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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

MARGARET ELAINE BELKNAP,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

Cause No. 42005-8-11

REPLY TO STATE'S RESPONSE
TO PERSONAL RESTRAINT
PETITION

Margaret Belknap, by and through counsel, responds to the State's Response to Personal Restraint Petition.

I. Prosecutor's Duty

"It is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public." Jahns, Jeffrey J. "The Quest for Justice: Prosecutorial Ethics and Professionalism." <http://www.waprosecutors.org/MANUALS/Quest/QUEST.pdf> p. x (last visited August 27, 2011), attached as Exhibit A. Washington Rule of Professional Conduct 3.8(a) cautions prosecutors to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." Comment 1 to this Rule states that "[a] prosecutor has the responsibility of a

1 minister of justice and not simply that of an advocate. This responsibility carries with it specific
2 obligations to see that the defendant is accorded procedural justice and that guilt is decided upon
3 the basis of sufficient evidence.” Ms. Belknap is innocent of the assault charge of which she was
4 convicted and the State now possesses documentary evidence substantiating this. Its persistence
5 in its opposition to setting aside Ms. Belknap’s video is a violation of its core ethical duty to seek
6 justice, rather than convictions.

7 II. Gassett’s Credibility

8 A witness may be impeached, at the court’s discretion, using evidence of specific
9 incidents of untruthfulness on cross-examination at the discretion of the court. ER 608(b). In
10 exercising its discretion, the trial court may consider whether the instance of misconduct is
11 relevant to the witness’s veracity on the stand and whether it is germane or relevant to the issues
12 presented at trial. *State v. Griswold*, 98 Wash.App. 817, 830–31 (2000). The Washington
13 Supreme Court has held that

14 “[f]ailing to allow cross-examination of a state’s witness under ER 608(b) is an abuse of
15 discretion if the witness is crucial and the alleged misconduct constitutes the only available
16 impeachment.” *State v. Clark*, 143 Wash.2d 731, 766 (2001).

17 Officer Gassett’s previous conduct is nearly identical to the current case and is absolutely
18 germane the issue of whether he would take extreme steps to deflect responsibility for
19 misconduct. In the *Barclift* case, Officer Gassett was caught by a colleague, Carolyn Barclift,
20 engaging in violent, unprovoked behavior towards an arrestee. Here, Gassett was caught by
21 Officers Allen and Johnstone engaging in violent, unprovoked behavior towards an arrestee. In
22 the *Barclift* case, Gassett went to the extreme measure of harassing the colleague who reported
23

1 him to avoid accountability for his misconduct. In this case, Gassetts went to the extreme measure
2 of accusing an innocent person of attacking him to avoid accountability for his misconduct. True,
3 the police department did not admit wrongdoing when it paid a large settlement to the
4 complainant. However, had counsel raised this line of inquiry on cross-examination, Gassetts
5 would have been under oath and required to tell the truth about what led up to that lawsuit
6 (although Ms. Belknap concedes that being under oath has not guaranteed Gassetts's honesty to
7 date). It is highly doubtful that a jury would have credited Gassetts's testimony had he been
8 effectively cross-examined on this matter.

9 III. The Video

10 The video at issue is one that was recorded by a police officer and provided to counsel in
11 discovery. Counsel saw that an altercation occurred on the video, but did not seek an expert to
12 put it into a format in which he could clearly discern what happened.

13 Enhancement of video imaging is not a new concept. It has been in use for at least two
14 decades. Its first widely-known use was in the federal trial of Stacey Koon and Laurence Powell,
15 the California Highway Patrol officers who brutally beat Rodney King after a traffic stop. See
16 *U.S. v. Koon*, 832 F.Supp. 769 (1993). Since then, the enhancement of videos has become a
17 routine practice for police to enhance videos when looking for suspect, see, e.g., "Dallas
18 investigators release enhanced photo, video of suspected police impersonator"
19 <http://crimeblog.dallasnews.com/archives/2010/09/dallas-investigators-release-e.html> (last
20 visited August 28, 2011) (Attached herein as Exhibit B); "Enhanced video helps lead to arrest in
21 old D.C. slaying."

1 [http://www.washingtonpost.com/wpdyn/content/article/2009/11/24/AR2009112403650.h](http://www.washingtonpost.com/wpdyn/content/article/2009/11/24/AR2009112403650.html)
2 tml (last visited August 28, 2011) (Attached herein as Exhibit C.); “Anarchists linked to arson at
3 governor’s mansion” <http://www.freerepublic.com/focus/f-news/2675897/posts> (last visited
4 August 29, 2011) (Attached herein as Exhibit D). Moreover, it is routinely used by both
5 prosecutors and defense attorneys in trials throughout Western Washington. See, e.g., *State v.*
6 *Paul Schene*, 09-1-00958-5 (video of police officer attacking teenager used by King County
7 prosecutor); *State v. Glen Proctor*, 08-1-00357-1 (enhanced surveillance footage basis for
8 dismissal of murder charges against innocent defendant). Regardless of the pervasiveness of this
9 technology, counsel never even considered bringing the video to a forensic media specialist.

10 The State’s renditions of the facts regarding Evergreen Law Group’s failure to investigate
11 the video, even though somewhat inaccurate, underscores the ineffective assistance rendered in
12 this case. The State argues that although the video shows that Ms. Belknap was attacked by
13 Officer Gassett in the enhanced video, counsel did not make a self-defense claim at trial and the
14 video is therefore irrelevant. The State is correct that counsel did not make attempt a self-defense
15 claim, but, assuming arguendo that these facts warrant a self-defense defense rather than one that
16 the elements of the crime had not been proven, it has mistaken cause and effect. Rather than
17 assuming that the enhanced video would not have been helpful because it contains information
18 that did not comprise counsel’s theory of the case, this Court should be asking whether counsel
19 would have made had it had all of the relevant facts of the case.

20 *State v. A.N.J.*, 168 Wash.2d 91 (Wash. 2010), precludes the State’s theory. There, a
21 public defender believed that his client was guilty of the crime charged and he therefore did not
22 have a duty to investigate the evidence against him. The Washington Supreme Court disagreed:
23

1 “The degree and extent of investigation required will vary depending upon the issues and facts of
2 each case, but we hold that at the very least, counsel must reasonably evaluate the evidence
3 against the accused.” Id. at 112. The video here was the most critical evidence in the case, and
4 counsel did not investigate it, did not know all of the facts of the case, and was not able to
5 proceed as an informed advocate.

6 Second, the State argues that “Ms. Belknap states that in the enhanced video shows Ms.
7 Belknap extending a limb (presumably her leg) toward Officer Gasset twice. Ms. Belknap’s
8 actions were presumably an attempt to kick Officer Gasset, although Ms. Belknap claims her
9 enhanced video shows no actual contact.” It is worth noting that the CrR 7.8 motion clearly
10 states “[b]oth times, a limb was extended to block the strikes.” It does not say, and it can be
11 ascertained from the video, whether the limbs were even Ms. Belknap’s. Someone else present
12 may have blocked Officer Gasset from attacking Ms. Belknap with his truncheon. Regardless,
13 the State is perplexingly unperturbed by the fact that the video simply does not depict what
14 Officer Gasset wrote in his police report or testified to under penalty of perjury, or what Ms.
15 Belknap was accused of in the Certification of Probable Cause, which a deputy prosecuting
16 attorney swore to under penalty of perjury. And had Ms. Belknap’s trial counsel known this, he
17 could have presented the video to the jury and used it to effectively cross-examine Officer
18 Gasset at trial. It is beyond reasonably likely that but for counsel’s failure to investigate the
19 video, a different result would have been secured.

20 At the CrR 7.8 hearing on this matter, the State suggested that extending one’s limbs in
21 the direction of an officer is a crime, and the video would not have helped her because even if
22 she was not actually guilty of the crime charged, the video could have shown that she was guilty
23

1 of something. But Ms. Belknap was not charged with being guilty of something. She was
2 accused of a specific offense and had the right to be tried and effectively defended on that charge
3 and not some other offense that the State conjures post hoc.

4 Finally, there was no strategic reason not to investigate the video further. Even if it did
5 not contain crystal-clear exculpatory evidence, it would have provided counsel the detailed
6 picture of the case that is necessary to properly defend a client at trial and could have provided
7 information needed for successful cross-examination of . Further, it would have prepared counsel
8 had the State introduced the video. Finally, there would have been no harm to the client even if
9 the enhanced video was wholly detrimental, as it would have been protected from discovery by
10 the work-product privilege.

11 IV. CONCLUSION

12 In sum, the State has been provided with ample evidence that Ms. Belknap has not
13 committed the crime with which she was charged. Rather than concede, consistent with its
14 ethical duties, that the prosecutor's office misplaced its reliance upon a dishonest police officer
15 and that it had secured a conviction that was not just, it has clung to the absurd position that her
16 counsel was able to effectively devise a trial strategy without conducting a proper investigation.
17 Undoubtedly, this failure to investigate is not the representation any prosecutor would want for
18 himself or herself if wrongly accused of a crime, and it is not satisfactory performance for Ms.
19 Belknap's defense either. Ms. Belknap has established the two prongs of the Strickland test here
20 and is entitled to relief.

21 Dated: August 29, 2011
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By:

/s/ Jennifer Kaplan
Jennifer Kaplan
Gilbert H. Levy
2003 Western Avenue, Ste 330
Seattle, Washington 98121
Attorneys for Margaret Belknap

Exhibit A

THE QUEST FOR JUSTICE

Prosecutorial Ethics And Professionalism

Prosecutorial Challenges

The public's perception of prosecutors is our reality. We are the ones exercising this incredible power against the citizenry in the name of public safety. You are the prosecutor's office when anyone deals with you. What message do your activities send?

Prosecutors inherently serve two masters—society and justice. Yet, society's desire for a conviction in a particular case often directly conflicts with a prosecutor's duty to seek justice in obtaining a verdict free of prejudice and passion, and based solely on admissible evidence and reason. GERSHMAN, PROSECUTORIAL MISCONDUCT, at viii-x (1996).

It is easy to deal professionally with an opponent who treats one with respect and courtesy, and who does not use the rules as a sword to attack at any cost. Yet it is hardly virtuous to treat another with respect only when treated similarly.

The challenge to one's professionalism comes when dealing with the opponent who lacks a moral compass. It is at this time that a prosecutor's true moral character is put to the test. Your response will ultimately determine whether the means you use to obtain a conviction are tainted, or whether justice is truly realized.

Supervisors also must be mentioned. Do you work for honest people who seek justice by encouraging professional conduct of subordinates? Or does your supervisor's desire for aggressive prosecutors translate into obtaining convictions at any cost, even if you have to cheat?

Each prosecuting attorney must recognize that slavish attendance to rules absent a personal ethical sense is almost worthless. Certain conduct may not violate the letter of any rule but may destroy a reputation. Rules and sanctions can be enumerated, but absent a sense of fair play and honesty they are minimally helpful. The rest is up to the individual conscience.

Susan J. Noonan, Senior King County Deputy Prosecuting Attorney, WAPA Presentation on Ethical Considerations, April 1995, at 5.

The ABA Standards for Criminal Justice

So where does a prosecutor go to seek guidance in what should be done? I submit that any analysis of a prosecutor's ethics and professionalism must begin with the nationally recognized AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, (2d ed. 1986) [hereinafter ABA Standards]. Why the ABA Standards? A quick search of case law using the query Standards for Criminal Justice resulted in 78 separate Washington State cases relying on the ABA Standards.

Our courts consistently cite the ABA Standards with approval, and will look to them as a reference guide in determining proper ethical and professional conduct. A prosecutor can be assured that consistent adherence to the ABA Standards will result in fulfillment of our duty towards society to attain justice through proper means.

The materials herein are organized using CHAPTER 3 THE PROSECUTION FUNCTION of the ABA Standards as the model for appropriate conduct to be followed by prosecutors. A brief synopsis of each standard is provided, followed by selected quotes from the Commentary to the ABA Standard. Relevant case law and/or additional information is thereafter provided for each topic.

Justice; Not Merely Convictions

As the first ABA Standard carefully points out, a prosecutor's duty is to seek justice and not merely convictions. The Commentary to the ABA Standard says

...it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public...

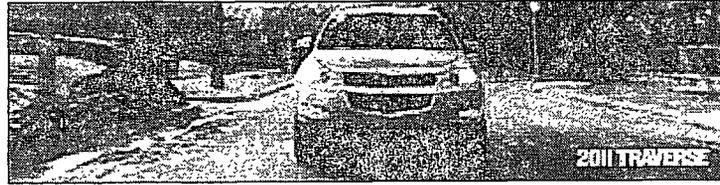
Prosecutors in Washington have been delegated tremendous power by the citizenry. Washington is not a grand jury state, and a prosecutor can subject anyone to criminal charges and possible arrest and jail based solely on his or her signature. This awesome power must be wielded impartially, and success cannot be measured by one's conviction ratio.

While it has been difficult for me to appreciate after a hard fought trial, a jury's decision to acquit is no less of a just result than had it voted to convict. Under our system of justice, to argue otherwise demeans the incredible role the people play when acting as jurors standing between the power of the government and the presumption of innocence of the individual.

New Prosecutors Must Be Careful

In preparing these materials and researching prosecutorial misconduct, I am struck by the volume of case law on the topic and the number of convictions reversed as a result of a prosecutor's improper conduct. Since a criminal defendant may appeal as a matter of right, appellate courts are constantly being asked to review the acts and omissions of prosecutors to determine whether the defendant received the constitutional due process right to a fair trial. Recent prosecutorial misconduct cases are beginning to evidence a trend against finding harmless error, especially for misconduct during closing argument.

Exhibit B



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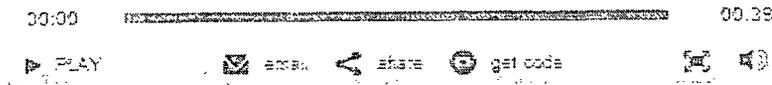
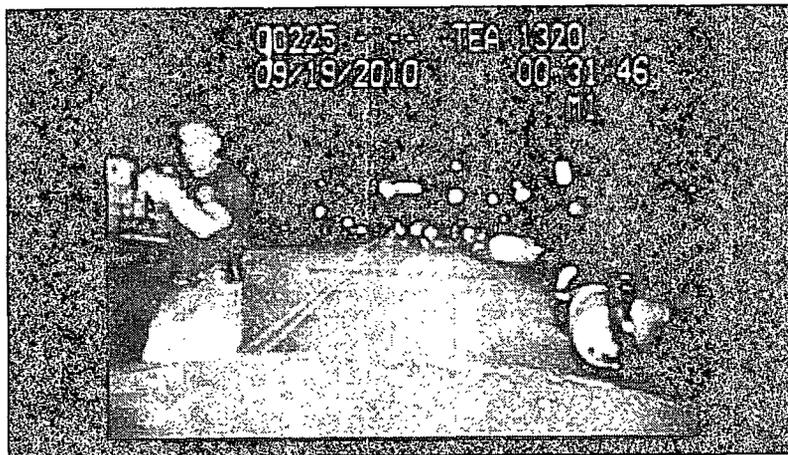
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Dallas investigators release enhanced photo, video of suspected police impersonator



By Scott Goldstein / Reporter
 sgoldstein@dallasnews.com | Bio
 11:04 AM on Wed., Sep. 29, 2010 | Permalink



Dallas police on Tuesday afternoon released this enhanced image and the video above of a police impostor who assaulted a man in Oak Lawn earlier this month.

The photo was pulled off the video, which is from an in-car camera belonging to 66-year-old Douglas Ervin.

Police have said the impostor could be about 30 years old. He is white, 5 feet 11 inches tall, 190 pounds, with brown hair and brown eyes, police said. He was driving a black four-door Ford with LED lights on the dashboard when he attacked Ervin early on September 19th, police said.

If you have any information on this case, police ask that you call 214-671-3616.

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Steve Score: 0

9:45 AM on 10/1/2010 Report Abuse

It is funny when you start paying attention and notice how many cars are running around with in-car camera systems.



bobsbarkers Score: 0

8:07 PM on 9/29/2010 Report Abuse

Did the suspects car "roll" backwards when he got out of the car??



FEDUPTXGRANNY Score: 1

12:57 PM on 9/29/2010 Report Abuse

Too many nuts running around.....



Spaceman Spiff Score: 0

12:20 PM on 9/29/2010 Report Abuse

I think the cops decided to side with the creepy old man versus the violent young man. But, yes, definately a case of impostor vs. impostor.



whitdawg Score: 0

12:12 PM on 9/29/2010 Report Abuse

Which one is the impersonator? The one pulling the weapon or the one with the in-car camera, running stop signs while conducting his own high speed chases?



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Exhibit C

8 investing mistakes you should avoid in 2011

If you have a \$500,000 portfolio, download the guide by Forbes columnist and money manager Ken Fisher's firm. It's called "The Eight Biggest Mistakes Investors Make and How to Avoid Them." Even if you have something else in place right now, it still makes sense to request your guide!

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Enhanced video helps lead to arrest in old D.C. slaying

By Theola Labbé-DeBose Washington Post Staff Writer Wednesday, November 25, 2009

Sharon Moskowitz was a young woman working at the Japanese Embassy and living in Adams Morgan in 1997 when she arrived home one afternoon and was killed.

D.C. police say Moskowitz, 25, returned to her apartment Jan. 21 after stepping out to buy some cold medicine. Two burglars in her building, in the 1900 block of Biltmore Street, attacked Moskowitz, tying her hands behind her back and binding her ankles with rope. She was strangled with her own white scarf.

The assailants stole her credit cards and used them in the days afterward at grocery stores in Maryland. Even though police released surveillance footage of the suspects shopping, leads dried up. The assailants remained on the loose -- for the next 12 years.

Police announced Tuesday that they had finally arrested someone in the slaying. Frederick Edward Morton, 57, was brought to the District on Monday from a federal prison in Allenwood, Pa., and D.C. detectives charged him on Tuesday with first-degree murder.



were helpful to closing the case, such as more sophisticated technology to improve the video quality and the increased willingness of once-reluctant witnesses to come forward.

"In many instances, members of the family think that in a cold case, we have forgotten. I assure you that we have not," Lanier said.

In the video, a man wearing glasses, an overcoat and a gray sweat shirt with "PITT" on the front is in the dairy aisle of a Giant in Shaw, at Seventh and O streets NW. He picks up a gallon of milk as a woman accompanying him pushes a cart. With the enhanced images, detectives were able to identify and track down Morton, police said. They did not say what happened to the other person in the video.

The killing rocked the quiet Adams Morgan neighborhood, with outraged neighbors flocking

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Police Chief Cathy L. Lanier credited enhanced surveillance video that police re-released in September with helping stir new leads in the case. The U.S. Secret Service were able to sharpen images of the two assailants pushing a grocery cart in a Giant Food store, and D.C. police released the video for a second time, asking the public for clues in solving the crime

"The public came forward -- almost immediately, calls came in," Lanier said.

Lanier said that some developments in the dozen years between the crime and the arrest

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to community meetings and demanding more police protection.

At the time of Moskowitz's killing, she had been living in the District for just a few months, having moved from Connecticut. Then-boyfriend Simon Hirschfeld described her as "funnier and smarter than you can imagine."

"Someone made her suffer and took her life for next to nothing, and this happens every day," he told The Washington Post in 1997.

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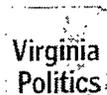
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Exhibit D

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Anarchists linked to arson at Governor's Mansion

[Austin Statesman](#) ^ | 2/17/2011 | Mike Ward, Steven Kreytak

Posted on **Friday, February 18, 2011 9:10:11 AM** by [Flightdeck](#)

An Austin-based anarchist group whose members were prosecuted for plotting to bomb the Republican National Convention in St. Paul, Minn., three years ago has been linked to the unsolved June 2008 arson fire that gutted the Texas Governor's Mansion, officials said Thursday.

Steve McCraw, director of the Texas Department of Public Safety, said that a white Jeep Cherokee photographed by surveillance cameras at the mansion four days before the fire has been "connected to people who were part of that anarchist group." The connection was confirmed about three months ago, he said.

The Jeep is believed to have been doing surveillance before the fire, McCraw said at a news conference called to ask for public assistance in cracking Texas' highest-profile unsolved crime.

Authorities said they have identified three people in the Jeep as "persons of interest" in the arson case and are seeking information that could identify a fourth person, the arsonist. They released three videos and a set of composite sketches — and reiterated the existence of a \$50,000 reward — in the hopes of drawing out new information.

McCraw said at least one of the persons of interest 'has been placed in downtown Austin' the morning of the mansion fire.

McCraw said the Jeep was located through a search of about 3,000 similar vehicles licensed in Texas, because its tag number was not readable on the video. Its owner was then linked to members of the "Austin-based anarchist group," he said.

The torching of the historic mansion, home to every Texas governor since 1856, has remained a top priority for authorities since June 8, 2008, when an arsonist started a fire on the porch that quickly gutted the two-story brick home across from the state Capitol.

The mansion was undergoing a \$10 million renovation at the time and was not occupied. Reconstruction began late last year.

A grainy video taken from a surveillance camera was made public in 2008. On Thursday, authorities released an enhanced version of that video and two previously unreleased ones, in addition to sketches of the arsonist drawn from enhanced video images. The images provide the clearest picture yet of how the crime occurred.

McCraw and DPS investigators said the Jeep — shown stopped at an intersection adjacent to the mansion about 2 a.m. on June 4 — is believed to be linked to the fire. Someone sitting in the back seat can be seen taking two photos of the house with a flash. McCraw characterized that as "obviously pre-ops surveillance" but would not elaborate.

He said one of the men arrested in the Minnesota case has been identified as a passenger in the Jeep.

All three persons of interest have denied any involvement in the burning of the mansion, authorities said.

Investigators believe a fourth person is the shadowy figure seen on video the night of the fire tossing a Molotov cocktail on the mansion's porch to start the fire, McCraw said.

On a second video made public Thursday, a shadowy figure can be seen walking up the front brick sidewalk to the mansion after hopping the front fence. He pauses and appears to light the Molotov cocktail, then throws it at the front door.

Flames can be seen quickly engulfing the mansion's door and porch, as the figure runs back down the sidewalk.

Antonio "Tony" Leal, chief of the Texas Rangers that are leading the investigation of the fire, described the arsonist as about 5 feet 10 inches tall, of medium build, weighing 175 to 180 pounds and wearing "lumpy" clothing.

McCraw said investigators believe the arsonist "was not in the Jeep." And though authorities have not confirmed the identity of the arsonist, they believe he is connected to the people taking photos from the Jeep, according to McCraw.

McCraw declined to identify any of the "persons of interest," noting that the investigation is ongoing.

About two years ago, investigators confirmed that they had questioned some of the members of the group who were arrested in Minnesota, several of whom were from Austin. But those interrogations yielded no arrests.

Two Austin men accused of building a cache of homemade firebombs were arrested in St. Paul during the 2008 Republican National Convention. Authorities said the men intended to use the Molotov cocktails on police vehicles and perhaps even police officers, but their plot was stopped with the help of Austin-area activist turned government informant Brandon Darby.

David Guy McKay, 24 , pleaded guilty to three counts related to illegal firearms and is serving a four-year sentence in federal prison. Brad Crowder, 25 , pleaded guilty to aiding and abetting possession of an unregistered firearm, which is how the law classifies a Molotov cocktail, and was sentenced to two years in prison. He was released in May 2010, according to federal records.

Crowder, reached by telephone Thursday, said he had nothing to do with the mansion fire and has no information about who may be involved.

"It's categorical nonsense," Crowder said. "What happened in Minnesota \u2026 wasn't connected in any way to the mansion fire."

Crowder said he is living in Austin and attending Austin Community College. On Wednesday, he said, his federal probation officer called him to a meeting where he met with Texas Rangers investigators. He said the interview lasted more than an hour and that he was shown photographs and surveillance video but was not able to identify anyone in them.

Minnesota defense lawyer Jeffrey DeGree, who represented McKay, said that his client has also previously denied involvement in the fire.

Scott Crow, a self-described anarchist from Austin who did not travel to Minnesota for the convention but who knew McKay and Crowder around that time, said Thursday that Texas Rangers have approached him and at least one other local activist he knows in recent days. The investigators offered reward money for information leading to an arrest.

Crow said the investigators interviewed him Thursday at his job.

Crow said he doesn't know anything about the crime and could not identify anyone in the photos and sketches shown to him by the investigators. "Those guys are grasping at straws," he said.

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KEYWORDS: [anarchist](#); [anarchists](#); [arson](#); [austin](#); [leftwingterrorism](#); [liberalfascism](#); [liberals](#); [liberalviolence](#); [progressives](#); [texas](#); [tx](#)

Just your typical leftists throwing Molotov cocktails through the private residence of an elected official. Right-wing rhetoric is responsible for such violence, of course...

1 posted on **Friday, February 18, 2011 9:10:18 AM** by **Flightdeck**
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To: **Flightdeck**

Arsonists and looters should be shot on sight!

2 posted on **Friday, February 18, 2011 9:15:16 AM** by **IbJensen** (Grab your pitchforks!)
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To: **Flightdeck**

Couldn't be home grown terrorists under Napolitano's definition, since her classifications are based sloely on ideology.

3 posted on **Friday, February 18, 2011 9:21:27 AM** by **Spok**
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To: **IbJensen**

Arsonists and looters should be shot on sight!

As I watch the unions go more and more out of control I sense that that day is fast approaching.

4 posted on **Friday, February 18, 2011 9:21:49 AM** by **Rapsallion** (The founders gave us the tool of impeachment for a reason. Now more than ever.)
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To: **Flightdeck**

Anybody remember the guys back in the 70s who ran on the "Arts & Sausages" platform for University President and VP? Kinda sounds like them...

Colonel, USAFR