints from the counter in front of Le's teller station after speaking with Le about the robbery. RP (5/2/07) 111-12. Moreover, McCoy did not suggest that "there is no valid verification" of where the palm print was lifted from until the defense rebuttal case, *after* McCoy had learned that Le's teller station was closed until noon. RP (5/9/07) 39.

reasonable possibility that the palm print could have been made on any day other than the day of the robbery.

In an effort to explain the presence of his palm print, McCoy claimed that he had been in the bank at 10:00, 10:30, or 11:00 a.m. to exchange coins for currency. RP (5/8/07) 96, 99; RP (5/9/07) 41. But both the bank's business records and the surveillance video established conclusively that Tuan Le's teller station was closed until he reported for work at noon. RP (5/8/07) 127-28; RP (5/9/07) 14-25. Moreover, McCoy was unable identify himself anywhere in the surveillance video during the morning hours when he claimed that he had been in the bank.[9] RP (5/9/07) 41-42.

The presence of McCoy's palm print at Tuan Le's teller station, McCoy's absence from the surveillance video when he claimed he had been in the bank, and the fact that Le's teller station was closed until noon overwhelmingly confirmed that McCoy was

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[9] McCoy argues that he could have been in the bank without being captured on the surveillance video because the video switched from camera to camera in different areas of the bank. Opening Brief of Petitioner, at 55. Defense witness Daniel Read testified that this was possible. RP (5/9/07) 34. However, it is extremely unlikely that a person could enter the bank, approach a teller, give the teller an assortment of coins, wait for the teller to count the coins, receive currency from the teller in exchange for the coins, and exit the bank without being captured on any of the 15 surveillance cameras in the bank. In addition, McCoy cites his own testimony that he was "in any frame [of the video] from 10 to 10:30." Opening Brief of Petitioner, at 55 (citing RP (5/9/07) 38, 41-42). But McCoy's testimony in this regard was vague and nonresponsive, and he could not answer the prosecutor's direct questions as to exactly where he appeared in the video at any time other than when the robbery occurred. RP (5/9/07) 41-42.

the Key Bank robber. The palm print, the video, and the bank records constituted independent evidence of the robber's identity that was not impeached in any meaningful way at trial. Even if Kevin Olsen had been confronted with the fact that he had received $1000 and had given false information in another case – or indeed, if Kevin Olsen had not testified at all – there is no reasonable probability that the outcome of the proceedings would have been different as to count II. Put another way, even though impeachment evidence was suppressed in violation of Brady, McCoy still received "a trial resulting in a verdict worthy of confidence"[10] on count II because the evidence was overwhelming and the impeachment evidence was not material.

In sum, the State agrees that McCoy has established a Brady violation as to counts I and III because the suppressed impeachment evidence could have made a difference in the outcome as to those counts. But count II should be affirmed because the impeachment evidence would not have made a difference given the overwhelming independent evidence of guilt.

[10] Thomas, 150 Wn.2d at 850-51 (quoting Kyles, 514 U.S. at 434).

2. THIS COURT NEED NOT ADDRESS MCCOY'S REMAINING CLAIMS, BUT IN ANY EVENT, THEY ARE WITHOUT MERIT.

McCoy also argues that if this Court is not inclined to reverse his convictions on the existing record, the Court should order another reference hearing to address whether the State knew that Olsen had provided false information in a different case. McCoy further argues that the trial court erred in addressing the question of whether Detective Aakervik or the trial prosecutor knew about the impeachment evidence, and that the trial court erred in declining to issue McCoy's subpoenas duces tecum. Lastly, McCoy asks this Court to review an unredacted copy of Exhibit 5, the documents relating to Kevin Olsen providing false information. Opening Brief of Petitioner, at 58-74.

In light of the State's concession that a Brady violation has been established, and that the violation should result in the reversal of two of McCoy's convictions, this Court need not address these additional claims. But in any event, these arguments should be rejected.

First, there is no need to order another reference hearing with respect to Kevin Olsen providing false information because the documents contained in Exhibit 5 establish conclusively that this

occurred. Appendix H. In addition, these documents show that Agent Distajo and Detective Nelson were involved in that incident.[11] Appendix H. As the State has already conceded, Distajo's and Nelson's knowledge about Olsen is constructively imputed to Detective Aakervik (and to the trial prosecutor) because they were part of the same Task Force working on the same case. Therefore, on the specific facts presented in this case, there has been a sufficient showing that the evidence of Olsen's untruthfulness was suppressed in violation of Brady. Although the trial court did not make specific findings in this regard, and was not asked to do so, another reference hearing on this topic is simply unnecessary given the existing record.

Second, whether or not the trial court erred in finding that Detective Aakervik and the trial prosecutor did not know about the impeachment evidence, there is no reason to address this issue because it is legally irrelevant. A prosecutor's lack of actual knowledge is irrelevant under Brady if the evidence in question is in the possession of a member of the "prosecution team." *See* Kyles, 514 U.S. at 437. As the State has conceded, Distajo's and

[11] Also, Agent Distajo admitted that he "may have recalled" that Olsen had failed a polygraph on September 7, 2006. RP (1/25/12) 71.

Nelson's knowledge are constructively imputed to Aakervik and to the trial prosecutor because these Task Force members were part of the same "team" in this case. Thus, the trial court's finding that Aakervik and the trial prosecutor were not aware of the impeachment evidence is not legally germane, and there is no need to address it further.

Third, there is also no need to address the trial court's decision not to issue McCoy's subpoenas duces tecum. As the trial court correctly observed, McCoy's subpoenas are overly broad.[12] And in any event, the documentary evidence that was produced and admitted during the reference hearing is more than sufficient to establish that impeachment evidence existed that was not disclosed prior to trial. *See, e.g.,* Appendix G, Appendix H. Moreover, if the State were to decide to retry counts I and III upon remand, any further potential discovery issues can and should be addressed by the trial court.

Lastly, while this Court certainly may examine an unredacted copy of the documents relating Olsen giving false information in an unrelated case, the redacted exhibit is sufficient on its face to establish the salient facts, *i.e.,* that Olsen lied, and that he admitted

[12] Copies of the subpoenas are attached to McCoy's brief.

doing so in an effort to "work a deal" for himself. Appendix H. Accordingly, no further information is necessary.

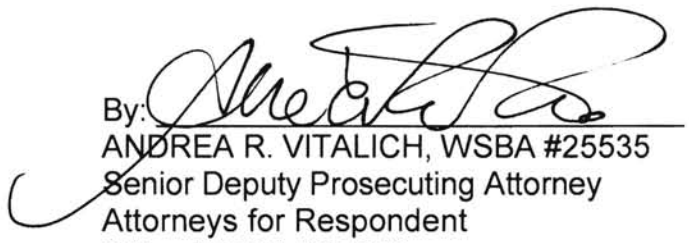
E. CONCLUSION

The State concedes that McCoy has established a Brady violation regarding impeachment evidence that is material with respect to counts I and III. This Court should accept the State's concession and reverse McCoy's convictions for robbery in the first degree on counts I and III, and remand for further proceedings. This Court should affirm McCoy's conviction for robbery in the first degree on count II because the impeachment evidence would not have made a difference in the outcome on count II.

DATED this 29th day of August, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: _____
ANDREA R. VITALICH, WSBA #25535
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Appendix A

FILED

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KING COUNTY
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CERTIFIED COPY TO COUNTY JAIL JUN 11 2007

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 06-1-03538-7 SEA
Vs.	)	**JUDGMENT AND SENTENCE FELONY**
RAYMOND DWAYNE MCCOY Defendant,	)	

I. HEARING

I.1 The defendant, the defendant's lawyer, ROBERT MCKAY, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

II. FINDINGS

There being no reason why judgment should not be pronounced, the court **finds**:
2.1 **CURRENT OFFENSE(S)**: The defendant was found guilty on 05/10/2007 by jury verdict of:

Count No.: I Crime: ROBBERY IN THE FIRST DEGREE
RCW 9A.56.200 (1) (b) & 9A.56.190 Crime Code: 02910
Date of Crime: 12/27/2005 Incident No. _____

Count No.: II Crime: ROBBERY IN THE FIRST DEGREE
RCW 9A.56.200 (1) (b) & 9A.56.190 Crime Code: 02910
Date of Crime: 02/13/2006 Incident No. _____

Count No.: III Crime: ROBBERY IN THE FIRST DEGREE
RCW 9A.56.200 (1) (b) & 9A.56.190 Crime Code: 02910
Date of Crime: 02/06/2006 Incident No. _____

Count No.: _____ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

[ ] Additional current offenses are attached in **Appendix A**

SPECIAL VERDICT or FINDING(S):

(a) [ ] While armed with a **firearm** in count(s) _____ RCW 9.94A.510(3).
(b) [ ] While armed with a **deadly weapon** other than a firearm in count(s) _____ RCW 9.94A.510(4).
(c) [ ] With a **sexual motivation** in count(s) _____ RCW 9.94A.835.
(d) [ ] A V.U.C.S.A offense committed in a **protected zone** in count(s) _____ RCW 69.50.435.
(e) [ ] **Vehicular homicide** [ ]Violent traffic offense [ ]DUI [ ] Reckless [ ]Disregard.
(f) [ ] **Vehicular homicide** by DUI with _____ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
(g) [ ] **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.130.
(h) [ ] **Domestic violence** offense as defined in RCW 10.99.020 for count(s)_____.
(i) [ ] Current offenses **encompassing the same criminal conduct** in this cause are count(s)_____ RCW 9.94A.589(1)(a).

2.2 **OTHER CURRENT CONVICTION(S)**: Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

_____

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):
[X] Criminal history is attached in **Appendix B.**
[ ] One point added for offense(s) committed while under community placement for count(s) _____

2.4 **SENTENCING DATA:**

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	12	IX	129 TO 171		129 TO 171 MONTHS	LIFE AND/OR $50,000
Count II	12	IX	129 TO 171		129 TO 171 MONTHS	LIFE AND/OR $50,000
Count III	12	IX	129 TO 171		129 TO 171 MONTHS	LIFE AND/OR $50,000
Count						

[ ] Additional current offense sentencing data is attached in **Appendix C.**

2.5 **EXCEPTIONAL SENTENCE** (RCW 9.94A.535):
[ ] Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in **Appendix D.** The State [ ] did [ ] did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A.**
[ ] The Court DISMISSES Count(s) _____.

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 **RESTITUTION AND VICTIM ASSESSMENT:**

[✓] Defendant shall pay restitution to the Clerk of this Court as set forth in attached **Appendix E.**

[ ] Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.

[ ] Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.

[ ]Date to be set.

[ ] Defendant waives presence at future restitution hearing(s).

[ ] Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of $500.

4.2 **OTHER FINANCIAL OBLIGATIONS:** Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

(a) [ ] $_____, Court costs; [✓] Court costs are waived; (RCW 9.94A.030, 10.01.160)

(b) [ ] $100 DNA collection fee; [✓] DNA fee waived (RCW 43.43.754)(crimes committed after 7/1/02);

(c) [ ] $_____, Recoupment for attorney's fees to King County Public Defense Programs; [✓] Recoupment is waived (RCW 9.94A.030);

(d) [ ] $_____, Fine; [ ]$1,000, Fine for VUCSA; [ ]$2,000, Fine for subsequent VUCSA; [ ]VUCSA fine waived (RCW 69.50.430);

(e) [ ] $_____, King County Interlocal Drug Fund; [ ] Drug Fund payment is waived; (RCW 9.94A.030)

(f) [ ] $_____, State Crime Laboratory Fee; [ ] Laboratory fee waived (RCW 43.43.690);

(g) [ ] $_____, Incarceration costs; [X] Incarceration costs waived (RCW 9.94A.760(2));

(h) [ ] $_____, Other costs for: _____.

4.3 **PAYMENT SCHEDULE:** Defendant's **TOTAL FINANCIAL OBLIGATION** is: $ 3,876.85 The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: [ ]Not less than $_____ per month; [✓] On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

[✓] Court Clerk's trust fees are waived.

[✓] Interest is waived except with respect to restitution.

4.4 **CONFINEMENT OVER ONE YEAR:** Defendant is sentenced to a term of total confinement in the custody of the **Department of Corrections** as follows, commencing: [✓] immediately; [ ](Date): _____ by _____.m.

150 months/~~days~~ on count I; 150 months/~~days~~ on count III; _____ months/day on count _____

150 months/~~days~~ on count II; _____ months/days on count ____; _____ months/day on count _____

The above terms for counts I, II, III are ~~consecutive~~/concurrent.

The above terms shall run [ ] CONSECUTIVE [✓] CONCURRENT to cause No.(s) 06-1-01623-4 SEA and 06-1-03529-8 SEA

The above terms shall run [ ] CONSECUTIVE [✓] CONCURRENT to any previously imposed sentence not referred to in this order.

[ ] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special **WEAPON** finding(s) in section 2.1: _____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

[ ] The enhancement term(s) for any special **WEAPON** findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The **TOTAL** of all terms imposed in this cause is 150 months.

Credit is given for [✓] 429 days served [ ] days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A505(6).

4.5 **NO CONTACT:** For the maximum term of life years, defendant shall have no contact with Key Bank, US Bank, Sterlings Savings Bank, 5000 S. Dearborn Seattle, WA → 2401 3rd Ave Seattle, WA → 1406 4th Ave., Seattle, WA

4.6 **DNA TESTING.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in **APPENDIX G.**
[ ] **HIV TESTING:** For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in **APPENDIX G.**

4.7 (a) [ ] **COMMUNITY PLACEMENT** pursuant to RCW 9.94A.700, for **qualifying crimes committed before 7-1-2000**, is ordered for _____ months or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer. [24 months for any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 6-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against person defined in RCW 9.94A.411 not otherwise described above.] **APPENDIX H** for Community Placement conditions is attached and incorporated herein.

(b) [ ] **COMMUNITY CUSTODY** pursuant to RCW 9.94.710 for any **SEX OFFENSE committed after 6-5-96 but before 7-1-2000,** is ordered for a period of 36 months or for the period of earned early release awarded under RCW 9.94A.728, whichever is longer. **APPENDIX H** for Community Custody Conditions and **APPENDIX J** for sex offender registration is attached and incorporated herein.

(c) [✓] **COMMUNITY CUSTODY** - pursuant to RCW 9.94A.715 **for qualifying crimes committed after 6-30-2000** is ordered for the following established range:

[ ] Sex Offense, RCW 9.94A.030(38) - 36 to 48 months—when not sentenced under RCW 9.94A.712
[ ] Serious Violent Offense, RCW 9.94A.030(37) - 24 to 48 months
[✓] Violent Offense, RCW 9.94A.030(45) - 18 to 36 months
[ ] Crime Against Person, RCW 9.94A.411 - 9 to 18 months
[ ] Felony Violation of RCW 69.50/52 - 9 to 12 months

or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.737.

[X]APPENDIX H for Community Custody conditions is attached and incorporated herein.

[ ]**APPENDIX J** for sex offender registration is attached and incorporated herein.

4.8 [ ] **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement. The defendant shall comply with all mandatory statutory requirements of community custody set forth in RCW 9.94A.700. **Appendix H** for Community Custody Conditions is attached and incorporated herein.

4.9 [ ] **ARMED CRIME COMPLIANCE, RCW 9.94A.475,.480.** The State's plea/sentencing agreement is [ ]attached [ ]as follows:

_____

_____

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: June 8, 2007

JUDGE
Print Name: **JUDGE PARIS K. KALLAS**

Presented by:

Deputy Prosecuting Attorney, WSBA# 24314
Print Name: Jim Ferrell

Approved as to form:

Attorney for Defendant, WSBA # 14687
Print Name: Robert S McKay

3202237

F I N G E R P R I N T S

BEST AVAILABLE IMAGE POSSIBLE

RIGHT HAND
FINGERPRINTS OF:

RAYMOND DWAYNE MCCOY

DEFENDANT'S SIGNATURE: X Raymond D. McCoy
DEFENDANT'S ADDRESS: c/o DOC

DATED: JUN 08 2007

Paris K. Kallas
JUDGE, KING COUNTY SUPERIOR COURT
PARIS K. KALLAS

ATTESTED BY: BARBARA MINER,
SUPERIOR COURT CLERK

BY: Barbara Winter
DEPUTY CLERK

CERTIFICATE

I, _____,
CLERK OF THIS COURT, CERTIFY THAT THE ABOVE IS A TRUE COPY OF THE JUDGEMENT AND SENTENCE IN THIS ACTION ON RECORD IN MY OFFICE.
DATED: _____

_____
CLERK

BY: _____
DEPUTY CLERK

OFFENDER IDENTIFICATION

S.I.D. NO. WA11364603

DOB: AUGUST 10, 1959

SEX: M

RACE: B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 06-1-03538-7 SEA
	)	
vs.	)	JUDGMENT AND SENTENCE,
	)	(FELONY) - APPENDIX B,
RAYMOND DWAYNE MCCOY	)	CRIMINAL HISTORY
	)	
Defendant,	)	
	)	

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
THEFT 2	03/13/2003	ADULT	021104190	KING CO
VUCSA: POSSESS COCAINE	12/08/2000	ADULT	001080758	KING CO
VUSCA: DELIVER COCAINE	12/08/2000	ADULT	001079857	KING CO
BURGLARY 1	07/23/1980	ADULT	801004600	KING CO
THEFT 2	09/30/2005	ADULT	051040048	KING CO
VUCSA: BURN	09/01/2006	ADULT	061016234	KING CO
FORGERY	09/01/2006	ADULT	061035298	KING CO

[ ] The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date: JUN 0 8 2007

Paris K. Kallas

JUDGE, KING COUNTY SUPERIOR COURT

PARIS K. KALLAS

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 06-1-03538-7 SEA
vs.	)	APPENDIX E
RAYMOND MCCOY, Defendant,	)	Agreed ORDER SETTING RESTITUTION

The court ordered payment of restitution as a condition of sentencing. The Court has determined that the following person is entitled to restitution in the following amounts;

IT IS ORDERED that defendant make payments through the registry of the clerk of the court as follows:

Sterling Savings Bank
1406 4th Avenue
Seattle, WA 98101
Re: Robbery 12-27-2005 AMOUNT: $ 450.00

KeyBank
MS WA31-05-0167
PO Box 1816
Tacoma, WA 98401
Re: Robbery 2-13-2006
@ 666 S Dearborn - Seattle, WA AMOUNT: $ 845.00

US Bank
Attn: Corp Security
111 SW 5th Avenue, Suite 330
Mailstop PD-OR-P3CI
Portland, OR 97204
@ 2401 3rd Avenue –Seattle, WA AMOUNT: $ 2,081.85

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

DONE IN OPEN COURT this 8 day of June, 2007.

JUDGE PARIS KALLAS

Presented by:

Jim Ferrell #24312
Deputy Prosecuting Attorney

Copy received; Notice Presentation waived:

Robert McKay-Private 17667
Attorney for Defendant

Order Setting Restitution
CCN# 0476934 REF# 2060331100 tl

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

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 06-1-03538-7 SEA
	)	
vs.	)	APPENDIX G
	)	ORDER FOR BIOLOGICAL TESTING
RAYMOND DWAYNE MCCOY	)	AND COUNSELING
	)	
Defendant,	)	
	)	

(1) **DNA IDENTIFICATION (RCW 43.43.754):**

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2) ☐ **HIV TESTING AND COUNSELING (RCW 70.24.340):**

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: JUN 0 8 2007

Paris K. Kallas

JUDGE, King County Superior Court

PARIS K. KALLAS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 06-1-03538-7 SEA
vs.	)	JUDGMENT AND SENTENCE APPENDIX H
RAYMOND DWAYNE MCCOY Defendant,	)	COMMUNITY PLACEMENT OR COMMUNITY CUSTODY

The Defendant shall comply with the following conditions of community placement or community custody pursuant to RCW 9.94A.700(4), (5):

1) Report to and be available for contact with the assigned community corrections officer as directed;
2) Work at Department of Corrections-approved education, employment, and/or community service;
3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
4) Pay supervision fees as determined by the Department of Corrections;
5) Receive prior approval for living arrangements and residence location;
6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.720(2));
7) Notify community corrections officer of any change in address or employment; and
8) Remain within geographic boundary, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

OTHER SPECIAL CONDITIONS:

[ ] The defendant shall not consume any alcohol.

[✓] Defendant shall have no contact with: Key Bank, US Bank and Sterling Savings Bank at their individual locations

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit:

[ ] The defendant shall participate in the following crime-related treatment or counseling services:

[ ] The defendant shall comply with the following crime-related prohibitions:

[✓] No Contact with: Olga Moore, Tuan Le, Yen Huynh, Marlena Wiley, Kenneth Jackson, Ruby Elwood, Shamine Fung, Eric Van Dusti,

Other conditions may be imposed by the court or Department during community custody.

Community Placement or Community Custody shall begin upon completion of the term(s) of confinement imposed herein or when the defendant is transferred to Community Custody in lieu of earned early release. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions [RCW 9.94A.720] and may issue warrants and/or detain defendants who violate a condition [RCW 9.94A.740].

Date: JUN 0 8 2007

Patrick Kelly
JUDGE

Appendix B

FILED
KING COUNTY WASHINGTON

DEC 14 2006

SUPERIOR COURT CLERK
BY ANDREW T. HAVLIS
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON, Plaintiff,	)	
v.	)	No. 06-1-03538-7 SEA
RAYMOND DWAYNE MCCOY,	)	AMENDED INFORMATION
Defendant.	)	

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse RAYMOND DWAYNE MCCOY of the crime of **Robbery in the First Degree**, committed as follows:

That the defendant RAYMOND DWAYNE MCCOY in King County, Washington on or about December 27, 2005, did unlawfully and with intent to commit theft take personal property of another, to-wit: money, from the person and in the presence of Marlene Willey, against her will, by the use or threatened use of immediate force, violence and fear of injury to such person or her property and to the person or property of another, and that he did commit the robbery within and against a financial institution defined in RCW 7.88.010 or RCW 35.38.060, to-wit: Sterling Savings Bank;

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

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse RAYMOND DWAYNE MCCOY of the crime of **Robbery in the First Degree**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to

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

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

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

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

COUNT III

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

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

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

NORM MALENG
Prosecuting Attorney

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

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

Appendix C

COPY TO COUNTY JAIL AUG 28 2009

FILED
09 AUG 28 PM 1:00
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

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

STATE OF WASHINGTON, Respondent,	)	No. 60134-2-I
v.	)	MANDATE
	)	King County
RAYMOND DWAYNE MCCOY, Appellant.	)	Superior Court No. 06-1-03538-7 SEA

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on July 21, 2008, became the decision terminating review of this court in the above entitled case on August 21, 2009. An order denying a motion for reconsideration was entered on September 12, 2008. An order denying a petition for review was entered in the Supreme Court on April 28, 2009. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to a Commissioner's ruling entered on July 1, 2009, costs in the amount of $6,190.44 are awarded against judgment debtor Raymond Dwayne McCoy to be awarded as follows: $6,148.04 in favor of judgment creditor to the Washington Office of Public Defense and $42.40 in favor of judgment creditor to the King County Prosecutor's Office.

c: Andrew P. Zinner, NBK
James A. Ferrell, KC
Hon. Paris K. Kallas

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 21st day of August, 2009.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals, State of Washington, Division I.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 60134-2-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
RAYMOND DWAYNE MCCOY,	)	
	)	
Appellant.	)	FILED: July 21, 2008

PER CURIAM. A threat to use force is implied when there is unequivocal demand for the immediate surrender of money from a bank teller without any color of right to that money. That implicit threat which induces a teller to part with the money is sufficient to sustain a robbery conviction. Here, the defendant made unequivocal demands for money from bank tellers at three different financial institutions. We affirm.

FACTS

Raymond McCoy was identified as the person who took money from tellers working at three Seattle area banks: Sterling Savings Bank, US Bank, and Key Bank.

Sterling Savings Bank

McCoy approached Marlena Willey's teller station and reached for the money she was still holding in her hand from a previous transaction. She pulled the money back, initially thinking that he was joking. He again reached for the money and she told him to "[s]top it." McCoy then said, "This is no joke. This is a robbery. Give me the money." It was at that point that Willey knew it was a real robbery. Willey was training Olga Moore for the teller position that day. Moore

testified that McCoy demanded the money and when Willey did not react, he reached over and said, "I am serious, give me the money." Moore described Willey as "very, very stressed out" after the incident and testified that "everybody was shocked" as a result of the robbery. Moore and Ruby Elwood, the branch manager, identified McCoy as the person who took the money.

US Bank

McCoy passed a note to Jasmine Fung, a teller at US Bank, directing her to give him all of her money and iterating that "this is not a game." McCoy then verbally conveyed the same demand to Fung. When she started to give him the money, he reached out to her cartridge to get the money himself. Fung also positively identified McCoy as the person to who took approximately $2,000.

An employee seated nearby, heard Fung say, "I was robbed, I was robbed." The responding police officer described Fung as "a little disturbed" and "shaken" by the incident. As a result, he only spoke with her briefly.

Key Bank

McCoy greeted Tuan Le, a teller at Key Bank, before slipping him a note on a card. Written in all capital letters it said, "ATTENTION, THIS IS A HOLDUP. PLEASE REACH INTO YOUR DRAWER AND PLACE ALL THE 100's INTO THE BAG." McCoy slid a plastic bag to Le under the Plexiglas. Le required a few moments to gather himself and did as he was asked.

When asked how long the entire incident took, Le responded, "To me, you know, when the incident happened, it lasted forever, but I could say anywhere

between a minute to three minutes." The teller working next to Le did not observe the interactions. Le gave her a signal that he had just been robbed.

King County Jail Disclosure

McCoy and Kevin Olsen, also being held for bank robbery, met in the King County Jail. Olsen and McCoy performed legal research work together while in jail. Over the course of approximately ten conversations initiated by McCoy, McCoy admitted to committing several bank robberies. Olsen took notes regarding these conversations. Olsen did not see either the police reports or the certificate of probable cause in McCoy's case. McCoy told Olsen that he had left a palm print on the counter at Key Bank and was contemplating explaining its presence by saying he was in the bank at a different time than the robbery. McCoy recounted that he had snatched money out of the hands of one of the tellers and that he was frustrated by one of the robberies because the teller trainee in the bank identified him with more specificity than had the bank employee senior to her.

Olsen shared his knowledge of McCoy's activities with FBI (Federal Bureau of Investigation) agents who contacted Dag Aakervik, the Seattle Police detective in charge of McCoy's case. Aakervik later took a tape recorded and handwritten statement from Olsen. Aakervik found Olsen's knowledge of the crimes to be detailed. Olsen did not receive any benefit in return for his assisting the police.

McCoy's Testimony

McCoy testified that he did not rob any of the three banks. He also stated that he was in Key Bank the morning of the day that bank was later robbed, claiming that he was exchanging coins that he had received panhandling for paper currency. McCoy also testified that he and Olsen helped each other on their cases and that Olsen had access to various portions of McCoy's discovery when they worked together.

McCoy was charged with three counts of first degree robbery of financial institutions. After a jury trial, he was found guilty as charged on all three counts. McCoy was sentenced within the standard range for 150 months. McCoy appeals.

ANALYSIS

Sufficiency of the Evidence

McCoy contends there was insufficient evidence to prove beyond a reasonable doubt that he was guilty of all three counts of first degree robbery of financial institutions. But his argument is unconvincing. Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of a crime beyond a reasonable doubt.[1] A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences gleaned therefrom.[2] Circumstantial

[1] State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).
[2] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

evidence is as reliable as direct evidence.[3] And, an appellate court defers to the trier of fact regarding witness credibility or conflicting testimony.[4]

> 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 immediate 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.[5]

"Any force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction."[6] In State v. Collinsworth, a defendant who told a bank teller to "[g]ive me your hundreds," "no dye packs," argued that he did not display a weapon and therefore may only be held liable for theft, not robbery. In rejecting that argument, the court stated, "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."[7] The Collinsworth court noted that the defendant "made a clear, concise, and unequivocal demand for money. He also reiterated his demand or told the teller not to include 'bait' money or 'dye packs,' thereby underscoring the seriousness of his intent."

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[3] State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).
[4] State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).
[5] RCW 9A.56.190.
[6] State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992).
[7] 90 Wn. App. 546, 553, 966 P.2d 905 (1997).

The words used in each of the three robberies of the financial institutions were unequivocal. At Sterling Savings Bank, McCoy declared, "This is no joke. This is a robbery. Give me the money." At US Bank, McCoy twice made a clear demand for money accompanied by the words that "this is not a game." The written note McCoy handed to the teller at Key Bank used the word "holdup" accompanied by the words, "Hurry up. This is a holdup," which were likewise unequivocal.

McCoy argues that in none of the incidents did the tellers actually feel threatened. The testimony at trial, however, contradicts this contention. Willey of Sterling Savings Bank was described as being "very, very stressed out." Fung at US Bank appeared "a little disturbed" and "shaken" up by the incident. And, Le of Key Bank described the incident as seeming to last forever even though it only lasted from one to three minutes.

But actual fear on the part of the tellers does not have to be specifically proven. As often noted, "the law, *in odium spoliatoris*, will presume fear where there appears to be just ground for it."[8] Here, the evidence was sufficient to warrant such a presumption.

Statement of Additional Grounds

McCoy raises several issues in his Statement of Additional Grounds (SAG), including State misconduct, flawed identification by a witness, and ineffective assistance of counsel. None of his claims have merit.

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[8] State v. Redmond, 122 Wash. 392, 393-94, 210 P. 772 (1922) (quoting Long v. State, 12 Ga. 293 (1852)).

First, the trial court properly denied McCoy's motion to dismiss for State misconduct or mismanagement. McCoy argues that the information Olsen obtained was akin to attorney work-product as McCoy was representing himself pro se and consulting with Olsen. After an evidentiary hearing, the trial court found that Olsen may have served as a "jail house lawyer" but that fact did not actually transform him into one and that any work that he performed with McCoy was not protected under the work-product doctrine. Once Olsen came forward to share his information with the State, the better course of conduct would have been to separate Olsen and McCoy. Thus, any suspicion that the State was using Olsen to garner McCoy's trial tactics and defenses would be transparently baseless. However, Olsen testified that he had no conversations with McCoy after he had informed the police of the contents of their conversations regarding the bank robberies. The assertion that no further information was obtained from Olsen between the time the detective spoke with him and when Olsen's statement was recorded approximately ten days later, was buttressed by the detective's testimony, and found credible by the trial court. Additionally, McCoy's claim that the State committed misconduct by serving him responses to his motion just before trial is devoid of merit. The State followed proper procedure in filing timely responses to McCoy's pretrial motions.

McCoy contends that his in-court identification by witnesses was tainted by a biased photomontage shown to them before trial. The photomontage was created from video surveillance cameras at the bank. However, McCoy fails to articulate how he was prejudiced. Moreover, each witness was extensively

cross-examined by counsel regarding the photomontage procedure and their credibility was a matter for the jury to determine. We do not review credibility determinations on appeal.[9]

McCoy argues that he received ineffective assistance of counsel because of his attorney's failure to request a CrR 3.5 hearing to suppress Olsen's testimony, in advising McCoy to take the stand, thus permitting the jury to learn of his in custody status and criminal history, and finally for failure to impeach one of the witnesses with evidence of prior misconduct. "To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice."[10] The issue of Olsen's testimony has already been addressed. McCoy's testimony alleging he was at the bank earlier in the day was crucial to rebut the State's evidence of his palm print found at the teller's station that was robbed. The decision to have McCoy testify could be construed to be a trial tactic. Legitimate trial strategy or tactics cannot serve as a basis for a claim of ineffective assistance of counsel.[11] McCoy's impeachment was in accord with the rules of evidence. McCoy contends that he should have been able to question in depth the prior bad acts by a bank teller who was subsequently dismissed from the bank. On direct, the prosecution elicited teller Le was subsequently dismissed for embezzlement of bank funds. Inasmuch as

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[9] Camarillo, 115 Wn.2d at 71.
[10] State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).
[11] McNeal, 145 Wn.2d at 362.

the jury heard this testimony, they could draw their own conclusions regarding Le's credibility.

Finally, McCoy's SAG arguments regarding insufficient evidence were adequately presented and argued in his appellate counsel's brief and have already been addressed in this opinion.

The trial court is affirmed.

For the Court:

Grosse, J.

Dwyer, A.C.J.

Azid, J.

Appendix D

COPY TO COUNTY JAIL SEP 27 2010

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

FILED
KING COUNTY, WASHINGTON
SEP 27 2010
SUPERIOR COURT CLERK

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 65590-6-I
	)	CERTIFICATE OF FINALITY
RAYMOND D. McCOY,	)	King County
	)	Superior Court No. 06-1-03538-7.SEA
Peittioner.	)	

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the order of the Court of Appeals of the State of Washington, Division I, filed on July 19, 2010, became final on September 24, 2010.

c: Raymond McCoy

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 24th day of September, 2010.

Richard D. Johnson
Court Administrator/Clerk of the Court of Appeals, State of Washington Division I.

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

In the Matter of the Personal Restraint of:	)	No. 65590-6-I
RAYMOND D. McCOY,	)	ORDER DISMISSING PERSONAL RESTRAINT PETITION
Petitioner.	)	

Raymond McCoy filed a CrR 7.8 motion in King County Superior Court seeking to vacate his 2007 conviction for three counts of first degree robbery under King County No. 06-1-03538-7. In accordance with CrR 7.8(c)(2), the superior court transferred the motion for consideration as a personal restraint petition.

McCoy now objects to the transfer and moves to withdraw his petition. The motion is granted and the petition will be dismissed without prejudice. Should McCoy refile the petition in the future, the petition must comply with all relevant substantive and procedural rules in effect at the time of filing. Dismissal of the petition does not reinstate any proceedings in King County Superior Court.

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed without prejudice pursuant to RAP 16.11(b).

Done this 19th day of July, 2010.

Leach, A.C.J.

Acting Chief Judge

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2010 JUL 19 PM 2:05

Appendix E

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF: RAYMOND D. McCOY, Petitioner.	)))))))	No. 61853-9-I ORDER REMANDING TO SUPERIOR COURT FOR REFERENCE HEARING

THE STATE OF WASHINGTON TO:

The Honorable Richard F. McDermott
Presiding Judge, King County Superior Court

Ms. Barbara Miner, Director and
Superior Court Clerk
King County Superior Court Clerk

The Honorable Daniel T. Satterberg
King County Prosecuting Attorney

Dennis J. McCurdy
Senior Deputy Prosecuting Attorney

Raymond D. McCoy

Raymond McCoy filed a personal restraint petition seeking to vacate his 2007 conviction for three counts of first degree robbery under King County No. 06-1-03538-7 SEA. Among other things, McCoy challenged the trial court's admission of the testimony of Kevin Olsen, who testified about McCoy's admissions to him in the King County Jail. In March 2010, the Acting Chief Judge determined that McCoy failed to provide good cause to revisit issues previously rejected on direct appeal, including claims about the admission of Olsen's testimony, and dismissed McCoy's petition. Also in March 2010, without notice to this court, the State forwarded information to McCoy indicating that Olsen misled the trial court as to whether he was working for the police and/or

the FBI as a paid informant at the time of McCoy's trial. McCoy filed a motion for discretionary review in the Supreme Court, as well as a motion to supplement the record with the information he received from the State regarding Olsen. The Supreme Court granted McCoy's motions for discretionary review and to supplement the record and remanded the matter to this court to refer the issue of whether Olsen lied at trial to the superior court for a reference hearing under RAP 16.11(a).

Accordingly, this matter shall be remanded to the trial court for a hearing and entry of findings as to whether and during what time frame Olsen worked as a paid informant for any government agency, whether Olsen received a benefit for supplying information to authorities about McCoy or for testifying at McCoy's trial, and whether Olsen lied at McCoy's trial.

Now, therefore, it is hereby

ORDERED that this matter is remanded to King County Superior Court for a reference hearing on the material issues of fact set forth above and for the entry of findings of fact.

Done this 29th day of July, 2011.

Leach, A.C.J.
Acting Chief Judge

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 29 PM 1:24

Appendix F

FILED
KING COUNTY WASHINGTON
FEB - 8 2012
SUPERIOR COURT CLERK
BY DAVID J. ROBERTS
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

STATE OF WASHINGTON V. RAYMOND MCCOY	NO. 06-1-03538-7 SEA COA NO. 61853-9-I FINDINGS OF FACT ENTERED FOR COURT OF APPEALS ORDER DATED 29 JULY 2011

The following Findings of Fact follow a reference hearing ordered by Division I of the Court of Appeals (Order dated 29 July 2011). The parties agreed that Mr. McCoy had the burden of proof by a preponderance of the evidence.

The Court of Appeals remanded on certain questions. The questions are: (1) Whether and during what time frame Olsen worked as a paid informant for any governmental agency; (2) Whether Olsen received a benefit for supplying information to authorities about McCoy or for testifying at McCoy's trial; and (3) whether Olson lied at McCoy's trial. This Court also

HON. JAMES E. ROGERS
KING COUNTY SUPERIOR COURT
DEPT. 45
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104

answers another question not asked: did the State fail to disclose the fact that Olson received a benefit for McCoy's case.

1. The Court found all witnesses credible at the hearing. Specific comments are made herein as to specific issues for each witness.
2. Throughout the hearing, witnesses did not always carefully differentiate from what letters from the US Attorneys' Office stated as fact and what they could remember.
3. Raymond McCoy was convicted by a jury on May 10, 2007 of the robbery of the Sterling Savings Bank under this cause number. Mr. Kevin Olson testified in the trial on May 7, 2007.
4. The Puget Sound Violent Crimes Task Force is an interagency group that is comprised of federal and state agencies. At all relevant times, their main task was to investigate bank robberies.
5. Seattle Police Detective Dag Aakervik was the lead detective on the Sterling Bank robbery case. He was a member of the Task Force. Mr. James Ferrell was the Senior Deputy Prosecutor assigned to the case.
6. Federal Bureau of Investigation Special Agent Allen Distajo worked with King County Det. Jon Nelson separately from Det. Aakervik on the same Task Force. Distajo and Nelson did not work on the Sterling Bank robbery or with Det. Aakervik on this investigation except as noted herein.

<u>Olsen worked as an informant for the FBI /PSVCTF</u>

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KING COUNTY SUPERIOR COURT
DEPT. 45
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104

7. Kevin Olson was a confidential informant for the FBI from December 5, 2005 to roughly March 13, 2007. His contacts were Agent Distajo and Det. Nelson.
8. Olson was read and signed a document called "admonishments" twice, once when he started his relationship in 2005 and again on March 13, 2007. This document could be construed as a contract. The first document was not admitted into evidence. The second admonishment is Exhibit 4. Mr. Olson signed both but did not receive a copy of either document. Both documents make clear that Olson is not promised any benefit for providing information. The officers made oral statements to Olson consistent with these admonishments.
9. Det. Nelson testified that he and Distajo developed a rapport with Olson over many meetings on many cases.
10. When he met with these law enforcement personnel, Olson sometimes received a cheeseburger and/or chewing tobacco.
11. Mr. Olson testified in this hearing, the McCoy trial, and elsewhere, that he did hope to get a benefit of a reduced sentence, dismissed charges or some other consideration for the time he faced serving. However, he never did receive any such benefit for any information or case.
12. These law enforcement personnel used Olson to gain information but not as a testifying witness.

HON. JAMES E. ROGERS
KING COUNTY SUPERIOR COURT
DEPT. 45
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104

13. In a meeting on September 1, 2006, Mr. Olson disclosed information about Mr. McCoy's involvement in the Sterling Savings Bank robbery to Agent Distajo and Det. Nelson. This disclosure was not made as the result of questioning about the Sterling case.

14. Agent Distajo and Det. Nelson then contacted Det. Aakervik, whom they knew was working this case.

Olsen received a benefit from the FBI for supplying information to authorities about McCoy

15. Once Mr. Olson gave information about the McCoy case, Det. Aakervik, who was the Seattle Police Officer in charge of the Sterling Bank robbery, decided to consider using him as a trial witness. This decision by Det. Aakervik led to Special Agent Distajo to make a decision that Mr. Olson was no longer of use to Distajo and Nelson for obtaining information as an informant in the jail.

16. Det. Nelson and Agent Distajo both testified that the two of them had discussed a desire to give Mr. Olson some money for the work he had done for them since 2005. However, they never discussed this fact with Olson before actually giving him the money. There was no promise of money for information. Olson never bargained for money and gave no expectation for money-he did hope for a reduced sentence.

HON. JAMES E. ROGERS
KING COUNTY SUPERIOR COURT
DEPT. 45
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104

17. Olsen was given the $ 1,000 at the end of his relationship with the FBI, which relationship ended because Mr. Olsen became a witness on the Sterling Savings Bank case. In other words, the agents gave Mr. Olson money for his earlier assistance.

18. Olson was shown (not given) a $1,000 check on November 21, 2006. He was told "Merry Christmas" or words to that effect. At that time, Olson was told to sign and did sign Exhibit 7, receipt. No one, including Distajo and Nelson, verbally told him why he was receiving the money. However, Exhibit 7 itself states, " . . .represented $1,000 for services and $ 0 for expenses for the period 12/05/05 to 08/28/06." Thus the dates preceded Olson's disclosure of the Sterling Savings Bank information. Olson did not receive a copy of the receipt. The money was later deposited in his jail account.

19. Exhibit 13, an internal FBI document request for funds, evidences that Agent Distajo requested $1,000 on August 29, 2006, in connection with information given by Olsen for the Sterling Savings Bank robbery. The date on the document is wrong, as Olson did not disclose the information until three days after this date. Distajo had no real independent memory of the document.

20. Agent Distajo created Exhibit 13. Distajo testified that it was routine to use the last case information received would be used as the reference case for money paid. Distajo said that Olson was being given money for all the work he had done, but could not remember if the money was given for the Sterling Savings Bank robbery. He admitted that Exhibit 4 was evidence that the money was for the robbery.

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KING COUNTY SUPERIOR COURT
DEPT. 45
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104

21. Distajo was the only witness from the hearing to have ever seen Exhibit 13 before this hearing. Nelson, Aakervik and Olsen never saw it. Aakervik testified that he would not have had access to the document. Det. Nelson did not realize that the Sterling Savings Bank case was being used to request the payment. Nelson had never seen Exhibit 13 prior to the scheduling of this hearing on 2010; however, Nelson did have a recollection that Olson was paid some money for the Sterling Savings Bank information.

22. Exhibit 4 has a list of all benefits received by Olson that the FBI had on record, which included a few meals and the $1,000.

Olson Did not Receive a Benefit Specifically for Testifying

23. Olson was not paid for his testimony in the Sterling Savings Bank. Aakervik did supply him with a meal during one meeting with Detectives.

24. Mr. Olson did not receive a benefit in any reduction in sentence or charges at the time that could be construed as a benefit for the information he gave for the McCoy case. He was sentenced to the highest standard range sentence he could have received.

Did The State Know of the Payment at the Time of the May 2007 Trial?

25. Agent Distajo and Det. Nelson did not tell anyone about the payment of $1,000. They were not part of the Sterling Savings Bank investigation.

26. Olson apparently did not tell anyone in the Sterling Savings bank case about the $1,000 payment.

HON. JAMES E. ROGERS
KING COUNTY SUPERIOR COURT
DEPT. 45
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104

27. Det. Aakervik assumed that he would have been told if Olson had received any benefit of any kind from anyone as a result of information or testimony in the Sterling Bank case. He said that in the past, persons who had supplied information or tips on bank robberies were sometimes paid and he was routinely knew or was involved He did not know of any bank robbery case where someone had been paid to testify.

28. While the federal and local law enforcement officers on the Task Force worked together, they did not always share information and did not have access to areas in the Federal building. Aakervik testified that he would not have had access to FBI financial records. These State officers were not even allowed in every part of the FBI's building in Seattle.

29. Det. Aakervik never promised Mr. Olson anything or gave him anything for information or testimony. He did buy Olson a meal while meeting with him at Seattle Police Robbery headquarters.

30. Since neither Det. Aakervik nor James Ferrell were ever informed that Mr. Olson was paid $1,000, they could not disclose this fact to Mr. McCoy's trial counsel in 2007, Mr. McKay.

<u>Did Mr. Olsen Lie at McCoy's Trial When Asked if He Received a Benefit?</u>

31. Both attorneys at Mr. McCoy's trial asked Mr. Olsen numerous times about any benefit he received at trial. These questions are in Exhibit 1, the certified transcript of his

HON. JAMES E. ROGERS
KING COUNTY SUPERIOR COURT
DEPT. 45
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104

testimony. In each question and answer found at pages 59,65,67,79-80,91 and 101, Mr. Olsen denied receiving a benefit.

32. Each of the questions either focused on a benefit as a reduction in sentence or were answered within the context of a prior question focusing on a benefit in sentence, and the answers were couched in the context of a reduction in sentence. Mr. Olson stated that this was the primary benefit he originally hoped he would receive when working for the FBI.

33. Mr. Olson is a careful witness who listens to questions and who answers only the question posed.

34. Mr. Olson's trial testimony was truthful to the questions posed.

35. In subsequent defense interviews on unrelated cases, when asked about any benefit ever received, Mr. McCoy has admitted that he received money for information, although at times he appears to have believed that his entire relationship with the FBI had some sort of confidentiality agreement that would allow him to not discuss any aspect of it. See Exhibits 11 and 12.

Summary

36. Mr. Olson was a government informant as noted during all times relevant.

37. The FBI paid Mr. Olson for his initial information for the Sterling Savings Bank. Olson was not paid for his testimony.

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DEPT. 45
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SEATTLE, WASHINGTON 98104

38. Mr. McCoy's defense attorney focused his cross examination on Mr. Olson about possible leniency received as a benefit. When the attorney asked about broader benefits, Mr. Olson answered, consistent with the earlier context, that he received no leniency and no promise of leniency. This was truthful testimony.

39. Mr. McCoy's defense attorney did not ask about any payments ever made to Mr. Olson. However, it was never disclosed to Mr. McCoy's defense attorney that Mr. Olson had received the $1,000 payment. Det. Aakervik did not know about the payment and assumed that Mr. Olson had received nothing. Mr. Ferrell did not know about the payment. Mr. Olson apparently did not disclose any payments for any for any cases.

This concludes the reference hearings in this Court. This Order shall be transmitted to the Court of Appeals for further appellate proceedings.

February 8, 2012

Hon. James E. Rogers
King County Superior Court

HON. JAMES E. ROGERS
KING COUNTY SUPERIOR COURT
DEPT. 45
KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON 98104

Appendix G

(Rev. 01-31-2003)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 08/28/2006

To: Seattle

From: Seattle
Squad 5
Contact: SA Alan K. Distajo, ext. 2508

Approved By: Fiddler Steven R
Fairries Bertram R

Drafted By: Distajo Alan K:akd

Case ID #: 137B-SE-92136 (Pending)

Title: SE-6350-SI-C

Synopsis: To request payment to Source.

Details: The Department of Justice (Attorney General) Guidelines, dated 01/08/2001, and MIOG, Part 1, Section 137/270-14 states that all payments to Sources must be requested by the submission of an FD-794 Draft Request and an Electronic Communication.

It is requested that the following payment be authorized to the above-captioned Source:

1. Period Covered: 12/05/2005 - 08/28/2006
(This time period must not overlap a previous payment date **for services**).

2. Current Fiscal Year Balance
(**not** including this request) = $100,000.00

3. a. Requested Payment To Source
For Services = $1,000.00
b. Requested Payment To Source
For Expenses = $0.00
Total Amount Requested = $1,000.00

4. Total aggregate paid to source (not including this request): $0.00

Captioned Source file was opened on 12/05/2005. During the current Fiscal Year, the Source has never been paid. The total amount paid to this Source by any FBI field division (aggregate total) is $0.00.

MIOG, Part 1, Section 137/270-14.1 states that each payment must be justified on its own and can include a summary of statistical accomplishments credited to the Source's file. These requests should be closely scrutinized to ensure that they are commensurate with the value of the information received. This responsibility rests with the field office management.

This Source payment is in furtherance of the following investigation(s):

Title: RAYMOND DWAYNE McCOY
STERLING BANK;
1406 4TH AVENUE;
SEATTLE, WASHINGTON;
12/27/2005;
BANK ROBBERY

Case ID #: 91A-SE-92016 (100% of payment)

Source Payment is based upon the following information and assistance provided by the Source:

McCOY was arrested for a drug charge during a sweep by Seattle Police Department (SPD) in the Central District. During a search of McCOY, SPD discovered a bank robbery demand note in his pocket. However, McCOY was only charged for the drug charge at that time.

Following his arrest, at some time later, McCOY was charged for bank robbery. McCOY stated to the source he committed several bank robberies and spoke as if our task force was ready to prosecute him for the bank robbery.

The source verified McCOY's identity depicted on bank robbery bulletin 06-11 dated 02/16/06.

When further questioned, the source advised that McCOY's female companion wrote the bank robbery demand note. McCOY stated to the source that he robbed the bank at approximately 3:30 p.m. McCOY was upset because a seasoned teller from the bank could not identify him; however, the trainee teller did. McCOY further stated he may have robbed several different banks within the same time frame.

An FD-302 detailing the above-mentioned information will be forwarded following completion to the Source's Sub-A file.

240akd01.ec
♦♦

Appendix H

SEALED SUB

SEALED SUB

FILED
KING COUNTY, WASHINGTON

JAN 06 2012

SEA
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, **Plaintiff,** **VS.** **RAYMOND McCOY,** **Defendant.**	**NO. 06-1-03538-7 SEA** **SEALED PER COURT ORDER DATED 1/6/2012.** ATTACHED TO ORDER DATED: 1/6/12

FBI REPORT is attached.

FD-302 (Rev. 10-6-95)

ATTACHED TO ORDER DATED: 1/6/12

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 09/08/2006

Kevin Scott Olsen, white male born 12/30/1959 (also uses the DOB of 12/30/1958) in Longview, Washington, [redacted] was interviewed at the Seattle FBI Office. Olsen is currently in custody at the King County jail on robbery charges. He was brought to the FBI Office by SA Alan K. Distajo and Detective Jon Nelson. Olsen knew the purpose of the interview so after being introduced to writer, the following investigation was conducted:

Olsen was initially shown a copy of an FD-328 "Consent To Interview With Polygraph" form. Olsen read the form, stated that he understood everything on it and signed it. He was then shown a copy of an FD-395 "Advice Of Rights" form. Olsen also read that form, stated that he understood everything on it and signed it. He then volunteered the following information:

Olsen stated that he was released from jail in March 2001. Shortly thereafter he started working at a used car lot called [redacted] He did everything there from repairing and washing cars to selling them. While working there he met a girl he knew as [redacted] [redacted] worked for [redacted] Her job seemed to be that of a driver as he only knew her to deliver cars to other car lots.

Olsen dated [redacted] for about one month. He stated that he worked at [redacted] for about six or eight weeks at which time he stole business checks from the lot, forged them and had to flee. Because of that he also stopped seeing [redacted] and never talked to her after that time. While they were dating he learned that she lived in [redacted], went to the community college on [redacted], possibly [redacted] and worked as a dancer at [redacted] She was of [redacted] decent and was in the United States on a student visa. [redacted] told Olsen that she had another boyfriend who was either from [redacted] or one of the other [redacted] and that he was in jail at that time on gun charges waiting to be deported. [redacted] told Olsen that her boyfriend was connected to [redacted] Organized Crime. Olsen doesn't believe that [redacted] ever told him her boyfriend's name.

Olsen stated that one day while they were dating he was asked by [redacted] if he knew the [redacted] Olsen responded by telling her that he did know the area as he used to work at [redacted]

Investigation on 09/07/2006 at Seattle, Washington

File # [redacted] Date dictated 09/08/2006

by SA Raymond G. Lauer

RGLAUER [redacted]

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

D-302a (Rev. 10-6-95)

[redacted]

[redacted]. [redacted] told Olsen that she wanted to move and was referred to a studio apartment there. She asked him if he would be willing to take her to look at the apartment and show her the area. They subsequently started heading towards the [redacted] On the way [redacted] told Olsen that they needed to stop at a restaurant on [redacted] called [redacted] so she could meet someone and obtain the apartment address from him. They drove to the restaurant. Upon arriving, [redacted] ot out of the car and walked down the street towards the restaurant. Without going in she met with a man who was sitting in a [redacted] They talked for a minute and [redacted] returned to their car. At some point Olsen learned that the person [redacted] met was her boyfriend's immigration attorney. He thought that the attorney's name was either [redacted] or [redacted] He said that he didn't get a good look at the attorney but described him as being older.

Once Olsen and [redacted] were back together they drove to [redacted]. Olsen didn't recall the address they were going to but he did say that he was not familiar with the street [redacted] was looking for and they didn't have a map so they just drove around. At one point [redacted] asked Olsen to stop at a [redacted] grocery store so she could use the pay phone. Olsen said that he thought that that was strange because [redacted] had a cell phone. When asked why [redacted] couldn't have simply called the attorney she obtained the apartment address from given that she had a phone as opposed to meeting him at the restaurant, Olsen couldn't explain.

Olsen stated that they eventually stopped at a park [redacted] and began walking around looking for the apartment. Olsen stated that at one point [redacted] stopped in front of what he thinks [redacted] and looked at it for a short time. He thinks they also walked around the block [redacted] During this trip [redacted] asked Olsen about the various ways to get [redacted] but didn't do or say anything else that seemed suspicious.

Olsen was subsequently given a polygraph exam concerning this issue. Afterwards he was interviewed further. He eventually stated that while he dated a girl he knew as [redacted] it wasn't her idea to go to [redacted] He stated that he and [redacted] were driving around the [redacted] area together one day when [redacted] started asking him about places where he's worked. Olsen told [redacted] about [redacted] and decided to take her there to show her the restaurant. While there he decided to stop at the park so he could smoke crack and go to the bathroom. Because they were at the park

FD-302a (Rev. 10-6-95)

[redacted]

Continuation of FD-302 of Kevin Scott Olsen, On 09/07/2006, Page 3

they decided to walk around the neighborhood. [redacted] Olsen believes that they were walking around the area [redacted] Olsen stated that [redacted] never asked to go to [redacted] to look at apartments. He stated that he thinks that [redacted] boyfriend's attorney is named [redacted] or [redacted] but they never went to [redacted] restaurant to meet him.

Olsen stated that he lied about these issues to make his story sound better. When Olsen was dating [redacted] she did tell him that her boyfriend was in jail or that he was somehow a criminal and possibly related to organized crime, Olsen wasn't sure. Olsen explained how he had helped law enforcement with a variety of cases in the past. When he was arrested and charged with the robberies he is currently in jail for, he hoped that he could be charged in the federal system and serve his time there as apposed to having to go to a state jail. Because he has acted as a government witness so often he fears for his safety. By "sugar coating" his story he was hoping that law enforcement would look into what he was saying and if there had been any chance that there was a connection between [redacted] or her boyfriend and [redacted], the government would then help protect him in jail.

SA Distajo and Detective Nelson returned Olsen to the King County jail.

SEATTLE POLICE DEPARTMENT

CONTINUATION SHEET

INCIDENT NUMBER
[redacted]
UNIT FILE NUMBER
[redacted]

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

09-07-2006 0900 hours Kevin Scott Olsen (protect identity), date of birth: December 30, 1958 was brought into the Seattle Office of the FBI and polygraph by SA Ray Lauer regarding information that he previously provided pertaining to [redacted]

At the completion of the polygraph, SA Lauer contacted Detective Gasperetti and advised that Olsen failed the polygraph test. Olsen indicated that he embellished during his previous interviews with Detectives and Special Agents because he was trying to work a deal for himself while in custody. Olsen admitted that he and [redacted] never went to [redacted] to look at apartments or studios for rent or did [redacted] take contact with an attorney by the name of [redacted]

INVESTIGATING OFFICER	SERIAL	UNIT	INVESTIGATING OFFICER	SERIAL	UNIT	APPROVING OFFICER	SERIAL
Detective Steve Kilburg	4252	715	Detective Natale Gasperetti	5280	715		

Form 5.7.2 CS 21.866 Rev. 4/97

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 09/28/2006

Detective MICHAEL CIESYNSKI, Seattle Police Department (SPD), Seattle, Washington, work telephone number: [redacted] was telephonically interviewed by Detective Natale J. Gasperetti, SPD, Seattle, Washington. Detective CIESYNSKI was advised of the nature of the interview and provided the following information:

Detective CIESYNSKI recently interviewed a SOURCE, who is not in the position to testify, regarding information the SOURCE previously provided to Special Agents of the FEDERAL BUREAU of INVESTIGATION, (FBI), Seattle, Washington, and Detectives of the Seattle Police Department and the King County Sheriff's Office, Seattle, Washington.

The SOURCE admitted that the information provided regarding [redacted] was false. The SOURCE provided the false information to law enforcement because of pending criminal charges he/she was facing and was attempting to "work a deal" for him/her self.

Investigation on 09/14/2006 at Seattle, Washington (telephonically)

File # [redacted] Date dictated 09/28/2006

by Detective Natale J. Gasperetti:njg

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency;

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the petitioner, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in IN PERSONAL RESTRAINT OF RAYMOND MCCOY, Cause No. 61853-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name

8/29/13
Date

Done in Seattle, Washington