

64839-0

64839-0

NO. 64839-0-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

NAVEEN HAQ

Appellant.

---

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

The Honorable Paris Kallas, Judge

---

OPENING BRIEF OF APPELLANT

---

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## **A ASSIGNMENTS OF ERROR**

1. The trial court erred in ruling that the defense bears the burden of proving insanity by a preponderance of the evidence in violation of the state constitutional right to a jury trial.
2. The trial court erred in allowing the state to introduce jail telephone calls between Mr. Haq and his family as evidence against him at trial in violation of the state and federal constitutions and the Washington Privacy Act.
3. The trial court erred in refusing to redact unfairly prejudicial statements from the jail phone calls.
4. The trial court erred in allowing the state to introduce compelled statements made by Mr. Haq in an interview with a state's expert witness and in playing an audio tape of Mr. Haq making some of the statements,
5. The trial court erred in refusing to dismiss the burglary aggravating factor pretrial and on the defense motion for arrest of judgment or new trial.
6. The trial court erred in refusing to instruct on the need for intent for the burglary aggravator separate from the intent to commit a murder or to provide a special verdict requiring the jury to so find as required by the state and federal constitutions.
7. Improper opinion testimony by state's witnesses denied Mr. Haq a fair trial as required by the state and federal constitutions.
8. The trial court erred in denying the defense motion for mistrial after the state's psychiatrist witness denied Mr. Haq his state and federal constitutional rights to a fair trial by testifying that Mr. Haq shot with intent.
9. Irrelevant and unfairly prejudicial hearsay testimony by the state's psychiatrist denied Mr. Haq a fair trial, as guaranteed

by the state and federal constitutions, even though the court struck the testimony and instructed the jury to disregard it.

10. Improper instructions on the law by state's experts invaded the province of the judge and denied Mr. Haq his state and federal constitutional rights to trial before a jury properly instructed by the trial judge.
11. Exclusion of anecdotal evidence and evidence of the results of a published study denied Mr. Haq his state and federal constitutional rights to a compulsory process and a fair trial.
12. The trial court erred in denying the defense motion to dismiss the malicious harassment charge and for entering judgment and sentence for malicious harassment; both the state and federal constitutions require that criminal convictions be proved beyond a reasonable doubt.
13. Cumulative error denied Mr. Haq a fair trial.

**B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Did the trial court err in placing the burden on the defense to prove insanity beyond a reasonable doubt where the right to a jury trial under Article 1, Section 22, at the time the state constitution was adopted placed the burden on the prosecution to prove sanity beyond a reasonable doubt and where a *Gunwall* analysis supports allocating the burden of proof to the prosecution? Assignment of Error 1.
2. Did the trial court err in admitting the recordings of calls from the King County Jail between Mr. Haq and his family and violate the Sixth Amendment right to counsel where, under the policy of the King County Jail, the prosecution was given the recordings without a waiver of counsel? Assignment of Error 2.
3. Did the trial court err in admitting the recordings of jail phone calls and violate the equal protection provisions of the state and federal constitution where similarly situated convicted felons in the Washington State Department of

Corrections have much greater protection of their right to privacy during inmate calls? Assignment of Error 2.

4. Did the trial court err in admitting records of jail phone calls and violate Article 1, Section 7 of the Washington Constitution, where the recordings were turned over to the prosecution without any security purpose and without any showing of probable cause or reasonable suspicion? Assignment of Error 2.
5. Did the trial court err in admitting records of jail phone calls and violate the Washington Privacy Act where the calls were not recorded for security purposes, but solely as an investigative tool? Assignment of Error 2.
6. Did the trial court err in refusing to redact unfairly prejudicial statements made during jail phone calls? Assignment of Error 2.
7. Did the trial court err in admitting incriminating statements made during a compelled mental examination without balancing Mr. Haq's state and federal privileges against self-incrimination against the state's interest in disclosure of information about his mental status? Assignment of Error 4.
8. Did the trial court err in refusing to instruct the jury that it had to find an intent for the burglary aggravator separate and distinct from the intent to commit murder where Washington law requires that the aggravating felony not be merely incidental to the murder and the eighth and fourteenth amendments and the Washington constitutional prohibition against cruel punishment require that any aggravating factor which subjects the accused to the penalties of life without parole or death genuinely narrow the class of persons eligible for the enhanced penalties? Assignment of Error 6,
9. Should the burglary aggravating factor be dismissed because of the state's concession that there was insufficient evidence to prove an independent and separate intent for the burglary aggravating factor? Assignments of Error 6, 7

10. Did the extensive improper opinion testimony as to guilt by the state's police officer and expert witnesses deny Mr. Haq his right to a jury trial under the sixth amendment and Const. art. 1, §§ 21 and 22? Assignments of Error 8 and 9.
11. Was the improper opinion testimony which was not objected to such a direct opinion as to guilt that it constituted manifest constitutional error? Assignment of Error 10.
12. Did the irrelevant and hearsay testimony by the state's psychiatrist expert that he knew of many high-functioning people who are bipolar – including a judge, a surgeon and several members of Congress – provide an improper and prejudicial basis to support his opinion that Mr. Haq was sane at the time of the crime; and thus deny Mr. Haq his state and federal constitutional rights to a fair trial even though the trial court struck the evidence and instructed the jurors to disregard it? Assignment of Error 10.
13. Did jury instructions given by the state's experts during their testimony, some of which were erroneous statements of the law, invade the province of the trial judge and deny Mr. Haq his state and federal constitutional rights to a properly instructed jury and right to have his trial presided over by the trial judge? Assignment of Error 11.
14. Did the trial court's exclusion of anecdotal evidence defense expert Dr. Julien learned of in talking with hundreds of clinicians at workshops throughout the country over a number of years, which confirmed his view that Mr. Haq's medication contributed to his mental state at the time of the shootings, deny Mr. Haq his state and federal constitutional rights to due process and compulsory process? Assignment of Error 12.
15. Did the trial court's exclusion of testimony by defense expert Dr. Missett about an article summarizing the results of scholarly studies on medications which increased the likelihood that the patient would go into a manic state deny Mr. Haq his state and federal constitutional rights to due process and compulsory process? Assignment of Error 13.

16. Did the trial court err in denying the motion to dismiss the malicious harassment conviction and for entering judgment and sentence for the conviction where there was no evidence that Mr. Haq targeted any of the victims as a result of religious bigotry rather than simply his views about political actions taken by Israelis in the Middle East and Jews in the United States? Assignment of Error 13.
17. Did cumulative error deny Mr. Haq a fair trial? Assignment of Error 14.

## **C. STATEMENT OF THE CASE**

### **1. Procedural history**

The question for the jury in this case was whether Naveed Haq was legally sane when he shot and killed Pam Waechter and shot and seriously injured Carol Goldman, Cheryl Stumbo, Layla Bush, Dayna Klein and Christina Rexroad at the offices of the Jewish Federation of Greater Seattle on the afternoon of July 28, 2006, and whether, if sane, he acted with premeditation.

It was undisputed that Mr. Haq suffered from a serious organic mental illness, having been diagnosed as bipolar with psychotic features or schizoaffective disorder bipolar type, for at least the previous ten years. RP(11/21/09) 15. The state's theory was that Mr. Haq was motivated by anger, not mental illness.<sup>1</sup> RP(11/21/09) 16. The defense theory was that

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<sup>1</sup> The parties stipulated, that the FBI concluded, after an exhaustive search, that Mr. Haq had no ties or associations with any terrorist group or organization. CP 659-660; RP(11/24/09) 78.

Mr. Haq's behavior had become increasingly driven by his mental illness over the year immediately preceding the shooting, due in large measure to a change in medication replacing lithium for an antidepressant drug Effexor, and that he was in the midst of a manic or hypomanic episode at the time of the shooting and experiencing auditory hallucinations. RP(10/21/09) 58-79.

As a result of the shootings, the King County Prosecutor's Office charged Mr. Haq, by fourth amended information, with aggravated first degree murder with the aggravating factor that "the murder was committed in the course of, in furtherance of, or in the immediate flight from the following crimes: Burglary in the First or Second Degree," two counts of attempted second degree murder, three counts of attempted first degree murder, unlawful imprisonment and malicious harassment. CP 877-881. All of the murder counts alleged that Mr. Haq was armed with a firearm. CP 877-881.

The jury at a first trial was unable to reach a verdict on any counts, except for an acquittal of attempted first degree murder involving Carol Goldman, with a failure to reach a verdict on the lesser charge of second degree attempted murder for this count. CP 739-742. On retrial, the jury convicted Mr. Haq of all counts, and the trial judge, the Honorable Paris Kallas, sentenced Mr. Haq to life without parole on the aggravated murder

count and standard range sentences for the remaining counts. CP 2156-2191, 2346-2355. Mr. Haq subsequently filed a timely notice of appeal.

## **2. Pre-Trial Motions and Rulings<sup>2</sup>**

### **a. Jail phone calls**

Shortly after his arrest and continuing through most of his jail stay, Mr. Haq placed collect calls to his parents' home through the King County Jail phone system. Those phone calls were recorded.

The prosecution did not seek to introduce the recordings of the phone calls at the first trial and did not provide them as part of the discovery, but sought to admit them under ER 801(d)(2), at the second trial. CP 888- 890. Over defense objection, the trial court allowed the state to introduce the phone calls in its case-in-chief. CP 1157-1167; RP(6/11/09) 18–34.CP 1157–1167; 1142–1144.

### **b. Pretrial order regarding compelled examination**

Prior to the first trial and over defense objection (CP 36-41), the Court ordered Mr. Haq to submit to an examination by a state's mental health expert during which he would not be permitted to assert any Fifth Amendment, Article 1, Section 9, or physician – patient privilege. RP(6/14/07) 2–21; RP(4/29/08) 93; CP 65-66. Additionally over defense

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<sup>2</sup> Some pre-trial facts are set forth in the text of the brief under the specific issue.

objection, the Court ordered the defense to provide the state with copies of any notes, reports or evaluations prepared by the defense mental health expert and copies of materials relied upon by defense mental health experts to form their opinion. CP 65- 66; RP(6/14/07) 18-21.

As a result of these orders, Mr. Haq was interviewed by Dr. Robert Wheeler, a state's psychologist, and made incriminating statements during the interview about his activities leading up to the shooting and at the Jewish Federation. RP(4/29/08) 68–84.

The trial court ultimately ruled that all of Mr. Haq's statements to Dr. Wheeler were admissible. Supp CP 8561-8570 ¶ 30.

### **3. The State's Case**

On July 28, 2006, Naveed Haq drove from his apartment in Kennewick, Washington to Seattle, Washington. After getting a traffic ticket in downtown Seattle RP(10/26/09) 98-110, Mr. Haq parked in the parking lot of a department store RP(10/26/09) 133 and walked to the Third Avenue entrance of the Jewish Federation office; he had found the address on the Internet and obtained directions to the Federation through MapQuest the previous evening. He entered into a small vestibule and discovered that the inner door was locked. Several minutes later, Kelsey Burkum, the 14-year-old niece of Cheryl Stumbo, who worked at the Federation, arrived and was buzzed in by the receptionist Layla Bush. RP(10/21/09) 92-94, 108;

RP(10/22/09) 33. Mr. Haq showed Kelsey his gun, told her that he was making a statement and followed her in and upstairs to the Federation offices. RP(10/21/09) 95-98. Kelsey walked straight through the reception area to the restroom where she hid during the shooting that ensued. RP(10/21/09) 98. Mr. Haq told receptionist Layla Bush that he was upset about what was happening in Israel and Lebanon and wanted to speak to a manager. RP(10/21/09) 110; RP(10/22/09) 35-36. Ms. Bush saw that he had a gun when he approached the reception desk. RP(10/22/09) 33, 35.

Ms. Bush told Mr. Haq to wait and went to the office of Cheryl Stumbo, who was a manager, and whispered to her that there was a man with a gun. RP(10/21/) 110; RP(10/22/09) 37-38. Ms. Stumbo turned to Carol Goldman, who shared a cubicle with Molly Bennett across the hall, and told her to call 911. RP(10/21/09) 115, 145-147; RP(10/22/09) 39. When Mr. Haq, who had followed Ms. Bush, heard Ms. Stumbo direct her to call 911, he shot Carol Goldman in the knee; Ms. Goldman dived under her desk. RP(10/21/09) 153, 155-156. Ms. Bennett also hid under her desk and was not injured. RP(10/21/09) 160; RP(10/22/09) 90-98. Mr. Haq then shot Ms. Stumbo and Ms. Bush. RP(10/21/09) 115. Ms. Stumbo heard him say that he was an angry Muslim and he wanted to be put in touch with CNN. RP(10/22/09) 116. According to Ms. Stumbo, Mr. Haq said, "It is not about

you people,” but that he did not want money going to Israel. RP(10/21/09) 116.

Mr. Haq went down the hallway, where he entered the next office and shot Pam Waechter and then the next office where he shot Dayna Klein, through her left forearm.<sup>3</sup> RP(11/3/09) 86-87 109. When Ms. Waechter tried to leave, he followed and shot her as she was going down the stairs; she died from wounds to her breast and head. RP(11/5/09) 106. When he was again at Ms. Stumbo’s office, he shot again at Ms. Bush. RP(10/22/09) 47. Ms. Stumbo had managed to leave the office and get outside. RP(10/21/09) 121. Mr. Haq encountered Christina Rexroad who had come to investigate and shot her; Ms. Rexroad managed to leave through the back exit to the parking garage. RP(10/22/09) 73-75. Other people who worked in other offices in the building left and ran to Starbucks where they alerted the police to the shooting. RP(10/22/09) 86; 162-166.

In the meantime, Mr. Haq heard Danya Klein talking to a 911 operator and returned to her office. RP(11/3/09) 91-93. When he said that he was holding her hostage, she offered him the phone. RP(11/3/09) 92-94. Mr. Haq spoke to the 911 operator briefly before putting down his gun and walking out to the sidewalk to surrender. He told the 911 operator that he was making a statement that the United States needed to get out of Iraq and

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<sup>3</sup> Ms. Klein was pregnant at the time, but her unborn child was not injured. RP(11/3/09) 112.

that he wanted to be patched through to CNN. RP(11/3/09). When asked by the operator why he was “so upset at these people?” he responded, “I am not upset at the people. I’m upset at the – at your foreign policy. These are Jews. I’m tired of getting pushed around and our people getting pushed around . . . – by the situation in the Middle East.” Exhibit 7, at 4. Mr. Haq told the 911 operator that he wanted “us to get out of Iraq.” Exhibit 7 at 4. He said that Muslims are upset because of the United States sending and selling weapons to Israel, that it was a hostage situation and that he had a gun pointed at a woman’s head. RP(10/22/09) 116-117. He responded to questioning by the operator that he did not have friends, but did have parents. RP(11/3/09) 98. After these brief exchanges, Mr. Haq said he was putting his gun down and had Ms. Klein confirm to the operator that he had put the gun down.<sup>4</sup> RP(10/22/09) 117; RP(11/3/09) 99.

911 OPERATOR: I – I don’t have a way to patch you into CNN. I’m afraid I can’t do that. But if you stay talking with me, we might be able to – you know, to get on some other people that you want to talk to. Is the lady still – can – is she still –

MR HAQ: Here. I’ll give myself up. This was just –

911 OPERATOR: Okay. Well, you –

MR. HAQ: -- to make a point.

Exhibit 7, at 12.

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<sup>4</sup> The state played the tapes of the 911 calls made by Kelsey Burkum, Ilana Kennedy, who worked downstairs in the building; and Carol Goldman and Dayna Klein. RP(11/21/09) 107; RP(10/22/09) 23; RP(11/26/09) 50; RP(11/3/09) 114.

The entire incident took approximately thirteen minutes from the time Kelsey Burkum arrived at the door of the Federation office at 3:53 p.m. until Mr. Haq exited the building at 4:06 p.m. RP(11/5/09) 85-88. The timing was established by the security cameras which captured a portion of the incident, including Mr. Haq entering behind Kelsey Burkum and leaving to surrender to the police. RP(10/27/09)111—130.

None of the women reported hearing Mr. Haq say anything derogatory about Jews. RP(10/22/09) 23. Ms. Stumbo described Mr. Haq's demeanor as not angry, but more excited and happy. RP(10/21/09) 137. Ms. Bush said that the first time Mr. Haq shot at her he held the gun in one hand firing rapidly "as opposed to a purposeful aim," but she believed that at the time of the second shot he was using both hands and "actually aiming." RP(10/22/09) 48, 56. Molly Bennett recalled Mr. Haq talking about hostages, but it seemed to her that he did not sound convinced or like he cared a lot about what he was saying. RP(10/22/09) 100. She heard him say that the police could come shoot him and he did not care. RP(10/22/09) 105. Temporary employee Elana Feldman told the police at the time that Mr. Haq was speaking rather quickly and very loudly. RP(10/22/09) 119.

Mr. Haq was arrested without incident on the sidewalk in front of the door to the Federation. RP(10/22/09) 130-132; RP(10/26/09) 64. One of

the arresting officers reported that Mr. Haq's hands were shaking and trembling. RP(10/22/09) 148. When pulled to his feet, Mr. Haq was described as being "in a bit of a stupor," and one of the officers yelled at him as a "verbal slap" to wake him. RP(10/26/09) 77. One officer described his passivity as "surprising." RP(10/22/09) 149-150. Another officer reported that when he was asked if there were others inside, Mr. Haq said non-responsively, "no, other than hostages." RP(10/26/09) 95. On the ride to police headquarters, Mr. Haq responded to police questioning that he had two guns and a knife, all left at the Federation, and that he was making a statement about Jews running the country and getting the United States out of Iraq and not giving bunker bombs to Israel. RP(11/2/09) 18-20. When interviewed at police headquarters, Mr. Haq indicated, when asked, that he was there because he killed somebody and that he drove to Seattle from the Tri-Cities to do this.<sup>5</sup> RP(11/5/09) 68-68.

In his wallet, the police found a number of credit cards, a shooting range pass, a receipt for the .40 caliber Ruger used in the shooting, and receipts from G.I. Joe's for ammunition and Hole in the Wall gun shop, as well as the telephone number of psychiatrist Dr. Hashmi at the Lourdes Health Network. RP(10/22/09) 151-154.

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<sup>5</sup> Prior to trial, the court suppressed all of Mr. Haq's statements in his custodial interview at police headquarters after he invoked his right to counsel. Attachment A of CP 3337-3362; RP(4/10/08) 92-107; RP(4/29/08) 85-90.

The police SWAT team arrived and cleared the building and, together with other officers, collected evidence.. RP(10/27/09) 21-34, 54-60; 94-100. The officers found a .45 caliber handgun with .45 caliber ammunition on the counter of the reception desk. RP(10/27/09) 24, 157. Cartridges, casings, bullets and bullet fragments were recovered from the offices and hallways. RP(10/26/09) 125-130, 157; RP(10/27/09) 13-86. 122-132, 80-95, 135-158. All of the evidence of what was believed to be a total of nine shots fired were fired from the .40 caliber Ruger; the .45 caliber Ruger found on the counter in reception, together with ammunition, was not used. RP(10/29/09) 31, 51-55, 56, 76; RP(11/2/09) 148.

Mr. Haq had purchased a rifle from Hole in the Wall gun shop in Kennewick on July 16, 2006, and then decided not to buy it. He tried to cancel the transaction, but the gun shop owner informed him that his deposit would either be retained as a restocking fee or could be used towards the purchase of different weapon. Mr. Haq chose to purchase the used .45 caliber Ruger rather than losing his deposit entirely. Mr. Haq never purchased ammunition for the Ruger from Hole in the Wall. RP(10/28/09) 98-110, 119. In the search of his apartment, the police found a shotgun and sling with packaging and an operation manual, no furniture and a laptop computer, as well as packaging for the knife found at the scene and paperwork and packaging for the .40 caliber Ruger, and receipts for ammunition

from Sportsman's store and G.I. Joe's. RP(11/2/09) 33-34; RP(11/4/09) 86-88, 101. They also found a VISA statement and debit card statement with purchases from Pasco, Montana, Minnesota, Illinois, Ohio, and Wisconsin from March 2006, in the basement where Mr. Haq sometimes stayed in his parents' house. RP(11/5/09) 8-13.

In the search of Mr. Haq's parents' home, the police confiscated his parents' computer. RP(11/3/09) 31. On his parents' computer, the police found two documents. One, a sermon, or khutbah, last accessed by Mr. Haq on July 23, 2006; it was a factual and non-political statement which did not denigrate any race or religion, comparing the experience of Jews in America to that of Muslims in America. RP(11/3/09) 48, 51, 55, 134-135. The khutbah concluded that Muslims had a long way to go and advised Muslims to become Americans and to write, phone and meet congressmen, to get an education and to give to charity and help others. RP(11/2/09) 135-136.

A second document, entitled "Sources of Muslim Anger," created on July 23, 2006, included a history of the Holy Land and why it was important to Christianity, Judaism and Islam; why America is so special to Jews, their overrepresentation in Congress and the power of the American Israeli Political Action Committee (AIPAC); how Muslims became even more marginalized after 9/11; reasons why Israel is likely to change and become less powerful in the Middle East, why Muslims will continue to get angrier

and angrier and concluding, with regret, that the United States should stop supporting Israel in order to stay out of harm's way and should also lessen dependence of Middle Eastern oil. RP(11/3/09) 57-58; RP(11/4/09) 6-17. The final chapter, "What About Israel," concludes that Israel will not continue as we now know it and that if attitudes don't change, Muslim anger will grow stronger and become a bigger problem and the future might be very bloody. RP(11/4/09) 18.

The police found nothing suggesting any terrorism affiliation on either computer. RP(11/3/09) 115.

On the laptop, the police found a number of Google searches on July 19, 2006 about mental illness and depression, genetic markers of bipolar disorder, as well as searches for ethnic demographics for Utah. RP(11/3/09) 121-123. On this date, there were also searches for the Jewish race in Israel, Jews for Allah and the history of the Jews. RP(11/4/09) 24-278. On July 22, there was a series of visits to pornography sites, and, in fact, there was evidence of a lot of pornography viewed on the laptop. RP(11/3/09) 123. On the 20th and 21st, there were visits to websites about the Middle East crisis and the Iraq war as well as a travel sites for Tel Aviv and information about the AIPAC. On July 23, 2006, there were searches about religious tolerance and various ethnic populations in the United States—Jews, Iranians, Muslims – and the number of Arab Americans in Congress, Asians in

Congress and Jews in Congress. RP(11/3/09) 125-126. This was the date on which the khutbah and "Sources of Muslim Anger" were created. RP(11/3/09) 123-126. A number of pornography sites were visited that day and the next few days. RP(11/3/09) 127-128. No sites about militant extremism or religious fundamentalism or addressing the destruction of Israel were visited at any time. RP(11/3/09) 129. On July 25, 2006, there were Google searches for the Washington Fourth Congressional District, the voting record of Representative Hastings, Project Vote Smart, the Secretary of State on-line candidate filing site, Franklin County election information and open seats. RP(11/3/09) 108-119. On July 26, 2006, from 11:56 to 1:41 a.m., pornography sites were visited and a series of environmental websites. RP(11/3/09) 129-130.

On July 27, 2007, at 5:18 p.m., there was a search for AIPAC in Sacramento and future and present AIPAC events. RP(11/3/09) 65-71. At 5:26, the webpage of the Jewish Federation of Greater Seattle was visited, and at 5:33 p.m. directions to the Jewish Federation were sought on MapQuest. RP(11/3/09) 71-75.

There was also a second khutbah found on the computer talking about the fact that before modern medicine, people were known as being possessed by demons for what we not know now are psychiatric illnesses such as schizophrenia and bipolar disorder arising from physical problems

with the brain and that there was no shame in getting help for these illnesses. RP(11/5/09) 17-18.

The state concluded its case by introducing, over defense objection, Mr. Haq's recorded phone calls from the jail to his relatives for the dates Aug 3, 7, 10 (2 calls), 15 (2 calls), 22, 25 and 29. RP(11/4/09) 42-48., 51. In the jail calls on August 3, 7, 10, and 15, 2009, the calls following most closely the time of the shooting, Mr. Haq insisted in each call that he was doing great, that his parents should be proud of him, that he did the right thing, the Jews were the enemy and the woman he shot (Pam Waechter) was an Israeli collaborator, that he did what he did for Allah, that he wanted to be a martyr, that he was a Jihadi, that he wanted to die on the battlefield and that he was going to go to heaven.<sup>6</sup> Pretrial Exhibit 12, 1-51. Starting on August 19, 2009, however, Mr. Haq's statements in his phone calls changed. He told his parents in these calls that he thought the medications he was taking "screwed me up" and ruined him; that he wasn't so angry before he took the drugs Effexor and Lamictal. Pretrial 12, at 55, 99. He told his parents that he had had his Effexor reduced because it was making him so hyper that he was jumping around his room. Pretrial 12, at 72-74. He regretted being

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<sup>6</sup> The jail calls were redacted, primarily by agreement between the parties. The defense objections to the inclusions of references to terrorists, references to the British and Spanish bombings, and Mr. Haq's statements that he received hate mail but his lawyers told him not to read it and that "there's some people who have murdered more people than me," were overruled. RP(10/26/09) 167-168, 171; RP(10/27/90) 164-166, 169. The jury heard these statements along with the others.

taken off lithium because having tremors was not as bad as what had happened without the lithium. Pretrial 12, at 76-78. “I was a good guy until, uh, I started getting on Effexor and Depakote and Lamictal . . . And then all of a sudden I turned into this wild person.” Pretrial 12 at 82.

During the course of the testimony, police officers provided testimony that the defense counsel pointed out was inappropriate and violated the court’s motions in limine. Officer Collins used emotionally-charged words such as “execution” and “hunt” (RP(10/26/09) 53, 77) and homicide detective Al Cruise testified, in direct violation of a motion in limine, that “I had no idea what may have motivated him to do what he had done, at that point, but it was apparent to me that he wasn’t acutely insane.” RP(11/2/09) 42, 67. Defense counsel objected and the court struck Detective Cruise’s testimony. RP(11/2/09) 43.

Without objection, Timothy Pasternak of the Seattle Police Department SWAT team gave this profile testimony, about an “active shooter”: “They’re normally well-armed; they have a very good plan, occasionally their death will be factored into it, and that they will continue their actions of looking for and shooting individuals randomly until there is some type of intervention.” RP(10/27/09) 15. Officer Pasternak also referred to such shooters as “bad guys.” RP(10/27/09) 21, 26.

#### **4. The defense case**

Naveed Haq's life started full of promise. He was an honor student in high school, a member of math and chess clubs and someone who participated in sports as best he could. RP(11/9/09) 14. He was thoughtful of others: he won prizes as volunteer of the year for the Tri-Cities and for essays written for Black Awareness Month and for the United Nations Institute of Peace. RP(11/9/09) 49, 50; RP(11/11/09) 57-58, 137. After graduating from high school, Mr. Haq entered an accelerated program designed to provide a degree in dentistry after two years at Rensselaer Polytechnic Institute and three years at the University of Pennsylvania. RP(11/9/09) 15-16. He made the dean's list his first year at Rensselaer, but began having serious mental problems during his second year there. RP(11/9/09) 16. Although he obtained a degree in biology from Rensselaer, because of mental illness he was unable to complete the program at the University of Pennsylvania. RP(11/9/09) 27-38; RP(11/11/09) 69.

Mr. Haq's problems had started in his last year of high school when he was, in his mother's description, "hyper" and not sleeping much. RP(11/9/09) 16. When he came home from Rensselaer after the first year, however, he seemed to sleep all of the time. RP(11/9/09) 18. The following year he was agitated and paranoid; he believed that people were listening to his thoughts and could feel what he described as "bad vibes" from them.

RP(11/9/09) 19-25. As time went on he reported hearing voices; sometimes he was agitated and angry and sometimes cried for long periods of time or slept excessively. RP(11/9/09) 30, 40; RP(11/16/09) 59-68; RP(11/16/09) 5-18. He was hospitalized in an in-patient day program as a result of being hyperactive, talking fast and having his mind race; he experienced some paranoia at that time and admitted having some thoughts about killing people. RP(11/18) 6-10, 24 . Mr. Haq also made several attempts at suicide during this period when he was being treated while at the University of Pennsylvania. RP(11/18/09) 9, 15-16.

Over the next ten or eleven years, Mr. Haq sought and obtained treatment from psychiatrists and other mental health providers who with some success prescribed medications to control his illness. RP(11/9/09) 30-32, 43, 65. Nevertheless, during this time, Mr. Haq had fifty or more jobs – mostly unskilled – some lasting hours and most for days or weeks only. RP(11/9/09) 54; RP(11/11/09) 8-19. He was able to attend Columbia Basin Community College for awhile and obtained a degree in engineering from Washington State University in the Tri-Cities. RP(11/9/09) 41, 50-51. He got an internship which led to a full-time job, but this too ended in failure. RP(9/11/09) 41, 117, RP(11/11/09) 109. Although he left his parents' home for brief periods of time, for the most part, he lived with and was dependent on his parents. RP(11/10/09) 96-99, RP(11/11/09) 76-86, 108.

Dr. Daniel Dye, a psychiatrist specializing in psychopharmacology, treated Mr. Haq for bipolar disorder starting in July, 2001, after Mr. Haq's mother had taken him to the crisis center and he had been referred to him. RP(11/9/09) 42-43, 64-65. Dr. Dye explained that generally bipolar disorder is a mood disorder that may include depression or mania; during the manic phase of the disease one has high energy, needs less sleep, is more impulsive and does things out of character. RP(11/9/09) 66, Mania may cause the person to feel important and to start books or businesses, spend money excessively or be more sociable or sexual. RP(11/9/09) 66. Dr. Dye explained that bipolar is an illness in the chemistry of the brain cell circuits causing over-excitability in certain circuits and an imbalance of function. RP(11/9/09) 67. Schizophrenia is a more serious disease in which the neurons are in the wrong layers of the brain's cortex so that there is miswiring of the brain. RP(11/9/09) 78. For people with bipolar disease, every minute of every episode causes damage to the emotional circuitry in the brain, just as there is damage to the gear teeth when a car transmission slips out of gear. RP(11/9/09) 79. With schizophrenia, because of the chaotic activity in the brain, the illness is always doing damage to the brain and its ability to function. RP(11/9/09) 8

Dr. Dye explained that bipolar disorder can also have a psychotic component, but if a person has delusions and hallucinations when not having

a manic episode, he has a psychotic illness as well as a mood disorder. RP(11/9/09) 67-69. Mr. Haq had several bipolar episodes in college, but also always had some psychotic symptoms present. RP(11/9/09) 71-72.

Mr. Haq had been prescribed medications by his family doctor and Dr. Dye prescribed others so that from August 28, 2001 to June 12, 2002, Mr. Haq was taking Depakote, a mood stabilizer; a fairly low dose of lithium to control impulsivity; and Geodon, which brings down mania. RP(11/9/09) 83-90. Ultimately Dr. Dye changed the Geodon to Risperdal and the agitation Mr. Haq had experienced abated. RP(11/9/09) 93, 108. Dr. Dye also added Wellbutrin, an antidepressant, and Mr. Haq's sleepiness and slight depression improved. RP(11/9/09) 109.

Dr. Dye reported one incident in November 2002, before Mr. Haq's medication was adjusted. RP(11/9/09) 97. Mr. Haq's mother had wakened him with a blaring radio because she felt he was sleeping too much, and he reported having an impulse to hit her with a baseball bat, but smashed the radio instead. RP(11/9/09) 95. Although in the radio incident, Mr. Haq realized he was wrong almost immediately, he did not realize it was wrong at the moment it happened. RP(11/9/09) 121.

According to Dr. Dye, Mr. Haq was distressed by 9/11 and said "That's not Muslim. They are going to hell." RP(11/9/09) 104. Dr. Dye last saw Mr. Haq in November 2002, when he was doing well and was at the

point that his internship at an engineering company turned into a full-time job. RP(11/9/09) 117.

In June 2005, however, Mr. Haq's lithium was discontinued and replaced by Effexor. RP(11/16/09) 126-129. From that point on until the time of the shootings, his life was characterized by instability and manic behavior, including sudden explosions of anger with his friends (RP(11/9/09) 135-137); fights with strangers (RP(11/9/09) 138); incidents of road rage, including an incident in which Mr. Haq yelled for an hour in extreme anger at a woman whose car he hit and yelled at the officers who responded (RP(11/10/09) 166-172; periods of driving long distances across the county or driving around all night (RP(11/11/09) 26-32, RP(11/16/09) 33-34; a period of improvident business ventures (RP(11/9/09) 62; RP(11/11/09) 92-94; and an arrest for lewd conduct in a shopping mall (RP(11/9/09) 128-133. During this time, Mr. Haq reported that the Kennewick police had him under surveillance and the FBI and CIA were bugging his home. RP(11/16/09) 31-33. He converted for awhile to Christianity. RP(11/9/09) 142-158.

He was hospitalized in July, 2005, after suffering an acute psychotic episode. RP(11/10/09) 115-124. During his hospitalization and after his release, Mr. Haq was seen by psychiatrist Dr. Bruce Bennett primarily so that Dr. Bennett could manage Mr. Haq's medication. RP(11/16/09) 15, 17-

19, 25. Dr. Bennett noted that Effexor can push a person into a manic state. RP(11/16/09) 39-40.

In September 2005, clinical psychologist Philip Barnard evaluated Mr. Haq when Mr. Haq was applying for welfare benefits. RP(11/10/09) 125-128. After testing, Dr. Barnard diagnosed Mr. Haq as bipolar not otherwise specified and concluded that he had a “marked level of impairment in his ability to exercise judgment and make decisions,” and was delusional, psychotic and paranoid with serious inability to function on a daily level or maintain fulltime employment. RP(11/10/09) 137-143. A second doctor, Dr. Jonas also evaluated Mr. Haq for the Social Security Administration and also concluded that he was severely and permanently disabled as a result of the severity of his mental illness, either schizophrenia or schizoaffective disorder which resulted in a marked restriction of his social functioning. RP(11./24/09) 72.

Mr. Haq’s sometime explosive behavior continued in jail after the shooting until after he was put on lithium again. RP(11/10/09) 5-10; RP(11/10/09) 20, 29, 37, 49, 71-81.

Dr. Robert Julien, who had a degree in pharmacology as well as a medical degree, who helped develop the drug Depakote and who for 34 years had published a basic textbook on Psychopharmacology, noted the changes in Mr. Haq’s mental health after he was taken off lithium in June

2005, after 10 years of substantial clinical remission while on lithium.

RP(11/16/09) 120-123. Examples include:

- By July 13, 2005, Mr. Haq was experiencing crying spells and believed that people were talking about him and that he could read their minds; he had problems with mood swings. RP(11/16/09) 129, 133-134.
- By August 2, 2005, he was paranoid and by August 24 reported an angry outburst in a pharmacy. RP(11/16/09) 136-137.
- On November 9, 2005, he reported being in a serious traffic accident and was fired from his then current job. RP(11/16/09) 139. A security guard had asked him to leave a local college. RP(11/16/09) 140.
- On January 19, 2006, he was fired from another job for being overly aggressive and defensive; he was driving at night talking to the night clerks at convenience stores. RP(11/16/09) 145, 148.
- In February, he got into a fistfight at a dance club and in March spent a night in jail after an incident with building security. RP(11/16/09) 146-147.
- In April, Mr. Haq called and requested hospitalization to get his medication adjusted, but there was no bed for him and he did not get in. RP(11/16/09) 149.

In Dr. Julien's opinion, if lithium had not been discontinued, Wellbutrin prescribed for depression and Effexor not been prescribed, the shootings would not have occurred. RP(11/16/09) 156. Dr. Julien explained that anytime an antidepressant is prescribed for someone suffering from a bipolar disorder, there is some risk that it will induce a manic state and Effexor is the drug most likely to result in such a "manic flip." RP(11/16/09)

133-135. Several published studies supported this conclusion about Effexor, and the package insert from the drug manufacturer listed the rare side effect of homicidal ideation for Effexor, which was not approved for bipolar disorders. RP(11/16/09) 144.

Dr. Julien was *not* permitted to testify that he lectured and presented workshops in 40 or 50 different cities to psychologists, mental health nurse practitioners and naturopathic physicians and universally heard them say that his statements about manic flips associated with Effexor explained what they had seen in their clinical practices. RP(11/16/09) 110. Clinicians also reported that Effexor can induce aggression, agitation, and confusion and odd behavior. RP(11/16/09) 110-111. Dr. Julien concluded that if odd behavior was observed, or aggression, agitation or confusion, he considered the behavior as induced by Effexor unless proven otherwise.<sup>7</sup> RP(11/16/09) 111. Over the past three or four years while lecturing at over 100 sites, with average attendance of from fifty to seventy people, he had heard consistent reports about Effexor. RP(11/16/09) 115. As a result of the court's ruling, the jury never heard this evidence.

Psychiatrist Dr. James Missett, who taught at Stanford Medical and Law schools, had considerable experience with persons with serious mental

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<sup>7</sup> The court excluded the evidence because Dr. Julien had not testified in his offer of proof that that anecdotal evidence was not a part of what he relied on for his opinion. RP(11/16/09) 116.

illnesses and considerable experience providing mental evaluations for superior courts. RP(11/17/09) 12-26. His private practice was divided equally between working for the court, the prosecution and the defense. RP(11/17/09) 27. Dr. Missett estimated that he had testified in court over a thousand cases and that he had performed over seven thousand forensic evaluations. RP(11/17/09) 40.

Based on an extensive review of the records of the case and Mr. Haq's mental health records, and forty hours of interview with Mr. Haq and interviews with his parents, Dr. Missett came to the conclusion, to a reasonable medical certainty, that Mr. Haq was not legally sane at the time of the shootings. RP(11/17/09) 39-47, 51-52. In Dr. Missett's opinion, Mr. Haq was substantially impaired in his ability to form intent and to premeditate, but was not totally unable to do so. RP(11/17/09) 51. Mr. Haq was, however, suffering from a mental disorder that was of such nature and severity that he was unable to and did not know the nature or quality of his actions and did not have the ability to distinguish right from wrong. RP(11/17/09) 51-52.

Dr. Missett noted that between 1997 and 2008, nine people had diagnosed Mr. Haq with bipolar disorder generally, ten people had diagnosed him with bipolar I disorder, two with bipolar II disorder and two people had diagnosed him with schizoaffective disorder. RP(11/17/09) 5457. Only two

people, who saw Mr. Haq only briefly, diagnosed him with having only a personality disorder. RP(12/1/09) 17, 19-22, 37-39.

Dr. Missett found evidence of Mr. Haq's mental illness as early as age fifteen. RP(11/17/09) 55. The family doctor diagnosed Mr. Haq as probably bipolar in 1996, and there was no question but that he had more than one severe manic episode in the ensuing years, occupational failure, social phobias and antisocial behavior. RP(11/17/09) 78-79. The medical records showed that Mr. Haq was manic in 2006; he experienced grandiosity of ideas and plans to start businesses; he started impractical projects; he went on long driving trips; and he was not responsive to the needs or wishes of those around him – all hallmarks of manic episodes. RP(11/17/09) 80-114. In Dr. Missett's opinion, Mr. Haq had been delusional in 2006 and experienced both auditory and visual hallucinations at the Jewish Federation. RP(11/17/09) 119, 122-123.

In reviewing Mr. Haq's extensive mental health records Dr. Missett noted their consistency and that even while on lithium, Mr. Haq experienced the same type of problems – unhappiness, crying, anxiety, grand ideas, feelings of failure, inability to hold a job – but the outbursts of anger and aggression were not present. RP(11/18/09) 55, 59, 64, 66, 67, 161. The changes after Mr. Haq stopped taking lithium were dramatic; within a month he had been hospitalized. RP(11/18/09) 75-77. From mid-August of 2005,

after Mr. Haq's release from the hospital, the reports of acting out in anger became more frequent. RP(11/19/09) 6. Further, Mr. Haq's reports of experiencing rage in high school provided an indication that anger was a part of his mood swings from early in his life. RP(11/19/09) 107. His acting out included slamming on his brakes while driving, driving in the wrong lane and ignoring stop signs; he could not control his impulses at these times. RP(11/19/09) 141, 144. Dr. Missett noted as well that the more manic Mr. Haq became, the more he denied that there was anything wrong with him. RP(11/19/09) 22, 63.

Mr. Haq felt impelled to go on a mission to the Jewish Federation Center. RP(11/19/09) 149-150. The thought to go on a mission started two days earlier; he thought about going to Costco or a pub in Kennewick or AIPAC in Houston with the idea of taking hostages or killing people. RP(11/23/09) 11-12. He had, Dr. Missett believed, been in a mixed manic and depressive state and thought about dying and dying with honor or suicide by cop. RP(11/23/09) 134. His job and living situation and severe financial problems acted as additional stressors. RP(11/23/09) 15. Mr. Haq was also disturbed by images of the Israelis invading Lebanon and he wanted peace and fairness in the Middle East. RP(11/23/09) 28, 29. In a manic state, people tend to act on such intense feelings and Mr. Haq was in virtually a constant state of concern and anger after being given Effexor and

Lamictal. RP(11/123/09) 25, 32. The Depakote he was taking kept the Lamictal from being metabolized by the liver and it built up with side effects of confusion and agitation and made his illness worse. RP(11/23/09) 127-128.

Mr. Haq denied to Dr. Missett that he intended to shoot people at the Federation and said he carried the guns to scare people. RP(11/23/09) 31, 36. He had heard a voice saying “go on a mission” before he looked up the Jewish Federation website. And he felt that everything that happened along the way confirmed that this was his mission: having retrieved the guns, the interaction with the officer over the traffic ticket in Seattle, the easy trip from the Tri-Cities to Seattle, the girl at the doorway to let him in, as well as the accuracy of his shooting. RP(11/23/09) 32-49. He felt that his trigger finger was controlled and once he started shooting, he did not feel that he was controlling the shots and the accuracy of his shots was evidence of divine intervention. RP(11/23/09) 52, 58. He heard the words “awesome” and “murder.” RP(11/19/09) 149-150.

Dr. Missett found that Mr. Haq’s conversation with the 911 operator and the video images of his running back and forth in the Center from one place to another provided concrete proof that he was in a manic episode. RP(11/23/09) 79-124. Mr. Haq’s voice was agitated; he jumped from topic to topic, focused on irrelevancies such as providing his social security

number, responded with non-sequiturs and quickly gave up. RP(11/23/09) 79. He began by declaring that it was a hostage situation and that he wanted the Jews out. RP(11/23/09) 82. He indicated he shot someone, but denied he was upset with any of the people at the Federation, he was upset with foreign policy and was tired of being pushed around and his people being pushed around. RP(11/23/09) 83. He said that he had shot people and there was a lot of blood; his affect was intense and he jumped from response to response. RP(11/23/09) 84. The comparison between Mr. Haq and the 911 operator was a comparison between a normal person and a person in the midst of a hypomanic or manic episode. RP(11/23/09) 84. Consistent with his mission, Mr. Haq asked the 911 operator to call the media, but said he wanted the U.S out of Iraq. RP(11/23/09) 85-87. When asked if the woman he shot was scared, he said non-responsively that he shot her once. RP(11/23/09) 89-90. He could not appreciate the enormity or meaning of the acts he is involved in. RP(11/23/09) 90-91. He was acting with blunted emotions rather than evil intent. RP(11/23/09) 91-92.

When the operator told him that the media was already calling, essentially giving him what he said he wanted, he responded that he had a gun and it was pointed at her (Dayna Klein's) head. RP(11/23/09) 93. He said that he does not give a shit if he is killed. RP(11/23/09) 94. He was disjointed, unpredictable and distracted. RP(11/23/09) 101. Mr. Haq said he

was just going to make a point and that he was tired of everyone not listening to “our point of view,” and referred to all the Jewish senators and representatives and Supreme Court justices and the media being controlled by the Jews. He said he wants some fairness in the country. RP(11/23/09) 102. He is simply talking and not thinking about what he is saying. RP(11/23/09) 103. He is blocked from being able to hear and understand the impact of his words and behavior on others. RP(11/23/09) 104-107. The operator told him she could not patch him to CNN, but might get other people for him to talk to, and he responded: “Here, I give myself up. This was just to make a point.” RP(11/23/09) 116.

Mr. Haq was impulsive and grandiose, attributes of mania. RP(11/23/09) 117. His belief that he could accomplish something with his actions was consistent with psychosis. RP(11/23/09) 123-124. His inability to respond to the operator or Ms. Klein in a normal way was evidence of both mania and psychosis. RP(11/23/09) 124.

Dr. Missett was not permitted to testify about a study which summarized a number of studies from the United States and Canada regarding manic flip.<sup>8</sup> RP(11/23/09) 134-135.

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<sup>8</sup> The court excluded the testimony as hearsay and as simply bolstering Dr. Missett’s testimony. RP(11/23/09) 136-138.

## 5. The State's rebuttal case.

Prior to the state's rebuttal case, the trial court denied the defense motion to exclude the portion of the slide presentation of the state's expert Dr. Victor Reus which gave definitions of insanity, premeditation and intent. RP(12/1/09) 95. The court also overruled the defense objection to the phrasing on one of the slides of Dr. Robert Wheeler which gave the impression that it stated a legal standard:

Key concept: If the defendant had a mental disease or defect at the time of the alleged crimes, *did the mental disease or defect functionally prevent or impair* the defendant from intending his actions; premeditating his actions; perceiving the nature and quality of his actions; or being able to tell right from wrong?

State's Exhibit 296.

Dr. Reus, who was a professor of psychiatry at the University of California at San Francisco, did not interview Mr. Haq and acknowledged that for that reason, he could not give a diagnosis. RP(12/1/09) 119, 122. His testimony was based on his review of information from sources other than an interview with Mr. Haq from the time of or close to the time of the shootings. RP(12/1/09) 97, 110. When he declared, however, "that from a legal standpoint the most important evidence for the jury to base its conclusions on is really what the behavior was like around the time of the criminal offense," defense counsel objected and the court struck the

testimony. RP(12/1/09) 120. Nevertheless, Dr. Reus further testified that interacting with many mental health providers made it less clear what Mr. Haq's mental state was at the time of the shooting and that even two months later was too late to get a definitive view. RP(12/1/09) 121. He relied on the report of prosecution expert Dr. Robert Wheeler about which he said he was:

struck by its beauty in how outstanding a report I thought it was. A 49-page report that was incredibly detailed and informative, remarkable in detail and logic.

RP(12/1/09) 109-110.

He then testified that from a legal standpoint the question is "at this particular point in time of the event" he's been charged "with this particular set of acts, was that mental disorder, disease or defect of such severity that as a result of that disorder, he was unable to perceive the nature and quality of the acts with which he's charged or unable to tell right from wrong." RP(12/12/09) 131. He, therefore, had to determine "from a psychiatric point of view," whether his mental condition "which waxes and wanes" was present at the time. RP(12/1/09) 131.

The prosecutor had Dr. Reus agree that ultimately the court would instruct the jury (RP(12/1/09) 132) and then elicited from him that how long it takes to premeditate is not specified, but that "it has to be sufficiently long that you, as a jury, are convinced that there was thought – that the act was thought over ahead of time." RP(12/1/09) 132-133, Dr. Reus explained that

“acting with intent” is “knowing that the action that you’re going to take is something that constitutes a crime.” RP(12/1/09) 133

Dr. Reus testified that Mr. Haq’s medication for the year preceding the shooting seemed appropriate and that there was “controversy in the field” as to whether the reference in the Effexor package insert to suicidality or homicidality is “truly drug-related or related to other issues in treating people with proclivities towards suicide.” RP(12/1/09) 164-166.

Dr. Reus’s testimony that he knew of persons who were bipolar – including a judge, a surgeon, and members of Congress – who could function at a high level was stricken and the jury admonished that:

Before the break, you heard testimony regarding specific individuals, including a Jonathan Nash, a surgeon, a judge and several members of Congress. You are instructed to disregard that testimony about those individuals and their claimed mental illnesses and any claimed impact the alleged mental illnesses had on those individuals’ functioning.

RP(12/1/09) 126-128, 146.

Over further defense objection, Dr. Reus was permitted to go through the evidence and offer such opinions as that buying the shotgun and knife “go to the heart of premeditation and intent,” as did his “choices of ammo.” RP(12/2/09) 18-19. According to Dr. Reus, everything from going on the Internet to memorizing the address of the Jewish Federation Center showed intent and premeditation. RP(9/2/09) 14, 23-29. The court sustained an

objection when Dr. Reus testified that “He’s shooting I think with intent.”

RP(12/2/09) 30. Defense counsel moved for a mistrial. RP(12/2/09) 30.

The court denied a mistrial but instructed the jury that:

Before you stepped out I granted the defense objection and struck the testimony as to whether or not Dr. Reus concluded that Mr. Haq acted with intent or not. I did that because witnesses, experts or otherwise, are not allowed to testify Mr. Haq actually premeditated or formed any specific mental state. That’s a question reserved solely for the jurors in this case. Instead an expert’s testimony is limited to whether a defendant has the capacity or ability to form a mental state.

RP(12/2/09) 35-36.

Dr. Reus then testified that he thought Mr. Haq retained the capacity to form intent for each bullet fired and that “I think he understood that [what he was doing] at the time.” RP(12/2/09) 36-37. When defense objection was sustained, Dr. Reus said he thought that Mr. Haq retained the capacity to understand. RP(12/2/09) 38.

Dr. Reus opined that he did not “place much credence” in Mr. Haq’s report of being told to go on a mission or hearing the words “awesome” or “murder.” RP(12/2/09) 42-44 He concluded that “I think he was legally sane to a reasonable degree of medical certainty.” RP(12/2/09) 49.

On cross-examination, Dr. Reus said that it would be foolish to practice medicine by the Physicians Desk Reference (PDR), but that he was not well enough informed about legal concepts to say whether it was

consistent with insanity to believe one was on a world stage and could change the world. RP(12/2/09) 55-56. On cross-examination, Dr. Reus denied that he was making a diagnosis that Mr. Haq suffered from a personality disorder, and attributed that diagnosis to Compass Health, the only instance of such a diagnosis, based on limited contact with Mr. Haq. RP(12/2/09) 98-99, 102-105. Dr. Reus later responded, however, that he “gave him [Mr. Haq] a diagnosis of personality disorder not otherwise specified with antisocial features” and that Mr. Haq’s motivation could best be understood as a long-standing antisocial feature of his personality disorder, RP(12/2/09) 109-110. In support of this conclusion, Dr. Reus described Mr. Haq: “he’s been able to go through life, hold jobs, go through school, actually gets two degrees, go to dental school for a period of time,” and that he had exhibited antisocial features such as “impulsivity, deceitfulness and irritability.” RP(12/2/09) 111.

Dr. Reus had never published on the topics of psychiatry and the law, of pharmacologically-induced violence, or violence and the mentally ill or insanity or diminished capacity. RP(12/2/09) 119.

The state also presented the testimony of psychological counselor Brian Jones and medication nurse Debroah Lusch who each reported that Mr. Haq was in a good mood on July 25, 2008 and feeling confident about his ability to become more financially independent, cope with family and job

pressures and control his angry outbursts.<sup>9</sup> RP(12/2/09) 148, 164-167; RP(12/3/09) 23, 57-58. Ms. Lush reported some psychomotor agitation. RP(12/3/09) 61.

Psychologist Robert Wheeler, who specialized in psychological assessment, testified based on his review of the discovery, other available materials, and his interviews of Mr. Haq. RP(12/3/09)97, 108-115. Like Dr. Reus, Dr. Wheeler focused on the time of the shootings and immediately before and afterwards, and assumed that what Mr. Haq said in interviews could not be taken “at face value.” RP(12/3/09) 121-122, 129, 140. He considered that Mr. Haq might be thinking “in ways to further his legal defense.” RP(12/8/09) 19. Like Dr. Reus, he was provided by the prosecutor with definitions of intent and premeditation. RP(12/3/09) 131-133.

Dr. Wheeler concluded that Mr. Haq suffered from schizoaffective disorder bipolar type with the alternative diagnosis of bipolar one disorder, but that he was not manic at the time of the shooting or in the week beforehand or in jail afterward. RP(12/3/09) 150-154. It was Dr. Wheeler’s opinion that Mr. Haq could tell right from wrong, was able to perceive the nature and quality of his acts and could form intent and premeditate. RP(12/3/09) 165-166. What was important to Dr. Wheeler in reaching these

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<sup>9</sup> Dr. Missett noted in his testimony that the more manic Mr. Haq became, the more he denied that there was anything wrong with him. RP(11/19/09) 22, 63.

opinions was that Israel invaded Lebanon on July 13, 2006; that Mr. Haq put a deposit on an assault rifle but changed his mind and purchased a .40 caliber Ruger instead; and that he lied on his application to purchase the gun. RP(12/3/09) 167-169. Dr. Wheeler considered Mr. Haq's writings at the time important, and the notes of Brian Jones and Debra Lusch three days before the shooting stating that Mr. Haq felt his position and ability to confront his problems improved. RP(12/3/09) 171-182. Further, Dr. Wheeler looked at Mr. Haq's lying to Jones and Lusch about having a gun as evidence of his capacity to plan and form intent. RP(12/3/09) 183-184.

Dr. Wheeler considered the facts that Mr. Haq had not looked for targets before July 27 or 28, 2006, but then thought of suicide missions to the Pub Tavern or Costco and dying in the cross fire as a result of his sense of dread about his financial situation and his difficulties in holding a job. RP(12/7/09) 6-7.

Dr. Wheeler admitted that Mr. Haq's two essays, his khutbah and "Sources of Muslim Anger," were moderate in tone, but found them to be evidence of deliberately planning a crime. RP(12/7/09) 11. Dr. Wheeler relied on Mr. Haq's father's report that he was in a good mood, and perhaps a little hyper, on July 27, although he had been more depressed during the week. RP(12/7/09) 12-15.

Dr. Wheeler also minimized Mr. Haq's report of hearing thought telepathy with Lyla Bush saying "awesome" to him. RP(12/7/09) 83-87. When asked about Mr. Haq's report that he heard the word "murder" when he saw Pam Waechter as he walked down the stairs, Dr. Wheeler responded, "it certainly was an accurate characterization of what had occurred." RP(12/7/09) 134-135.

Dr. Wheeler agreed that Mr. Haq said if he saw someone he shot them and that he was on autopilot and not in control of his own mind or body. RP(12/7/09) 93. He referred to not seeing whether he hit Pam Waechter because someone tried to jump him from behind. RP(12/7/29) 96-98. Dr. Wheeler considered Mr. Haq's explanation that he feared Ms. Waechter would escape and prevent him from holding hostages while he talked with the media as a retroactive rationalization. RP(12/7/09) 98. Mr. Haq described rage and being full of negative energy; he described his brain not working, having no control over his trigger finger and of being unable to stop shooting. RP(12/7/09) 102.-103.

Dr. Wheeler concluded that Mr. Haq had generalized rage and the Lebanese-Israeli War provided a focal point or target for his anger. RP(12/8/09) 29-31.

On cross-examination, Dr. Wheeler agreed that he did not view Mr. Haq as having a personality disorder or having antisocial views as Dr. Reus

did. RP(12/8/09) 50. He agreed that Mr. Haq's history of irritability and aggressiveness was more tied to the mood component of his mental illness. RP(12/8/09) 51-52. He also agreed that the results of Mr. Haq's MMPI test showed him as a person with a serious mental disorder which probably had effects on his thinking and might include delusions and hallucinations and that his day-to-day function was likely impacted by his mental disorder. RP(12/8/09) 53-56. The MMPI results reflected an active psychotic component, with loss of contact with reality, inappropriate affect and erratic and possible assaultive behavior. RP(12/8/09) 56-59. His test results indicated that Mr. Haq was not attempting to fake his answers. RP(12/8/09) 68-69.

#### **6. Defense surrebuttal**

Dr. Robert Weinstock, psychiatrist from the University of California in Los Angeles, was an expert on ethics in psychiatry. RP(12/9/09) 5-15. Dr. Weinstock testified that psychiatrists such as Dr. Reus should make a reasonable effort to obtain a personal examination before rendering an opinion and, if they could not arrange a personal interview, should make explicit the limitations this imposed on any opinion offered. RP(12/9/09) 19-21. Dr. Weinstock disputed Dr. Reus's claim that there was no value in talking to a defendant because they have had time to exaggerate or make

things up and disputed that what a defendant says is necessarily inaccurate. RP(12/9/09) 21.

Dr. Weinstock noted that in spite of never having interviewed Mr. Haq, Dr. Reus did, in fact, give his opinion about insanity and his opinion that Mr. Haq did not meet that definition. RP(12/9/09) 28. Dr. Weinstock had never heard of a respected forensic psychiatrist, even on the simpler issue of competency to stand trial, testify without attempting to interview the accused in a criminal case. RP(12/9/09) 30-32.

#### **7. Jury instruction issues**

The court deleted language from instruction No. 43, given at the first trial, which required the jury to find for the burglary charged as an aggravating factor a separate purpose and intent from the intent to commit the murder, and declined to give a special verdict form requiring the jury to find a separate intent. RP(12/2/09) 156-159; RP(12/8/09) 112-116, 119. The prosecutor conceded that the state could not prove a separate intent. RP(12/8/09) 116-117. Defense counsel objected to excluding this language.

The trial court denied Mr. Haq's motion to dismiss the aggravating factor and malicious harassment charge for insufficiency of the evidence, and denied Mr. Haq's motion for a directed verdict finding him not guilty by reason of insanity. RP(12/9/09) 75-76; RP(12/9/09) 123-129;

RP(12/10/09) 123.

**8. Sentencing**

At sentencing, defense counsel stated that the psychiatrist originally retained by the state found that Mr. Haq was psychotic and delusional in the year before the shooting and that Mr. Haq's belief that he could change the world motivated his actions at the Jewish Center. RP(1/14/09) 191; *see also* CP 2299-2327. This statement was unchallenged.

**D. ARGUMENT**

**I. ARTICLE I, SECTION 21 AND SECTION 22 OF THE WASHINGTON STATE CONSTITUTION PLACES THE BURDEN OF PROVING SANITY BEYOND A REASONABLE DOUBT ON THE GOVERNMENT.**

As the defense argued in the trial court, notwithstanding RCW 9A.12.010 and RCW 10.77.030 which statutorily place the burden of proving insanity on the accused by a preponderance of the evidence, Article 1, Section 22 of the Washington State Constitution requires the government to prove sanity beyond a reasonable doubt.<sup>10</sup> *See* CP 141 – 159, CP 258 – 262.

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<sup>10</sup> Article 1, Section 21 provides: **Trial by jury.** The right of a trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given therein.

Article I, Section 22 secures the right to a jury trial, set out in Article I, section 21, in criminal cases: "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed . . ."

The right to a jury trial under Article I, Section 21, at the time the state constitution was adopted in 1889, placed the burden on the prosecution to prove sanity; and it is well-established that the right to a jury trial is preserved as it existed at common law in the territory at the time of the constitution's adoption. The trial court erred in ignoring the that the right to a jury trial at the time the constitution was adopted included the right to have the prosecution prove sanity; the court ruled only that the right to a jury trial was preserved because the jury must determine whether the accused was insane at the time the crime was committed. RP(4/1/08) 31-47; RP(4/2/08) 3 – 7; CP 8561 – 8570 ¶16.

**A. At the time of statehood, the government had to disprove insanity beyond a reasonable doubt.**

Article I, Section 21 provides that the right to jury trial shall remain inviolate. As stated in *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989), "the term 'inviolate' connotes deserving of the highest protection."<sup>11</sup> In construing Article I, Section 21, the Washington State Supreme Court has long held that it preserves the right as it existed at common law in the territory at the time of its adoption. *Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982); *State ex*

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<sup>11</sup> *Webster's* defines "inviolate" as "free from change or blemish: pure ... free from assault or trespass: untouched, intact." *Webster's Third International Dictionary* 1190 (1993).

*rel. Mullen v. Doherty*, 16 Wash. 382, 47 P. 958 (1897); *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910); *State v. McDowell*, 61 Wash. 398, 112 P. 521 (1911); and *State v. Smith*, 150 Wn.2d 135 (2003).

There is little doubt that the law in the territory at the time the constitution was adopted required the government to prove sanity beyond a reasonable doubt:

The rule of law, as to the burden of proof in criminal cases we all agree, is this: The burden is on the Territory to make out every material allegation in the indictment beyond all reasonable doubt . . . . The force and effect of this rule cannot be destroyed by any action of the prosecuting officer so far as the facts constituting the *res gestæ* are concerned. Part of the facts included in the *res gestæ* may be developed by the Territory, and part by the defense, but still the rule is the same. The defendant is entitled to the instruction that the jury must be satisfied of his guilt beyond all reasonable doubt on all the facts so put in evidence . . . . And we are satisfied that so far as the facts attending the killing are concerned--at least so far as those facts are included in the *res gestæ*, that the burden of proof never shifts. *This is as true of the defense of insanity under the limitations stated above, as of any other defense.*

*McAllister v. Washington Territory*, 1 Wash.Terr. 360, 366, (Wash.Terr. 1872) (emphasis added). In *McAllister*, the trial court erroneously placed the burden to prove insanity on the defendant. On review, the Supreme Court for the Territory of Washington stated the instruction “was erroneous if the facts upon which [insanity] was based could properly be considered as part of the *res gestæ*.” *McAllister*, 1 Wash. Terr. at 367.

A decade and a half after the adoption of the Washington State Constitution, the Washington State Supreme Court acknowledged two divergent lines of cases from other jurisdictions, with one placing the burden on the government and the other placing it with the defense. *State v. Clark*, 34 Wash. 485, 76 P.98 (1904). The Court concluded, without reference to Article I, Section 21, that the better “desired rule” was the latter. *Id.*

Since *Clark*, the Washington State Legislature has codified the insanity defense which specifically places the burden on the defendant to prove insanity by a preponderance of the evidence. RCW 10.77.030(2). This statutory construction has been approved under a due process analysis. *State v. Box*, 109 Wn.2d 320, 322-330, 745 P.2d 23 (1987); *see also, Leland v. Oregon*, 343 U.S. 790, 798 – 801, 72 S.Ct. 1002, 96 L.Ed.2d 1302 (1952)(there is no federal violation of due process with such a burden).

No Washington case, however, has addressed the burden allocation under an Article I, Section 21 analysis. It is clear that the Supreme Court in *McAllister* defined the scope of the jury trial right as it relates to criminal proceedings involving insanity as the government must bear the burden of proving sanity beyond a reasonable doubt whenever the defense was pled based on facts that attended the charged offense. *McAllister*, 1

Wash.Terr. at 366. The *McAllister-res gestae* rule was in effect at the time the constitution was ratified in 1889. There is no case law or authority supporting a contrary position.

A review of *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003), demonstrates the importance that the Washington State Supreme Court considers “the right as it existed at common law in the territory at the time of its adoption” to interpret the rights afforded under Article I, Section 21.

In *Smith*, the defendant argued that Article I, Section 21 required juries to determine persistent offender status. To advance this argument, the defense relied on *State v. Furth*, 5 Wn.2d 1, 104 P.2d 925 (1940), which held that Article I, Section 21 provided a right under a former habitual offenders statute. The *Smith* court concluded the *Furth* court wrongly determined the scope of Article I, Section 21 by failing to observe that an 1866 statute eliminated the right, and it was not until 1903 – some fourteen years after the adoption of the constitution – that the claimed right was restored. *Smith*, 150 Wn.2d at 154.

The *Smith* court concluded that the right to have a jury determine habitual offender status was not secured when the constitution was adopted and therefore did not fall within the rights afforded by Article I, Section 22. *Smith*, 150 Wn.2d at 146. The *Smith* court held that the constitutional holding of *Furth* was flawed and consequently not

controlling:

It may have been reasonable for the court to conclude that juries were required under the 1909 habitual offender statute given the previous version of the law, the practice of continuing to provide juries in such proceedings, and the fact that juries were required under various contemporary state statutes. But though the *Furth* court's holding rests on a reasonably sound *statutory* basis, its conclusion that the statutory right was based on a *constitutional* guaranty is not sound, as a historical analysis of article I, section 21 will demonstrate.

*Id.* (emphasis in the original).

*Smith* therefore stands for the proposition that an erroneous judicial determination as to Article I, Section 21 jury trial right cannot detract from a proper historical analysis of Article I, Section 21. Because Article I, Section 21, at the time of adoption, placed the burden of proving sanity on the prosecution, a later statute cannot constitutionally change that burden and the court erred in placing the burden of proof on Mr. Haq to prove insanity.

**B. An analysis of the *Gunwall* factors further demonstrates that the government must disprove insanity beyond a reasonable doubt.**

The state constitutional right to a jury trial includes the right of a person accused of a crime to have a jury determine every substantive fact bearing on the question of guilt or innocence beyond a reasonable doubt. *See generally State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910). This

state constitutional right demonstrates that the state must bear the burden of proving sanity beyond a reasonable doubt where the issue of insanity is raised at trial.

The Washington Supreme Court held, in *State v. Gunwall*, 106 Wn.2d 54, 58, 61-63, 720 P.2d 808 (1986), that a court must consider certain factors when determining whether Washington's constitution should be interpreted as more protective of individual rights than the federal constitution: (1) textual language, (2) differences between the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. Parties asserting a violation of the state's constitution must brief and discuss these factors. *Gunwall*, 106 Wn.2d at 62 (citing *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

A party need not provide a *Gunwall* analysis, however, if the Washington Supreme Court has already analyzed the constitutional provision in the context at issue. *State v. Reichbach*, 153 Wn.2d 126, 101 P.3d 80, 84 n.1 (2004) (citing *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998)). The Washington Supreme Court has previously analyzed Article I, Sections 21 and 22, under the *Gunwall* factors and has concluded that the right to a jury trial may be broader under Article I, Sections 21 and 22 than under the Federal Constitution. *State v. Smith*,

150 Wn.2d 135 (2003). Nevertheless, a review of the *Gunwall* factors provides sufficient evidence that Article I, Section 21 requires the State to prove sanity beyond a reasonable doubt.

**(i) State Constitutional Textual Language.**

The first *Gunwall* fact examines the textual language of the state constitution. Unlike the United States Constitution, the Washington Constitution contains two provisions regarding the right to trial by jury: "The right of trial by jury shall remain 'inviolable...." In addition, Article I, Section 22 provides that "[i]n criminal prosecutions the accused shall have the right to ... have a speedy public trial by an "impartial jury." Article I, section 21 has no federal equivalent. *State v. Schaaf*, 109 Wn.2d 1, 13 – 14, 743 P.3d 240 (1987). The fact that the Washington Constitution mentions the right to jury trial in two provisions instead of one indicates the general importance of the right under Washington's State Constitution. *State v. Smith*, 150 Wn.2d 135 (2003).

**(ii) Differences in the text for the relevant state and federal constitutional provisions.**

The second *Gunwall* factor examines the difference between the state and federal constitutional texts. As mentioned, the state constitution embodies the jury trial right in two separate provisions. In contrast, the federal constitution contains a single provision: The Sixth Amendment to

the United States Constitution provides that “[i]n all criminal trials, the accused shall enjoy the right to a speedy and public trial by an impartial jury.” The federal constitution therefore does not include the “inviolable” language found in Washington’s constitution, which our courts have found critical to tether the right to the common law practice of 1889. *Sophie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

**(iii) State Constitutional and common law history.**

The state constitution and common law history supports the argument that the government must prove sanity beyond a reasonable doubt in this case. Consistent with the federal common law at the time, the Washington common law obligated the government to prove sanity beyond a reasonable doubt whenever proof of insanity is required consideration of facts attendant to the charged offense. *McAllister*, 1 Wash.Terr. at 366 – 367; *United States v. Davis*, 160 U.S. 469, 16S.Ct. 353, 40 L.Ed. 499 (1895).

**(iv) Preexisting State law.**

The critical historical analysis under this prong is discussed above and set forth in *McAllister*, 1 Wash.Terr. at 366 – 367 and *State v. Clark*, 34 Wash. 485 (1904); *see also State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1919)(because the right to present an insanity defense existed at the

time of constitutional ratification, the court ruled that the Legislature was powerless to eliminate the defense).

**(v) Differences in structure between the state and federal Constitutions.**

The federal constitution serves as a limit of federal power, where the state constitution serves as a protector of fundamental rights. As such, this factor will nearly always support a broader state constitutional right than the corresponding federal right. *See e.g., Gunwall*, 106 Wn.2d at 62; *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

**(vi) State interests or local concern.**

The scope of the jury trial right is a matter of particular state interest is apparent from the drafters' inclusion of the right in two constitutional provisions, which the Washington State Supreme Court has concluded secure "a right to a jury trial as liberal" as can be found in this country. *Pasco v. Mace*, 98 Wn.2d 87 n. 6, 653 P.2d 618 (1982).

For the reasons stated above, the Washington State Constitution requires the State to prove sanity beyond a reasonable doubt whenever proof of insanity defense involves facts attendant to the charged offenses. It should be undisputed that Mr. Haq's assertion of an insanity defense incorporated the surrounding facts of the charge; thus, the state should

have been required to prove sanity beyond a reasonable doubt. The trial court's opposite conclusion was in error.

**II. THE STATED POLICY OF RECORDING ALL JAIL CALLS TO INVESTIGATE PENDING CASES, AND THE PROSECUTION'S UNLIMITED ACCESS TO THE RESULTS OF THE INVESTIGATION, WHILE DEFENSE COUNSEL IS NEITHER PRESENT NOR WAIVED AND ABSENT PROBABLE CAUSE OR REASONABLE SUSPICION, VIOLATES BOTH THE STATE AND FEDERAL CONSTITUTIONS.**

According to the pre-trial testimony of Barclay Pierson, an officer with the King County Jail, the Jail records all calls from inmates and keeps track of the calls on a log sheet with the date and time of the call, the duration of the call, the number dialed, and the location in the jail where the call was made. RP(2/17/09) 28–30; CP 1160. A stated purpose behind the jail's policy to record calls is to ensure a "safe and secure facility." RP(2/17/09) 9. This purpose is a generally recognized and legitimate basis to record out-going jail calls.<sup>12</sup>

However, Officer Pierson explained that the Jail also records phone calls and disseminates them to the prosecution or law enforcement in order to provide the state with a "*great resource as an investigative tool for past, ongoing, and future crimes.*" RP(2/17/09) 9 (emphasis added). This

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<sup>12</sup> See e.g., *State v. Archie*, 148 Wn.App 198, 199 P.3d 1005 (2009) quoting *Bell v. Wolfish*, 441 U.S. 520, 533, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pre-trial detainees.").

purely investigative function of recording jail calls and providing them to the prosecution, when, like here, there are no issues of jail security, alleged criminal activity, or any stated safety concern issue, is impermissible.

**A. The recording of jail calls for purpose of investigating pending cases and providing the prosecution unlimited access to those calls violates a defendant's right to counsel.**

The Sixth Amendment guaranty of assistance of counsel attaches when the State initiates adversarial proceedings against a defendant. *Brewer v. Williams*, 430 U.S. 387, 401, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). Recognizing that the right to counsel is shaped by the need for the assistance of counsel, the courts have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Maine v. Moulton*, 474 U.S. 159, 170, 106 S.Ct. 477, 484 (1985); *United States v. Wade*, 388 U.S. 218, 224, 87 S.Ct. 1926, 1931, 18 L.Ed.2d 1149 (1967) (quoted in *United States v. Gouveia*, 467 U.S. 180, 189, 104 S.Ct. 2292, 2298, 81 L.Ed.2d 146 (1984)). Once the right has attached, a government agent may not interrogate a defendant and use incriminating statements the defendant made in the absence of or without waiver of counsel.<sup>13</sup> *Brewer*, 430 U.S. at 401-404. The accused need not

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<sup>13</sup> This is not a situation akin to the facts found in *Maryland v. Shatzer*, 130 S.Ct. 1214

make an affirmative request for assistance of counsel. *Id.*

Courts apply the “deliberately elicited” standard in determining whether a government agent has violated a defendant's Sixth Amendment right to assistance of counsel. *Fellers v. United States*, 540 U.S. 519, 524, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004); *Kuhlmann v. Wilson*, 477 U.S. 436, 459, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986); *In re Pers. Restraint of Benn*, 134 Wash.2d 868, 911, 952 P.2d 116 (1998).<sup>14</sup> The deliberate elicitation standard does not require formal interrogation by an employee of the government, does not require that the information be secretly elicited, and does not turn on whether the defendant initiated the conversation in which the contested statements were made. *Massiah v. United States*, 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed. 2d 246 (1964); *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d (1980); and *Maine v. Moulton*, 474 U.S. at 176-177 (1985). The standard therefore protects against direct and indirect violations of the right to counsel.

The recording of jail phone calls and turning them over to the prosecution when there is no legitimate concern of jail facility safety or

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(2010), where the United States Supreme Court concluded a valid waiver occurred when an accused, after initially invoking his right to counsel was later reinterrogated after being placed some two weeks into general population because there was a “break in custody.” No such “break in custody” occurred here.

<sup>14</sup> The Sixth Amendment “deliberately elicited” standard has been expressly distinguished from the Fifth Amendment “custodial-interrogation” standard. *Fellers*, 540 U.S. at 524, 124 S.Ct. 1019.

security, but solely as an investigative tool, violates Mr. Haq's Sixth Amendment right to counsel.

The trial court, in denying the defense Sixth Amendment challenge to the admissibility of the jail calls, concluded that it was undisputed that Mr. Haq's right to counsel had attached and no government agent could interrogate him in the absence of a valid waiver of counsel, but ultimately concluded:

There are no facts before this court to show that the State deliberately elicited these statements. Absent such a showing, there is no basis to find that there is a violation of the State or Federal right to counsel.

CP 1142 – 1144.

The trial court's heavy reliance on the fact that Mr. Haq initiated the calls to find that his statements were not elicited (CP 1142-1144) is contrary to case law.

The government in *Maine, supra*, argued a similar position that the Sixth Amendment right to counsel could not be violated when the defendant initiates the captured conversations. The Supreme Court rejected this limited viewpoint of Sixth Amendment jurisprudence, noting that "the identity of the party who instigated the meeting in which the Government obtained incriminating statements was not decisive or even important to our decision in *Massiah* or *Henry*." *Moulton*, 474 U.S. at

174. The Supreme Court concluded that the government has an affirmative obligation to use counsel as a medium and that the government fails that obligation, not only by setting up an opportunity to confront an accused in the absence of counsel, but also by knowingly exploiting such an opportunity:

As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever by luck or happenstance the State obtains incriminating statements from the accused after the right to counsel has attached.

However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.

Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

*Moulton*, 474 U.S. at 176 (internal citations omitted, paragraph breaks added).

Mr. Haq was booked into the King County Jail on July 28, 2006, and housed there until January, 2010. For over three years, Mr. Haq was confined to his cell for 23 hours a day, and allowed access to the dayroom

one hour each day. CP 1161. Mr. Haq was denied any meaningful personal contact. The system here created an atmosphere that required Mr. Haq, in order to have any contact with his family – who lived hundreds of miles from King County – to call them on the jail-controlled phones. Mr. Haq’s parents were understandably concerned about their son given his mental history of psychosis and attempted suicide. They therefore had no option but to accept his calls from the King County Jail.

The state intentionally recorded these calls. This is understandable for purposes of screening for calls that might jeopardize facility safety, criminal activity, or concern of escape. None of these concerns, however, was present here. Even so, the King County Prosecutors Office, for no other reason than an investigative fishing expedition, was permitted unfettered access to these calls by simply requesting them by e-mail. Although a recording warns the caller that calls will be recorded, there is nothing to inform the pre-trial inmate that he or she has a right to counsel, or how the recordings will be used, or to whom the recordings will be provided. RP(2/17/09) 38; CP 1160.

The recording of jail calls in this case and providing unlimited access to the calls to the prosecution was not to advance any security or safety concerns, but rather a state-sanctioned investigative tool to gather evidence on pending cases while circumventing an accused’s right to

counsel. As such, this constituted a complete failure of the state to honor its “affirmative obligation not to act in a manner that circumvents” the Sixth Amendment right. *Moulton*, 474 U.S. at 176.

**B. The Equal Protection Clause is violated when the state has unlimited and unilateral access to pre-trial detainee jail calls when the calls are not for a legitimate security purpose but rather used as an investigative tool.**

The prosecution would not have the same complete and unfettered access to recorded calls made by an inmate at one of the Washington State’s Department of Corrections (DOC) facilities that it had here to Mr. Haq’s calls from the King County Jail. Nevertheless, the trial court concluded, without legal authority, that “similarly situated” for equal protection purposes is limited to others at the King County Jail and does not include individuals at DOC. CP 1157–1167. Consequently, the trial court’s narrowly defined standard permits a pre-trial detainee, like Mr. Haq, who maintains the presumption of innocence, to receive significantly different – and lower – treatment than a convicted felon incarcerated at DOC. The trial court’s conclusion was in error.

The Fourteenth Amendment provides that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.” Article 1, section 12 of the Washington

Constitution states “no law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” The equal protection clause and the privileges and immunities clause of Washington constitution are considered under the same analysis, and both constitutional provisions require that similarly-situated persons be treated similarly. *State v. Shawn P.*, 122, Wn.2d 553, 559 – 560, 850 P.2d 1220 (1993).

The standard of review – strict scrutiny, intermediate scrutiny or rational basis – depends on the nature of the interest affected or the characteristics of the class created by the statutes at issue. *Shawn P.*, at 560; *State v. Garcia-Martinez*, 88 Wn. App. 322, 326, 944 P.2d 1104 (1997).

Under any standard of review the King County Jail policy denies equal protection.

Strict scrutiny applies whenever the challenged action affects a “fundamental right.” *State v. Phelan*, 100 Wn.2d 508, 512, 971 P.2d 1212 (1983). Strict scrutiny will be satisfied only if the challenged action is shown to be “necessary to accomplish a compelling state interest.” *Phelan*, at 512. The right to counsel and a fair trial are among the most fundamental rights guaranteed to accused persons under the state and

federal constitutions, which are the rights at stake for Mr. Haq.<sup>15</sup>

While recording jail calls for security purposes undoubtedly serves a legitimate interest, recording jail calls for the sole purpose to investigate pending cases in violation of the right to counsel does not. This is particularly true given the Jail's policy of freely divulging any and all the recorded conversations (even when no threats, criminal activity, or security concerns exist) to the prosecution on as little as an e-mail request. RP(2/17/09) 30-31; 40; CP 1160. Thus, under the King County Jail's policy, the prosecution has unlimited access to these jail calls, needing neither probable cause, reasonable suspicion nor a subpoena to obtain their content.

In contrast, a person serving time in the DOC is treated differently, with higher protections. Protocols for calls recorded at the Department of Corrections are set forth in RCW 9.73.095, which reads in part:

(b) The calls shall be "operator announcement" type calls. The operator shall notify the receiver of the call that the call is coming from a prison offender, and that it will be recorded and may be monitored.

(3) The department of corrections shall adhere to the following procedures and restrictions when intercepting,

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<sup>15</sup> Intermediate scrutiny applies when disparate treatment turns on a semi-suspect classification and a challenged classification will be upheld only if it is "substantially related to an important government objective." *State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001). The rational basis test will be upheld only where the state action is rationally related to a legitimate governmental purpose. *State v. Clinton*, 48 Wn. App. 671, 687-680, 741 P.2d 52 (1987).

recording, or divulging any telephone calls from an offender or resident of a state correctional facility as provided for by this section.

(a) Unless otherwise provided for in this section, after intercepting or recording any conversation, only the superintendent and his or her designee shall have access to that recording,

(b) The contents of any intercepted and recorded conversation shall be divulged only as is necessary to safeguard the orderly operation of the correctional facility, in response to a court order, or in the prosecution or investigation of any crime.

(c) All conversations that are recorded under this section, unless being used in the ongoing investigation or prosecution of a crime, or as is necessary to assure the orderly operation of the correctional facility, shall be destroyed one year after the intercepting and recording.

Thus, the DOC limits access to the superintendent and contents are divulged only when: (1) to do so is necessary to safeguard the orderly operation of the correctional facility; (2) in response to a court order; or (3) in the prosecution or investigation of any crime. None of these facts were applicable in this case. RP(2/17/09) 36; CP 1161.

First, there was no jeopardy to the “orderly operation” of the King County Jail. In the three years Mr. Haq was incarcerated at the King County Jail there were no “red flags” to suggest concern of any threats, or escape, or that he was in violation of any court order. As such, there was no active or real-time monitoring of his phone calls. RP(2/17/09) 36; CP

1161.

Second, the dissemination of the jail recorded calls was not pursuant to a court order since one was neither sought nor required. RP(2/17/09) 30-31; 40; CP 1160.

The defense, on the other hand, would have been required to seek a court order (subpoena). *Id.* This separate and arbitrary access to the King County Jail recordings not only illustrates the state-connection between the King County Jail and the King County Prosecutor's Office, it also exposes the secrecy of this "investigative tool." Under this different treatment, the defense would not receive notice of the prosecutions attempts to "investigate" recorded jail calls of their clients; while the defense would be required to give notice to the prosecution if it sought the same materials. *See State v. White*, 126 Wn.App.131, 107 P.3d 753, (2005)(subpoenas in a criminal case, like subpoenas in civil actions, require notice as dictated by CR 45, so that an adverse party may move to quash or modify the subpoena or pursuant to CR 26(c) limit it).<sup>16</sup> Consequently, the defense is without an avenue to seek to quash or limit the discovery demand, which here equates to an unlimited investigative tool.

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<sup>16</sup> It is worth noting that the state, as a result of its written request to the King County Jail, received approximately 600 recorded calls, which totaled approximately 67 compact discs of discovery. RP(7/15/08) 2.

Finally, recorded calls from the Department of Corrections can only be divulged for purpose of an investigation or prosecution of a crime. RCW 9.73.095. This provision, when read with the provision that the contents would be divulged only to the superintendent and his designee, contemplates a process in which the superintendent approves the release of information based on a request to investigate a specific crime or prosecution. Moreover, given that the calls are from individuals at the Department of Corrections, it is safe to presume they have already been convicted and therefore the investigation would not be for the crime of which they were convicted; but rather a new and separate allegation – a significant difference than the broad position taken by King County Jail that recording and disseminating the calls is a “*great resource as an investigative tool for past, ongoing, and future crimes.*” RP (2/17/09) 9 (emphasis added).

There is no legitimate state interest that justifies this disparate treatment of convicted prisoners incarcerated at any Department of Corrections facility and a presumed innocent pre-trial detainee placed in a county jail facility.

**C. Article I, Section 7 of the Washington State Constitution prohibits the unfettered dissemination and collection of recorded jail calls for any purpose other than to maintain security and order of the facility.**

Even though there was no evidence or concern that Mr. Haq jeopardized the safety or security of the King County Jail facility, the prosecution was nonetheless able to obtain his jail recorded phone calls by simply attaching a written order form to an e-mail sent to the King County Jail. Such disclosure of recorded jail calls solely as an investigative undertaking by the prosecutor's office runs afoul of Article I, Section 7 since it is not supported by either by probable cause nor reasonable suspicion.

Article I, section 7 of the Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Whether undisputed facts constitute a violation of that constitutional provision is a question of law we review de novo. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). The law is settled that the privacy protections provided by Article I, Section 7 are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment. *City of Seattle v. McCreedy*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994) (citing *Gunwall*, 106 Wn.2d 54, 65, 720 P.2d 808 (1986)).<sup>17</sup>

“Private affairs” are “those privacy interests which citizens of this

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<sup>17</sup> Consequently, it is unnecessary to engage in a *Gunwall* analysis to determine whether a claim under Article I, Section 7 warrants an inquiry on independent state grounds. *McNabb v. Dept. of Corrections*, 163 Wn.2d 393, 399-400, 180 P.3d 1257 (2008).

state have held, and should be entitled to hold, safe from government trespass.” *State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984). “In determining whether a privacy interest merits article I, section 7 protection, a central consideration is the nature of the information sought – that is, whether the information obtained via the government trespass reveals intimate or discrete details of a person's life. *State v. Jordan*, 160 Wn.2d 121, 126, 156 P.3d 893 (2007); *see also State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002) (explaining that Article I, Section 7, protects against disclosures that could reveal “intimate details of [individual’s] lives, their activities or the identity of their friends or political and business associates”).

Here, the trial court relied solely on *State v. Archie*, 148 Wn.2d 198, 199 P.3d 1005 (2009) to reject the Article I, Section 7 claim. CP 1157 – 1167. A review of the basis underlining the *Archie* decision, however, does not support the trial court’s conclusion.

In *Archie*, the defendant was arrested and charged with a crime against his on-and-off again girlfriend. The court issued a no contact order that prevented the defendant from contacting her. While at the King County Jail, the defendant called her and apologized for his actions and repeatedly urged her to “be by [his] side” regarding the case. *Archie*, 148 Wn.2d at 201. Like here, each call contained the preamble indicating the

call is being recorded. The recordings were admitted at trial against the defendant.

On appeal, the defendant argued that Article I, Section 7 of the Washington State Constitution afforded a privacy interest in the recorded calls. In rejecting the defense's argument, the Court of Appeals reasoned that the need for monitoring inmate communications for safety and security reasons is a legitimate concern that justifies a diminished expectation of privacy:

These concerns do not depend upon whether the inmate is pre- or post-trial, or whether the communication is by mail or telephone. "Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." The King County Jail recording system serves important institutional purposes.

Balancing the circumstances here against the privacy protection usually applied to telephone communications, we are persuaded that Archie's phone calls from the jail were not private affairs deserving of article I, section 7 protection.

*State v. Archie*, 148 Wn.App. at 204 (citations omitted).

The "circumstances" found in *Archie* are not present here. The recorded conversations in *Archie* were in violation of an existing court order preventing the defendant from contacting the alleged victim. Consequently, the monitoring of the defendant's phone calls and releasing

them to the prosecution served a legitimate basis, namely the prevention of any ongoing criminal conduct.

This legitimate safety concern is not found in Mr. Haq's case. Mr. Haq had no restrictions placed on whom he could call. Nor, unlike *Archie*, was the content of the communications criminal in nature. There was nothing illegal or inappropriate with Mr. Haq's phone calls. On the contrary, the calls were largely those taking place between a son and his concerned parents.

Additionally, the *Archie* court, in rejecting the distinction between privacy rights afforded to convicted prisoners and pre-trial detainees – who still possess the presumption of innocence – rested primarily on a Fourth Amendment analysis. *See e.g., Archie*, 148 Wn.App 198 at 203 – 204, *quoting Bell v. Wollfish*, 441 U.S. 50, 533, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Such a reliance fails to appreciate the significant difference between the Fourth Amendment and Article I, Section 7:

Article I, section 7, is explicitly broader than that of the Fourth Amendment as it “clearly recognizes an individual's right to privacy with no express limitations” and places greater emphasis on privacy. Further, while the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, article I, section 7, holds the line by pegging the constitutional standard to “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” (citations omitted).

*State v. Ladson*, 138 Wash.2d 343, 348-349, 979 P.2d 833, 837 (1999).

Because the recorded conversations in this case did not jeopardize the safety or security of the facility, were not in violation of any court order and did not consist of any criminal activity, the circumstances relied upon in *Archie* to deny an Article I, Section 7 privacy interest are not present here. It is undisputed the purpose for releasing the recorded calls was not to advance any legitimate safety concern, but rather for investigative purposes to collect whatever useful information that may be used against Mr. Haq at trial without probable cause or reasonable suspicion.

This purpose goes beyond the understandable security basis expressed in *Archie* and tramples inappropriately on Article I, Section 7. The trial court's reliance on *State v. Archie* to deny the defense's motion was error.

**D. The Washington State Privacy Act prohibits the unfettered dissemination and collection of recorded jail calls for the purpose other than to maintain security and order of the facility.**

The trial court, relying exclusively on *State v. Modica*, 164 Wn.2d 83, 186 P.3d 1062 (2008), rejected the defense's claim that the Washington State Privacy Act (RCW 9.73.030) prohibited the interception and recording

of jail calls.<sup>18</sup> CP 1157 – 1167; 1139 - 1141. In so doing, the trial court concluded that the facts in *Modica* are virtually identical to the facts in this case. *Id.* ¶C(i)(b).

As the defense argued at trial, Mr. Haq’s case was distinguishable: because Mr. Haq was mentally ill; because there was “coerced consent”; and because the monitoring was not related to crimes that were being committed (*i.e.*, witness tampering and/or in violation of a court order). The defense also argued that the King County Civil Division, in rejecting a Public Disclosure Request by media for the same phone calls, acknowledged them as “private” for purposes of the Washington Privacy Act as well. CP 1139-1141; RP(6/11/09) 9.

The court rejected all these arguments, claiming that the *Modica* Court “did not focus on law enforcement’s purposes for recording or using the phone calls.” *Id.* at ¶ C(i)(d).

The *Modica* Court did, however, rely in part on the purpose behind recording the phone calls:

Intercepting or recording telephone calls violates the privacy act except under narrow circumstances, and we will generally presume that conversations between two parties

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<sup>18</sup> RCW 9.73.030 provides, in relevant part, that:

Except as otherwise provided in this chapter, it shall be unlawful . . . to intercept, or record any ...[p]rivate communications transmitted by telephone, telegraph, radio, or other device between two or more individuals . . without first obtaining the consent of all participants in the communication...

are intended to be private. Signs or automated recordings that calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy. *However, because Modica was in jail, because of the need for jail security, and because Modica's calls were not to his lawyer or otherwise privileged, we conclude he had no reasonable expectation of privacy.*

*Modica*, 164 Wn.2d at 89 (emphasis added). In contrast to *Modica*, Mr. Haq's calls were not recorded or turned over to the prosecutors' office because of security issues or as part of the investigation of continuing criminal conduct. They were turned over purely because the prosecutors' office was on a fishing expedition to see if they could find something to use against Mr. Haq at trial.

Even if recorded jail calls are deemed to lack the privacy protection afforded under the Washington Privacy Act, that permits the recording of the calls; it should not, however, extend to an unlimited prosecution access to the recorded calls.

**E. The trial court erred when it allowed prejudicial statements that were provided to the prosecution by the King County Jail as part of the recorded jail phone calls.**

After the trial court ruled that the jail calls would be admitted, the defense sought to redact portions of recorded jail calls it believed were unfairly prejudicial. CP 1894 – 1897; RP(10/19/09) 12. The court concluded that some of the calls should be redacted, but allowed others to be played. RP(10/19/09) 13–17. Over the defense objection, the court permitted the

jury to hear the following recorded conversations:

NH<sup>19</sup>: A lot of terrorists are the same way. Not terrorists, but Jihadi.

NaH: (inaudible)

NH: Jihadi.

NaH: You are a gentle person.

NH: A lot of Jihads are.

RP(10/12/09) 167–168; Pre-trial Exhibit 12, pg. 23.

NH: Okay. Like educated people in British did the same thing. Educated people in, uh – in, uh, the Madrid -- and Spain -- ... did the same thing.

RP(10/26/09) 171; Pre-trial Exhibit 12, pg. 28

NH: There's – there's some people who have murdered more people than me.

RP(10/27/09) 164 - 166; Pre-trial Exhibit 12, pg. 64

NH: I know a lot of the mail I got was hate mail.

NaH: Is it?

NH: Yeah.

NaH: Oh, so you read it?

NH: No, I didn't read it. My lawyers told me.

RP(10/27/09) 169; Pre-trial Exhibit 12, pgs. 72 -73.

Under ER 403, relevant evidence may be excluded if the danger of

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<sup>19</sup> “NH” refers to Naveed Haq, and “NaH” refers to another speaker.

unfair prejudice substantially outweighs its probative value. Unfair prejudice means “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *State v. Hanson*, 46 Wn.App. 656, 662, 731 P.2d 1140, *rev. denied*, 108 Wn.2d 1003 (1987). Even though relevant evidence is presumed admissible, it should be excluded when its probative value is substantially outweighed by the danger of unfair prejudice. ER 403; *Carson v. Fine*, 123 Wn.2d 206, 225, 867 P.2d 610 (1994). The courts review a trial court's balancing of probative value against prejudice for abuse of discretion. *State v. Kennealy*, 151 Wn.App. 861, 890, 214 P.3d 200 (2009).

Here, it was undisputed that neither the Seattle Police nor the FBI found any links between Mr. Haq and any terrorist group. His computer was thoroughly searched and what was found was moderate and tolerant views on religion. Allowing statements which conveyed to the jury that he was a “jihadi” or that his actions were similar to the acts of terrorism in Britain and Spain was unnecessarily and unfairly prejudicial; it was not the state’s position that he was in any way linked to a terrorist movement, religious or otherwise. These statements were unfairly prejudicial, likely to generate heat, but not light, and should have been excluded.

Similarly, Mr. Haq’s statement about people who had murdered more people than him and his lawyers advising him not to read hate mail,

had virtually no probative value and considerable potential for misleading the jury. There was no evidence that Mr. Haq received any hate mail and the suggestion that he was acting on the advice of counsel was improper and misleading as was his statement that other people had killed more people than he. The court should have excluded these statements.

### **III. THE TRIAL COURT ERRED WHEN IT COMPELLED A MENTAL HEALTH EXAMINATION AND DISCLOSURE OF PRIVILEGED AND CONFIDENTIAL INFORMATION.**

The prosecution, citing CrR 4.7, moved the Court for a mental health examination by an expert that it retained. CP 57-59.<sup>20</sup> The prosecution also requested the court order the defense to disclose notes, reports, interviews, test results, and “other materials relied upon or considered by said mental health experts in forming their conclusions.” *Id.*

Over defense objection (CP 36-41), the court granted the state’s motion for the compelled examination and disclosure of defense materials, and ordered that Mr. Haq could not assert any Fifth Amendment, Article 1, Section 9, or physician–patient privilege during the course of the examination. RP(6/14/07) 2–21; RP(4/29/08) 93; CP 65-66.<sup>21</sup> Because

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<sup>20</sup> The prosecution’s motion specifically stated: “The state has retained a mental health expert, Dr. Robert J. Wheeler, to interview and examine the defendant, to review the defense reports and underlying materials, and to render opinions as to insanity and diminished capacity as required and if possible.” CP 57 – 59.

<sup>21</sup> The court also ordered consistent with RCW 10.77.060(2) that a defense expert shall be

the mental health professional by whom the court compelled Mr. Haq to be examined was a state-retained expert, and not one appointed by the court, the trial court's order was in error.

Mr. Haq raised the affirmative defense of Not Guilty by Reason of Insanity (NGRI), and the defense of diminished capacity. As such, provisions of RCW 10.77 are applicable:

(1)(a) Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

Additionally, RCW 10.77.020(5) provides:

In a sanity evaluation conducted under this chapter, if a defendant refuses to answer questions or to participate in an examination conducted in response to the defendant's assertion of an insanity defense, the court shall exclude from evidence at trial any testimony or evidence from any expert or professional person obtained or retained by the defendant.

Read together it is clear that a defendant asserting an insanity defense may not refuse to answer questions or participate in an examination conducted by an expert "appointed" by the court. The trial

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permitted to witness said examination, that the examination may be tape recorded by the defense, that the examination shall not occur in the absence of defense counsel, and that work-product is to be excluded . CP 65-66.

court did not follow the directive of RCW 10.77.020 since it neither appointed nor requested the secretary to designate at least two qualified experts. Instead, the trial court ordered a compelled mental health examination be done by “the State’s mental health expert.” CP 65 – 66.

In *State v. Bond*, 98 Wn.2d 1, 653 P.2d 1024 (1982), the Washington State Supreme Court concluded that a defendant who asserts an insanity defense waives his attorney-client privilege as applied to the defense psychiatrist, waives his privilege against self-incrimination, and may be ordered to submit to an examination by state’s mental health expert. This holding was extended to assertions of diminished capacity. *State v. Hutchinson II*, 135 Wn.2d 863, 959 P.2d 1061 (1998).

Here, however, the court compelled Mr. Haq to participate in an examination by an expert retained by the state, not appointed by the court as required under RCW 10.77.060 or hired by the defense as in *Bond*. Unlike a court-appointed expert, a state-retained expert does not function as a neutral and unbiased participant in the proceedings. In this context, Mr. Haq should be afforded the protections against self-incrimination under the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Washington State Constitution. Furthermore, under this context, Mr. Haq should not be forced to forgo his attorney-client privilege under RCW 5.60.060(2) or physician-patient privilege under

RCW 5.60.060(4).

**IV. THE TRIAL COURT ERRED WHEN IT RULED THAT INCRIMINATORY AND NON-INCRIMINATORY STATEMENTS DERIVED DURING A COMPELLED EVALUATION WERE ADMISSIBLE.**

Pursuant to the court's order and over the defense objection, Mr. Haq was interviewed by Dr. Robert Wheeler, Ph.D., the psychologist retained by the state. RP(4/29/08) 68–84. During the compelled interview, Mr. Haq made incriminating statements with the regard to the procurement and testing of weapons; his internet activity related to Jewish organizations; his obtaining the address of the Jewish Federation; and his actions at the Jewish Federation. *Id.* 68 – 84.

Dr. Wheeler appeared uncertain whether he could render an opinion regarding diminished capacity or sanity without considering the incriminating statements made during the compelled mental exam, the statements to the police, and the fruits of any illegally obtained custodial statements. *Id.* In contrast, Dr. James Missett, M.D., Ph.D., a defense-retained psychiatrist, indicated that even though he was present during Dr. Wheeler's interview with Mr. Haq and reviewed a transcript of the interview, he was able to render an opinion regarding sanity and diminished capacity without considering Mr. Haq's incriminating statements. CP 422-425.

After the interview and prior to the trial, the defense, citing CrR 3.1, the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 3 and 22 of the Washington State Constitution, argued that the State's expert should not be permitted to testify to incriminating statements made by Mr. Haq during the compelled mental examination and testify to opinions based on those statements. CP 421 – 446; CP 424 – 425. In essence, the defense argued that even if a defendant asserting diminished capacity or insanity may be ordered to submit to an examination by a state's expert, Washington courts have restricted the use at trial of information gathered during such an examination. CP 421 – 427; RP(4/9/08) 65- 79; 84 – 87; 116 - 112. Accordingly, the defense argued that one of the court's gate-keeping functions is to determine the permissible scope of the expert's testimony of "incriminatory observations in arriving at [the experts] opinion including incriminatory statements by the defendant." *Id*; quoting *State v. Hutchinson I*, 111 Wn.2d 872, 766 P.2d 447 (1989).<sup>22</sup> The State argued that "anything done or said by the defendant is relative to the mental condition and, thus admissible." CP 474-496; RP(4/9/08) 87-106, 109-116, 122-125.

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<sup>22</sup> The defense also argued that incriminating statements made by a defendant during a compelled psychiatric examination may not be used to cross-examine the defense psychiatrist. CP 421 – 427; (RP 4/9/08) 65 – 79; 84 – 87; 116 -122.

During pretrial hearings, the court adopted the position that a balancing analysis should be employed to determine what is characterized as “incriminating.” RP(4/10/08) 108–132.

After reviewing the transcript of Dr. Wheeler’s interview *in camera*, RP(4/29/08) 37–38,<sup>23</sup> and his in court testimony RP(4/24/08) 137; RP(4/29/08); 27-28; 68 – 94, the court ruled initially:

A statement should not be ruled incriminating merely because it tends to show the defendant was capable of forming the crime’s requisite mental state. On the other hand, an expert should not be allowed to testify to a defendant’s incriminating statement, e.g., confessions or admissions that he or she committed the crime charged.

This distinction will not always be easy to apply, but it balances the defendant’s right to be free from self-incrimination with the State’s interest in disclosure, the only effective means it has of controverting a defendant’s proof on an issue that he injected into the case.

RP(4/29/08) 94-95.

The court ultimately concluded that the state must have access to the defendant, and any information used by the defense expert to reach his opinion as to the defendant’s sanity or insanity, mental state or ability to form a mental state is not incriminating, although it may be used to prove the defendant’s guilt. *Id.* at 95. The court, however, acknowledged that confessional admissions about the *actus reas* are incriminating. *Id.*

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<sup>23</sup> The transcript of Dr. Wheeler’s interview with Mr. Haq was marked as Pre-Trial Exhibit No. 18.

After the first trial resulted in a hung jury, and before the second trial began, the trial court ruled that all statements by Mr. Haq during the compelled interview would be admissible:

Having heard the testimony of defense expert, Dr. Missett, and considered all of the topical area Dr. Missett discussed with the defendant and considered in arriving at his conclusions, all statements made by the defendant to Dr. Wheeler are available for direct testimony and cross-examination of the mental health expert.<sup>24</sup>

CP 8561 – 8570 ¶ 30.

The trial court erred in concluding that all statements, including incriminating statements, made by Mr. Haq during his compelled evaluation were admissible. This error was even more unfairly prejudicial because the state's expert was routinely allowed to play, as part of his power-point presentation, the actual audio recordings of Mr. Haq's compelled evaluation even though the content of the interview, and not Mr. Haq's demeanor or tone during the interview, was considered relevant by Dr. Wheeler's opinion.<sup>25</sup>

Washington courts are careful to balance the competing interests of

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<sup>24</sup> This order is somewhat unclear as it suggests the trial court may have based its ruling, in part, on the testimony of Dr. Missett during the first trial that resulted in a hung jury.

<sup>25</sup> There is nothing in the record that suggests Dr. Wheeler reached his opinion based on the tone or inflection of Mr. Haq's voice, thus making the audio recording relevant. In fact, Dr. Wheeler indicated that it was the content of Mr. Haq's statements that was considered as part of the basis for his opinion. Consequently, playing the audio recording of Mr. Haq making incriminating statements were not relevant to Dr. Wheeler's opinion, but had the prejudicial affect of reinforcing the impermissible incriminating statements.

full disclosure and protection of a defendant's right against self-incrimination when a criminal defendant's mental state is at issue. *See e.g., Hutchinson I*, 111 Wn.2d 872 (1989); *State v. Brewton*, 49 Wn.App. 589, 744 P.2d 646 (1987). An expert who conducts a compelled examination may testify to "non-incriminatory" observations and conclusions, but may not relate "incriminatory" statements or express "incriminatory" opinions. *Hutchinson II*, 135 Wn.2d 863 (1998)(quoting *State v. Craney*, 347 N.W.2d 668, 673 (Iowa, 1984). The *Hutchinson II* court went on to hold that an expert should not be permitted to testify to a defendant's incriminating statements, e.g., confessions or admissions that he or she committed the crime charged. *Hutchinson II*, 135 Wn.2d at 878. Also inadmissible is testimony derived from the expert's "incriminatory observations in arriving at his opinions." *Hutchinson I*, 111 Wn.2d at 883.

Here the trial court ruled that all of Mr. Haq's statements that were derived during a compelled interview were admissible. Equipped with this invitation, the state took full advantage, eliciting testimony of its expert, Dr. Wheeler, about any and everything Mr. Haq said.

Dr. Wheeler's testified about statements that undoubtedly fall within the category of "incriminating." Moreover, in addition to testifying about what Mr. Haq said, Dr. Wheeler was permitted to play audio portions of his interview with Mr. Haq during his slide presentation,

including clips of Mr. Haq explaining that at the time he purchased the weapons he was feeling enraged and suicidal because of the failures in his life – his inability to hold a job, his being forced to live in subsidized housing, his inability to even find a job in his profession. RP(12/3/09) 171-172.

Dr. Wheeler focused on Mr. Haq telling him that he looked on the Jewish sites because he started thinking about his political activism and what could be done to bring this bad foreign policy to the American public's attention. RP(12/7/09) 17.<sup>26</sup> Dr. Wheeler's slides included, for further examples, audio clips of Mr. Haq saying he that he did not bring the shot gun because it would scare people to see him with it in Seattle and that he wanted his mission to be a suicide mission RP(12/7/09) 31-64. The audio clips included Mr. Haq saying when the woman said call 911 it triggered a feeling of rage and he blew up. RP(12/7/09) 66-73. A recording was played of Mr. Haq saying that people were running and he just started shooting, that he tried to stop the trigger but he shot her and then the other woman. RP(12/7/09) 78-81. Dr. Wheeler attempted to downplay the less incriminating statements. RP(12/7/09) 82.

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<sup>26</sup> He had to agree, however when questioned by defense counsel, that Mr. Haq also said that when he saw the Jewish Federation website, it popped into his mind, maybe he should go on a mission, but that he was not exactly sure what the mission was, but the thought took control of him. RP(11/7/09) 19.

Dr. Wheeler’s testimony is flush with incriminating statements that were derived during a court-compelled mental health examination. The trial court was tasked with “balancing the defendant’s right to be free from self-incrimination with the State’s interest in disclosure.” *Hutchinson II*, 135 Wn.2d at 879. The court failed to properly make this distinction when it ruled that “all statements made by the defendant to Dr. Wheeler are available for direct testimony and cross-examination of the mental health expert.” CP 8561 – 8570, ¶ 30.

**V. RCW 10.77.020(5) VIOLATES THE SEPARATION OF POWERS DOCTRINE BECAUSE THE LEGISLATURE ENCROACHED ON THE DISCRETION OF THE JUDICIARY BY MAKING THE EXCLUSION OF EVIDENCE MANDATORY.**

A court’s core judicial function is its power to determine the admissibility of evidence. In amending RCW 10.77.020(5), the Legislature, by requiring the mandatory exclusion of certain evidence, violates the separation of powers. RCW 10.77.020(5) reads:

*In a sanity evaluation conducted under this chapter, if a defendant refuses to answer questions or to participate in an examination conducted in response to the defendant's assertion of an insanity defense, the court shall exclude from evidence at trial any testimony or evidence from any expert or professional person obtained or retained by the defendant.*

(emphasis added).

Washington State's state constitution divides the political power of the government between three equal branches. Implicit in this distribution is the separation of powers doctrine, the purpose of which is to secure the core functions of each branch against encroachment by the other two branches. *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002).

The Washington Constitution does not contain a formal separation of powers clause; “[n]onetheless, the very division of our government into different branches has been presumed throughout our state history to give rise to a vital separation of powers doctrine.” *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009), (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). The doctrine does not require that the three branches be hermetically sealed off from one another, however. *Carrick v. Locke*, 125 Wn.2d at 135. Some overlap is required to “maintain an effective system of checks and balances.” *Id.* Accordingly, the test for deciding whether “one branch of government [is] aggrandizing itself or encroaching upon the ‘fundamental functions of another’ is ‘not whether the two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.’ ” *Moreno*, 147 Wash.2d at 505-06, 58 P.3d 265 (quoting *Carrick*, 125 Wash.2d at 135, 882 P.2d 173).

The authority of Washington's Supreme Court derives from Article

IV of the state constitution and from the legislature under RCW 2.04.190. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 389, 143 P.3d 776 (2006). Article IV provides the judiciary with the power to promote the effective administration of justice by governing court practice and procedure. *Jensen*, 158 Wash.2d at 394. “Practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.” *Jensen*, 158 Wash.2d at 394, (quoting *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974)).

Under RCW 2.04.190, the Supreme Court has the power “to prescribe ... the mode and manner of ... filing proceedings and pleadings; of giving notice ... and process of all kinds; *of taking and obtaining evidence*; of ... entering ... orders and judgments; and generally to regulate ... by rule the forms for ... the entire pleading, practice, and procedure to be used in all suits, actions, appeals and proceedings...” (Emphasis added). Accordingly, “[t]he adoption of the rules of evidence is a legislatively delegated power of the judiciary.” *Jensen*, 158 Wn.2d at 394, 143 P.3d 776. This includes the power to determine the admissibility of evidence. *Ludvigsen v. City of Seattle*, 162 Wn.2d 660, 671, 174 P.3d 43 (2007).

The authority of the legislature to enact evidence rules has been recognized since statehood. *State ex rel. Foster-Wyman Lumber Co. v.*

*Superior Court for King County*, 148 Wash. 1, 4, 267 P. 770 (1928).

Hence, both branches may promulgate rules of evidence.

In light of this overlap, “[w]hen a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both.” *Jensen*, 158 Wn.2d at 394. But when rules and statutes cannot be harmonized, “the nature of the right at issue determines which one controls.” *State v. W.W.*, 76 Wn.App. 754, 758, 887 P.2d 914 (1995). Thus, “[w]henver there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power, the court rule will prevail.” *Jensen*, 158 Wn.2d at 394.

Recently, the Court of Appeals, Division I, addressed a separation of powers argument regarding RCW 10.58.090, which permits: “In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.” *State v. Gresham*, 153 Wn.App. 659, 223 P.3d 1194 (2009). The defense lodged a separation of powers claim because RCW 10.58.090 conflicted with Evidence Rule 404(b) expressly and impliedly.<sup>27</sup>

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<sup>27</sup> The implied conflict arises from the absence of any language in the statute limiting the purposes for which past acts evidence may be admitted, while ER 404(b) limits use of past acts evidence for specific purposes only, such as proof of motive, opportunity, intent,

The *Gresham* court, looking at *Jensen* as guidance, found no separation of powers violation. In *Jensen*, the court considered whether a statute governing the admissibility of blood alcohol content (BAC) test results in driving under the influence of an intoxicant (DUI) prosecutions, RCW 46.61.506(4)(a), violated the separation of powers doctrine. The statute provided, “A breath test performed by any instrument approved by the state toxicologist *shall be admissible* at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of [a list of exclusive factors].” (Emphasis added.) The statute, RCW 46.61.506(4)(c) continued:

Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

The *Jensen* court rejected the argument that the legislature impermissibly attempted to regulate court procedure by mandating admission of BAC tests results once the State met its *prima facie* burden because the statute merely established reliability standards:

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and the like. According to *Gresham*, this absence of any limiting language means that evidence may be admitted under RCW 10.58.090 for purposes prohibited by ER 404(b). *Gresham*, 153 Wn.App. at 667.

[O]nce reliability of the test is established by a prima facie showing from the State, all other challenges concerning the accuracy or reliability of the test, the testing instrument, or the maintenance procedures necessarily go to the weight of the test results. That is, *the trial court may still utilize the rules of evidence, including ER 702, to determine if the BAC test results will be admitted.*

*Gresham*, 153 Wn.App. at 668; *Jensen*, 158 Wn.2d at 397-98 (emphasis added in *Grisham*).

In essence, the *Jensen* court reasoned that the statute did not deprive the court of a core judicial function - the power to determine admissibility of evidence in an individual case because the statute was permissive, not mandatory, and can be harmonized with the rules of evidence. *Id.*; see also *State v. Long*, 113 Wash.2d 266, 778 P.2d 1027 (1989) (“There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence. The legislature is not invading the prerogative of the courts, nor is it threatening judicial independence”).

Using the same analysis framework, the *Gresham* Court concluded that RCW 10.58.090 is permissive, preserving to the court authority to exclude evidence of past sex offenses under ER 403, thus the challenge to the statute fails. *Gresham*, 153 Wn.App. at 665-670.

In contrast RCW 10.77.020(5) is mandatory, not permissive. When reading a statute, courts will not construe language that is clear and

unambiguous, but will instead give effect to the plain language without regard to rules of statutory construction. *State v. Silva*, 106 Wn.App. 586, 591, 24 P.3d 477, 480 (2001). And in the absence of a specific statutory definition, this Court will give words their ordinary meaning, which it may determine by referring to a dictionary definition. *State v. Standifer*, 110 Wn.2d 90, 92, 750 P.2d 258 (1988); *Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986) (in an unambiguous statute, the court will give words their plain and obvious meaning).

Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly. CrR 4.7 provides the trial court with the sound discretion in determining whether evidence should be suppressed or excluded. *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). This discretion is legislatively removed by RCW 10.77.020(5)'s mandatory language. In fact, RCW 10.77.020(5) mandates complete exclusion of any defense expert or professional, regardless of whether the testimony or evidence is related to the issue of NGRI (“the court shall exclude from any evidence from *any testimony or evidence from any expert or professional person obtained or retained by the defendant.*”) (emphasis added).

Because of the mandatory directive of RCW 10.77.020(5), the legislature has deprived the court of its core judicial function of

determining admissibility of evidence in an individual case. As a result, RCW 10.77.020(5) violates the separation of powers.

**VI. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ABOUT THE NEED FOR A SEPARATE AND DISTINCT INTENT FOR THE BURGLARY AGGRAVATING FACTOR; BECAUSE THE STATE CONCEDED THAT THERE WAS NO INDEPENDENT INTENT, THE AGGRAVATOR SHOULD BE DISMISSED AND VACATED.**

The defense position at trial that to establish the burglary aggravating factor, the sole aggravating factor charged against Mr. Haq, the state had to prove that the burglary was not merely incidental to the murder, and on that basis moved to dismiss the aggravating factor. CP 643-654. Although the trial court denied the defense motion to dismiss the aggravator, the court, in the first trial, gave a jury instruction requested by the defense, based on *State v. Hacheney*, 160 Wn.2d 503, 158 P.3d 1152 (2007), making it clear that to find the burglary aggravating factor proven, the jury must find that the intent element of the burglary was not just the intent to commit the murder:

For purposes of the aggravating circumstances, the intent to commit the crime therein cannot be the intent to commit the crime of murder or attempted murder against any person within the Jewish Federation building, or an assault against Pam Waechter.

CP 2227-2228.

At the second trial, the prosecution, citing *State v. Howland*, 66 Wn.

App. 586, 832 P.2d 1339 (1992), asked the trial judge to exclude the instruction or any other instruction requiring the jury to find that the intent of the burglary had to be independent of the murder.<sup>28</sup> RP(12/2/09) 191-197; RP(12/8/09) 117-119. The trial court granted the state's request. RP(12/8/09) 119-120.

The state conceded that it could not prove any intent for the burglary other than the murder, and the court ruled that if the defense was correct about the law, the case should be remanded to dismiss the aggravating factor. CP 2081-2083; RP(12/8/09) 116-120.

Because the court was wrong about the law, Mr. Haq's case should be remanded for dismissal of the aggravating factor.<sup>29</sup> The Court of Appeals, in *Howland*, rejected the analysis of the California court in *People v. Green*, 27 Cal.3d 1, 164 Cal.Rptr. 1, 609 P.2d 468 (1989),

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<sup>28</sup> The defense proposed the instruction:

For the purposes of the aggravated circumstances, there must be more than coincidence between the time and place between the burglary and the murder. The murder must advance an independent felonious purpose of the burglary. The burglary must be independent of the underlying murder and not an integral part of the murder. The burglary must have an independent purpose and effect from the murder and not be merely incidental to the murder.

CP 2084-2086, 2227. The defense also proposed a Special Verdict Form: "Did the burglary have an independent purpose and effect from the murder, as opposed to being incidental to the murder?" CP 2084-2086, 2227.

<sup>29</sup> The defense moved for an arrest of judgment and new trial based on the court's refusal to give the requested instruction or special verdict form, and the court denied the motion. CP 2226-2252; RP(1/14/10) 165.

*overruled on other grounds by People v. Dominguez*, 39 Cal.4th 1141, 47 Cal.Rptr.3d 575, 140 P.3d 866 (2006). *Howland*, 66 Wn. App. at 592-593.. The Washington Supreme Court in *Hacheny*, expressly relied on the *Green* analysis, effectively overruling *Howland*. *Hacheny*, 160 Wn.2d at 516-517,

The Washington Supreme Court in *Hacheny* set out the law on the aggravating factor “in the course of, in furtherance of, or in immediate flight from” another felony. First, the *Hacheny* court relied on the rule set out in *State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191 (1970), *overruled on other grounds*, *State v. Arndt*, 87 Wn.2d 374, 378, 553 P.2d 1328 (1976), that the homicide must occur when the accused is acting with intent to commit some crime other than the murder and the killing occurs while carrying out that intent:

It may be stated generally that a homicide is committed in the perpetration of another crime, when the accused, intending to commit some crime other than the homicide, is engaged in the performance of any one of the acts which such intent requires for its full execution, and, while so engaged, and within the *res gestae* of the intended crime, *and in consequence thereof, the killing results.*

*Hacheny*, 160 Wn.2d at 514 (quoting *Golladay*. 78 Wn.2d at 131 and *State v. Diebold*, 152 Wash. 68, 72, 277 P. 394 (1929) (emphasis added in *Hacheny*). Further, “for the homicide to have been committed in the course of the felony, the causal connection had to run such that the death

was the probable consequence of the felony, but not the other way around.” *Hacheny*, at 515.

Although *Golladay* was a felony murder case, the *Hacheny* court noted that “in both circumstances the defendant’s culpability *for the killing* is enhanced because the killing occurred ‘in the course of’ an enumerated felony” and declined to distinguish between the felony murder and aggravated murder in analyzing the aggravated murder statute. *Hacheny*, at 515.

Second, the *Hacheny* court looked to the decision of the California Supreme Court in *People v. Green*, 27 Cal.3d 1, 164 Cal.Rptr. 1, 609 P.2d 468 (1989), *supra.*, which held that “when the legislature characterized murders committed ‘during the commission’ of an enumerated felony as aggravated, it intended to allow the death penalty for those ‘who killed in cold blood in order to advance an independent felonious purpose.’” *Hacheny* at 517-518 (quoting *People v. Green*, 609 P.2d at 505). “Thus, where the murder was the primary crime and the felony was incidental . . . . imposition of aggravating circumstances was inappropriate.” *Hacheny* at 518; *People v. Green*, 609 P.2d at 505-506.

In electing to apply the rules articulated in *Golladay* and *People v. Green*, the court concluded that this rule was consistent with the plain language of the statute and concluded that a “person is guilty of

aggravated first degree murder if the *murder* was committed ‘in the course of’ an enumerated *felony* . . . *not* if the enumerated felony is committed in the course of the murder.” *Hachenev* at 518. Further, the court held that even if the phrase “in the course of” were ambiguous, the rule of lenity would dictate that the aggravating circumstances be construed narrowly “where their application determines the imposition of our most severe penalties, death or life without possibility of release.” *Hachenev*, at 519.

The court concluded:

The plain language of the aggravated first degree murder statute does *not* provide that the aggravating circumstance applies if the felony occurred in the course of the murder. Even if we were to find the term “in the course of” to be ambiguous, the rule of lenity dictates the narrow construction of aggravating circumstances.

*Hachenev*, at 520.

In reaching this conclusion, the *Hachenev* court acknowledged that other jurisdictions had “opted for a broader reading of their aggravated murder statutes,” but rejected such an approach. *Hachenev* at 516-518. In rejecting this approach, the court implicitly rejected the decision in *Howland*.

The constitutional underpinnings of the *Hachenev* decision began with *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), in which the United States Supreme Court held that the arbitrary

imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. To be constitutional, the state's sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman*, 408 U.S. at 313 (White, J., concurring).

Similarly, in *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), the Court held that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."

Under this authority, to be aggravated murder, the premeditated first degree murder had to have been committed while Mr. Haq was acting with intent to commit some other crime, burglary, and while engaged in committing the burglary and as a consequence of committing the burglary, the killing occurred. Death had to be the consequence of the burglary not the other way around: the burglary could not be merely incidental to the murder without an independent felonious purpose. The murder had to be committed in the course or furtherance of the independent burglary, not the burglary committed in the course or furtherance of the murder.

The state admitted that it could not prove more than that the

burglary was committed to further the murder or that the burglary had any independent felonious purpose other than the intent to commit a murder. RP(12/9/09) 116-117. The trial court erred in refusing to give an instruction and verdict form which required that the jury find such an independent purpose. Because of the state's concession and the court's ruling, however, it is not necessary to remand the case for retrial on the aggravating factor since it can be dismissed at resentencing.

**VII. IMPROPER OPINION TESTIMONY AS TO GUILT DENIED MR. HAQ HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL.**

The many instances of improper opinion testimony and testimony on the credibility of witnesses denied Mr. Haq his state and federal constitutional rights to a fair trial.

The Sixth Amendment to United States Constitution guarantees the right to a jury trial, and the Washington State Constitution provides that the right to a jury trial is "inviolable," Article. 1, Sections 21 and 22. "The right to have factual questions decided by the jury is crucial to the right to trial by jury." *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.2d 267 (2008) (citing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989)). "To the jury is consigned under the constitution, 'the ultimate power to weigh the evidence and determine the facts.'" *Montgomery*, 163 at 590 (quoting *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878

(1971)).

For this reason, expression of personal belief as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses, is “inappropriate for opinion testimony in criminal trials,” even for expert witnesses.<sup>30</sup> *Montgomery*, at 591 (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007), *State v. Farr-Lenzini*, 93 Wn. App. 453, 463, 970 P.3d 313 (1999)). “No witness, lay or expert, may testify to his opinion as to the guilt of the defendant, whether by direct statement or inference.” *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (testimony that the victim fit a rape trauma profile constituted impermissible opinion as to the defendant’s guilt); *United States v. Lockett*, 919 F.2d 585, 590 (9th Cir. 1990) (citing *United States v. Kinsey*, 843 F.2d 383, 388 (9th Cir.), *cert. denied*, 488 U.S. 836 (1988)). In criminal cases, experts are not allowed to testify that the defendant had the mental state constituting an element of the crime charged. *Weinstein’s Federal Evidence*, § 794.02 (2005) (citing *United States v. Morales*, 108 F.3d 1031, 1037-1038 (9th Cir. 1997)). “Such an opinion violates the defendant’s right to a trial by an impartial

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<sup>30</sup> As the *Montgomery* court noted:

This rule is well-grounded in the rules of evidence. Testimony that tells the jury which result to reach is likely not helpful to the jury (as required by ER 702), is probably outside the witness’s area of expertise (in violation of ER 703), and is likely to be unfairly prejudicial (in violation of ER 403). *Montgomery*, 163 Wn.2d at 591 n.5.

jury and her right to have the jury make an independent evaluation of the facts.” *State v. Sanders*, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992).

In *Montgomery*, the Court noted that trial attorneys have a duty to prepare witnesses in a manner which will assure that impermissible opinions as to guilt are not injected into the trial and a duty to avoid inviting such opinions during questioning. *Montgomery*, at 592.

“Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a ‘manifest’ constitutional error.” *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009) (quoting *Kirkman*, 159 Wn.2d at 936). “But, ‘an explicit or nearly explicit’ opinion on the defendant’s guilt or a victim’s credibility can constitute manifest error.” *King*, 167 Wn.2d at 332 (quoting *Kirkman*, at 936). As the Court stated in *King*:

We have previously said an appellate court must approach claims of constitutional error asserted for the first time on appeal by first “satisfy[ing] itself that the error is truly of constitutional magnitude — that is what is meant by ‘manifest.’” *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). “If the claim is constitutional, then the court should examine the effect the error had on the defendant’s trial according to the harmless error standard set forth in *Chapman v. California*” *Id.*; see *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (holding that before an error can be held harmless, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant’s conviction).

*King*, 167 Wn.2d at 333, n.2.

“To determine whether statements are impermissible opinion testimony, the court will consider the circumstances of the case, including” (1) ‘the type of witness involved,’ (2) ‘the specific nature of the testimony,’ (3) ‘the nature of the charges,’ (4) ‘the type of defense,’ and (5) ‘the other evidence before the trier of fact.’” *King*, at 332-333, quoting *City of Seattle v. Heatley*, 70 Wn.App. 573, 579, 854 P.2d 658 (1993) and *Kirkman*, 159 Wn.2d at 928)).

Examples of improper opinion testimony which constituted manifest constitutional error include testimony that the defendant’s wife believed a child’s allegations of abuse against him, *State v. Johnson*, 152 Wn.App. 924, 219 P.3d 958 (2009); *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (expert’s testimony that the child was not lying about sexual abuse, was effectively testimony that the defendant was guilty); *State v. Black*, 109 Wn.2d at 349 (expert testimony that the victim suffered from rape trauma syndrome constituted “in essence” a statement that the defendant was guilty); *State v. Florczak*, 76 Wn. App. 55, 73-74, 882 P.2d 199 (1994) (expert testimony that the victim suffered from post traumatic stress syndrome secondary to sexual abuse was an opinion that the defendant was guilty).

Here, the trial was riddled with state’s witnesses offering their

opinion that Mr. Haq was guilty. Officer Collins referred to Ms. Waechter as the “woman who had been *executed*,” and described the gunman at the Federation as being “an active shooter, which means he was *hunting* for people and shooting them as he found them.” (emphasis added) RP(10/26/09) 53, 77. His testimony was, thus, not only emotionally charged, it expressed Officer Collins’s opinion that Mr. Haq was guilty of acting with intent in “executing” Ms. Waechter and had premeditatedly hunted for people to shoot.

Homicide Detective Al Cruise gave his opinion, in direct violation of the trial court’s in limine ruling, that “it was apparent to me that he wasn’t acutely insane.” RP(11/2/09) 42, 67. Although the court struck the testimony, it was a direct opinion that Mr. Haq was legally sane at the time of the shooting and the type of opinion testimony likely to remain in the minds of the jury. When considered along with Officer Collins’s testimony and the un-objected-to profile testimony by SWAT team member Timothy Paskernak that Mr. Haq fit the profile of an “active shooter” who would have a “very good plan” and would look for and shoot people until someone intervened, the unfair prejudice of the testimony was overwhelming. It was also tantamount to telling the jury that a number of Seattle Police Officers who were at the scene determined that Mr. Haq was sane, had premeditated and was guilty as charged.

Further, the state's experts on Mr. Haq's mental illness also impermissibly gave their opinions. State's expert psychiatrist Dr. Victor Reus gave his opinion both as to guilt and as to the credibility of the state's psychological expert Dr. Robert Wheeler. Dr. Reus described Dr. Wheeler's report as beautiful, "outstanding" and "incredibly detailed and informative." RP(12/1/09) 109-110. In this way, Dr. Reus bolstered his own testimony as well as Dr. Wheeler's since he relied on Dr. Wheeler's report and never personally interviewed or was able to diagnose Mr. Haq.<sup>31</sup> RP(12/1/09) 119, 122.

Over defense objection, Dr. Reus gave his opinion that buying the shotgun and knife and Mr. Haq's choice of ammunition "go to the heart of premeditation and intent." RP(12/2/09) 18-19. In fact, except for his testimony that Mr. Haq's medication was appropriate RP(12/1/09) 134-173), and his review of the notes of Ms. Lusch and Mr. Jones (RP(12/2/09) 4-16), Dr. Reus primarily went through the state's evidence and gave his opinion that everything from going on the Internet to memorizing the address of the Federation showed intent and premeditation, and concluded this review with his explicit opinion that

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<sup>31</sup> Dr. Reus did not testify at the first trial and the defense objected to his testifying at the second trial both because he was not endorsed as a witness until shortly before the second trial and because of concerns that he was in fact making a diagnosis that Mr. Haq had a personality disorder which he could not ethically make since he had not interviewed Mr. Haq. CP 1518-1528.

“[h]e’s shooting I think with intent.” RP(12/2/09) 11-30. The trial court sustained an objection to this direct opinion testimony as to guilt but denied a mistrial. RP(12/2/09). Then Dr. Reus reinforced the stricken testimony by rendering his opinion that Mr. Haq had the capacity to form intent for each bullet fired and that “I think he understood that [what he was doing] at the time.” RP(12/2/09) 36-37. When the defense objection to the later statement was sustained, Dr. Reus again testified that in his opinion Mr. Haq retained the capacity to understand. RP(12/2/09) 38. The jury heard his direct opinion testimony that Mr. Haq premeditated and intended his actions and his testimony that Mr. Haq had the capacity to premeditate and intend.

Dr Reus also stated that at he did not “place much credence” in Mr. Haq’s statements about going on a mission or hearing the words “awesome” or “murder.” RP(12/2/09) 49. Similarly, Dr. Wheeler gave his opinion that when Mr. Haq made exculpatory statement during an interviews, those statements could not be taken “at face value” and “retroactive rationalization.” RP(12/3/09) 121-122. Thus, both commented directly on Mr. Haq’s credibility and were expressions of their opinions as to guilt.

Dr. Wheeler also gave his direct opinion as to guilt. During his presentation, when a portion of his interview with Mr. Haq was played

describing hearing a voice in his head saying “murder” when he saw Pam Waechter, Mr. Wheeler added that “it certainly was an accurate characterization of what had occurred.” RP(12/7/09) 134-135.

The opinion testimony as to guilt, both that which was objected to and that which was not, constituted constitutional error. All five of the witnesses who gave opinion testimony as to guilt were experts, police and mental health experts. Their testimony was explicit and clearly conveyed to the jury their opinions that Mr. Haq was guilty. The opinion testimony also went to the heart of Mr. Haq’s insanity defense. It was particularly prejudicial because the focus of the police officer’s testimony was about the crucial time of the shooting, and they represented, at least in theory, the most reliable and dispassionate witnesses of Mr. Haq’s behavior and demeanor at that time. The opinions of the mental experts were also particularly prejudicial because the jury had no way of assessing the impact of his mental disease at the time of the shootings except through expert testimony. When the experts merely told the jury what to decide – for example – that all of Mr. Haq’s actions during the week before the shooting “went to” premeditation and intent – the experts were not aiding the jurors in understanding Mr. Haq’s mental disorder. They were usurping the function of the jury.

The improper opinion testimony by state’s experts was

constitutional error, not harmless beyond a reasonable doubt and denied Mr. Haq a fair trial.

**VIII. DR. REUS'S IMPROPER TESTIMONY ABOUT IMPORTANT, HIGH-FUNCTIONING PEOPLE HE HAD HEARD OF WHO ARE BIPOLAR WAS IRRELEVANT HEARSAY EVIDENCE SO UNFAIRLY PREJUDICIAL THAT IT DENIED MR. HAQ HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.**

Dr. Reus's testimony that he knew of persons who were bipolar – including a judge, a surgeon, and members of Congress – who could function at high level was stricken and the jury admonished that:

Before the break, you heard testimony regarding specific individuals, including a Jonathan Nash, a surgeon, a judge and several members of Congress. You are instructed to disregard that testimony about those individuals and their claimed mental illnesses and any claimed impact the alleged mental illnesses had on those individuals' functioning.

RP(12/1/09) 126-128, 146.

This hearsay and irrelevant testimony improperly implied Dr. Reus's opinion that Mr. Haq was legally sane at the time of the shooting. Even though stricken, it was so unfairly prejudicial that it denied Mr. Haq the right to a constitutionally fair trial. The testimony was irrelevant because it was completely unreliable and introduced without any showing that the persons described actually had a mental illness or a mental illness similar to Mr. Haq's. As such, it had no "tendency to make the existence of any fact that is

of consequence to the determination of the action more probable or less probable that it would be without the evidence.” ER 401. The testimony was hearsay because there was no evidence that Dr. Reus had first-hand knowledge of these cases, or that he had diagnosed, treated or even met the people he testified about. ER 801.

It is a given that the testimony was inadmissible since Judge Kallas sustained an objection to it and instructed the jury to disregard it. Unfortunately, this was the type of evidence that the jury was unlikely to set aside – that persons seemingly with the same mental illness as Mr. Haq not only were able to live normal lives, they were able to perform the most important and demanding jobs. This went to the heart of Mr. Haq’s defense and was not cumulative of any other evidence. Nothing short of a new trial would cure the prejudice of this expert testimony on the critical issue at trial.

As set out in *State v. Gamble*, 168 Wn.2d 161, 177, 255 P.3d 973 (2009) (quoting *State v. Thompson*, 90 Wn.App. 41, 47, 950 P.2d 977 (1998)), “ultimately the question is ‘whether . . . viewed against the background of the evidence, ‘ the improper testimony was so prejudicial that the defendant did not get a fair trial.’” Here, as in *State v. Escalona*, 49 Wn.App. 251, 256, 742 P.2d 190 (1987), where the court reversed a conviction even though the testimony was stricken and a curative instruction given, “despite the court’s admonition, it would be extremely difficult, if not

impossible, in this case for the jury to ignore this seemingly relevant fact.”

In *Escalona*, the jury heard that the defendant who was on trial for assault with a knife had previously stabbed someone. *Esacolona*, 49 Wn. App. at 254. Here, the evidence was that a mental disease such as Mr. Haq’s was no barrier to functioning well, even in a most stressful and responsible job. The introduction of this evidence denied Mr. Haq his right to a fair trial. The case was very close – the first trial ended in a hung jury on all counts but one – and testimony such as Dr. Reus’s likely had a significant impact on the jury at the second trial. Nothing short of a new trial can cure the prejudice.

**IX. IMPROPER EXPERT STATEMENTS OF THE LAW  
INVADED THE PROVINCE OF THE JUDGE AND  
DENIED MR. HAQ HIS STATE AND FEDERAL  
CONSTITUTIONAL RIGHT TO HAVE BE TRIED  
BEFORE A PROPERLY INSTRUCTED JURY.**

It is the duty of the trial judge to instruct the jury. *State v. Sanchez*, 122 Wn.App. 579, 589-590, 94 P.3d 384 (2004). Even though jurors are presumed to follow instructions, the failure of the trial judge to read an instruction to the jury or the trial judge’s giving of an erroneous, ambiguous or misleading instruction invalidates that presumption. (citing *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998) and citing *Ho v. Carey*, 332 F.3d 587, 593-95 (9th Cir. 2003)). Even a proper written instruction cannot cure an erroneous oral instruction. *Ho*, 332 F.3d at 593-594.

For this reason among others, only the judge can properly instruct the

jury. As aptly stated by the court in *United States v. Caputo*, 517 F.3d 935, 942 (7th Cir. 2008), in affirming the exclusion of expert testimony about the meaning of statutes and regulations, “That’s a subject for the court, not for testimonial experts. . . . The only legal expert in a federal courtroom is the judge.” Accordingly, legal opinions and conclusions of experts are inadmissible. *Stenger v. State*, 104 Wn.App. 393, 409, 16 P.3d 655 (2001); *King County Fire Protection District 16 v. Housing Authority of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); *Orian Corp. v. State*, 103 Wn.2d 441, 462, 693 P.2d 369 (1985).

It is well settled that expert witnesses invade the province of the judge by testifying about the law:

Expert testimony is properly admissible when it serves to assist the trier of fact to understand the evidence or determine a fact in issue. *United State v. Brodie*, 858 F.2d 492, 496 (9th Cir. 1988).<sup>32</sup> It is well settled, however, that the judge instructs the jury in the law. *Id.* Resolving doubtful questions of law is the distinct and exclusive province of the trial judge. *Id.* at 497.

*United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993), *cert denied sub non. Mariani v. United States*, 115 S. Ct. 939 (1995), *See also, United States v. Boulware*, 558 F.3d 971, 975 (9th Cir. 2009) (expert opinion that the defendant’s corporate distributions were legally non-taxable was

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<sup>32</sup> *Brodie* was overruled on other grounds in *United States v. Morales*, 108 F.3d 1031, 1033 (9th Cir. 1997) (en banc).

impermissible legal opinion); *National Transp. Finance v. Cass Information Systems*, 523 F.3d 1051, 1058-1060 (9th Cir. 2008) (expert's testimony about how UCC applied to the facts of case and that defendant violated the UCC were properly excluded; expert's legal conclusion invaded the province of the judge and constituted erroneous statements of the law).<sup>33</sup>

In *Hygh v. Jacobs*, 961 F.2d 359, 364 (2nd Cir. 1992), the court noted, in particular, that

even if a jury were not misled into adopting a legal conclusion proffered by an expert opinion, the testimony would remain objectionable by communicating a legal standard -- explicit or implicit -- to a jury. (citations omitted). Whereas an expert may be uniquely qualified by experience to assist the trier of fact, he is not qualified to compete with the judge in the function of instructing the jury.

Where the statement is an erroneous statement of the law, it is "not only superfluous, but mischievous." *Nationwide Transit Finance v. Cass Information Systems, Inc.*, 523 F.3d 1051 (9th Cir. 2008) (quoting *Brodie*, 858 F.2d at 497).

First, over defense objection, Dr. Reus presented slides in his PowerPoint presentation defining insanity, premeditation and intent.

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<sup>33</sup> Other federal circuits have similarly concluded that expert testimony which expresses legal conclusions is improper and inadmissible. *Hygh v. Jacobs*, 961 F.2d 359 (2nd Cir. 1992); *United States v. Scop*, 846 F.2d 135, 140 (2nd Cir. 1988) (expert opinion that the defendant's conduct established a violation of securities law constituted an invasion of the duty to instruct); *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985); *Strong v. E.I. DuPont de Nemours Co.*, 667 F.2d 682, 685-86 (8th Cir. 1981); *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 510-512 (2nd Cir.), *cert. denied*, 434 U.S. 861 (1977) (legal opinion on meaning of contract terms an invasion of the duty to instruct).

RP(12/1/09) 95. The court allowed this evidence because the state agreed to make it clear that the prosecution had provided the definitions not Dr. Reus. RP(12/1/09) 126-128, 132, 149. This clarification, however, did not help. As stated by defense counsel, this merely interjected the state as un-sworn and un-cross-examined witnesses into the case, in violation of the Sixth Amendment right of Confrontation. RP(12/1/09) 144. Moreover, if the definitions of these elements of the crime and affirmative defense differed from the definitions ultimately given by the court in instructing the jury, they would have been objectionable and misleading for that reason. It is improper to instruct with an erroneous statement of the law. *Nationwide Transit Finance, supra*. Thus, the court is either bound by the instructions and definitions given by the prosecutor and witness, or the testimony during trial by the witness is erroneous; in either case the witness has usurped the role of the judge.

Dr. Reus not only invaded the province of the trial court by providing definitions of elements of the crime; his testimony also contained clearly erroneous statements of the law. He used what he described as the “legal question” – did Mr. Haq’s mental disorder make him “at this particular point in time of the event . . . unable to perceive the nature and quality of the acts with which he’s charged or unable to tell right from wrong” – to describe the psychiatric question -- whether his mental condition “which waxes and

wanes” was present at the time. RP(12/1/09) 131-132. In this way, Dr. Reus communicated that the legal standard dictated that the factual question was whether Mr. Haq’s mental disorder was present at the time of the offense, an erroneous statement of the law.

Most importantly, in addition to the definition of premeditation provided to him by the prosecutor, Dr. Reus gave an additional erroneous definition of premeditation, as an act which took long enough to convince the jurors “that there was thought – that the act was thought of ahead of time.” RP(12/1/09) 132-133. In fact, to establish premeditation, the state must prove not only that the accused *thought* beforehand, but also that he or she actually deliberated, reflected and weighed matters for some period of time, even if only a short time, before deciding to take a life.

Premeditation, as distinct from intent to kill, requires "the deliberate formation of and reflection upon the intent to take a human life," and must involve the "mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Hoffman*, 116 Wn.2d 51, 82, 804 P.2d 577 (1991); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987); *State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982). "[T]he crux of the issue of premeditation and deliberation is . . . whether the defendant *did* engage in the process of reflection and meditation." *Austin v. United States*, 382 F.2d 126, 136 (D.C.

Cir. 1967); accord *United States v. Peterson*, 509 F.2d 408, 412 (D.C. Cir. 1974).

Dr. Reus defined “acting with intent” as “knowing that the action that you’re going to take is something that constitutes a crime.” RP(12/1/09) 133. This is erroneous; acting with intent requires that the person have “the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010. Dr. Reus’s definition of “intent” is more consistent with the lesser intent of “knowledge” or being “aware of a fact, facts, or circumstances or results described by a statute defining an offense.” RCW 9A.08.010.

Similarly, Dr. Wheeler testified that he was provided by the prosecutor with definitions of intent and premeditation. RP(12/3/09) 131-133.

The instructions provided by the state and the improvised instructions during the course of Dr. Reus’s testimony invaded the province of judge and denied Mr. Haq the right to have a properly instructed jury. These erroneous instructions could not be corrected by the trial court’s later instructions and require reversal of Mr. Haq’s convictions. The jurors were likely misled by Dr. Reus’s erroneous statements about the requirements of the law. He did not testify at the first trial and the jury hung on most counts after that trial.

**X. THE TRIAL COURT’S EXCLUSION OF ANECDOTAL EVIDENCE BY DR. JULIEN AND TESTIMONY BY DR. MISSETT ABOUT A LEARNED ARTICLE ABOUT “MANIC FLIPS DENIED MR. HAQ HIS RIGHT TO COMPULSORY PROCESS AND TO DEFEND AT TRIAL.**

In *Washington v. Texas*, 388 U.S. 14, 18 L. Ed. 1019, 87 S. Ct. 1920 (1967), the Court held that the right to offer evidence in one's own behalf is a fundamental component of due process of law. “The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies . . . This right is a fundamental element of due process of law.” *Washington v. Texas*, 388 U.S. at 19; *see also United States v. Nixon*, 418 U.S. 683, 709, 41 L. Ed. 2d 1034, 94 S. Ct. 3090 (1974).

“Whether rooted directly in the Due Process Clause of the Fourteen Amendment, or in Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.’” *Crane v. Kentucky*, 476 U.S. 683, 690, 90 L. Ed. 2d 636, 106 S. Ct. 2142 (1986) (citations omitted) (quoting *California v. Trometta*, 467 U.S. 479, 485, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984). . . . “[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied mechanistically to defeat the ends of justice.” *Chambers*, 410 U.S. [284,] 302 [1973]).

*Greene v. Lambert*, 288 F.3d 1081, 1090-1091 (9th Cir. 2002).

The Supreme Court has consistently held in a number of contexts

that state procedural and evidentiary rules must give way to a criminal defendant's rights under the Fifth, Sixth and Fourteenth Amendments to appear, testify and defend at trial, and to present witnesses in his or her own behalf. See, e.g., *Washington v. Texas*, *supra* (a statute preventing defendants from testifying if tried jointly with others unconstitutionally denied those defendants their right to testify at trial); *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973) (a state hearsay rule prohibiting a party from impeaching his or her own witness precluded the defendant from examining a witness who had confessed to the crime and unconstitutionally denied the defendant his right to present witnesses and evidence negating the elements of the charged crime); *Rock v. Arkansas*, 483 U.S. 44, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987) (an Arkansas evidentiary rule excluding all post-hypnosis testimony unconstitutionally burdened the defendant's right to testify at trial).

Most recently in *Holmes v. South Carolina*, 547 U.S. 319, 164 L. Ed. 2d 503, 126 S. Ct. 1727 (2006), the Supreme Court held that the state's rule excluding evidence of third-party guilt if the prosecution's case against the defendant was strong violated a defendant's constitutional rights to present a complete defense grounded in the due process, confrontation, and compulsory process clauses.

Even when evidence is not otherwise admissible, a defendant has a

due process right to rebut arguments presented by the state. *Simmons v. South Carolina*, 512 U.S. 154, 164-165, 114 S.Ct. 2187 (1994); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197 (1977); *Ake v. Oklahoma*, 470 U.S. 68, 83-87, 105 S.Ct. 1087 (1985).

Here, in an offer of proof, defense pharmacologist Dr. Julien explained that he collected anecdotal information learned during the course of his presenting to, on average, 70 psychologists, mental health nurse practitioners and naturopathic physicians in workshops in 40 to 50 different cities across the country for three or four years. RP(11/16/09) 110-111, 115. Dr. Julien explained that these clinicians universally said that his descriptions of odd behavior, aggression, agitation and confusion associated with the medication Effexor explained what they saw in their practices. RP(11/16/09) 110. Dr. Julien explained that these reports were all consistent with his position in Mr. Haq's case. RP(11/16/09) 11. The court nonetheless wouldn't allow Dr. Julien to testify about this information because he did not say that these stories formed the basis of his opinion that if lithium had not been discontinued and Effexor prescribed, the shootings would not have occurred. RP(11/16/09) 116, 156.

The trial court would not allow defense psychiatrist Dr. James Missett to testify about a study which summarized a number of other studies

showing the danger in treating bipolar disorders and the relative percentages of manic flips associated with medication. RP(11/23/09) 134-136. The court disregarded the defense argument that these articles provided scientific proof to support Dr. Missett's opinion, and ruled that the articles were obviously hearsay and simply "bolstered" Dr. Missett's opinion. RP(11/23/09) 136-137.

The trial court erred in excluding this highly relevant evidence and, in so doing, denied Mr. Haq his rights under the Fifth, Sixth and Fourteenth Amendments to call witnesses in his own behalf and defend at trial.

The evidence was admissible as consistent with the opinions of the defense experts and supporting their opinions. The anecdotal evidence was a part of Dr. Julien's professional experience; the study was a learned treatise and admissible under ER 803(18), as an exception to the hearsay rule. And, in any event, such highly relevant information supporting Mr. Haq's defense should have been available to him because of his state and federal constitutional right to present evidence in his defense against the state's allegations whether or not admissible under the rules of evidence. This evidence went to the heart of Mr. Haq's mental defense – that he was suffering from a mental disorder aggravated by the wrong medication. He had the right to inform the jury of the percentage of incidents of "manic flips" caused by the medication he was taking and to inform the jury of the

widespread experience of clinicians that the medication contributed to aggression and confusions.

Further, the defense had a federal constitutional right, under clearly and long-established authority of the Supreme Court, to present evidence to rebut the state's evidence. Dr. Reus, for example, testified that Mr. Haq's medication was appropriate. RP(2/1/09) 164-166, He also belittled the importance of information in the Physicians Desk Reference and the package insert for the drug Effexor. RP(10/1/09) 164-166; RP(10/2/09) /55-66. He testified about a controversy surrounding the question of whether Effexor really caused homicidal or suicidal ideation. RP(10/1/09) 164-166. Testimony by Dr. Julien and Dr. Missett was relevant to rebut this state's evidence and was admissible for that reason.

The exclusion of the evidence should require reversal of his convictions.

#### **XI. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE MALICIOUS HARASSMENT CONVICTION.**

As a matter of state and federal constitutional law, a conviction cannot be affirmed unless a rational trier of fact taking the evidence in a light most favorable to the state could find, beyond a reasonable doubt, the facts needed to support the enhancement. *Jackson v. Virginia*, 443 U.S. 301, 61 L. Ed.2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d

216, 220-221, 6161 P.2d 628 (1980).

Here, as the state charged Mr. Haq and as the jury was instructed, in order to affirm Mr. Haq's conviction for malicious harassment in this case the state had to prove beyond a reasonable doubt that Mr. Haq maliciously and intentionally caused physical injury to Jewish Federation employees because of his perception of their religion. CP 881, 2126-2127.

While the state presented evidence sufficient for the jury to find that Mr. Haq caused physical injury and did so because the employees were Jewish, there was no evidence that he did so because of religious bigotry. As stated by defense counsel, the state's theory was that Mr. Haq's motivation was political activism. RP(12/9/09) 76. The state's evidence showed that his concern was with the political actions of Israel against Lebanon, the American war in Iraq and the political power of Jews in the United States.

On the 911 tape, Mr. Haq specifically denied being upset at the people at the Jewish Federation and insisted that he was upset at the foreign policy of the United States. Ex. 7, at 4. He articulated his goal at the Federation as wanting to get the United States out of Iraq and to stop selling weapons to Israel. RP(10/22/09) 116-117. No one at the Federation during the shootings reported hearing Mr. Haq say anything derogatory about Jews or the Jewish religion. RP(10/22/09) 23. And neither his

khutbah nor article on Sources of Muslim Anger denigrated of any religion; the article focused on political issues involving Israel and Jews, RP(11/3/09) 48, 51, 55, 134-135; RP(11/3/09) 57-58; RP(11/4/09) 6-17, Most importantly, there were no sites related to militant extremism, religious fundamentalist nor the destruction of Israel. RP(11/3/09) 129..

Under these circumstances the trial court erred in denying Mr. Haq's motion to dismiss the malicious mischief charge. This Court should now reverse and dismiss the charge for insufficiency of the evidence. RP(12/9/09) 75-77, 81.

## **XII. CUMULATIVE ERROR DENIED MR. HAQ A FAIR TRIAL.**

The combined effects of error may require a new trial even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. *Mak v. Blodgett*, 970 F.2d 614 (9<sup>th</sup> Cir. 1992); *United States v. Frederick*, 78 F.3d 1370, 1381 (9<sup>th</sup> Cir. 1996).

Here, the cumulative impact of the combined errors, as well as the individual errors, should require reversal of Mr. Haq's convictions. The jury improperly heard evidence of calls made by Mr. Haq from jail, his

compelled incriminating testimony, improper opinion testimony as to guilt from the state's expert witnesses, and improper instructions from state's witnesses which invaded the province of the trial court. At the same time, Mr. Haq's relevant evidence was excluded in violation of his right to present a defense to the state's case. These errors combined with improper instructions on the burden of proof of insanity and the burglary aggravating factor denied Mr. Haq a fair trial.

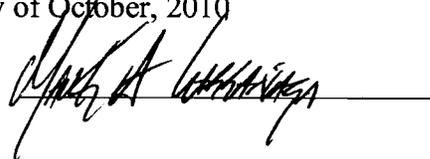
Although each error challenged on appeal should result in a new trial or dismissal of a conviction or aggravating factor, the combined and overwhelming prejudice of all of the errors considered together should require a new trial even if the individual errors did not.

**F. CONCLUSION**

Mr. Haq respectfully submits that his conviction for aggravated murder should be reversed and the aggravating factor dismissed, and that his conviction for malicious harassment should be reversed and dismissed. His premeditated murder conviction and all other convictions besides the malicious harassment should be reversed and remanded for retrial.

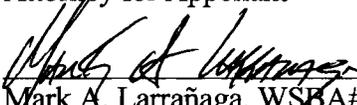
Respectfully submitted,

DATED this 26<sup>th</sup> day of October, 2010

A handwritten signature in black ink, appearing to read "Charles A. Cunningham", is written over a horizontal line.

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Rita Griffith, WSBA# 14360  
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Certificate of Mailing

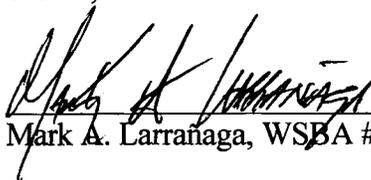
I certify that on October 29, 2010, a true and correct copy of the APPELLANT'S OPENING BRIEF and APPELLANT'S MOTION FOR OVERLENGTH BRIEF was served upon the following individuals by fax and depositing same in the United States Mail, first class, postage prepaid:

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