

FILED

OCT 13 2009

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 26899-3-III

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

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STATE OF WASHINGTON,

Respondent,

v.

KEVIN HILTON,

Appellant.

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BRIEF OF APPELLANT

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LENELL NUSSBAUM  
Attorney for Kevin Hilton

Market Place One, Suite 330  
2003 Western Ave.  
Seattle, WA 98121  
(206) 728-0996

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional rights to due process and to present a defense by excluding all evidence and argument that another person committed these murders. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22.

2. The trial court violated appellant's constitutional rights to counsel and to due process by prohibiting his counsel from arguing the defense theory of the case -- that another person committed the crimes. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22.

3. Appellant assigns error to the Court's Finding of Fact #1 in its Order on Motion to Exclude Third Party Perpetrator Evidence, CP 22:

There are no facts or circumstances which tend to point clearly to Lisa Ulrich as the guilty party.

4. Appellant assigns error to the Court's Finding of Fact #4 in its Order on Motion to Exclude Third Party Perpetrator Evidence, CP 22:

To wit, there is no evidence that Ms. Ulrich ... had any reason to steal the rent receipt book or caller ID phone of her parents. Further, the evidence undisputed [sic] that she was always in the company of another person during the night of March 20, 2002, when the murders occurred.

5. Appellant assigns error to the Court's Finding of Fact #4 in its Order on Motion to Exclude Third Party Perpetrator Evidence, CP 22:

The fact that Ms. Ulrich called the Benton County Prosecutor, Andy Miller, after discovering her parents had been murdered is not relevant.

6. The court erred by applying the "independent evidence" and "inevitable discovery" rules, in violation of the exclusionary rule, to admit evidence from Schoonie's Rod Shop, which was derived from the illegal search of the defendant's home. U.S. Const., amends. 4, 14; Const., art. I, §§ 7, 9.

7. Appellant assigns error to the Court's Finding of Fact #22 regarding inevitable discovery of evidence from Barbara Schoonover, CP 26:

Mr. Bricker had begun researching the A-MERC brand and determining possible sellers prior to the execution of the search warrant on March 21, 2002, which was prior to the execution of the search warrant [sic].

8. Appellant assigns error to the Court's Finding of Fact #28 regarding inevitable discovery of evidence from Barbara Schoonover, CP 26:

... [T]he evidence from Schoonies Rod Shop would have been inevitably discovered under proper and predictable investigatory techniques.

9. The court erred by admitting Laura Hilton's testimony and exhibit 477A, which were derived from knowledge obtained from the unconstitutional search warrants, under the independent source doctrine. U.S. Const., amends. 4, 14; Const., art. I, §§ 7, 9.

10. Prosecutorial misconduct denied appellant due process. U.S. Const., amend. 14; Const., art. I, § 3.

11. Prosecutorial misconduct denied appellant a fair trial.

12. The trial court violated appellant's constitutional rights by admitting evidence of his library usage and books borrowed. U.S. Const., amends. 1, 5, 14; Const., art. I, §§ 3, 5, 7.

13. The trial court erred in admitting evidence obtained from a subpoena under a non-existent special inquiry judge proceeding. U.S. Const., amends. 1, 4, 14; Const., art. 1, §§ 3, 5, 7.

14. The trial court abused its discretion by permitting the state to admit and argue irrelevant evidence of Mr. Hilton's lack of income and employment as motive and character evidence.

15. The court erred by admitting evidence of Mr. Hilton's irrelevant and constitutionally protected ownership of guns and ammunition, gun club membership, which was highly prejudicial. U.S. Const., amend. 2; Const., art. I, § 24.

16. The court abused its discretion by admitting into evidence the defendant's ex-wife's testimony that more than five years before these murders, in a context completely unrelated to the victims in this case, he had said "I know someone that does away with people." CP 28-32.

17. The court abused its discretion by admitting into evidence his ex-wife's testimony that, well more than five years before these murders, he would not help her when they moved and would become angry or "shut down." CP 28-32.

18. The trial court incorrectly interpreted the legal effect of the three-day pay-or-quit notice, limiting defense evidence and argument.

19. The court erred by failing to disclose to the defense a police department's internal affairs record or any potentially exculpatory evidence from it, pursuant to Brady v. Maryland, after reviewing it in camera.

Issues Pertaining to Assignments of Error

1. Where all the state's evidence was circumstantial, there was no question the victims were murdered, was appellant denied his right to present a defense and to counsel when the court excluded circumstantial evidence equally suggesting the victim's daughter committed the murders?

2. Did the court deny appellant his right to counsel by prohibiting argument on the defense theory of the case, when the state argued no one else could have committed these crimes?

3. Was it relevant circumstantial evidence that, immediately after finding her parents' bodies, the victim's daughter asked a neighbor to call 911 because she was too hysterical, while she used her cell phone to call the elected prosecuting attorney "so things wouldn't get messed up"?

4. Does the Constitution, art. I, §§ 7 & 9, permit the concepts of "inevitable discovery" or "independent source" as exceptions to the exclusionary rule?

5. Did the evidence here support application of the "inevitable discovery" or "independent source" doctrine as exceptions to the exclusionary rule?

6. May a prosecutor properly argue the jury should not believe the defendant because he was able to tailor his testimony by being present at this trial and a previous trial and hearing all the state's evidence first?

7. May a prosecutor properly argue the jury should not believe the defendant because he did not tell the police every detail of what he testified to at trial because he exercised his right to remain silent and to counsel?

8. May the police issue a subpoena duces tecum, reportedly authorized by telephone and not signed by a judge or attorney, with a caption for a special inquiry judge proceeding that does not exist, to seize library records identifying a patron and the materials he has checked out?

9. May the state admit and argue the defendant's lack of a job and poor financial situation as motive or character evidence when he did not gain financially from the murders?

10. May the state present inflammatory evidence of the defendant's constitutionally protected lawful possession of guns and ammunition that were completely unrelated to this or any other crime?

11. Did the trial court abuse its discretion by admitting irrelevant and inflammatory testimony from the defendant's ex-wife?

12. Did the trial court and state misinterpret the legal effect of the three-day pay-or-quit notice issued, resulting in improper argument and exclusion of defense evidence?

13. Did the trial court err in concluding there was no Brady evidence in exhibits it reviewed in camera?

B. STATEMENT OF THE CASE

1. MURDERS

On the morning of March 21, 2002, Lisa Ulrich came screaming out of her parents' home. She drove across the street to the neighbors' house. She said she'd found the bodies of her parents, Larry and Jo Ulrich. Lisa asked the neighbors to call 911. RP 1014-17, 1298-1300; Ex. 360; RP(Dep. P. Coleman) at 4-5.<sup>1</sup>

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<sup>1</sup> Ex. 360 is the DVD of the deposition of Phyllis Coleman, which was played for the jury but not reported. RP 1038-39. It was transcribed separately for this appeal. It is filed with the superior court under a Stipulation of Counsel to Supplement the Record, and designated in the Supplemental Designation of Clerk's Papers.

Meanwhile, Lisa Ulrich used her cell phone to call Andrew Miller, the elected Benton County Prosecuting Attorney. She later told the detective she called Mr. Miller "because I didn't want anything messed up." RP 921, 1268-72, 1362-63; CP 863, 865, 874; Ex. 360; RP(Dep. P. Coleman) at 13.<sup>2</sup>

The prosecutor and police arrived at the scene. Mr. Miller went to the neighbor's house where Ms. Ulrich was. CP 874.

## 2. CRIME SCENE

### a. Victims' Bodies

Larry and Jo Ulrich had been shot to death at close range. Larry Ulrich had been shot twice in the entry hall of the home. Jo Ulrich was shot three times, at least once as she came up the stairs from a lower living room to the kitchen entry. Her body had been moved slightly from where she initially fell. Larry's body had been dragged ten to twelve feet into the entry to the kitchen and placed with Jo's body. Exs. 10, 100, 110, 230-

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<sup>2</sup> The court struck testimony that she called Mr. Miller. RP 1272. Since the jury was from Asotin County, it was unlikely to recognize this elected official by name.

33, 348-49, 384; RP 1413, 1460-94, 1527-32, 1761-66, 2776-92.<sup>3</sup>

Jo Ulrich's jeans were unfastened and partially unzipped. RP 1244-45, 1765; Ex. 354.<sup>4</sup>

The open kitchen door next to Larry's body blocked a view from the front door of everything except his stocking feet. RP 1263, 1765-66, 2134, 2139; Exs. 227, 382.

b. Note

A yellow sticky note, or "Post-It," was found lying on Larry Ulrich's hand, between his thumb and the edge of his palm.<sup>5</sup> The note was folded. Part of the adhesive strip was towards the edge of Larry's palm. The other part of the adhesive strip was stuck to a second piece of paper, concealed within the folded note. RP 1229-31, 1578-81, 1720-21.

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<sup>3</sup> The expert could not say whether he was moved minutes or hours after being shot, given the amount of blood he lost where he fell. RP 1554, 2788-89.

<sup>4</sup> It was common for her to unzip her pants after dinner, but her daughter had never seen her with her pants unbuttoned when a tenant was present. RP 1284-85, 1325-26.

<sup>5</sup> The photographs demonstrate this unusual position far better than these words can. See Exs. 9B, 29A, 83-84, 103, 238, 350-51. They refute the characterization that it was "clutched."

On the yellow note was written: "Robert & Janice Rodgers - 1010 McPherson." Ex. 29A; RP 2048. Only the address was visible. RP 1582-85.

Inside the folded yellow note was a rent receipt made out to Kevin Hilton for \$3475. It noted check #3222, was dated March 20, and appeared to be signed by Jo Ulrich. RP 1051, 1313-14, 1582-85, 2048; Ex. 9B.

Robert and Janet Rodgers were the Ulrichs' tenants in 2000-2001. They moved from the rental in early July, 2001, to 1010 McPherson. Their last contact with the Ulrichs was receiving their rental deposit -- at their new address -- eight months before the murders. RP 1500-05, 2913-19.

Experts could not determine whether the note had been held by Mr. Ulrich when he was shot, and stayed on his hand when his body was moved, or had been placed there after he was dead. RP 1546-49, 1766-68.

c. Shoeprints

In the entryway where Mr. Ulrich first fell, there was a pool of blood. From that pool there were seven partial shoeprints toward the front door, made in blood. Exs. 10, 114-15, 136; RP 2807-12. A separate boot print, not in blood but

in some sort of grease, also was found in the entryway. RP 2840-41, 1862-71.

No shoeprints, bloody or otherwise, were noted elsewhere in the house. Ex. 201.<sup>6</sup>

d. Bullets and Shell Casings

Five bullets were recovered. Only three shell casings were found.<sup>7</sup> All three casings were .45 caliber and stamped "A-Merc." RP 2069-71; CP 110, 2426; Ex. 105.

e. Items Missing

Wallets were missing from Mr. Ulrich's pocket and Mrs. Ulrich's purse. Neither the wallets nor their contents were ever recovered. RP 3340-42, 3348.

A receipt book the Ulrichs had begun using in February was missing. It would have produced the

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<sup>6</sup> Lisa Ulrich insisted she only set one foot inside the doorway the morning of March 21. RP 1298-99. Lisa told Sgt. McCamish she looked inside. "It looked like her dad was propped against mom." She claimed to have seen this from the doorway. RP 3078-81. Det. Bricker testified Larry Ulrich's body wasn't visible unless you stepped well into the foyer. RP 2139. See also RP 1263 (Officer Smith saw only a pair of feet when he stepped inside the door of the house); Exs. 227, 382 (photos showing open kitchen door blocked view of bodies).

<sup>7</sup> With five bullets, there logically should have been five shell casings. RP 1434.

receipt found on Mr. Ulrich's hand. RP 1047-49, 1083-85, 1313-14.<sup>8</sup>

The handset was missing from a kitchen telephone. Lisa Ulrich's family knew it had not worked as a receiver, but it continued to function for caller ID. RP 1047-49, 1596-98, 1614-15.

f. Lights

A few lights were on in the home: in the upstairs office, the stairs leading upstairs, the entry way, the kitchen, and the lower level family room. RP 2922.

g. Other Details

Files containing rental records were on top of the refrigerator in the immaculate kitchen. Ex. 116-17.<sup>9</sup> The top folder had John Lawson's name on it, a former tenant. It contained copies of some records with Mr. Hilton's name, some with Mr. Lawson's name, and a variety of blank forms. The first document in the file was a Notice to Pay Rent or Quit, made out with Mr. Hilton's name. It was

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<sup>8</sup> In the receipt book that remained, of all the receipts written before, only one had ever noted a check number. RP 1101-13.

<sup>9</sup> The family knew Jo Ulrich kept her receipt books on top of the refrigerator. RP 1601-02.

an original writing on a photocopy of a form. A sticky note was attached to it suggesting an estimated work credit of \$150. There was no evidence Mr. Hilton received a copy of this notice.<sup>10</sup> RP 1135-40, 1193, 1340-44; Exs. 11, 11A1, 11A2, 365.

The file labeled with Mr. Hilton's name was in the upstairs office. There was no Pay or Quit notice in the folder labeled for Kevin Hilton. RP 1147; Ex. 13A-13H.

A paper shredder was in the middle of the upstairs office. Lisa Ulrich had brought it to the house on March 19 or 20. RP 1351-52; Ex. 99.

### 3. INVESTIGATION

#### a. Crime Scene

The police sealed off the scene. The officers who processed the scene all wore Tyvek suits and latex gloves. They carefully avoided contributing any contamination to the scene. No one handled the

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<sup>10</sup> Mr. Hilton testified he did not receive it. RP 3536-38. The Ulrichs' files contained these forms in tri-colored triplicate, which would have made copies automatically, but this one was on a photocopy. Exs. 31C, 310. Jo Ulrich had used the triplicate version when she gave another tenant a notice. RP 1206-10.

shell casings with bare hands. RP 2091, 2141-42; Exs. 124, 386.

b. Interviews

Det. McCamish interviewed the Ulrich family members at Lisa Ulrich's home about 1:30 p.m. on March 21. Lisa insisted on being the first person interviewed. RP 1350, 3068.

c. Visits to Tenants

Det. Hansens contacted all but two of the Ulrichs' tenants on March 21. He received no answer at Mr. Hilton's home when he knocked at the end of the day.<sup>11</sup> RP 1694-95.

d. Mr. Hilton's First Interview

Mr. Hilton spent the night of March 21 with his girlfriend, Margaret Oxenreider. RP 3132. His home remained dark all night. Sgt. Taylor saw his red Suzuki Swift at the house at 6:20 a.m. Mr. Hilton answered the door in his robe. RP 1790-95.

Mr. Hilton invited Sgt. Taylor and Cpl. Ruegsegger into his home. Mr. Hilton had seen the

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<sup>11</sup> Ms. Norris in the adjacent unit told the officer to knock loudly because Mr. Hilton was often in the basement and wouldn't hear them. She saw Mr. Hilton drive away in his car a few minutes later. He had not left by the front door. RP 1648-52. Mr. Hilton and his friends usually used his back door, where he could see people from his computer in the basement. RP 3681-83.

news about the Ulrichs' murders. In response to questions, he said he paid \$600/month rent. He acknowledged he was behind, and owed a total of \$3,475. He said the Ulrichs had been very good to him, arranging for him to work some of the rent off, and they'd recently reached an agreement about the balance owed. RP 1795-98.

The officers asked Mr. Hilton if he owned any guns. He described his long guns. Asked about handguns, he said he currently owned none. He used to own a Smith & Wesson, a Beretta 92, and two Norinco .45 calibers. He used to shoot competitively. He had sold the handguns along with other assets to live on. He recalled selling the Beretta and Smith & Wesson three to four years ago. He'd sold one Norinco to Dirk Leach. The other Norinco he recalled selling at a gun show in Walla Walla, estimating six to eight months earlier. Mr. Hilton invited the officers to his basement, where he showed them the guns he still owned, all rifles. RP 1800-05, 1827.<sup>12</sup>

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<sup>12</sup> Dirk Leach confirmed the sale to him. RP 2306-21. Police did not attempt to confirm the sales of the Beretta or S&W guns. A promoter testified the last gun show at the Walla Walla fairgrounds had been the previous February. RP 2257-67.

Sgt. Taylor saw a pair of boots in the basement. Mr. Hilton agreed he could look at them. Sgt. Taylor noted the pattern of the soles. He saw no indication of blood on the boots. RP 1628-29.

In response to questions, Mr. Hilton said the evening before, Thursday March 21, he had been home until he picked up his girlfriend about 6:30, then they went to play volleyball at Hanford School from 7:00-9:30. RP 1810, 1812. Earlier in the day he had driven to Mattawa where he sold some primers. RP 1809.

The previous evening, Wednesday, he had worked on his computer, gone to the grocery, and dropped off a book at the library. RP 1807. He had called the Ulrichs about 6:00-6:30 p.m. RP 1818. They had phoned him back while he was out, leaving him a message about 7:00-7:15 p.m. that they agreed to his proposal for paying the back rent. RP 1819. He had played volleyball that night from 8:30-10:30 p.m. RP 1808, 1807-10, 1815-20.

The officers asked to see Mr. Hilton's checkbook register. RP 1800-01, 1820-21. He showed it to them. RP 1800-01, 1820-21. The last check had been written February 20, 2002. RP 1800-01, 1821. When asked if he had any idea why anyone

would want to kill the Ulrichs, Mr. Hilton responded he had no clue. "They were such nice people." RP 1826.

Mr. Hilton was very cooperative with the officers and volunteered information in response to their questions. RP 1814. He provided his girlfriend's name and phone number. RP 1829.

e. Mr. Hilton's Taped Interview

On the morning of March 26, Kevin Hilton kept his appointment at the Richland Police Department for an interview. He consented to record the interview. Exs. 418-21. His answers were all consistent with his interview with Sgt. Taylor, although he gave more detail.

f. Time of Deaths

The Ulrichs died within three or four hours after eating dinner. RP 1492-94.

g. Crime Lab

Latent fingerprints were found at the scene. The crime lab eliminated from consideration, however, all prints of police personnel, and all prints of Lisa Ulrich, her boyfriend, and her children. Excluding these, no prints "of value" were found. RP 2920-21.

h. Bullets and Shell Casings

The gun used was never located.

The three shell casings at the scene had been fired from the same gun. They were not reloads; i.e., they had been fired only once from a single gun, not reloaded and refired. RP 1431-34; Exs. 16-18.

Although the state's expert believed four of the five bullets were fired from a semi-automatic, RP 1423-24, he could not say if the bullets were fired from the shell casings found at the scene. RP 1434, 1437. He could not rule out a revolver as having fired the shell casings. RP 1452. If it was a semi-automatic, it was a very common model, one that numbers in the multi-millions. RP 1421-23, 1439-41, 1451-52, 2152.

A semi-automatic handgun would eject the shell casings, but would eject one for each bullet, not three for five bullets. RP 1434. A revolver would not expel shell casings at all. The shooter must open the cylinder and manually remove the cartridge cases. RP 1414.

Without a gun to compare it to, the expert could not determine what kind of gun fired the rounds, nor determine an ejection pattern to

predict where casings should have landed if ejected. RP 1409, 1458.

i. DNA

The Washington State Crime Lab processed the three shell casings together for DNA. RP 2566-73; Exs. 18, 28B, 28C.

**The DNA on the shell casings was that of a female. It conclusively excluded Mr. Hilton.** RP 2597-2606.<sup>13</sup>

j. Searches of Mr. Hilton's home

The police obtained two search warrants for Mr. Hilton's home and vehicles. They searched first on March 26, 2002, while Mr. Hilton was at the Richland Police Department giving his recorded interview.

Officers seized Mr. Hilton's personal computer, numerous spent .45 caliber shell casings including "A-Merc" brand, reloading equipment, a box of latex gloves, and other items. ... Officers found nothing that would have come from the Ulriches' home. Nothing of evidentiary value was found in Mr.

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<sup>13</sup> Although the supervising forensic scientist had noted no contamination events in handling the evidence, she agreed the few alleles present were consistent with her own DNA. RP 2683-94. The state offered evidence that a test it conducted after this second trial began excluded Lisa Ulrich from this DNA. The court did not admit this evidence, as the defense expert was unable to review the work. RP 2670-73.

Hilton's vehicles or in examination of his clothing or footwear.

State v. Hilton, Court of Appeals No. 22116-4-I (Slip Op. 1/26/06) at 7, review denied, Supreme Court No. 78685-2 (Jan. 2007).

They also seized receipts showing Mr. Hilton had purchased A-Merc brand .45 caliber ammunition from Schoonie's Gun Shop. RP 57-61, 118-20.

When the prosecutor expressed concern that the first warrant could be invalid, Det. Wehrens obtained a second search warrant on April 23, 2002. They had seized buckets of spent shell casings in the first search. Det. Bricker, the lead detective for the search, speculated there might be additional spent shell casings at the residence that he didn't find the first time. State v. Hilton, supra, at 26.

k. Arrest and Charges

The state arrested Mr. Hilton on April 26, 2002, at his home while he was having a yard sale. RP 3691-92. It charged him with two counts of aggravated first degree murder.

4. FIRST TRIAL AND APPEAL

At a first trial, the jury found Mr. Hilton guilty as charged.

The Court of Appeals reversed the convictions. It held the first search warrant violated the Fourth Amendment's particularity requirement; and the second was based on what was found with the first. It remanded for retrial without the evidence obtained from the searches. State v. Hilton, supra. The Court of Appeals did not address other issues raised, including the seizure of library records.

5. SECOND TRIAL: PRETRIAL

a. Motion to Disqualify Prosecutor

The defense moved to disqualify the Benton County Prosecutor's office, headed by Andrew Miller, because of his friendship with Ms. Ulrich.<sup>14</sup> The court denied the motion. It found Mr. Miller and Lisa Ulrich were acquaintances at best. RP 12-14; CP 20-21.

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<sup>14</sup> When Ms. Ulrich found her parents' bodies, she personally phoned Mr. Miller on her cell phone while she asked neighbors to call police. Mr. Miller promptly responded in person to the scene at her call. Prior to the first trial, Mr. Miller's deputy prosecutor participated in Ms. Ulrich's attempt to get a restraining order. Mr. Miller wrote a Declaration for Ms. Ulrich in a custody case over her son, Kelly. And Ms. Ulrich felt comfortable enough to call Mr. Miller's office to intervene about her son's juvenile matter later referred to them. CP 863, 865-76; RP 921, 1362-63, 1268-72; Dep. of P. Coleman at 1-13.

b. Police Department and Brady Evidence

The Kennewick Police Department had been involved in this case only to examine the computer seized from Mr. Hilton's home with the search warrant. Before the second trial, however, a private citizen approached a Kennewick police officer. Without counsel's involvement or knowledge, she provided him four binders of documents, apparently from trial discovery. The officer reviewed the material and drafted a thirteen-page memorandum regarding his opinion of the case, which he passed to his supervisor. This memorandum was "not an officially sanctioned investigation." RP 16-19.

The Kennewick Police Department then conducted an internal investigation regarding this officer's activity. Defense counsel subpoenaed the documents and all related information from the Kennewick and Richland police departments. RP 15-24.

The court disclosed to all counsel the four binders of material and the thirteen-page memorandum and email communications. Counsel were satisfied with this review. RP 26-27, 136-41.

The court reviewed in camera the internal investigation records for possible Brady evidence.

RP 141-43. It concluded there was no Brady evidence in it. It sealed the documents for the record. RP 289-90; CP 1118-1228.

c. Schoonie's Records

The state conceded it could not present any evidence recovered from the two unlawful searches of Mr. Hilton's home. Nonetheless, it sought to introduce receipts showing Mr. Hilton had purchased guns and ammunition at Schoonie's in 1993-94. CP 739; Exs. 45-50.

When they first found the shell casings at the scene, Det. Bricker noted he'd never seen the "A-Merc" stamp before. Dets. Bricker and Wehner discussed the need to identify the manufacturer, but "the specific assignment was not made at that point in time." RP 125.<sup>15</sup> Furthermore, Det. Bricker was not able to say that, if he had gone to the manufacturer, his research would have led him to retailers in the area. RP 75-76.<sup>16</sup>

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<sup>15</sup> Det. Bricker referred to "gettin' on a web site," but by then he had a box of the ammunition, so this was after he'd been to Schoonie's. RP 62.

<sup>16</sup> The record-keeping laws had changed. He didn't know what records the manufacturers or retailers would have.

During the March 26 search, Det. Bricker seized a file from Mr. Hilton's basement containing receipts from Schoonie's Rod Shop in Benton City. RP 57-62.

After the March 26 search, Det. Wehner directed Det. Bricker to research the A-Merc brand, to contact all gun shops or ammo shops in the region and find out who sold it. RP 124-26. Receipts in hand, Det. Bricker went to Schoonie's first, on April 8, 2002. RP 65; Pretrial Ex. A. "Upon checking their records against copies of the receipts obtained during the search warrant of Kevin Hiltons home," the owner was "able to confirm that the receipts from Kevin's home were from their shop." Pretrial Ex. A at 1. The matching receipts for these eight-year-old transactions were in her records. RP 54-55.

Det. Bricker testified he later checked other gun and ammunition dealers in the Tri-Cities, but none sold the same ammunition with the A-Merc stamp. His 2002 report did not note any of these contacts. RP 56-57; Pretrial Ex. A.

On January 20, 2003,<sup>17</sup> he checked with several dealers in Richland, Kennewick, and Pasco. Pretrial Ex. A at 27-28. None of these dealers sold American .45 ACP ammunition. RP 65-66.<sup>18</sup>

The court ruled the receipts were admissible under both the independent source doctrine and the inevitable discovery doctrine, exceptions to the exclusionary rule. RP 131-32, 144-47; CP 24-27.

d. Subpoena Duces Tecum and "Special Inquiry Judge Proceeding"<sup>19</sup>

On March 26, 2002, at 11:10 a.m., someone purporting to have telephonic authority signed

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<sup>17</sup> This investigative step did not occur until three days after the court heard the defense Motion to Suppress Evidence, claiming the warrants were invalid, before the first trial. Supp. CP [Subno. 171, Clerk's Minutes from Status Conf./Hearing 1/17/03].

<sup>18</sup> He later testified that JT's Guns in Richland had A-Merc when he was there in 2002. RP 2145. His report shows JT's didn't carry it until May of 2002 -- suggesting his investigation there did not occur until after that date. Pretrial Ex. A at 27.

<sup>19</sup> This issue was raised before the first trial and raised in the first appeal. The Court did not address it in the appeal. The issue was raised again before the second trial. References to the record on this issue refer to the Report of Proceedings from the first trial and appeal. State v. Hilton, Court of Appeals No. 22116-4-III.

Judge Swisher's name to a Subpoena Duces Tecum.<sup>20</sup>

CP 492. The subpoena directed the Richland Library

to be and appear before **the Special Inquiry Judge of Benton County**, State of Washington, Benton County Justice Center, 7320 West Quinault, Kennewick, Washington, on April 19, 2002, at 1:30 p.m., then and there to give evidence concerning matters there under investigation and then and there to have with you:

Any and all documents and/or records that would show any activities or transactions between Kevin Lee Hilton and the Richland Library between March 18, 2002 and March 25, 2002.

CP 492. The subpoena noted an appearance in court would not be necessary if the records were received by Det. John Hansens. The caption on the Subpoena was for Benton County Superior Court, "Proceedings Before the Special Inquiry Judge." There was no cause number on the subpoena. CP 492, 877-80.

At 11:55 a.m. that morning, the police obtained from the library the following information regarding Mr. Hilton's library usage:

Returned "Hard Time" 03/19/02, returned both "Richter 10" and "Chance" on 03/21/02, checked out "P is for Peril" on 03/21/02.

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<sup>20</sup> No electronic recording of an affidavit or of the court authorizing this subpoena was ever produced.

With these records, the police seized the four books from the library. CP 477-78, 494, 496-98.

The defense repeatedly moved to exclude the records of Mr. Hilton's library usage before the first trial. Benton County had no special inquiry proceedings at the time. CP 877, 879-80, 575-80.

At a hearing set for entry of findings, the defense again raised the issue, and the court again declined to rule. The defense noted there was no evidence to identify the signature and notation on the subpoena duces tecum, and no special inquiry judge proceeding was ever initiated. RP(8/21/03)<sup>21</sup> 44-52.

The trial judge searched Benton County's local rules and found nothing regarding special inquiry judge proceedings. The court observed, "At the time of the issuance of the subpoena duces tecum there was no other special inquiry proceeding." RP(8/21/03) 71-73.

The court eventually entered findings:

6. ...The subpoena duces tecum commanded the Richland Library to appear before the Special Inquiry Judge of Benton County.

...

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<sup>21</sup> This report of proceedings is within the volume dated on the cover "February 14, 2003."

8. At the time of the issuance of the subpoena duces tecum, there were no subsequent [sic] special inquiry proceedings.

RP(8/21/03) 44-52, 71-73; CP 1003-04. Nonetheless, the court denied the motion. RP(1/17/03) 32.

Defendant raised this issue on appeal. The state did not cross-appeal nor challenge the findings of fact quoted above in the appeal. This Court did not address this issue in its opinion. State v. Hilton, supra.

The defense renewed this motion to exclude before the second trial. CP 877-95. The court denied it. RP 240-46.

e. Laura Hilton's Deposition

Laura Hilton was Kevin Hilton's ex-wife. She did not testify at the first trial. The defense objected to her entire deposition as irrelevant. She had minimal contact with Kevin Hilton after their divorce in 1997-98, and knew nothing about his life in 2002. CP 408.

The state argued Laura's testimony that before their divorce in 1997, Kevin "would shut down," "wouldn't help," "would be angry" when they moved was admissible under ER 404(b) to prove his motive to kill the Ulrichs in 2002 -- so he would not have

to move. RP 2472-91. The court overruled the objection. CP 28-32.

The defense also objected to an inventory Laura Hilton prepared of the guns and ammunition Kevin had at the time of their divorce. It virtually duplicated the inventory from the unconstitutional search warrant. CP 444-45; RP 921-22; Ex. 477A. It was derived from the unconstitutional search: the state would not have sought such evidence without the unlawful search. The court ruled it was admissible under the independent source doctrine. RP 922-23.

f. Excluding Defense Evidence

The state moved to prevent the defense from presenting what it described as "third party perpetrator evidence," specifically:

questions, comments or suggestions that Lisa Ulrich had financial motive to murder her parents, that she had access to her parents' home or that any of her friends and family were in any way involved in the murders.

CP 630. The defense responded asserting the right to cross-examine and to present evidence of another suspect. It made the following offer of proof, based on the record of the first trial:

Lisa Ulrich visited her parents with her daughter, Carly Connell, and young

son Kelly on March 20, 2002. While they were there, Jo Ulrich was preparing dinner. Initially, the day after the murders, Ms. Ulrich told the police (Off. Sandra McCamish) they had arrived at 5:00 p.m. and left at 5:30 p.m. At trial she had "remembered better" that she didn't leave until 5:55 p.m. And she may have arrived as early as 4:30. Ms. Ulrich recalled that she and her boyfriend at the time, Joe Yahne, had to get his daughter home by 7:00 p.m. She claimed she and Mr. Yahne<sup>22</sup> then sat in her garage at their home arguing from 6:45 p.m. until 8:30 p.m.

Ms. Ulrich's daughter Carly wanted to go back [to] her grandparents to pick up a jacket she left but her mother, Lisa Ulrich, told her to wait until the next day. Carly initially said that they were there from 4:00-6:00 p.m. At home, Carly's boyfriend came over and she spent the rest of the evening with him in a part of the house away from Lisa, Joe, and his daughter.

Kevin Hilton arrived for his volleyball game at the usual time of 8:30 p.m. He usually was there at least ten minutes early. When teammates asked, he explained he had spilled garbage he had to clean up before leaving the house so the cat wouldn't get into it. He played volleyball until 10:30 p.m.

The timing issue is crucial to the case since the defense maintains that Mr. Hilton had no time to kill the Ulrichs and show up for volleyball unperturbed. Mr. Hilton appears to have called the Ulrichs at 6:42 p.m. on March 20, 2002. The State's theory was that Mr. Hilton appeared at the Ulrichs between 6:42 p.m. and 7:41 p.m. (Hilton on the internet) and shot the couple (and then played volleyball at 8:30 p.m. without anything strange being noted about Mr. Hilton).

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<sup>22</sup> Mr. Yahne never testified in this case. The defense did not concede this evidence was true.

Partial bloody shoeprints were found leading from the victims to the front door. A defense expert, William Bodziak, opined that the shoe that made the bloody prints was a size eight or at most a size nine. Lisa Ulrich wears a size 8-1/2 shoe.

Also, female DNA was found on the shell casings found at the scene (one can slough off skin cells when loading a gun). The DNA on the shell casings was that of an unidentified female. It conclusively excluded Mr. Hilton. It also excluded the crime lab technicians, and Larry and Jo Ulrich.

...  
In the present case, evidence that Hilton was the shooter is entirely circumstantial. There are no witnesses to the shooting or anyone claiming to see Hilton coming or going from the Ulrich's house on the night of the murder. The last people to see the Ulrichs alive were their daughter and grandchildren. The first to find them dead the next morning was Lisa Ulrich. The timing is also significant.

... Female DNA was found on a shell casing. Lisa Ulrich stood to gain from the death of her parents in the form of a large inheritance. The circumstantial evidence against Lisa Ulrich is as strong as the circumstantial evidence against Kevin Hilton. **The defense should be allowed to put on this evidence to the extent it is characterized as "third party perpetrator" evidence.**

CP 623-27.<sup>23</sup>

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<sup>23</sup> The offer of proof includes citations to the report of proceedings of the first trial, where this evidence came in.

The court ruled the defense could not present evidence nor argue that Lisa Ulrich was a possible suspect. RP 207-08, 935-40.

1. Arguments that Lisa Ulrich specifically committed the crimes herein shall not be allowed.

2. Cross-examination of Ms. Ulrich is allowed on the following:

a) That she entered her parents's [sic] home at 210 Thayer, Richland, Wa. by using a credit card to unlock the front door.

b) Ms. Ulrich's shoe size.

c) That she was not consistent in stating the time that she arrived at and left her parents's [sic] home.

d) That she would have inherited from her parents after their death.

3. Cross-examination on the following topics is not allowed:

a) The specific amount that Ms. Ulrich would have inherited from her parents.

b) That she called Prosecutor Miller after discovering her parents had been murdered.

CP 23.

The court also granted the state's motion to strike Andrew Miller from the defense witness list.

RP 337-39.

g. Motion to Exclude Financial Hardship

Based on the experience of the first trial, counsel moved in limine to exclude evidence and argument of Mr. Hilton's poverty, unemployment, and debt. Other than owing the back rent, there was no relevance to his being broke. The court denied the motion. RP 303-14; CP 457-58, 583.

h. Motion to Exclude Gun Ownership and Gun Club Membership

The defense moved pretrial to exclude evidence of Mr. Hilton's past gun ownership and involvement in a gun club. The state argued: "Whoever shot the Ulrichs was a good shot. ... We're gonna need to show the person that shot the Ulrichs was involved pretty heavily with guns." The court allowed the evidence under ER 403, 404(b). RP 216-23; CP 588-90.

The defense again objected to Laura Hilton's testimony about his gun ownership from years earlier, and particularly to her speculation that he may have owned more than she found. RP 921-23.

6. SECOND TRIAL: EVIDENCE

a. Prosecution's Opening Statement

The prosecution proposed establishing that Mr. Hilton's mother and sister had asked him, before he

was charged with these crimes, whether he had killed the Ulrichs. RP 320-24. The defense objected. RP 326, 911. The court excluded this evidence. RP 931-35.

The prosecutor used a PowerPoint for his opening statement. He explained he would adjust his PowerPoint based on the court's rulings in limine. RP 942. The PowerPoint included slides of exhibits not yet admitted into evidence. The court sustained the defense objection. The prosecutor apologized and "moved quickly" through those slides. RP 961, 965.

Within moments, the prosecutor displayed to the jury a slide that read:

"Formal Interview Mar. 26.

Admits mom asked if he killed Ulrichs.

Admits mom's question is unusual."

RP 979. The court excused the jury. It sustained the defense objection as violating the ruling in limine; but it denied a mistrial. RP 978-82.

b. Evidence

Larry and Jo Ulrich owned fourteen duplex rental units in Richland. At the time of their deaths, thirteen were occupied. Larry did most of the maintenance and prepared the tax returns. Jo

handled collecting rent and the day-to-day accounting. RP 1040-44, 1097-1111.

The Ulrichs often worked with tenants who had problems paying rent. Some tenants performed work for the Ulrichs in return for rent credits. RP 1094-96, 1672-75, 1680-83. Some entered into promises to pay. Mr. Lawson, for example, signed promissory notes for \$4,469 he owed in back rent, with a plan to repay it over time with interest. RP 1137-45, 1173-74, 1183-84; Exs. 267-69.

Jo occasionally provided a written Notice to Pay or Quit for a tenant to use to obtain public assistance to pay the rent. Tenants Heather Nelson and Amie Boatwright received the Notice from a triplicate tri-color form that made its own copies. RP 1206-11, 1675-77. Extra copies of these triplicate forms were in the Ulrichs' files. RP 1680-83; Exs. 31-C, 31-O.

The Ulrichs "bent over backwards" to work with their tenants if there were problems paying rent. They rarely, if ever, evicted someone. RP 1683-84.

The Ulrichs had two grown daughters. Lisa<sup>24</sup> lived in Richland; Jennifer lived in Washington, D.C. Neither daughter had resided with their parents since they graduated from high school, in 1983 and 1987, respectively. They both testified to their understanding of their parents' rental practices, offering interpretations from notes on calendars, sticky notes, and mismatched files. RP 1040-80, 1094-95, 1185, 1292-93, 1301-14, 1321-22, 1327.

c. March 20, 2002

Lisa Ulrich visited her parents with her daughter, Carly Connell, and young son, Kelly Castleberry, on March 20. Jo Ulrich was preparing dinner. RP 1294-96. Kelly wanted to sleep over at his grandma's, which he did frequently, but his mother said no. RP 1394-95, 1613-15.

Lisa recalled she and her boyfriend, Joe Yahne, had to get his daughter home by 7:00 p.m. She testified they were home about 7:30, and eventually went to bed. RP 1295-97.

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<sup>24</sup> Lisa was adopted, but the court prohibited the defense from mentioning that fact. RP 148-50; CP 648-49.

Lisa told the police, however, that she'd sat in the garage arguing with Joe until 8:30 or so. RP 3069-72. *Kelly testified he did not remember whether Mr. Yahne was there that night.*<sup>1</sup>

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<sup>1</sup> Counsel for appellant vehemently disagrees with this characterization of Kelly's testimony, but includes this sentence as ordered by the Court. See Commissioner's Ruling; Motion to Modify; Order Denying Motion to Modify (12/29/09); but see U.S. Const., amends. 6, 14; Const. art. I, §§ 3, 22.

**Counsel for appellant understands Kelly's testimony to be that to the best of his memory, Joe Yahne was not at the house that night.**

His testimony was:

Q. Now when you went home, who all was there when you went home?

A. Uh, **it was just me, my mom, and my sister** as far as I can remember.

Q. Okay. You don't remember anybody else being there?

A. ... Oh, no, I don't.

...

Q. It's okay.

Do you remember a fellow named Joe Yahne being there?

A. Yeah, I remember -- **not that night**, but I remember Joe being around.

Q. Okay. Was he staying there?

A. Uh, he wasn't living with us.

Q. Okay, but would he stay there on occasion?

A. Yeah, occasionally.

Q. But not on this night?

A. **Yeah, not on this night.** Not that I can remember.

Q. Okay, and you don't recall seeing his daughter or do you know if he has a daughter?

A. No, I know he has a daughter. **I don't remember seeing him or her that night, though.**

RP 1397-99.

Carly said they left her grandparents about 8:30 p.m. RP 3082. She said Joe Yahne and her boyfriend came over later that night. RP 1613-14.

Kevin Hilton arrived for his volleyball game that evening at exactly 8:30, the starting time. He usually was there at least ten minutes early to warm up. When teammates asked, he explained he had spilled garbage. He had to clean it up before leaving so the cat wouldn't get into it. RP 2183-2203. There was nothing unusual about Kevin that night. He carried the same orange gym bag. He played volleyball until 10:30 p.m. His teammates joked how he always wore the same clothes and Costco brand tennis shoes. They never saw him with a fanny pack. RP 2198-2200.

d. March 21, 2002

After midnight on the night of March 20-21, 2002, a fuse failed on a power pole supplying three

houses, including the Ulrichs'. The power company restored power by 2:00 a.m. RP 3102-18.

It was still dark when Carl Stewart delivered the paper to the Ulrichs at 4:49 a.m. All the lights in the house were on. Usually only the kitchen and dining room lights were on. RP 3399-3403, 3434-35, 3735-38. He also noticed a green Mercury Sable in the driveway, parked diagonally behind a white car. There was no one in it. He knew it wasn't one of the Ulrichs' cars. RP 3403-12, 3442, 3707-09; Ex. 147.

Lisa's oldest son, Kyle Connell, stopped by his grandparents' at 7:55 a.m. He said the entire house was dark; there were no lights on. He got no answer when he knocked. The door was locked, when it usually was open. He had a key, but didn't use it. He drove away in his green Honda Accord. RP 1600-05.

Jo Ulrich routinely went to Lisa's home to help Kelly get ready for school in the morning. At 8:50, Kelly called Lisa at work to say grandma hadn't come. Lisa's phone call to her parents went unanswered. She then left work and picked up Kelly. Instead of taking him to school, she drove to her parents' home. RP 1296-99, 1392-93. She

let herself in the locked door using a credit card.  
RP 1270, 1359-60.

e. Mr. Hilton's Computer

Mr. Hilton's computer records showed he was on the internet after noon on March 20, 2002, at the following times:

1255:53 - 1352:44	(12:55 - 1:52)
1441:11 - 1505:48	(2:41 - 3:05)
1742:12 - 1759:17	(5:42 - 5:59)
1820:13 - 1820:21	(6:20 - 6:20)
1941:32 - 1941:42	(7:41 - 7:41)
1958:35 - 2010:24	(7:58 - 8:10)
2241:17 - 2245:36	(10:41 - 10:45)

RP 3259-65, 3542, 3603; Exs. 134, 490. RP 3265-67.

f. Caller ID

The Ulrichs' caller ID listed a call from Mr. Hilton's phone at 6:42 p.m., confirming what he told the police. A list of all calls received March 17-22 listed many sources as "unavailable." The police were unable to trace these sources. RP 1722-29, 1770-74; Ex. 135.

It was the state's theory that Mr. Hilton was able to travel the 11 blocks from his home to the Ulrichs' residence and commit the murders between the time of his 6:42 telephone call to them and his 7:41 p.m. log-on to his home computer. State v. Hilton, supra, at 10.

g. Library Books and Records

The Richland librarian knew Mr. Hilton as a frequent library user. She did not recall seeing him the evening of March 20. There were times she had stepped away from the front counter that evening. People could enter the library without her seeing them. The library kept paperbacks on spindles just inside the front door. It did not keep check-out records of the paperbacks. RP 2154-2167-76, 2181; Exs. 87, 92.

Mr. Hilton frequently borrowed both hardbacks and paperbacks. The library records showed that Mr. Hilton had returned one hardcover book March 19: HARD TIME by Sara Paretsky; and two on March 21: CHANCE by Robert Parker and RICHTER 10 by Arthur Clark. Over objection, the court admitted copies of the books themselves, but required they be wrapped and sealed so the jury could not open the books or review their contents. RP 2163-67, 2175; Exs. 36-39.

h. History of Firearms

Back in 1994-97, Mr. Hilton had shot in practical pistol competitions at a local gun club. The preferred gun for these competitions was the .45 caliber Model 1911 style. Almost everyone

customized their gun in some way. He competed maybe four or five times. RP 2202-12, 2306-18.

Perhaps the most common size of a handgun is .45 caliber Model 1911. Hundreds of thousands of the weapons exist. People commonly purchase ammunition for them at gun shops, gun shows, yard sales, and in bulk by mail. RP 1441.

In 1994 Mr. Hilton bought a .45 caliber Model 1911 style Norinco handgun from Schoonie's Rod Shop. At the same time, he bought A-Merc brand cartridges. He was one of five people who bought this brand at this shop. He had not purchased any since 1994. RP 1877-1920, 1934, 1942.

i. Yard Sales

i. Shell casings

In 2006, after the Court of Appeals reversed Mr. Hilton's conviction and excluded the evidence seized from his home, a good friend of Det. Hansens brought him a can containing 67 shell casings. He said it contained shell casings that his father had bought at a yard sale in 2002 at Kevin Hilton's

home.<sup>25</sup> The father testified he bought a small plastic bag of shell casings and gave them to his son, who was a reloader. RP 2511-15. The son dumped the casings into this can with others he had until he got ready to polish, size and reload the brass. He didn't look at the casings. RP 2528-40. Three of the casings in the can were stamped "A-Merc." RP 2541-49; 3290-96; Exs. 495-504.

There was no evidence to distinguish whether these three casings were from the small bag the father had bought, or were already in the can.

The crime lab determined none of the casings in the can had been fired from the same gun as the casings found at the Ulrichs' home. RP 2550-51, 3296, 3313-14, 3444-46.<sup>26</sup>

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<sup>25</sup> Mr. Hilton was conducting a yard sale on the day he was arrested, April 26, 2002. It is not at all clear why he would have still had any empty shell casings after the police had twice searched his home specifically looking for shell casings.

<sup>26</sup> The state called another yard sale patron who reported he'd bought A-Merc shell casings, most likely at a yard sale in 2004 at another address on Mahan, at a trailer park. His hobby was to make tie tacks out of cartridge cases. Over the years, he'd had A-Merc brand "off and on." RP 2695-2707, 3296-97.

ii. Gun

In the spring of 2002, Mr. Frisby had a yard sale at 1869 Mahan. He sold a Model 1911 style .45 caliber ACP pistol manufactured by Para-Ordnance, serial number PG-004962. He remembered the buyer asked him if he had guns for sale, so Mr. Frisby went into the house and brought the gun out. He hadn't listed it in the yard sale. The same man bought a .22 caliber rifle from him. RP 2218-24; Ex. 455.

Mr. Frisby described the buyer as a man in his 40s, 5'11" and 190 pounds. RP 3758. Mr. Frisby, who is 6'3", described the buyer as having come to his shoulders. RP 2222-25, 3701-02.

In 2007, after the Supreme Court denied review of this case, Mr. Tremmel and Mr. Jones met with the police to discuss a gun they thought maybe they had purchased from Mr. Hilton at a yard sale. It was the gun Mr. Frisby had sold. RP 2721-25; Ex. 455. Mr. Tremmel had seen a picture of Mr. Hilton in the newspaper and identified him as the person who sold him this gun. RP 2732-35. He'd asked the man if he had a gun to sell. The man looked kind of funny, said yeah, he'd go in the house and get it. He brought back a .45 automatic and sold it to

Mr. Tremmel for \$100 -- a very cheap price. Mr. Tremmel bought a .22 caliber rifle from the same man at that yard sale. RP 2226-33.

Mr. Tremmel is 5'9" and weighs 170 pounds. RP 2230-31.

Mr. Hilton is 6'2 and 265 pounds. He did not come to Mr. Frisby's shoulders and he did not match the description. RP 2752-53, 2225.

At trial, Mr. Frisby was unable to identify the buyer in the courtroom. RP 2221. He agreed Mr. Hilton did not come to his shoulders. RP 2225.

There was no evidence connecting this gun to the murders. RP 3314, 3446-49.

j. Shoeprint Evidence

William Schneck, a forensic scientist at the Washington State Crime Lab since 1990, examined the evidence of partial bloody shoeprints. RP 2804-05. He initially predicted the shoe was 10-3/4 to 11-1/4 inches -- size 7 to 10. After learning Mr. Hilton wore a size 13 shoe, Mr. Schneck crossed out his measurements. He tried other methods to connect the impressions to a size 13. RP 2876-78.

"I knew he had a size 13. So, I looked for size 13." RP 2881.<sup>27</sup>

During the second trial the FBI found the make of shoe that matched the imprinted sole. Mr. Schneck received photos of it: a 1991 or 1992 Nike Air Trainer. He had no idea what size the shoe in the photo was. RP 2822-25; Exs. 473-74.

Mr. Schneck testified he could not eliminate a size 13 shoe as having made the bloody shoeprint impressions. RP 2848. He acknowledged:

If I knew the defendant wore a size 14, I would have gone to 14 or 15 or 21. That's why I stopped at 13. What would a size 13 look like? Would it look awkward? Would it look unusual? Size 13 did a little bit, but size 11 looked too short.

RP 2908.

During a recess, Mr. Schneck saw Ex. 466: a pair of Nike shoes matching the photos he'd examined from the FBI. They were size 9. After seeing them, Mr. Schneck agreed the bloody imprints could not have been made by a size 13 shoe. RP 2848.

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<sup>27</sup> "I don't, by the way, claim to be a footprint expert at all." RP 2837. His degrees were in respiratory therapy and geology. RP 2805.

Nike maintains a collection of every shoe it ever manufactured, all in size 9. Nike sent Mr. Bodziak, formerly the FBI's expert in footwear impressions, the shoe that matched the bloody imprint. RP 2985-97. From that shoe, he was able to determine the shoe that left the print was probably a size 9-1/2, perhaps as large as 10. RP 3006. He noted this particular shoe ran small for its size. RP 3022-23.

Mr. Hilton's foot tracings<sup>28</sup> showed his feet were much larger than size 9-1/2 to 10. They ranged from size 12-1/2 to 13-1/2. RP 2978-79, 3006. Mr. Hilton's foot was much longer, heel to toe, than the shoe's insole. RP 3060. Mr. Hilton was very flat-footed. RP 3682-83.

Police Detective Brazeau also wore a size 13 shoe. His feet measured 1/4" to 5/8" smaller than Mr. Hilton's. He had an arch. RP 5720-22, 3722, 3778. Det. Brazeau testified he was able to wear size 9-1/2 New Balance shoes and jog 1/4 mile in them without a problem. He tried on the pair of

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<sup>28</sup> Tracing the foot, as in Exs. 168-69, captures the actual width and length of the foot; an inked impression, such as Exs. 158-59, records only the part of the foot that touches the ground. It does not take into account the fleshiness of a foot. RP 3020.

size 9 Nikes, which he agreed did not "fit" him, but believed he could jog 1/4 mile in them. RP 3767-78.

k. Mr. Hilton's Taped Interview

The court played the tape of Mr. Hilton's interview. RP 2451-71, 2492-2501; Exs. 418-421.<sup>29</sup> Responding to questions, Mr. Hilton described his back rent that was due, other debts to his parents and credit cards, his working off part of his rent with Larry and Jo Ulrich, and his recent conversations with them to "formalize" a repayment and work plan. Ex. 418 at 1-2.

He described his activities of March 19-21 generally: computer work in his basement; errands (shopping,<sup>30</sup> gas, to the library, returned a book by Sara Paretsky); volleyball each of those nights. On Thursday he'd driven to Mattawa to sell \$100 worth of reloading primers to a man who had bought some of his reloading gear before, then gone to

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<sup>29</sup> Ex. 418 is the transcript of what was played for the jury; Exs. 419-21 are the disks with the recording. The court reporter did not report the recording at it was played.

<sup>30</sup> In the past two weeks he'd shopped at Winco, Albertson's, and Safeway, he wasn't sure if he'd been to Costco. Ex. 418 at 3.

Margaret's, volleyball, and spent the night at her home. Ex. 418 at 13, 15.

Friday morning he talked with Sgt. Taylor early, slept, then went to Tacoma for the weekend with his kids and parents. Ex. 418 at 15.

He explained his history of owning guns: what he had owned, still had, and one rifle in pawn. He described his IPSIC shooting years earlier, reloading ammunition, and that he'd been selling the guns, equipment and supplies to support himself. He'd sold to people he knew and at gun shows to people he didn't know. Ex. 418 at 16-20.

He also explained at some length his arrangement with the Ulrichs for working for rent. They permitted him to pay up to one-half the rent with work credits at \$12/hour. Thus he was responsible for \$300/month of actual payment, plus working for them. He had spoken with Jo over the previous ten days at her request to come to a "more formalized" resolution. She said Larry was willing to have him work half of it off, but they either needed the money or a note and work plan they could

agree to. He should write it up and call them about it.<sup>31</sup>

He told the detective he had called the Ulrichs Wednesday, March 20, about dinner time to read his proposed note. While he was out, Jo had called back and left a message approving the plan. Ex. 418 at 9, 12. He provided a copy of the note and repayment plan he had sent the Ulrichs. RP 2493-96; Exs. T1-T2.

In his six years of renting from the Ulrichs, he recalled getting a receipt for paying rent only if he paid by cash, not if he paid by check. Ex. 418 at 10.

When the detective asked him why Larry would be holding a receipt made out to him for the full amount he owed, Mr. Hilton had no idea. "The only way there'd be some sort of a receipt would be if I'd been able t'pay off the amount, couldn't payoff the amount." Ex. 418 at 19.

Asked how upsetting it would be if he were evicted, he responded: "Being evicted, is just

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<sup>31</sup> This request was similar to the arrangements the Ulrichs had made with another tenant, Mr. Lawson -- whose file was on the refrigerator with some of Mr. Hilton's documents in it. Exs. 267-268.

being evicted. That means you have to find a different place to live." Ex. 418 at 21.

He denied any involvement in or reason for killing the Ulrichs.

l. WinCo Security Videos

Security videotapes from WinCo Foods for the evening of March 20, 2002, did not show Mr. Hilton. RP 1961-68.<sup>32</sup>

m. Financial Situation

In 1998, the year he divorced, Kevin Hilton worked every month for Larry Ulrich to offset his rent. Exs. 30 H-I. The divorce left him with credit card debt of about \$20,000. RP 3674-75.

Mr. Hilton began selling his possessions to pay his living expenses. RP 2312-13. That fall, he again worked for Larry for his rent. Exs. 30 A-B. He also sublet his duplex to roommates. RP 3668. He did odd jobs for people he knew, and occasional contract work by computer. RP 3575-78, 3676-77.

Mr. Hilton owed some back child support. He'd gotten behind, but was current again by December,

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<sup>32</sup> Sgt. Taylor remembered Mr. Hilton said WinCo foods. RP 1807. Det. Hansens acknowledged Mr. Hilton didn't specify Winco Foods in his interview. RP 1968.

2001. RP 2640. When he was not on time, the state began garnishing his bank account, so he mostly stopped using it. RP 2625-26, 3678. He was again current with support by May, 2002. RP 3674-76.

But there was no evidence that this financial situation caused him stress. Mr. Hilton's mother loaned him money for school and a new car. She sometimes gave him money for child support, rent or other living expenses. He could come to her any time, for a loan or gift. He was to receive a significant disbursement from a family trust in 2004, with another large disbursement to come later. His mother was willing to loan him money against that future disbursement. RP 2293-2304.

Lisa and Jennifer Ulrich inherited their parents' real estate and other assets. They retained a company to manage the rentals. RP 1175-77, 2397-99.

After the Ulrichs' deaths, Mr. Hilton still owed the back rent. With new management, he was not able to work off any portion of it. Ms. Oxenreider invited him to move in with her. He began moving, rented storage, and held a yard sale. He showed no upset at all about the process. On April 8, with funds from his mother, his girlfriend

and his yard sale,<sup>33</sup> Mr. Hilton paid all back rent owed and gave the management company notice that he would move out the end of April, 2002. RP 1185, 2402-03, 2411-12, 2419, 3321-28, 3362-64, 3535-36.

The court instructed the jury on this topic:

Evidence has been introduced in this case on the subject of defendant's financial condition (i.e. his debts, child support arrearage, etc.) for the limited purpose of motive. You must not consider this evidence for any other purpose.

CP 42.

n. Laura Hilton's Deposition<sup>34</sup>

i. Guns and ammunition

Laura and Kevin Hilton petitioned for divorce in 1997. CP 29. When they were married, he had a .45 handgun a friend had customized for him. She testified he carried it with him in a leather fanny pack all the time. He competed in Practical Pistol.

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<sup>33</sup> He made about \$2,200 on his April yard sale. RP 2675-77.

<sup>34</sup> An edited DVD deposition was played for the jury. RP 2360; Ex. 477. A full transcript, before editing, was filed. CP 355-81. The transcript of the edited deposition was not made part of the record. It is being filed with a Stipulation of Counsel in the superior court file to be designated in the supplemental clerk's papers. It is annotated here as "LHDep. at [page]."

Before the divorce, she thought he owned about three handguns and some collector rifles. After she moved out, her father and brother packed all of Kevin's guns and equipment and moved it to Tacoma. Laura made an inventory of what he had, then returned it all to Kevin. Ex. 477A.

Q And when you said you made the list of gun equipment, gun, ammunition, is that the list you are speaking of?

A That is correct.

Over objection, CP 408, she continued:

... And we didn't look further -- there could have been more -- because the mess was so bad.

The guns were "hidden all over, behind books. There were bookcases, and they were just behind everything." LHDep. at 10.

ii. Knew someone

Laura had been involved in a large sexual harassment case at her job, "and it was really bad." She discussed it with Kevin in the last month they were together.

A ... And he said, "Well, I know someone that does away with people." And I was like, 'Oh, my God. What kind of conversations are you having with friends to have them share that information?'

Q **When Kevin Hilton said that to you, how did you take it? Did you take**

it serious or did you takes [sic] it  
as a joke?

A Oh, I took it very seriously. I got  
really physically ill inside.

LHDep. at 10-11. The court overruled counsel's  
objection to Kevin's comment, but sustained the  
objection to Laura's response, directing lines 19-  
22 be deleted (bold above). RP 2370-73; CP 28-32,  
408. Nonetheless, those lines were played for the  
jury. Ex. 477; LHDep at 11.<sup>35</sup>

iii. Keeping things

Laura testified Kevin tended to keep things  
rather than throw them away. He had piles of his  
old shoes in the closet appropriate for doing yard  
work. She did not recall him having any Nike  
shoes. LHDep. at 12.

iv. Moving

In their 16-year marriage they moved five  
times. The prosecutor asked how Kevin "handled"  
moving.

A It was a nightmare. ... He could not  
cope or pack things to move. ... He  
could not make decisions. ...

The anger and anxiety when it came  
to packing was him telling me "you need  
to label everything in every box and  
what's in there, everything." I would  
get no help to move and pack. The only

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<sup>35</sup> Mr. Hilton denied ever making this  
comment. RP 3555.

thing he would move would be the heavy items that I could not lift, every time we moved. ...

When we moved from Seattle to Everett, I worked, and I packed. I worked three days a week. I had Sara. She watched a movie all the time. She was little, one and a half, two years old. I packed. ...

Q ... [What behaviors did you notice] when you and Kevin Hilton would move.

A He would shut down. He wouldn't help. He would be angry. ...

LHDep. at 12-14. The objection was overruled. CP 28-32, 408.

v. Children's reaction

Q Did you learn at some point that Kevin Hilton's landlords, Larry and Jo Ulrich, had been murdered?

A Yes. My children were hysterical.

LHDep. at 17.

o. Testimony of Kevin Hilton

Mr. Hilton testified he had nothing to do with the Ulrichs' deaths. RP 3517-18.

His testimony largely tracked his prior two statements to police. He testified he went to Albertson's on March 20; and that he told Sgt. Taylor Albertson's, not Winco. He testified he was mistaken on the time he sold the second Norinco in Walla Walla; it was February 2001, not 6-8 months before his interview. He testified he returned

paperbacks to the library on March 20. RP 3525-26, 3551-54.

During cross-examination, the prosecutor repeatedly referred to Mr. Hilton's presence at this trial and the prior trial:

Q You have been through one prior proceeding and heard testimony in this case; is that true?

A Yes

Q And you've sat right in that chair and heard all the testimony in this case; isn't that true?

A Yes.

RP 3563.

Q And this is the first time you've told I guess anybody, maybe even your defense lawyers, that you sold the gun in early February of 2001?

MR. CONNICK: Objection to the comment in reference to defense attorneys. ...

THE COURT: I'll sustain the question as asked.

Q Other than your defense attorneys, have you told anyone about this February 2001 date, prior to today in court?

A Yes, I have.

Q Who have you told, Mr. Hilton?

A The other people that are working on my defense team.

Q Right.

So you've told people on your defense team about this, but nobody else?

A That's correct.

RP 3564-65.

Q All right, and, in fact, you've had an investigator in this case, haven't you?

A Yes.

MR. CONNICK: Your honor, I'm gonna object to the comment on his defense and what they did or didn't do.

MR. JOHNSON: I think it's opened up once he testifies, you Honor.

RP 3567. After a sidebar, the court sustained the objection. RP 3567-68.

Mr. Hilton testified he told Officers Taylor and Ruegsegger he went to Albertson's, not Winco on March 20.

Q ... [Y]ou're aware that the police didn't get any kind of video surveillance from Albertson's, aren't you?

A I don't know if they did or not.

Q Well, you sat through one proceeding, didn't you?

A Un-huh.

Q And you sat through this proceeding, didn't you?

A Yes, I did.

Q And according to your knowledge, there was never any video attempted to be gained from anywhere but Winco; is that right?

A That's what I heard.

RP 3604-05.

Mr. Hilton went to the library 4-5 times a week. He testified he returned paperbacks on March 20. RP 3527-30. The prosecutor reviewed that Mr. Hilton had told Det. Hansens he had returned HARD TIME to the library on March 20. "That was my best guess at the time, yes." He had not mentioned any paperbacks. But the library records said he returned HARD TIME on March 19.

Q And you say you realized you were wrong about that after you talked to Detective Hansens; isn't that right?

A Quite a bit later actually, yes.

Q Quite a bit later, and there's been a prior proceeding, correct?

A Yes.

Q And this trial?

A Yes.

RP 3607-08. Yet again, the prosecutor brought up the prior trial:

Q You've had a chance to sit through one proceeding, is that correct?

A Yes.

Q And now this proceeding?

A Yes.

RP 3609. The prosecutor turned to Mr. Hilton's schooling.

Q You withdrew over the course of your college career [from] over 50 classes, didn't you?

MR. CONNICK: Your Honor, I'm gonna object to education as character evidence.

THE COURT: Overruled.

MR. CONNICK: Can we have a side bar?

THE COURT: No.

BY MR. JOHNSON:

Q So, you withdrew from class after class?

A On occasion.

MR. CONNICK: Objection as to relevance, your Honor.

THE COURT: Overruled.

BY MR. JOHNSON:

Q You withdrew from class after class after class?

A On occasion.

Q And even though your family wasn't here, you had no regular job and you weren't in any type of full-time school, you stayed in the Tri-Cities, didn't you?

A Yes. I liked the area.

RP 3644-45.

Q You became upset when you heard you might have to leave 1310 Mahan, didn't you?

A No, I did not.

Q You weren't upset that you were about to lose your home?

A I was not about to lose my home.

Q You weren't upset you were about to lose the place you'd lived for the years that you'd been living in Richland since your family left?

A No. If I have to move, I just have to move.

Q And in fact, Mr. Hilton, you stayed at 1310 Mahan until you were forcibly removed in April of 2002, isn't that correct?

A That is not true. I gave notice on April 8th when they -- when I found out the property management firm that took over from the Ulriches would not honor the agreement and was trying to raise my rent back up to the \$700.00 from the \$600.00 that it had been.

Q You didn't move out of 1310 Mahan did you, Mr. Hilton?

A Eventually I did move out of 1310 Mahan.

Q Let me ask you again. You --

Defense counsel's objection was sustained. At sidebar, the defense pointed out the prosecutor's effort to put before the jury that Mr. Hilton was arrested at his home on April 26, before he could move out. The court again sustained the objection.

RP 3648-49.

Q You never told anything to Detective Hansens about you not answering your front door because of neighbors, did you?

A I was not asked that, no. So, no, I did not.

Q The first time in any official capacity<sup>36</sup> you mentioned that has been here today in court; isn't that right?

A Yes. I haven't talked to anybody officially since the 26th of March.

RP 3690. The court excused the jury. The prosecutor argued that his own question and the defendant's answer opened the door to telling the jury Mr. Hilton had invoked his right to remain silent at the end of his interview on March 26, 2002. The court overruled the defense objection, permitting the state to ask Mr. Hilton if he had any further conversations with police after March 26, but suggested he "shy away" from invoking his rights. RP 3690-93.

The state also asked Mr. Hilton about the three-day Pay or Quit Notice, Ex. 11A. It noted that March 20, the day the Ulrichs were killed, was three business days after March 15, the day Jo Ulrich came to talk to him about back rent. RP 3599-3600.

On redirect, Mr. Hilton testified he did not receive this notice; and furthermore, the exhibit itself said "three days," not three "business"

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<sup>36</sup> Prior objections to the prosecutor's use of "official capacity" had been sustained. RP 3564-65, 3608-09.

days. Sua sponte, the court called counsel for a sidebar and cautioned the defense:

Be careful not to misrepresent Washington State law, which says that weekends and holidays are excluded from the three-day calculation, and that's all I wanted you to be careful of.

Defense counsel explained he wasn't trying to interpret the law. RP 3671-72. He did not pursue this line of questioning any further.

Mr. Hilton had worn size 13 shoes since high school. He did not wear Nikes. He always wore Court Classics, which he could buy at Costco for \$16 a pair. RP 3680-83.

7. SECOND TRIAL: CONCLUSION

a. State's Closing

The state emphasized the theme that Mr. Hilton's financial straits drove him to kill the Ulrichs.

[W]e know the financial motive of the defendant because we know his financial state in 2002 -- in 2000 and through 2002. He had no job. ...

...[T]hat child support financial declaration he filed, he hadn't filed a W-2 since 1997. Since 1997 he had filed no W-2.

It is laughable at best to think that the defendant had a job. In fact, if you look and remember the defendant's statement to John Hansens, he acknowledges, "I really wasn't working." He says that, "The most I earned was \$2,000.00 a year for the past few years."

Was he borrowing money from his mom? Yeah. Was he selling off his assets? Yeah. Was he in the end borrowing money from his new girlfriend, Margaret Oxenreider? Yeah. But he had no job, and he had no financial resources.

He was also delinquent on his child support, and you all saw that board a million times. You know he was delinquent on his child support. And then he takes the stand and has the audacity to tell all of you that, "Yeah, I was delinquent on my child support, but I had other bills I had to pay. I had other things I needed to do with my money.

Not only was he delinquent, he was delinquent to the point where they were garnishing his bank account. That's how bad his situation was. And you also heard how mixed up his priorities were because making sure his child support payments were made, making sure that was done wasn't as important as other things.

RP 3803-05. The court overruled an objection to the state arguing his financial situation as character evidence.

He was deceitful when he hid that money from his children, from his ex wife, and from support and enforcement, and that's one of the many examples of deceit we see with the defendant both in the evidence and in his actual testimony.

The defendant had overwhelming credit card debt, and I say it's overwhelming credit card debt because he had no money coming in. \$2,000.00 a year at most. Most people have some credit card debt. That's understandable. Most people who have some credit card debt, though, don't have no job. Don't have no income.

RP 3805. The prosecutor continued for three more pages on the defendant's financial situation. RP 3805-08.

"Ladies and gentlemen, who else could it be? Who else could it be? No one. No one." RP 3819. "No other reasonable, logical explanation as to who killed the Ulrichs [sic] but the defendant." RP 3836-38.

The state argued that Mr. Hilton killed the Ulrichs March 20, the third business day after he received the three-day notice March 15. RP 3811.

"[H]e's had a chance to see all the evidence twice ... ." RP 3819. Mr. Hilton's testimony that he doesn't answer the front door of his duplex. "That was all new, after having heard all the evidence." RP 3832.

And then the formal interview comes. And in the formal interview, the defendant admits he's near bankruptcy. The defendant admits DSHS has attached his bank accounts, and he's admitting these things because he knows these are things that can be readily proved by the police.

He admits owning a .45 -- having owned a .45 Norinco. Admits to the IPSC shooting. Admits to pawning guns again. All things that he knows the police can verify. But he denies currently owning any .45.

RP 3834.

We also know from Laura Hilton that the defendant hid guns in the past. Hid guns from her, in fact, and so do we know the total extent of how many weapons the defendant had on March 20th of 2002? No. Will we ever know that answer? No.

RP 3837.

He continued saying Mr. Hilton's testimony "certainly was rehearsed."

He's had six years to make this up. Six years to hear all the evidence, six years to get up there and weave a tale to you, and he's had the benefit of knowing all the evidence from a prior proceeding and this case.

RP 3837-40.

He talks about his child support and how he had more important bills. ... He tells you that his finances were fine. That's what he tells you. That they were fine.

They weren't fine. You all know that. ...

RP 3839.

The defendant doesn't miss a beat. As Larry and Jo are lying there dead, the defendant keeps right on going with his life.

And he continues going on with his life. But Larry and Jo didn't get the chance to go on with their lives. You look at this calendar. They had plans. They had things they wanted to do.

MR. HOLT: Object, your Honor, play for sympathy.

MR. JOHNSON: It's no play for sympathy, you Honor.

THE COURT: Overruled.

MR. JOHNSON: They had a life. They had hopes, and they had dreams, and this man (indicating), on March the 20th of

2002, had the audacity to take that from Larry and Jo.

RP 3842.

b. Defense Closing

The defense was precluded from arguing any inference suggesting Lisa Ulrich or anyone else committed these crimes. It thus had no ability to respond to the state's query of "Who else could it be?"

The defense argued, inter alia, that the three-day notice and its accompanying instructions, Ex. 31, actually says 72 hours, not three business days. Most non-lawyers would not understand it to mean three business days. Under the instructions, one would expect to be evicted if he wasn't out by March 18, yet no eviction occurred March 19. RP 3858-59.

c. State's Rebuttal

In rebuttal, the prosecutor repeatedly used "maybe" and "possible" to connect the evidence to Mr. Hilton's guilt. RP 3888, 3892. He also argued that to believe the defendant, the jury had to disbelieve all the following witnesses: Chris Grow, Sgts. Taylor & Ruegsegger, Ms. Norris, Det. Hansens, Laura Hilton, Librarian, Ben Clark, and

Joe Tremmel. "Do you want to disbelieve all these witnesses to believe the defendant?" RP 3890.

After arguing factors the state believed connected the defendant to the crimes, the prosecutor again said: "The only person that meets all of those criteria is the defendant." RP 3895.

d. Verdict and Sentencing

The jury found Mr. Hilton guilty as charged.

At sentencing, Mr. Hilton again protested he had nothing to do with the Ulrichs' deaths. Judge Acey responded: "There is no way I can explain the inexplicable. However, you've been found guilty by a jury of your peers, and that's the law of the case." RP 3928.

e. Motion for New Trial

The defense moved for a new trial based in part on the exclusion of the "other suspect" evidence and the state arguing in closing that no one else could have committed these murders. CP 1005-18, 1019-22. The court denied the motion.

f. Court's Findings and Conclusions

On March 10, 2008, the court entered written findings of fact and conclusions of law on its various pretrial motions. CP 22-32.

It explicitly added a finding that the third business day after the March 15 Notice to Pay or Quit was March 20, the day of the murders. RP 3943-45.

Clearly ... the evening on which they died was the third business day after the State represented that a notice or inferred that a notice to pay or quit premises was delivered to the defendant. ... High relevancy.

RP 4014-15.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE AND ARGUMENT ON THE DEFENSE THEORY THAT LISA ULRICH COMMITTED THESE CRIMES.

- a. Washington State Law

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401. ER 402 provides:

All relevant evidence is admissible ... . Evidence which is not relevant is not admissible.

"A criminal defendant has a constitutional right to present all admissible evidence in his defense." State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). If the evidence

is of even minimum relevancy, the court may exclude it only if the state has a compelling interest in doing so. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

Defense evidence is relevant if it meets or overcomes any of the state's evidence. One can view it by each piece of evidence: e.g., if the state presents a confession, the defense may present any evidence tending to contradict that confession, or that someone else confessed. Or one can compare it to the state's larger theory of the case: if the defense evidence makes that theory or a supporting inference less likely, it is admissible.

i. Other suspect evidence

Historically, courts of this state have required a minimal foundation for evidence of another suspect where there is direct evidence of the defendant's guilt.

Before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.

State v. Mak, 105 Wn.2d 692, 716, 718 P.2d 047, cert. denied, 479 U.S. 995 (1986);<sup>37</sup> State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932); State v. Kwan, 174 Wash. 528, 533, 25 P.2d 104 (1933); State v. Drummer, 54 Wn. App. 751, 775 P.2d 981 (1989); State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993).

However, courts apply a lesser foundational requirement to cases in which the state presents only circumstantial proof of the crime:

[I]f the prosecution's case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime.

State v. Clark, 78 Wn. App. 471, 478-49, 898 P.2d 854, review denied, 128 Wn.2d 1004 (1995); Jones v. Wood, 207 F.3d 557, 562 (9th Cir. 2000); Leonard v. Territory, 2 Wash. Terr. 381, 396, 7 P. 872 (1885).

ii. Cases of direct evidence

It is rare that circumstantial evidence of another suspect will be sufficient to meet or

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<sup>37</sup> Mak offered evidence regarding a third person he claimed was an accomplice to the crime; thus it was not relevant to show someone besides the accused committed the crime, and so not relevant to prove he was not guilty. Mak, 105 Wn.2d at 716-18; Clark, 78 Wn. App. at 478 n.6.

overcome direct evidence of the defendant's guilt. That is, evidence that someone else had a motive to kill the victim, without more, does not counter a defendant's confession or possessing the murder weapon.

See, e.g., State v. Drummer, supra, 54 Wn. App. at 755 (hearsay rumors that others had threatened to kill the victim was "not relevant to rebut the evidence presented against Drummer," including his confessing statements, having items stolen from the murder victim's home, and his knife having the victim's blood on it); State v. Mezquia, 129 Wn. App. 118, 118 P.3d 378 (2005), review denied, 163 Wn.2d 1046 (2008) (evidence victim was angry and jealous of ex-boyfriend's new girlfriend and was looking for him when left friend's apartment not relevant to meet or rebut defendant's DNA found on her body after sexual assault and murder; in contrast, other suspect evidence admissible for cab driver who was in area at time, claimed prior relationship with victim, and made odd incriminating statements a year after murder); State v. Condon, supra (defendant could not cross-examine girlfriend/victim's wife about inheritance as motive to kill victim; did not meet or rebut his

threats to kill the victim and possessing the murder weapon); State v. Downs, supra (evidence that reputed safe burglar was in town night of burglary not admissible to meet and refute defendants being in car near burglary shortly after crime, counting items taken from safe); State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) (defendant told many people about his plans to rob and perhaps kill the victim, recruited others to help him, and there was a long string of eyewitnesses and physical evidence connecting him to the murder; court still permitted defense to question police about the initial arrest of victim's partner, later released after alibi confirmed, but excluded polygraph evidence that partner had been deceptive).

iii. Cases of circumstantial evidence

When the state has only a circumstantial case, the crux is the interpretation of that evidence, the inferences to be drawn, the gaps the jury must fill. In circumstantial cases, the defense evidence "meets" and "neutralizes" the state's evidence by contradicting the evidence or the

inferences, or by showing the same or similar evidence equally implicates another person.

One main question on the trial was, Who killed the deceased? Addressed to this, the evidence for the prosecution was wholly circumstantial; and some of it, tending to identify the defendant as the slayer, was of a like description to that proposed to be obtained from this witness. Defendant, therefore, had a right to meet and neutralize or overcome the evidence of the prosecution, tending to identify himself as the guilty party, by evidence of the same nature tending to identify some other person as the perpetrator of the crime.

Leonard v. Territory, supra, 2 Wash. Terr. at 396.

In addition, ... the prosecution theory was that there was no other person who could have committed the crime - a theory that [the defense] was entitled to rebut once the prosecution relied upon it.

Jones v. Wood, supra, 207 F.3d at 562.

In Jones v. Wood, Mr. Jones was in the bedroom and his wife was bathing when he heard her scream. In the hallway he saw a man with a knife come out of the bathroom. He swung his hand toward the knife, cutting his hand. The intruder pushed him and he hit his head against the wall. Upon recovering, he went into the bathroom where his wife was bleeding profusely in the bathroom. The murder weapon was on the bathroom floor near the

tub. Neither Mr. Jones nor his daughters had ever seen the knife before.

The state charged Mr. Jones with her murder because he was in the house when she was killed between 9:30-10:00 p.m., his head showed no sign of trauma, and they found no evidence that anyone else had done it. Jones v. Wood, 114 F.3d 1002, 1004-06 (9th Cir. 1997), after remand, 207 F.3d 557, 559-60 (9th Cir. 2000).

The Ninth Circuit granted a writ of habeas corpus based on post-conviction investigation that trial counsel had failed to conduct, although he was directed to do so. The investigation showed Busby, a young neighbor infatuated with the Jones daughter, was blocked by Mr. and Mrs. Jones from contacting her. He usually met her secretly at her home, at 9:30-10:00 on Friday or Saturday when her parents were out. She had told him that morning she'd be home and her parents out. But they had changed their plans and she hadn't told him of the change. Although he and his mother told police he'd been home the entire night of the murder, his sister and a friend testified differently. Jones, 207 F.3d at 560-62.

The only issue on appeal after remand was whether Jones was able to lay a foundation under Washington law to admit the evidence implicating Busby. The Ninth Circuit held it was admissible.

If the prosecution's case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime.

... The prosecution's case was almost entirely circumstantial. Thus, under Clark, Jones was entitled to offer "evidence of the same character tending to identify some other person as the perpetrator of the crime."

Jones v. Wood, 207 F.3d at 562-63, quoting State v. Clark, supra.

As in Jones v. Wood, the state's evidence against Mr. Hilton was entirely circumstantial and relatively weak, based largely on arguments that the physical evidence didn't prove he *didn't* commit the crimes.<sup>38</sup> As in Jones, the state also argued

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<sup>38</sup> Here the prosecutor admitted as much in closing argument: "[W]hen you put the murders of Larry and Jo in the context of what the defendant was living, it starts to add up, and that's the best we can do in this case." RP 3812-13. "The shoes don't prove the defendant did it beyond a reasonable doubt, but they absolutely don't provide a reasonable doubt. ... You can't use the shoe prints to convict the defendant, but you can't use them to say he didn't do it." RP 1824. In

that no other person could have committed these crimes.<sup>39</sup>

In State v. Rehak, supra, the victim's wife called the police saying she'd found him dead. She said she walked to the barn at 11:00 a.m. and returned at 11:30 to find him shot. But fresh snow fell the night before. There were no tracks to the barn or at the entry of their rural property before emergency vehicles arrived.

The defense offered evidence that the victim's son could have killed him, based on a history of quarreling and financial benefit if the wife were convicted. He also knew where the murder weapon was kept and had no alibi for the relevant time.

The court affirmed the exclusion of this evidence. The son lived in Snohomish County; there was no evidence he was anywhere near the victim's Clark County residence. Thus the proposed motive

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rebuttal, the prosecutor repeatedly used "maybe" and "possible" to connect the evidence to Mr. Hilton's guilt. RP 3888, 3892.

<sup>39</sup> "Ladies and gentlemen, who else could it be? Who else could it be? No one. No one." RP 3819. "No other reasonable, logical explanation as to who killed the Ulriches but the defendant." RP 3836-38.

evidence did nothing to meet or overcome the wife's presence and opportunity.

In State v. Clark, supra, the defendant was convicted of first degree arson for a fire at his office discovered at 11:30 p.m. He had been at the office earlier that evening. He was fully insured. He filed a claim for the loss. He was divorced, his credit cards were "maxed out" and business was slow. Id., 78 Wn. App. at 475-76.

Clark offered evidence that his girlfriend's ex-husband, Arrington, had set the fire:

Arrington's alleged motive was revenge against Clark for having an affair with his wife and, Arrington believed, molesting his daughter. Arrington had the opportunity to set the fire because his vehicle was seen near the house prior to the fire and because, although he had a similar alibi to Clark's, he nonetheless may have had time to drive to his meeting after setting the fire. Clark also sought to offer evidence that Arrington had previously threatened to set his former wife's house afire and that he had told her he knew how to commit arson without being detected.

Clark, 78 Wn. App. at 479-80.<sup>40</sup>

The trial court excluded all evidence about Arrington. The Court of Appeals reversed.

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<sup>40</sup> Arrington also possessed a note with the fire marshall's phone number on it, not unlike Lisa Ulrich having the number to the prosecutor here. Clark, 78 Wn. App. at 474.

[T]he evidence against Clark was entirely circumstantial. ... While this evidence is not insufficient to support a conviction, **no evidence linked Clark directly to the fire.**

Similar evidence indicates that Arrington had the motive, opportunity, and ability to commit the arson. ... Like Clark, while no evidence directly linked Arrington to the fire, this evidence nonetheless provides a trail of evidence sufficiently strong to allow its admission at trial.

Clark, 78 Wn. App. at 479-80.

In State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996), a child was abducted from her home the night of January 24-25. Her body was found six months later. The state argued the defendant killed her the same night he abducted her. The defense offered a witness who had seen the child alive with another man later on the 25th or the next day. The trial court excluded this evidence.

The Supreme Court reversed and remanded for a third trial.

Although the State correctly notes this testimony would not necessarily have exculpated Maupin, as he may have been acting in concert with the persons Brittain claimed to have seen, **it at least would have brought into question the State's version of the events of the kidnapping.** An eyewitness account of the kidnapped girl in the company of someone other than Maupin after the time of the kidnapping certainly does point directly to someone else as the guilty party ... .

Maupin, 128 Wn.2d at 928 (emphasis added).

"Either way, Brittain's story directly contradicts, or at least raises considerable doubt about, the State's claim that the murder occurred right after the kidnapping on January 25." Id.

iv. Evidence in this case

The defense theory was that Mr. Hilton did not kill the Ulrichs. Yet there was no dispute they were murdered. By implication, someone else had to have done it. Evidence suggesting another person committed the crimes is certainly relevant to this defense. Thus he was entitled to present evidence that another person committed the crimes. ER 401, 402.

As in Jones v. Wood, the proffered evidence in this case directly contradicted the state's argument that no one else could have killed the Ulrichs. Furthermore, the evidence he offered directly responded to the evidence the state presented against him, and to the inferences the state argued from that evidence.

For example, the bloody shoeprints in this case: Mr. Hilton's feet and all his shoes in evidence were far too large to have made them. Yet the state argued he could have made them because a

detective with large feet was capable of wearing a similar size. It asked the jury to infer (1) if the detective could have made the footprints, Mr. Hilton could have made them; and (2) if he could have made them, he must have.

Arguing that Lisa Ulrich regularly wore a similar size of shoe was at least as relevant as the detective being able to wear a similar size.

The state argued that Mr. Hilton took the handset from the kitchen phone to conceal that he had phoned the Ulrichs shortly before they were killed. Yet he readily admitted in his first and subsequent interviews he had called them at that time, suggesting he was not trying to hide that fact.

Yet the caller ID from the upstairs phone did not identify several calls. Lisa's phone number did not appear on the listed calls, suggesting it did not identify her calls. RP 1722-29. Lisa's family knew that phone handset worked as a caller ID, while there was no evidence a tenant would know that.

The state argued the missing receipt book demonstrated Mr. Hilton had taken it to destroy evidence of the receipt Jo Ulrich made out for his

rent payment. Yet there was no evidence he knew that Jo kept the receipt book on top of the refrigerator. If he murdered them and took the receipt book to conceal the receipt, it meant he knew there was a receipt. It then makes no sense that he would have left Larry's hand with the receipt, or even with an unidentified sticky note, if he knew there was a receipt and he didn't have it. Leaving the note is especially odd if he dragged Mr. Ulrich's body ten to twelve feet, but didn't look at the note.

In contrast, that same missing receipt book supported an argument that Lisa Ulrich knew where her parents kept the book and its significance. If she were looking to accuse Mr. Hilton of the murders by creating the receipt,<sup>41</sup> it makes more sense that she would have placed it on Larry's hand after his body was dragged into the kitchen entry.

Unlike Downs and Drummer, supra, Mr. Hilton was never connected to any of the items taken from the Ulrichs' home. Unlike Kwan, no eyewitnesses identified Mr. Hilton as the murderer or placed him

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<sup>41</sup> See Ex. 1, receipt No. 141919, which shows someone had traced over Jo Ulrich's signature on the receipt, perhaps practicing the ability to copy the handwriting. RP 3885.

at the scene. Unlike Condon, Mr. Hilton was never found with the murder weapon.

Like Rehak, Lisa Ulrich was the victims' family member who had last seen them alive and found them dead. She had the opportunity and a financial motive at least as strong as Mr. Hilton's.<sup>42</sup>

b. Constitutional Right to Present a Defense and Due Process

If the evidence proffered did not meet the foundational requirements of Clark, supra, the Washington courts may need to re-evaluate that foundational test in light of the Constitution.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." ... This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"

Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

The right to offer the testimony of witnesses, and to compel their

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<sup>42</sup> The slayer's statute, RCW Ch. 11.84, would prohibit Lisa from inheriting if she were convicted of murdering her parents.

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 it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

State v. Thomas, supra, 150 Wn.2d at 857; Washington v. Texas, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Fundamental standards of relevancy, subject to the discretion of the court to exclude cumulative evidence and to insure orderly presentation of a case, require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged.

United State v. Crosby, 75 F.3d 1343, 1347 (9th Cir. 1996); United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980); Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

In Holmes, the South Carolina court excluded evidence of another suspect in a murder case. South Carolina's test turned on the strength of the prosecution's case: if the state's evidence was strong, then the defense was not permitted to present evidence of another suspect.

The Holmes Court held, however, that where the defense did not concede the credibility or reliability of the state's evidence, but challenged the forensic evidence with its own evidence that it was contaminated or planted, the defense was entitled to present evidence that the other suspect was in the neighborhood the morning of the crime and had made inculpatory statements. This was the holding, although the other suspect denied making the statements and provided an alibi. Holmes, 547 U.S. at 330. "Nor has the State identified any other legitimate end that the rule serves." Id. at 331.

In United States v. Crosby, supra, the defendant was charged with assaulting his girlfriend. Her memory of the event was not reliable. The defense sought to admit evidence that her husband, Hoskie, had assaulted her before, had beaten Crosby recently, and was in the general area the night she was beaten. The court reversed the conviction for excluding this evidence. "The Hoskie evidence was also significant because there was so little direct evidence of what actually happened." Id. at 1347.

The central question here was "Who beat Dorothy?" Because the government did not contend that Crosby and Hoskie acted in concert, inculcating Hoskie would have tended to exculpate Crosby. The excluded evidence could thus have caused the jury to develop a reasonable doubt by suggesting that someone other than the defendant was in a position to have beaten Dorothy, that a competent investigation might have identified that person, and that Dorothy was lying when she pointed the finger at Crosby. In such circumstances we are guided by the words of Wigmore:

If the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.

Crosby, 75 F.3d at 1349, citing 1A John Henry Wigmore, Evidence in Trials at Common Law § 139 (Tillers rev. 1983).

In United States v. Robinson, 544 F.2d 110 (2d Cir. 1976), cert. denied, 434 U.S. 1050 (1978), the court reversed a conviction for bank robbery. Two of the robbers were known. The witnesses identified the defendant from a photograph of the third man. The defense offered a corrections officer who recognized the photograph as Eli Turner, a suspect in two other robberies who remained at large.

It was entirely proper for Robinson to disprove the government's contention by proving that the third man was someone else. ... If it was, then obviously Robinson was innocent. Evidence to the effect that the third man in the bank resembled an individual suspected of two armed robberies that occurred in the Bridgeport area within six days prior to the bank robbery was clearly probative of the issue Robinson sought to prove, namely, that the third man was someone else.

Robinson, 544 F.2d at 112-13. Furthermore, the evidence was not confusing or cumulative.

Turner was not before the court, and he could not have been brought to court because he was still at large. The comparison that Maher was going to make was one which the jury could not have made for itself, so his testimony did not suffer from a "lack of helpfulness."

Robinson, 544 F.2d at 113.

As in these cases, the central question here was, "Who killed the Ulrichs?" As in Crosby, the state did not suggest Kevin Hilton and Lisa Ulrich acted in concert. As in Holmes, the defense did not concede the credibility or reliability of the state's evidence, but challenged it as contaminated or planted. As in those cases and Robinson, the evidence that implicated Lisa Ulrich could have led the jury to doubt that Kevin Hilton was guilty. It was constitutional error to exclude it.

c. Constitutional Right to Counsel and Due Process

The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." This right to counsel encompasses the delivery of closing argument. Although trial courts possess discretion over the scope of closing argument, a limitation that goes too far may infringe upon a defendant's Sixth Amendment right to counsel. When a court's limitation of argument relates to a fact necessary to support a conviction, the defendant's due process rights may also be implicated.

State v. Frost, 160 Wn.2d 765, 768, 161 P.3d 361 (2007); Herring v. New York, 422 U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975).

To appear and defend in person and by counsel is a right guaranteed to one accused of crime by the constitution of this state, as well as by the Federal constitution, and it is not to be denied that a part of that right is the right to address the jury on the questions of fact the issues present for determination. This right, too, has always been regarded as one of the greatest value, not only to the accused, but to the due administration of justice, and any limitation of it which has seemed to deprive the accused of a full and fair hearing has generally been held error entitling the defendant to a new trial.

State v. Mayo, 42 Wash. 540, 548-49, 85 P. 251 (1906) (reversing murder case where court limited closing argument to 1-1/2 hours per side as abuse

of discretion, after trial of more than four days); Const., art. I, § 22.

The ability to argue a case is not merely a legal nicety. Counsel's argument collects the various pieces of evidence into a coherent theory, or story, that supports a not guilty verdict. This narrative goes to the very essence of how jurors, as human beings, understand evidence.

Social cognition studies show that people construct stories from the evidence they consider, and those stories largely determine their understanding of what occurred. In a series of studies, all participants read the same evidence but in different orders:

In one condition, the prosecution evidence was presented in story order and so was easy to construct, but the defense evidence was presented in a jumbled order and so was difficult to construct. In another condition, the defense evidence was presented in story order, but the prosecution evidence was presented in a jumbled order. This order manipulation had a dramatic impact on verdict decisions: When the prosecution story was easy to construct but the defense story difficult to construct, fully 78 percent of participants chose the guilty verdict. But when the prosecution story was difficult to construct and the defense story easy to construct, fewer than half as many participants, 31 percent, chose the guilty verdict. Two other conditions in which both stories were equally easy to construct or equally

difficult to construct yielded intermediate levels of guilty verdicts.

Kunda, Ziva, SOCIAL COGNITION: MAKING SENSE OF PEOPLE (MIT Press, Cambridge, Mass. 1999) at 139-40.

Here defense counsel was prohibited from arguing his theory of the case. Even if the jury had many pieces of evidence defense counsel would have relied on, the court prohibited him from putting those pieces together into a coherent narrative the jury would understand.

The constitutional rights to present a defense and to counsel means not merely the right to say the state is incorrect, but to explain why it is incorrect, what is or may be true instead, and to cite the evidence to support the narrative. Denial in this case violated these constitutional rights and due process. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22.

d. Evidence that Lisa Ulrich Phoned the Elected Prosecutor was Relevant and Admissible.

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which he or she has directly observed or perceived through the senses. Circumstantial evidence consists of proof of facts or circumstances which, **according to common experience** permit a reasonable inference that other facts existed or did not

exist. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

CP 45 (emphasis added).

People's "common experience" does not include a woman, apparently in shock, horror, and grief at discovering her parents shot to death, driving to a neighbor and asking him to call 911, while she uses her cell phone to call the elected prosecutor "so things don't get messed up."

Lisa Ulrich's phone call to Andy Miller is at least circumstantial evidence that she was not completely shocked at finding her parents. Despite outward screaming, perhaps for the benefit of onlookers, she had the inner calm to call not her sister, not her boyfriend, not an ambulance, not the police, not even a deputy prosecutor, but the elected prosecuting official. The court found Lisa and Andy Miller were not particularly close. This lack of a close relationship makes it even more suspicious of why his number would pop to her fingertips before anyone else's.

This evidence was relevant to Lisa Ulrich's credibility, and to the defense theory that Lisa Ulrich killed her parents and attempted to frame

Mr. Hilton for it. There was no compelling state interest in excluding it. Hudlow, supra. It was an abuse of discretion to exclude this evidence.

e. Argument Counsel Could Have Made

Here, as the Court did in Herring, 422 U.S. at 864, it is vital to consider what argument counsel might have made on the excluded defense theory.

i. Motive

Lisa inherited one-half of her parents' estate. This estate included 14 rental properties, their own home, plus at least some investment property at Candy Mountain. The defense proffered that she gained over \$1 million in her inheritance. She would inherit nothing if she were convicted of their murders.

This motive is at least as strong as the state's theory that Mr. Hilton owed \$3,475 in back rent and faced possible eviction. Even after the Ulrichs were dead, Mr. Hilton still owed the back rent, still faced eviction, and he'd lost the opportunity to work off any of the rent. Thus he gained nothing and actually lost financial ground from their deaths. Furthermore, after their deaths, when faced with an actual notice to pay or quit, he was able to borrow the funds to repay the

debt quickly. That same month he agreed to move in with his girlfriend. He demonstrated none of the "psychological shutdown" the state claimed he experienced by preparing for this move.

ii. Opportunity

Lisa Ulrich was the last person to see her parents alive and the first to discover their bodies in the morning. Her alibi that she was arguing with her boyfriend in the garage when they were killed was never verified. She could enter their home whenever she liked with her credit card -- something she had done before. She clearly could have returned during the night to move and remove things.

Lisa prevented Kelly from sleeping over at her parents' the night they were killed, although he wanted to and frequently did. She also refused to drive her daughter back to her parents' to pick up a jacket that night. She gave no reason for either of these decisions.

The state's theory was that Mr. Hilton killed the Ulrichs in less than an hour between his phone call to their home and his time on the internet from his computer. Anger at having to move and this short time period would suggest an impulsive

killing. Yet it the state claimed he planned it carefully enough to locate the receipt book and realize he needed to steal it; recognize the phone receiver had caller ID that would show he had called and realize he had to steal that; and he brought along a ten-year-old pair of shoes several sizes too small for him to intentionally create the bloody footprints.

Of course, he would only know he needed to steal the receipt book if he knew the receipt on Larry's hand existed. And if he knew that, or expected the receipt, he would have removed it from Larry's hand.

iii. Access to murder weapon

No murder weapon was ever found. There is no evidence the police ever looked for one from Lisa, her boyfriend, or household. Nor was there any evidence that Mr. Hilton owned a handgun at the time of the murders. The type of weapon used included the most common variety of handgun available on the market.

iv. Efforts to divert investigation

Lisa Ulrich asked a neighbor she didn't know to call 911, yet she used her cell phone to call the elected prosecutor, Andy Miller, directly. She

told police she called him so things wouldn't get messed up. He reciprocated her reliance on him by responding immediately to the scene.

In contrast, Mr. Hilton cooperated with the police informally in his home. He showed officers his guns and shoes on their first visit. He gave an informal interview at his home and a longer recorded interview at the police station. Evidence corroborated the vast majority of his statements.

v. Other details

Lisa Ulrich insisted the bloody footprints were not hers. She was adamant she did not set more than one foot across the threshold before seeing her parents' bodies and certainly did not step in the pool of blood. Yet she told an officer that morning she had seen her father propped up against her mother. The physical evidence shows she could not have seen her mother's body without stepping well into the foyer to see past the open kitchen door. Yet the shoes she wore that morning had no sign of blood on them.

Lisa Ulrich knew her parents' custom of keeping receipt books on their refrigerator; there was no evidence tenants would know this. She knew her parents' telephone receiver functioned as

caller ID; there was no evidence an infrequent visitor to the home would know that. She had access to her parents' rental records and knew Mr. Hilton owed back rent, so conceivably she could have created the receipt left on Larry's hand, imitating her mother's handwriting. There was a receipt in an old receipt book that reflected someone had written over Jo's signature more than once. Ex. 1, Receipt No. 141919. There was no reason Larry would have had the note with the Rodgers' name on it if he intended to greet Mr. Hilton and accept a rent check. Yet it provided someone a handy sticky note to adhere the forged receipt to his hand.

The family testified Jo Ulrich frequently unzipped her pants after eating, but acknowledged it was unlikely she would greet a tenant in that state of undress. This detail suggests she was not expecting to see Mr. Hilton, but more likely greeted a family member.

f. Prejudice

Constitutional error is presumed to be prejudicial. The state has the burden of demonstrating it is harmless beyond a reasonable doubt.

As in Herring,

There is no way to know whether these or any other appropriate arguments in summation might have affected the ultimate judgment in this case. The credibility assessment was solely for the trier of fact. But before that determination was made, the appellant, through counsel, had a right to be heard in summation of the evidence from the point of view most favorable to him.

Herring, 422 U.S. at 864. As in Herring, the defense had a right to present this argument. The state cannot show it was harmless to prohibit it.

2. THE COURT ERRED BY ADMITTING THE EVIDENCE FROM SCHOONIE'S GUN SHOP.

The police learned of Mr. Hilton's purchases from Schoonie's gun shop from the documents they seized in the unconstitutional search of his home. The court erred by admitting this evidence under the inevitable discovery rule.

a. The Court's Finding of Fact is Not Supported by the Evidence.

The court found:

Mr. Bricker had begun researching the A-MERC brand and determining possible sellers prior to the execution of the search warrant on March 21, 2002, which was prior to the execution of the search warrant [sic].

CP 26. The search warrant was executed March 26, 2002. And, as shown above, Mr. Bricker had not begun determining possible sellers of A-MERC brand

ammunition before the search. He had discussed the need to follow up with the manufacturer, but he had not done so. He could not say whether, had he done so, it might have led him to local sellers. And Schoonie's was the first ammunition shop he went to -- with the receipts in hand from the search.

b. These Facts Did Not Meet the Fourth Amendment Requirements of Nix v. Williams for Inevitable Discovery.

In Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984), a child had disappeared and was presumed dead. The Iowa state police had organized some 200 volunteers to search for the child's body through fields, roads, ditches and culverts. The state agent testified how the volunteers used a grid system to comb the countryside. The search commenced at 10 a.m. and moved westward. 467 U.S. at 448-49.

Meanwhile, Mr. Williams was arrested and asserted his right to counsel. A Des Moines detective induced him to talk. At 3:00 p.m., the defendant agreed to cooperate and police called off the search. He led them to the body. It was 2-1/2 miles from where the search had stopped.

There was testimony that it would have taken an additional three to five hours to discover the body if the search had

continued ...; the body was found near a culvert, one of the kinds of places the teams had been specifically directed to search.

Nix, 467 U.S. at 448-50.

On this record it is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found.

Id. at 450-51.

Nothing like this history of objective facts supports the trial court's finding here that police inevitably would have obtained Schoonie's records.

Unlike Nix, there was no evidence of an ongoing investigation headed inexorably to Schoonie's within a matter of hours or days. There was only a conversation about identifying the manufacturer, no assignment to investigate it. Det. Bricker could not say if identifying the manufacturer could have led him to Schoonie's.

Also unlike Nix, the evidence of an independent investigation was not from an independent source; it was from the very same detectives who had obtained and executed the unconstitutional search warrants. These

detectives' own reports did not corroborate their testimony.

For these reasons, the court's finding that Schoonie's records "inevitably would have been discovered" without the unlawful searches violated the Fourth Amendment of the United States Constitution.

c. Washington Has Not Adopted an "Inevitable Discovery" Exception to the Exclusionary Rule.

**Invasion of Private Affairs or Home Prohibited.** No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Constitution, art. I, § 7.

The Washington Supreme Court has never held that Article I, section 7, permits an "inevitable discovery" exception to the exclusionary rule. State v. Gaines, 154 Wn.2d 711, 716 n.5, 116 P.3d 993 (2005) (declining to reach the question);<sup>43</sup> State v. O'Neill, 148 Wn.2d 564, 592 & n.11, 62 P.3d 489 (2003) (declining to apply inevitable discovery exception to search preceding arrest).

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<sup>43</sup> The Court originally granted review of Gaines on this issue, then chose not to decide it. The decision, however, demonstrates this issue was not resolved by State v. Avila-Avina, 99 Wn. App. 9, 991 P.2d 720 (2000), or State v. Richman, 85 Wn. App. 568, 933 P.2d 1088, review denied, 133 Wn.2d 1028 (1997).

d. Article I, Section 7 Prohibits an Inevitable Discovery Exception to the Exclusionary Rule.

[T]he protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.

State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580, 584 (2008).<sup>44</sup> An analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), prohibits an inevitable discovery exception to the exclusionary rule.

i. The textual language and significant differences

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. 4. In contrast:

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<sup>44</sup> The increased protections of article I, section 7, require a warrant to search: telephonic and other electronic communication records, State v. Gunwall, *supra*; sobriety checkpoints, State v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988); garbage, State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990); a vehicle based on an anonymous tip, State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996); and a person's home with infrared thermal detectors, State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994).

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Const., art. I, § 7. And compare:

[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . .

U.S. Const., amend. 5, with:

No person shall be compelled in any criminal case to give evidence against himself . . . .

Const., art. I, § 9.

Art. I, § 7 emphasizes a person's "private affairs," a much broader category than the Fourth Amendment's list of protected areas. And Art. I, § 9 prohibits not merely being "a witness" against oneself, but "giving evidence" against oneself, again a much broader term, encompassing the concept of physical evidence and documents.

ii. State constitutional and common law history

The Rights Committee who drafted Article I, sections 7 and 9, specifically chose language different from the Fourth and Fifth Amendments. It did so in 1889 in the context of the recent decision, United States v. Boyd, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886), and Thomas M. Cooley, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW (1880).

The majority opinion in Boyd believed that the government's use of evidence obtained in violation of the Fourth Amendment was functionally identical to compelling a defendant to give evidence against himself in violation of the Fifth Amendment. 116 U.S. at 634-35. Its construction under the language of these amendments was, however, strained. The state constitutional framers thus adopted broader language intended to incorporate the conclusions of the Boyd majority into Washington's Constitution. See Johnson, Charles W. and Beetham, Scott P., "The Origin of Article I, Section 7 of the Washington State Constitution," 31 SEATTLE U. LAW REV. 431 (2008).

iii. Preexisting state law

During its history, the Washington exclusionary rule has gone through three distinct historical periods. The Washington Supreme Court adopted the rule in 1922. This initial period of developing an independent state exclusionary rule jurisprudence continued until 1961, when the United States Supreme Court first required state courts to apply the federal exclusionary rule in state prosecutions. As a result, Washington's independent rule entered its dormant period; the Washington court stopped applying the independent state exclusionary rule, and began relying solely on cases decided under the fourth amendment ... until 1982, when the rule passed out of dormancy into a new era of independent application.

Pitler, Sanford E., "The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy," 61 WASH. L. REV. 459, 465 (1986) ("Pitler"); State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922).

Pitler explains that courts adopt one of two approaches to the exclusionary rule. A unitary approach recognizes exclusion as an inviolate constitutional right or a constitutionally compelled remedy aimed at protecting the accused's personal right to privacy. Once a court decides a substantive violation has occurred, it automatically excludes the wrongfully obtained evidence.

A bifurcated approach perceives exclusion as a product of the court's supervisory power intended to check unlawful police conduct and unconnected to the accused's personal constitutional rights. Once a court determines whether a substantive constitutional violation occurred, it engages in a cost-benefit analysis of whether to exclude the evidence.

During the first sixty years of federal exclusionary rule jurisprudence, federal courts strictly adhered to the unitary approach. Since 1974, however, the [United States Supreme] Court has

employed the bifurcated approach, selectively applying the exclusionary remedy according to the results of this cost-benefit analysis.

Pitler at 463-64.

Thus our state began with an independent exclusionary rule long before the federal constitution imposed it. We have the independent basis for it. It is a unitary approach, as described by Pitler.

The right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy ... Whenever the right is unreasonably violated, the remedy must follow.

State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Where evidence is obtained as a direct result of an unconstitutional search, that evidence must be excluded as "fruit of the poisonous tree." Eisfeldt, 185 P.3d at 586-87.

iv. Differences in structure between the federal and state constitutions

The United States Constitution is a grant of limited power to the federal government. The Washington Constitution imposes limitations on the otherwise plenary power of the state. This factor favors an independent analysis. Gunwall, 106 Wn.2d at 61.

v. Matters of particular  
state interest or local  
concern

The sole purpose of the federal exclusionary rule is to deter police misconduct. United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). This purpose permits the United States Supreme Court to conduct a cost-benefit analysis to the exclusionary rule -- the "bifurcated" approach Pitler describes.

The purpose of our state's exclusionary rule is to protect the privacy of our state's residents. That privacy is a matter of particular state concern, as is the regulation of criminal trials and the administration of criminal justice in our courts. Gunwall, 106 Wn.2d at 62; State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990).

vi. Conclusion

Article I, section 7, thus precludes exceptions to the exclusionary rule that the Fourth Amendment may permit. It prohibits the "good faith" exception to the exclusionary rule. State v. Groom, 133 Wn.2d 679, 687 n.4, 947 P.2d 240 (1997).<sup>45</sup> It prohibits the "private search"

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<sup>45</sup> Compare: United States v. Leon, supra.

doctrine. State v. Eisfeldt, 185 P.3d at 584-86.<sup>46</sup> It equally prohibits "inevitable discovery" as an exception to its exclusionary rule.

"The analysis under article I, section 7 begins with a determination of whether the State has intruded into a person's private affairs." Boland, 115 Wn.2d at 577. "This constitutional protection is at its apex 'where invasion of a person's home is involved.'" Id.; City of Pasco v. Shaw, 161 Wn.2d 450, 459, 166 P.3d 1157 (2007), cert. denied, 128 S. Ct. 1651 (2008).

In this case, the illegal search was of Mr. Hilton's home. As a direct result of seizing private records in his basement, the police proceeded to Schoonie's Rod Shop, where they obtained more records of his purchases from eight years earlier. Under article I, section 7, the records and testimony from Schoonie's should have been suppressed.

The rule does not permit exceptions based on what police officers speculate they might otherwise have discovered had they taken a different investigatory route than they did.

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<sup>46</sup> Compare: United States v. Jacobsen, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

e. Jurisdictions with a Similar Heightened Right of Privacy Have Rejected the Inevitable Discovery Rule.

Some jurisdictions have adopted an "inevitable discovery" exception to the exclusionary rule.<sup>47</sup> But the jurisdictions that place special value on the right to privacy -- that is, whose constitutions or statutes mandate a right to privacy more protective than the Fourth Amendment - - have either rejected completely, or rejected overly permissive versions of, the inevitable discovery rule.

The Indiana Constitution<sup>48</sup> does not permit an inevitable discovery exception to the exclusionary rule. Ammons v. State, 770 N.E.2d 927, 935 (Ind. App. 2002):

[T]he inevitable discovery exception has not been adopted as a matter of Indiana constitutional law. ... Our state supreme court has previously held that "our state constitution mandates that the evidence found as a result of [an unconstitutional] search be suppressed."

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<sup>47</sup> E.g.: People v. Coffman, 17 Cal. Rptr. 3 710, 769 (2004); Haynes v. State, 127 S.W.3d 456 (Ark. 2003); State v. Christianson, 627 N.W.2d 910, 912 (Iowa 2001); State v. Waddell, 14 Kan. App. 2d 129, 784 P.2d 381 (1989); Cook v. State, 374 A.2d 264 (Del. 1977).

<sup>48</sup> Art. 1, § 11 of the Indiana Constitution essentially copies the Fourth Amendment.

... In light of this clear language we are not inclined to adopt the inevitable discovery rule as Indiana constitutional law.

See also Schultz v. State, 742 N.E.2d 961, 966 n.1 (Ind. App. 2001).<sup>49</sup>

Similarly, the Texas courts have not adopted the inevitable discovery doctrine. State v. Daugherty, 931 S.W.2d 268 (Tex. Cr. App. 1996) (inevitable discovery doctrine did not apply due to statutory exclusion of improperly obtained evidence).

Under the historic protections of article I, § 7, the Washington Supreme Court has rejected other challenges to unlawful searches and the exclusionary rule. As Indiana and Texas did, it should also reject the inevitable discovery exception in this case.

f. Pennsylvania Applies a Very Strict Standard to Inevitable Discovery Requiring Evidence Independent of the Investigators Who Conducted the Illegal Search.

The Pennsylvania courts hold that the inevitable discovery doctrine cannot be used to

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<sup>49</sup> "The inevitable discovery exception has not been adopted as a matter of Indiana constitutional law, and the State does not advance any support for such an exception in this appeal."

evade the exclusionary rule unless the state proves that the independent source is truly independent not only of the tainted evidence, but also from the police or investigative team that engaged in the illegal search.

Article I, section 8 of the Pennsylvania Constitution provides:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

As the court explained in Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887, 897-98 (1991), the state constitution's purpose of protecting the right to privacy compels this more protective state court rule:

The United States Supreme Court ... made clear that, in its view, the *sole purpose* for the exclusionary rule under the 4th Amendment was to deter police misconduct. ...[U]nder the Federal Constitution, the exclusionary rule operated as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

...  
[In contrast] we made explicit that "the right to be free from unreasonable

searches and seizures contained in Article I, Section 8 of the Pennsylvania Constitution is tied into the implicit right to privacy in this Commonwealth."

...  
*If our sole purpose in applying Article I, Section 8 to the facts of this case were to deter police misconduct, we would be constrained to rule in favor of the Commonwealth, for in balancing the interests, it is apparent that society's interest in arresting those guilty of serious crime should not be thwarted where police would inevitably and independently arrive at the same evidence, but for their illegal conduct.*

...  
*However, where our task is not merely to deter police misconduct, but also to safeguard privacy and the requirement that warrants shall be issued only upon probable cause, our conclusion is different.*

(Emphases added.) The Pennsylvania Supreme Court later adopted a strict limitation on the independent source rule:

Application of the 'independent source doctrine' is proper only in the very limited circumstances where the 'independent source' is truly independent from both the tainted evidence and the police or investigative team which engaged in the misconduct by which the tainted evidence was discovered.

Commonwealth v. Melendez, 544 Pa. 323, 334, 676 A.2d 226 (1996).<sup>50</sup>

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<sup>50</sup> The court used "independent source" and "inevitable discovery" interchangeably. See 544 Pa. at 332 ("The inevitable discovery rule, sometimes referred to as the "independent source rule").

See also State v. Silva, 979 P.2d 1137, 1146 (Haw. App. 1999); State v. Lopez, 896 P.2d 889, 907 (Haw. 1995) (Hawai'i adopts rationale of dissenting Justice Brennan's decision in Nix to require "clear and convincing evidence" that independent investigation was already underway).

g. Protecting Privacy with Article I, Section 7

The purpose of Article I, § 7, is the same as the Pennsylvania constitution: to protect citizens' right to privacy and to deter police misconduct.<sup>51</sup> This analysis discourages adoption of any exceptions to the exclusionary rule.

Even if some inevitable discovery rule were consistent with Art. I, § 7, it must be one that still protects our right to privacy. The Pennsylvania courts' prerequisite -- that the state must prove the source is independent not just of the tainted evidence, but also of the investigative team that engaged in the illegal search -- accomplishes this end.

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<sup>51</sup> See Utter, Robert F., Survey of Washington Search and Seizure Law: 1988 Update, 11 U. PUGET SOUND L. REV. 411, 591-92 (1988); State v. White, supra.

As discussed above, the Nix decision also was based on the "inevitable" search being conducted and testified to by an independent police source.

Requiring evidence independent of the officers involved in the unlawful search is consistent with the application of Article I, § 7, in an analogous context. In State v. Myers, 117 Wn.2d 332, 815 P.2d 761 (1991), the police testified they had obtained a telephonic warrant under CrR 2.3. The officer learned there was no recording the day after the search. He wrote down what he recalled of the preceding day's events. The judge remembered receiving a call and authorizing a warrant, but had no independent recollection of the name of the officer or defendant, or the details upon which he determined probable cause. Myers, 117 Wn.2d at 334-36.

The trial court accepted the officer's testimony as a "reconstruction" of the affidavit and admitted the evidence from the search. The Supreme Court reversed.

[T]he courts will not tolerate procedural noncompliance that fundamentally compromises the "constitutional armory safeguarding citizens from unreasonable searches and seizures." ...

... **The court may allow the parties to reconstruct an entire sworn statement**

only if detailed and specific evidence of a disinterested person, like the magistrate or court clerk, corroborates the reconstruction.

... The only evidence of the telephonic affidavit is the police officers' testimony, offered 4 months after the event, and Officer Hiles' report, made after the search occurred and after the tape that could establish the accuracy of the report was lost. This is not sufficient. We do not presume that any party in this case abused the procedures that govern telephonic warrants, but:

[W]e cannot be unmindful of the possibility that an overzealous law enforcement officer may, subconsciously ..., be tempted to rectify any deficiency in his testimony before the issuing judge by post-search repair ... .

Myers, 117 Wn.2d at 342-44 (emphases added).<sup>52</sup>

This case illustrates the need for a disinterested person to be able to confirm the facts that support any "inevitable discovery" exception to the exclusionary rule.

As in Myers, the trial court here accepted the detectives' "reconstruction" of their investigation from March, 2002 -- not of what they already were doing, but what they speculated they would have done. Their testimony, not four months but six years later, was the only evidence that anyone had

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<sup>52</sup> Citing State v. Valencia, 93 N.J. 126, 134, 459 A.2d 1149 (1983), and State v. Fariello, 71 N.J. 552, 561-62, 366 A.2d 1313 (1976).

considered an independent investigation to find the source of the shell casings. RP 41-79, 116-26.

Det. Wehner did not assign Det. Bricker to check for gun shops when they first found the shell casings at the crime scene. He relied on the information from the first search warrant to direct his later investigation. RP 125. Their contemporaneous reports from March and April, 2002, showed no order to find the source of A-Merc ammunition, nor any contacts made to do so until 2003. Pretrial Exhibits A, E.

This court should reject any invocation of the inevitable discovery exception to Washington's exclusionary rule. Whatever any such exception would be, it still would not permit admission of this evidence.

3. LAURA HILTON'S GUN LIST AND TESTIMONY ALSO SHOULD HAVE BEEN EXCLUDED AS A RESULT OF THE UNLAWFUL SEARCH.

Just as the Washington Supreme Court has not adopted the inevitable discovery exception to the exclusionary rule, so it has not adopted the "independent source" exception. For the same reasons articulated above regarding inevitable discovery and the Washington Constitution, this exception should not be adopted.

There was no evidence explaining how the same officers obtained the evidence from Laura Hilton regarding Kevin Hilton's guns from years earlier. It is logical to believe, since they did not present this evidence at the first trial, that they only went search for it because of what they had found in Mr. Hilton's home, and because it was excluded by the appellate court. They only knew what they were looking for because of what they had unlawfully found.

Under our state constitution's exclusionary rule, this evidence also should have been excluded.

4. PROSECUTORIAL MISCONDUCT DENIED APPELLANT A FAIR TRIAL.

The prosecutor's duty is to ensure a verdict free of prejudice and based on reason.

The district attorney is a high public officer, representing the state, which seeks equal and impartial justice, and it is as much his duty to see that no innocent man suffers as it is to see that no guilty man escapes. In the discharge of these most important duties he commands the respect of the people of the county and usually exercises a great influence upon jurors. In discussing the evidence he is ... given the widest latitude within the four corners of the evidence by way of comment, denunciation or appeal, but he has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.

State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct can deny due process and a fair trial, and can rise to a constitutional violation. U.S. Const., amend. 14; Const., art. 1, § 3; Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935); Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984).

But even in the absence of a constitutional violation, the appellate courts exercise supervisory authority over trial courts to see that they properly administer justice. Thus they reverse convictions for prosecutorial misconduct that does not necessarily rise to the level of constitutional error. See, e.g., State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009).

a. Comment on the Right to Remain Silent

In Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965), the Supreme Court held it was reversible error for a prosecutor to comment on the defendant's silence as evidence of guilt, violating the Fifth and Fourteenth Amendments, when he did not testify at his trial.

In Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the Court held it violated due process for a prosecutor to impeach at trial the defendant's exculpatory story, told for the first time at the trial, by cross-examining him as to his post-arrest silence after being advised of Miranda rights.

In State v. Thomas, supra, 142 Wn. App. 589, the defendant was charged with burglarizing his girlfriend's home. When police responded to the scene, the defendant phoned the residence but refused to talk to the officer who answered the phone. He testified at trial. In closing:

The prosecutor emphasized that although he had been accused of a crime, Thomas would not return to tell his story, "[w]on't talk to Officer Peterson," "doesn't want to talk to the cops," and "didn't go back" to explain that [the girlfriend] had scratched his face. These comments clearly conveyed the message that if Thomas was not guilty, he would have returned to the crime scene to tell his side of the story.

The State argues, however, that it properly used Thomas's silence to impeach his exculpatory testimony. ...

... But the prosecutor went beyond impeaching Thomas's story about the number and nature of the phone calls. He described Thomas's statements as "[y]eah, I don't want to talk to you" and "I don't want to talk to you [about] my story" and his motive for them as "[h]e's just been accused of a crime. I mean, he knows that that's what's going on. The cops

showed up there for a reason." ... Like the comments in Easter, the prosecutor's argument plainly invited the jury to infer Thomas's guilt from his refusal to talk with Officer Peterson and to return to the scene to tell the police his story.

Thomas, 142 Wn. App. at 597. The Court held this was constitutional error and the state failed to demonstrate that any reasonable jury would have reached the same verdict absent the error. Id.

In State v. Henderson, 100 Wn. App. 794, 998 P.2d 907 (2000), the defendant did not testify at trial. He told the police he was present during the robbery but not involved in it. The prosecutor asked the detective whether he asked Henderson to be tape-recorded during his interview; the detective said yes. On objection, without the jury, the officer testified Henderson responded if he wanted to tape-record the interview, he wanted an attorney and did not want to talk. Defense counsel argued the question implicated the defendant's right to remain silent and right to

counsel. The Court of Appeals agreed it was improper.<sup>53</sup>

Mr. Hilton was advised of his Miranda rights at the beginning of his interview on March 26, 2002. Ex. 234. He asserted his right to counsel and to remain silent at the end of that interview. He maintained his silence at his first trial. He exercised his right to testify at his second trial. Throughout, he was represented by counsel.

Here, the prosecution repeatedly brought before the jury that Mr. Hilton had not told the police certain things, that he had sat back and listened at the "earlier proceeding," and had not told them other things before testifying at this trial. He may have told his counsel, or his investigator, but he had not told anyone "in an official capacity."

Mr. Hilton had no obligation to tell the police or anyone else "in an official capacity." He had the right to review the evidence with his

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<sup>53</sup> The Court did not find this error alone warranted reversal because "neither the officer nor the prosecutor commented on Henderson's refusal to speak." 100 Wn. App. at 799. However, combining it with other instances of prosecutorial misconduct, the Court reversed for cumulative error.

counsel. He had a right, and an obligation under CrR 3.4, to be present throughout both his trials. He had a right to confront the witnesses against him face to face at both trials.

The fact that there was a prior trial should not have been conveyed to the jury. It had no relevance to the charges at this trial.

The prosecutor's comments were flagrantly improper comments on his constitutional right to silence both pretrial and at the first trial.

b. Comment on Rights to Be Present, to Confront Witnesses, to Counsel, to Testify on One's Own Behalf

The state may not draw unfavorable inferences from a defendant's exercise of a constitutional right. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (right to bear arms); United States v. Jackson, 390 U.S. 570, 581, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968); Griffin v. California, supra, 380 U.S. at 614.

In State v. Jones, 71 Wn. App. 798, 810-12, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994), the court held the prosecutor could not cross-examine the defendant about his eye contact with the complaining witness while she testified, then argue in closing that he watched her to

intimidate her. These questions and comments on his constitutional right of confrontation were prosecutorial misconduct.<sup>54</sup>

In State v. Johnson, 80 Wn. App. 337, 908 P.2d 900, review denied, 129 Wn.2d 1016 (1996), the prosecutor argued in closing the defendant's presence throughout the evidence:

the only one witness that could watch the entire proceeding take place, to fit his testimony to suit the evidence that was entered earlier, and that's the defendant.

...  
I would suggest the defendant had fit his testimony, to tailor his testimony to what came before --.

Id. at 341. The court held these comments impermissibly infringed on the defendant's constitutional right to be present at trial and confront witnesses. Id.<sup>55</sup>

In Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), the United States Supreme Court held such prosecutorial arguments did

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<sup>54</sup> See also Dyson v. United States, 418 A.2d 127, 131 (D.C. 1980); Sherrod v. United States, 478 A.2d 644, 654 (D.C. 1984). In Jones, the court found the error was harmless because of the overwhelming evidence of guilt.

<sup>55</sup> As in State v. Jones, supra, the court found the error was harmless beyond a reasonable doubt due to overwhelming evidence of guilt. Id.

not unlawfully burden the defendant's Sixth Amendment right to be present and confront witnesses, his Fifth and Sixth Amendment rights to testify on his own behalf, and his Fourteenth Amendment right to due process. Id. at 64-65. Nonetheless, the Court observed that its decision

is addressed to whether the comment is permissible as a constitutional matter, and not to whether it is always desirable as a matter of sound trial practice. The latter question, as well as the desirability of putting prosecutorial comment into proper perspective by judicial instruction, are best left to trial courts, and to the appellate courts which routinely review their work.

Id. at 73 n.4. Justice Stevens amplified those sentiments in his concurrence:

The Court's final conclusion ... does not, of course, deprive States or trial judges of the power either to prevent such argument entirely or to provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial.

Portuondo, 529 U.S. at 76 (Stevens, J., concurring).

Indeed, other states as well as Washington previously had found it was improper for

prosecutors to make such arguments.<sup>56</sup> Since Portuondo, New Jersey explicitly accepted the Court's invitation to prohibit such arguments.

[O]ur courts have a "responsibility to guarantee the proper administration of ... criminal justice," and "to take all appropriate measures to ensure the fair and proper administration of a criminal trial." ... That responsibility requires this Court at times to exercise its supervisory authority over criminal trial practices in order to curb government actions that are repugnant to the fairness and impartiality of trials.

...

Our review encompasses prosecutorial misconduct, including a prosecutor's allegedly improper comments. Prosecutors are expected to assert vigorously the State's case and are given considerable leeway in delivering their summations. ... However, a prosecutor's overarching obligation always remains "not to obtain convictions, but to see that justice is done." ... To fulfill that bipartite duty, "a prosecutor must refrain from improper methods that result in a wrongful conviction, and is obligated to use legitimate means to bring about a just conviction."

State v. Daniels, 182 N.J. 80, 95-96, 861 A.2d 808 (2004) (citations omitted). In Daniels, the prosecutor argued:

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<sup>56</sup> See State v. Cassidy, 236 Conn. 112, 762 A.2d 899 (1996); State v. Jones, 580 A.2d 161 (Me. 1990); Hart v. United States, 538 A.2d 1146 (D.C. 1988); State v. Hemingway, 148 Vt. 90, 528 A.2d 746 (1987); Commonwealth v. Person, 400 Mass. 136, 508 N.E.2d 88 (1987); all cited in Portuondo, *supra*, 529 U.S. at 83 n.5 (Ginsburg, J., dissenting).

the defendant sits here with counsel, listens to the entire case and he listens to each one of the State's witness[es], he knows what facts he can't get past. ... But he can choose to craft his version to accommodate those facts.

182 N.J. at 101. Even without an objection, the New Jersey Supreme Court reversed the conviction.

Those who face criminal prosecution possess fundamental rights that are "essential to a fair trial." ... Indeed, a criminal defendant has the right to be present at trial ..., to be confronted with the witnesses against him and to hear the State's evidence, ... to present witnesses and evidence in his defense, ... and to testify on his own behalf ... . **Prosecutorial comment suggesting that a defendant tailored his testimony inverts those rights, permitting the prosecutor to punish the defendant for exercising that which the Constitution guarantees.** Although, after Portuondo, prosecutorial accusations of tailoring are permissible under the Federal Constitution, we nonetheless find that they undermine the core principle of our criminal justice system -- that a defendant is entitled to a fair trial.

Daniels, 182 N.J. at 97-98 (emphasis added).<sup>57</sup>

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<sup>57</sup> But see State v. Martin, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (No. 61127-5-I, 7/6/09), rejecting supervisory power as something distinct from constitutional limitation.

Because we find no constitutional infirmity in the prosecutor's questions, there is no principled basis on which to fashion the rule that Martin seeks. Accordingly, we decline the invitation. Martin, Slip Op. at 23 n.10.

c. Judicial supervisory authority

Our Supreme Court has long exercised supervisory authority over trial courts to see that justice is administered properly and fairly. State v. Bennett, 161 Wn.2d 303, 305, 165 P.3d 1241 (2007).

"A fair trial consists not alone in an observation of the naked forms of law, but in a recognition and a just application of its principles."

It is the law of the land, a right vouchsafed by the direct written law of the people of the state. It partakes of the character of fair play which pervades all the activities of the American people, whether in their sports, business, society, religion or the law. In the maintenance of government to the extent it is committed to the courts and lawyers in the administration of the criminal law, it is just as essential that one accused of crime shall have a fair trial as it is that he be tried at all, whether he be guilty or not, has his picture in the rogue's gallery or not. ... [I]t must be remembered ... "that unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community."

State v. Devlin, 145 Wash. 44, 51-52, 258 P. 826 (1927) (citations omitted). Thus it has reversed many convictions for prosecutorial misconduct, which it concluded denied the defendant a fair

trial, without specific reliance on the state or federal constitution.<sup>58</sup>

d. The Washington Constitution, art. I, § 22, Guarantees a Greater Right to Appear, Defend, Confront, Have Counsel and Testify on One's Own Behalf.

i. The textual language and significant differences

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, ... to testify in his own behalf, to meet the witnesses against him face to face ... .

Const., art. I, § 22.

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the Assistance of Counsel for his defence.

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<sup>58</sup> See, e.g.: Devlin, supra (improper redirect examination); State v. Navone, 186 Wash. 532, 537-40, 58 P.2d 1208 (1936); State v. Lindsey, 27 Wn.2d 186, 177 P.2d 387 (1947); State v. Bozovich, 145 Wash. 227, 259 P. 395 (1927) (improper cross-examination to discredit defendant, not to contradict direct examination); State v. Sang, 184 Wash. 444, 51 P.2d 414 (1935) (improper closing argument); State v. Tweedy, 165 Wash. 281, 5 P.2d 335 (1931) (admitting evidence thrice excluded by trial court); State v. Carr, 160 Wash. 83, 294 P. 1016 (1930) (improper questioning despite sustained objections); State v. Montgomery, 56 Wash. 443, 105 P. 1035 (1909) (using duress to compel state's witness to testify certain way); State v. Stevick, 23 Wn.2d 420, 161 P.2d 181 (1945) (improper questioning of defendant and witness); State v. Fisher, supra (presenting evidence violating pretrial ruling, arguing evidence from outside the record).

U.S. Const., amend. 6.<sup>59</sup>

Differences in text support a separate interpretation. The specific language assures the accused shall be present at all stages of proceedings where substantial rights might be affected. State v. Shutzler, 82 Wash. 365, 144 P. 284 (1914). The right to confront witnesses "face to face" means something more than the right to cross-examine. State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998).<sup>60</sup> See also State v. Silva, 107 Wn. App. 605, 27 P.3d 663 (2001) (greater right to access to courts).<sup>61</sup>

ii. State constitutional and common law history

While our state constitutional history is scant, the federal Bill of Rights had already been established and Washington did not adopt its

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<sup>59</sup> See also: Const., art. I, § 9, supra, and U.S. Const., amend. 5, for comparable rights to remain silent.

<sup>60</sup> In Foster, five members of the Court agreed Art. I, § 22 provides a broader right of confrontation than the Sixth Amendment. State v. Smith, 148 Wn.2d 122, 131, 59 P.3d 74 (2002).

<sup>61</sup> See also State v. Kolocotronis, 73 Wn.2d 92, 97, 436 P.2d 774 (1968) (explicit guarantee of right to represent self not in 6th Amendment).

language, but copied much of the language from other states' constitutions.

It would defy logic to assume that 'a declaration of rights copied from such a state constitution at a time when the federal Bill of Rights did not apply to the states, was meant to be interpreted with reference to federal courts' interpretations of the federal Constitution.

Silva, supra, 107 Wn. App. at 619.

iii. Preexisting state law

This state constitutional right to be present is fundamental and inalienable.

It is a constitutional right of the accused in a criminal prosecution to appear and defend in person and by counsel (Const., Art. 1, § 22); ... . These are rights that pertain to the accused at every stage of the trial when his substantial rights may be affected ... and any denial of the right without the fault of the accused is conclusively presumed to be prejudicial.

State v. Ulmo, 19 Wn.2d 663, 666, 143 P.2d 862 (1943), quoting State v. Shutzler, supra, 82 Wash. at 367.

The presence of the accused is not a mere form. It is a sacred and inalienable right which has been won through the struggle of the ages.

Ulmo, 19 Wn.2d at 669.

iv. Differences in structure between the federal and state constitutions

It is well established that the differences in structure between the federal and state constitutions inherently support independent review of our state constitution. Richmond v. Thompson, 130 Wn.2d 368, 382, 922 P.2d 1343 (1996).

v. Matters of particular state interest or local concern

The orderly administration of justice is of particular local concern. Our appellate courts have a long history of concern with the prosecutor's role in administering justice. From the earliest years, our courts have reversed convictions for prosecutorial misconduct not based on any specific constitutional provision, but on the judiciary's commitment to see that our courts operate with an appropriate commitment to justice. See, e.g., cases cited at note 58, supra.

vi. Conclusion

The differing texts, structures, and purposes of the two constitutional provisions call for a separate interpretation of Art. I, § 22. Our state's history and prior decisions support greater

protective from this provision than from the Fifth and Sixth Amendments.

e. Arguing to Believe Defendant Must Disbelieve Other Witnesses

This court has previously determined, and the State concedes, that cross examination or comments in closing argument which seek to compare the honesty of the defendant with law enforcement officials ... are improper.

State v. Stith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

The State concedes that the prosecutor committed error by stating during closing argument that, if the jury were to believe Michael Riley, it would have to find that the arresting officers and other witnesses were not telling the truth. The State's conclusion is consistent with State v. Barrow, 60 Wn. App. 869, 876-75, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991), where this court held that similar liar arguments amounted to misconduct.

State v. Riley, 69 Wn. App. 349, 351, 354 n.5, 848 P.2d 1288 (1993).

As in these cases, the prosecutor's argument that to believe Mr. Hilton the jury had to disbelieve the other witnesses he named, was misconduct. Given the history of case law condemning such arguments, this argument was flagrant and ill-intentioned.

f. PowerPoint

The prosecutor's projecting the slide to the jury during his opening statement, in direct violation of the court's ruling in limine, was also improper. Fisher, supra. It alone may not have warranted a mistrial at that time. But the cumulative prejudice of this error contributes to the need for a new trial.

g. Prejudice

An impermissible comment on the defendant's constitutional rights is a constitutional error. State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996); State v. Thomas, supra, 142 Wn. App. at 597. It is presumed prejudicial. The state bears the burden of showing it was harmless.

To do so, the State must convince us beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error, and we must find the untainted evidence so overwhelming that it necessarily leads to a finding of guilt.

Id. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000); State v. Contreras, 57 Wn. App. 471, 473, 788 P.2d 1114 (1990).

But even the non-constitutional harmless error requires reversal in this case. Unable to contradict Mr. Hilton's testimony, the prosecutor

instead argued the jury should not believe him because he invoked his right to remain silent with the police and attended not just this trial, but a "prior proceeding" as well, and did not testify until the state had presented all of its evidence. The he "tailored" his testimony to the state's evidence. The prosecutor clearly conveyed if he were not guilty, he would have talked to the police instead of to his defense lawyer and investigator. These questions and this argument were flagrant and ill-intentioned violations of Mr. Hilton's constitutional rights. As in Thomas, supra, it requires reversal.

5. THE SUBPOENA DUCES TECUM FOR LIBRARY RECORDS WAS NOT VALIDLY ISSUED, AND WAS UNCONSTITUTIONALLY OVERBROAD.

a. The "Special Inquiry Judge Proceeding" Subpoena was Unlawful Because there Was No Such Proceeding

The Special Inquiry Judge Proceeding is a creature of statute.

**RCW 10.27.050. Special inquiry judge -- Selection**

In every county a superior court judge as **designated by a majority of the judges** shall be available to serve as a special inquiry judge to hear evidence concerning criminal activity and corruption.

**RCW 10.27.170. Special inquiry judge--  
Petition for order**

When any public attorney, corporation counsel or city attorney has reason to *suspect crime or corruption*, within the jurisdiction of such attorney, and there is reason to believe that there are persons who may be able to give material testimony or provide material evidence concerning such *suspected crime or corruption*, **such attorney may petition the judge designated as a special inquiry judge pursuant to RCW 10.27.050** for an order directed to such persons commanding them to appear at a designated time and place in said county and to then and there answer such questions concerning *the suspected crime or corruption* as the special inquiry judge may approve, or **provide evidence as directed by the special inquiry judge.**

This statute authorizes use of the special inquiry proceeding to discover or gather evidence of "suspected crime or corruption." State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976); State v. Manning, 86 Wn.2d 272, 543 P.2d 632 (1975).

The prosecutor must apply to the judge "designated by a majority of the judges" to handle special inquiry matters. The trial court here could find no local rule stating such a judge had been designated in Benton County. RP(8/21/03) 71-73. Perhaps that was because the prosecuting attorney had never petitioned the court to appoint such a judge. See, e.g., State v. Neslund, 103 Wn.2d 79, 80, 690 P.2d 1153 (1984) (prosecutor

petitioned court to appoint special inquiry judge pursuant to RCW 10.27 to take evidence of suspected murder). Had such a petition been filed, a case file would have been opened in the court, and a cause number would have been on the subpoena.<sup>62</sup>

The original trial judge found as a fact there was no special inquiry judge proceeding for which the subpoena was issued.<sup>63</sup> The subpoena to the library therefore was not validly issued.

b. The Subpoena Duces Tecum was Not Valid as a Search Warrant.

The first trial court held the Subpoena Duces Tecum for the non-existent special inquiry judge proceedings was valid because it was approved by Judge Swisher, who had already authorized the unconstitutional search warrant. RP(1/17/03) 24-32; RP(2/26/03) 8-9; RP(8/21/03) 44-52, 71-73.

But Judge Swisher had not signed the subpoena; someone claiming "telephonic authority" had done so. There is no evidence to support a valid

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<sup>62</sup> See, e.g., Local Rules of the Superior Court of Washington in and for Benton and Franklin Counties (all forms included in the local rules require a Case No. on them).

<sup>63</sup> The state did not challenge this finding in the first appeal. Unchallenged findings are verities on appeal and become the law of the case. Eisfeldt, supra, 163 Wn.2d at 583-84.

telephonic warrant here. See State v. Myers, supra (telephonic warrant not valid under Const. art. I, § 7 if no contemporaneous recording of affidavit and no disinterested person, like the magistrate or clerk, to corroborate it). The court heard no evidence of how this subpoena came to be issued.

Thus, whether analyzed as a subpoena duces tecum for a Special Inquiry Judge Proceeding or a court approved warrant, the state failed to make an adequate showing for the state to obtain the library records.

c. The Right of Privacy in Library Records in Washington

As noted above, the Washington Constitution, art. I, § 7, protects a person's "private affairs" from governmental disturbance. The Legislature has explicitly established a right of privacy in library records.

The Public Disclosure Act, RCW 42.17.250 - .348, requires the government to disclose, upon request, public records and documents.

Each agency ... shall make available for public inspection and copying all public records. To the extent required to prevent an unreasonable invasion of personal privacy, an agency shall delete identifying details when it makes available ... any public record.

In re Request of Rosier, 105 Wn.2d 606, 717 P.2d 1353, 1356-57, 12 Media L. Rep. 2233 (1986).

The statute explicitly excludes from disclosure:

(1) Any library record, the primary purpose of which is to maintain control of library materials, or to gain access to information, which discloses or could be used to disclose the identity of a library user.

RCW 42.17.310(1). The government agency must delete this information from any record to be disclosed. RCW 42.17.310.

This statute declares the Legislature's intent that library records are private and that citizens have a right of privacy in the public library's records of what material they have used.<sup>64</sup>

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<sup>64</sup> Prior to 1987, the FBI clandestinely visited libraries to track the reading habits of people from communist countries, with foreign-sounding names, and with foreign accents, pursuant to its "Library Awareness Program." The infringement on privacy was so distasteful to Americans that 48 states passed library confidentiality laws, such as RCW 42.17.310(1), aimed at protecting the privacy of library lending records. See PEN American Center report at [www.pen.org/viewmedia.php/prmMID/67/prmID/278](http://www.pen.org/viewmedia.php/prmMID/67/prmID/278).

Such state statutes occur in the context of the "double security" the people enjoy in a federal system of government, with protections of both the federal and state laws. See Alderwood Assocs. v. Environmental Council, 96 Wn.2d 230, 237-38, 635 P.2d 108 (1981), citing The Federalist No. 51 (Modern Library ed. 1937, at 339) (A. Hamilton or J. Madison).

This right of privacy, in turn, is protected by Const., art. I, § 7, supra.

d. Protections Under the First Amendment

Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. 1.

"It is now well established that the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). "The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64-65 n.6, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963).

The right of freedom of speech and press has broad scope. ... This freedom embraces the right to distribute literature ... and necessarily protects the right to receive it.

Martin v. City of Struthers, 319 U.S. 141, 143, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).

In sum, the First Amendment embraces the individual's right to purchase and read whatever books she wishes to, without fear that the government will take steps to discover which books she buys, reads,

or intends to read. A governmental search warrant directed to a bookstore that authorizes seizure of records that reflect a customer's purchases necessarily intrudes into areas protected by this right.

Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1053 (Colo. 2002).

e. Constitution, art. I, § 5

The United States Supreme Court's interpretation of the Federal Constitution defines the minimum level of protections that must be afforded, through the Fourteenth Amendment, by the states. See, e.g., PruneYard Shopping Center v. Robins, 447 U.S. 74, 81, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980). State constitutions provide even greater freedoms for their citizens.

**Freedom of Speech.** Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Const., art. I, § 5.<sup>65</sup>

This same language is found in the Colorado Constitution, art. 2, § 10.

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<sup>65</sup> See, e.g., Alderwood Associates v. Washington Environmental Council, 96 Wn.2d 230, 240-43, 635 P.2d 108 (1981) (state constitution protects right of citizens to gather initiative signatures at privately owned shopping mall, based largely on comparable California and New Jersey constitutional provisions).

Indeed, because our state constitution provides more expansive protection of speech rights than provided by the First Amendment, it follows that the right to purchase books anonymously is afforded even greater respect under our Colorado Constitution than under the United States Constitution.

Tattered Cover, supra, at 1054.

A requirement that a publisher disclose the identity of those who buy his books, pamphlets or papers is indeed the beginning of surveillance of the press. ... Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears ... the purchase of a book or pamphlet today may result in a subpoena tomorrow.<sup>66</sup>

Libraries are the public sector equivalent of bookstores and publishers.

In Tattered Cover, police found a meth lab in a bedroom in a trailer. Four people lived in the trailer; the police wanted to establish whose bedroom it was. The bedroom contained both male and female clothes, Suspect A's address book, papers bearing names of Suspects A, B, and C, and other items.

Also in the bedroom were two books: ADVANCED TECHNIQUES OF CLANDESTINE PSYCHEDELIC AND AMPHETAMINE

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<sup>66</sup> United States v. Rumely, 345 U.S. 41, 57, 73 S. Ct. 543, 97 L. Ed. 770 (1953) (Douglas, J., concurring).

MANUFACTURE, and THE CONSTRUCTION AND OPERATION OF CLANDESTINE DRUG LABORATORIES. An earlier search of the trailer's garbage revealed a mailer addressed to Suspect A from Tattered Cover Inc., a bookstore. The police sought to establish that these books belonged to Suspect A.

[The officers] served the Tattered Cover with a DEA administrative subpoena. This subpoena demanded the title of the books corresponding to the order and invoice numbers of the mailer, as well as information about all other book orders ever placed by Suspect A. Usually such a subpoena was ordinarily a successful technique for DEA officers, though such a subpoena lacks any legal force or effect.

Tattered Cover, supra, 44 P.3d at 1049.

The bookstore declined to comply with the subpoena. "Instead of attempting to obtain an enforceable subpoena," the officers sought a search warrant for the records.<sup>67</sup> The court approved a warrant "for information related to the transaction in question, and for records of any other transaction involving Suspect A during the thirty-day period before the police searched the trailer." Id., at 1049-50.

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<sup>67</sup> "Several prosecutors at the Adams County DA's office refused to sign off on the warrant, voicing concerns about its scope and subject matter." The Denver DA's office was more cooperative. Id., at 1049.

The trial judge approved seizure of records relating to the mailer, but restrained the thirty days of records. The Colorado Supreme Court ruled none of the warrant was valid.

[C]ourts have recognized that a very high level of review, referred to as "strict scrutiny" or "exacting scrutiny" is to be undertaken when government action collides with First Amendment rights. ... This heightened standard is necessary because governmental action that burdens the exercise of First Amendment rights compromises the core principles of an open, democratic society.

Tattered Cover, supra, at 1057.

f. Prejudice

It was constitutional error to permit a subpoena for a nonexistent special inquiry proceeding to seize evidence protected by the First Amendment and Constitution, art. I, § 5. The library records should have been suppressed.

Constitutional error is presumed prejudicial. The state must demonstrate it was harmless beyond a reasonable doubt. State v. Thomas, 142 Wn. App. 589, 174 P.3d 1264 (2008). The evidence of guilt was clearly not overwhelming. This error was not harmless.

6. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF MR. HILTON'S POVERTY AS A MOTIVE TO KILL.

The problem with poverty evidence without more to show motive is not just that it is unfair to poor people, as Wigmore says, but that it does not prove much, because almost everyone, poor or not, has a motive to get more money. And most people, rich or poor, do not steal to get it.

United States v. Mitchell, 172 F.3d 1104, 1109 (9th Cir. 1999). Most people also don't kill to get it. And in this case, Mr. Hilton didn't get any money.

Where an accused is penniless or in financial difficulties and turns up after a crime with a hefty bankroll, a trial judge may, in his discretion, permit a prosecutor to inquire into the defendant's pecuniary situation. ... Where the evidence elicited only demonstrates that the defendant is "poor," the inquiry is improper: Whatever probative value this evidence had, it was outweighed by its prejudicial effect.

Davis v. United States, 409 F.2d 453, 458 (D.C. Cir. 1969).

The lack of money by A might be relevant enough to show the probability of A's desiring to commit a crime in order to obtain money. But the practical result of such a doctrine would be to put a poor person under so much unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly those of violence.

II Wigmore, *Evidence* § 392 (Chadbourn rev. 1979);

United State v. Mitchell, supra, 172 F.3d at 1108.

Thus courts have found evidence of people living beyond their means relevant for charges of theft or robbery, and a murder occurring during an attempted robbery. State v. Matthews, 75 Wn. App. 278, 877 P.2d 252 (1994), review denied, 125 Wn.2d 1022 (1995) (murder occurring during attempted robbery); State v. Kennard, 101 Wn. App. 533, 6 P.3d 38, review denied, 142 Wn.2d 1011 (2000) (three bank robberies, each coinciding with events in bankruptcy proceedings).

In Mitchell, in contrast, also a robbery case, the court reversed the conviction. As here, the only issue at trial was who did it.

[T]he prosecutor faced some difficulties in proving that Mitchell was the robber. One of the devices she used was to show that Mitchell had motive: he needed the money because he was poor.

Id., 172 F.3d at 1106. She presented evidence that the defendant had been fired from a sales job because he didn't sell enough. But as here, he also was self-employed. As here, the government showed he could not adequately support himself and his wife and children. As here, his parents paid for his car and helped him many times. As here, "Mitchell was encouraged by his parents to come to

them when he needed money, he came regularly, and they wanted him to." Id. Like Mr. Hilton, Mr. Mitchell was overdrawn at his bank, both before and after the crime. Id. at 1107.

The court noted:

Then in her rebuttal argument, ... the prosecutor hit the poverty evidence hard:

He didn't have any money. He had minus \$57 in his bank account. Look at his bank records. It's about consistent for the entire time that you've got bank records for. ... Mr. Mitchell is staring down the face of the getting kicked out of his condominium. He doesn't have any money. His wife is not getting the usual [A.F.D.C.] money she's used to getting that month. Lo and behold, the day after the robbery, unexplained he can go in and pay the full amount of the rent in cash. ...

Id. at 1107.

Poverty as proof of motive has in many cases little tendency to make theft more probable. Lack of money gives a person an interest in having more. But so does desire for money, without poverty. A rich man's greed is as much a motive to steal as a poor man's poverty. Proof of either, without more, is likely to amount to a great deal of unfair prejudice with little probative value.

Mitchell at 1108-09.

Here it may have been relevant that Mr. Hilton owed back rent to the Ulrichs -- although killing them certainly did not relieve him of that debt.

It was not relevant, however, that he owed child support or credit card bills dating from his divorce. Yet it was the state's theme through closing argument -- his motive to kill the Ulrichs.

Just as the defense predicted, the state argued this evidence more as character evidence than as actual motive: if he would be late paying child support, he would lie and murder. RP 3803-08. This was improper argument, based on evidence that should not have been admitted.

7. THE TRIAL COURT ERRED AND VIOLATED MR. HILTON'S CONSTITUTIONAL RIGHTS TO BEAR ARMS BY ADMITTING INTO EVIDENCE HIS HISTORY OF GUN OWNERSHIP AND GUN CLUB MEMBERSHIP.

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

Const., art. I, § 24. "This constitutional provision is facially broader than the Second Amendment, which restricts its reference to 'a well regulated militia.'" State v. Rupe, supra, 101 Wn.2d at 706. But see U.S. Constitution, Amendment

2;<sup>68</sup> District of Columbia v. Heller, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1783, 171 L. Ed. 2d 637 (2008) (Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia and to use that firearm for traditionally lawful purposes, such as self-defense within the home).<sup>69</sup>

To protect the integrity of constitutional rights, the courts have developed two related propositions. The State can take no action which will unnecessarily "chill" or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right.

Rupe, supra, 101 Wn.2d at 705.

In Rupe, the defendant was convicted of two counts of aggravated first degree murder for shooting two bank tellers during a robbery. After he was found guilty, in the penalty phase of the trial, the state admitted evidence that the defendant had a gun collection of four weapons:

(1) a CAR 15 semiautomatic rifle (civilian version of the military's M-16), (2) a 12-gauge shotgun with one shortened barrel, (3) a .22 caliber

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<sup>68</sup> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

<sup>69</sup> Heller was decided after the retrial of this case.

rifle, and (4) a pistol with interchangeable barrels.

The weapons were legal, but experts testified they were not suitable for hunting or sport. Id., 101 Wn.2d at 703.

The Supreme Court reversed the death penalty.

[I]f the evidence in question allowed the jury to draw adverse inferences from a constitutional right, reversal ... is required.

Although we do not decide the parameters of this right [to bear arms], here, defendant's behavior -- possession of legal weapons -- falls squarely within the confines of the right guaranteed by Const. art. I, § 24. Defendant was thus entitled under our constitution to possess weapons, without incurring the risk that the State would subsequently use the mere fact of possession against him in a criminal trial unrelated to their use.

Id., 101 Wn.2d at 706-07.

The Rupe court recognized, as here, the highly inflammatory and prejudicial nature of the evidence on a jury.

Defendant next argues that this evidence is both irrelevant and highly prejudicial. We agree. The guns in question had no connection with the crime and were all, admittedly, legally owned. ... Furthermore, we take judicial notice of the overwhelming evidence that many nonviolent individuals own and enjoy using a wide variety of guns. ...

... Personal reactions to the ownership of guns vary greatly. Many individuals view guns with great abhorrence and fear. Still others may

consider certain weapons as acceptable but others as "dangerous." A third type may react solely to the fact that someone who has committed a crime has such weapons. Any or all of these individuals might believe that defendant was a dangerous individual ... .

Rupe, 101 Wn.2d at 708.

In this case, the state never located or identified the murder weapon. It focused on one gun Mr. Hilton admittedly had owned,<sup>70</sup> and on the reasons the jury should not believe that he had sold it. But it also submitted testimony far more inflammatory about his owning several other guns that could not have been involved the crime. His ex-wife's testimony about his guns, in particular, offered nothing of relevant substance, yet enormous inflammatory emotion and speculation in her telling about it.

As in Rupe, the state used this constitutional right to bear arms to convey that he was dangerous and guilty of this crime. For the same reason, admitting this evidence requires a new trial.

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<sup>70</sup> He told the police the first morning he spoke with them what guns he had owned, that he used to shoot competitively.

8. THE COURT ABUSED ITS DISCRETION BY  
ADMITTING LAURA HILTON'S TESTIMONY.

Several portions of Laura Hilton's testimony were erroneously admitted over objection of irrelevance: her speculation that he had more guns than she knew and hid guns; his comment years earlier that he knew someone who "does away with people," and her response to that comment; and the children's reaction to learning the Ulrichs had been killed. ER 401, 402, 403, 404(b).

When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. . . . **"[I]n doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence."** . . . The prejudicial nature of ER 404(b) evidence must be balanced by the court on the record.

State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

In State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985), the defendant was charged with the first degree murder of his wife. Over objection, a witness testified that eight months before his wife's death, the defendant admitted he had struck his wife during an argument. "The State argues that the evidence was properly admitted to prove motive." Sargent, 40 Wn. App. at 351. The trial court found the statements "probative of the

intent, attitude and disposition of the defendant toward the victim ..." Id., at 352.

The Court of Appeals disagreed.

**We can discern no relationship between proof of Sargent's intent the night of the murder and an argument with his wife 8 months earlier. The trial court erred in admitting this testimony.**

Id. If it was reversible error to admit evidence of a previous assault against the murder victim from eight months earlier, how less relevant and more prejudicial is the comment made more than five years earlier in a conversation utterly unconnected to the Ulrichs at all, that Mr. Hilton know someone that does away with people.<sup>71</sup> Ms. Hilton's response also erroneously was admitted, after the court ruled it should be excluded.

Similarly, her comment that her "children were hysterical" when they learned the Ulrichs were murdered was utterly irrelevant.

Even if there is some relevance other than propensity, such evidence should not be admitted if

its effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.

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<sup>71</sup> The state never suggested Mr. Hilton hired someone else to commit these murders.

State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950); State v. Goebel, 40 Wn.2d 18, 23, 240 P.2d 251 (1952).

It was error to admit this evidence. Although this error alone might not warrant reversal, the cumulative effect of this error with other errors requires reversal.

9. THE TRIAL COURT AND PROSECUTOR MISINTERPRETED THE LEGAL EFFECT OF THE THREE-DAY PAY-OR-QUIT NOTICE AND SO ARGUED THE LAW INCORRECTLY WHILE LIMITING THE DEFENSE ARGUMENT AND EVIDENCE.

The state repeatedly argued Mr. Hilton's motive to kill the Ulrichs on March 20 was because it was the third business day after he had received the three-day Pay-or-Quit Notice on March 15.

The three-day notice is authorized in RCW 59.12.030, the statute for unlawful detainer.

A tenant of real property for a term less than life is guilty of unlawful detainer ...

...  
(3) When he or she continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises ... has remained uncomplished with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due ... .

RCW 59.12.030(3).

In Christensen v. Ellsworth, 162 Wn.2d 365, 173 P.3d 228 (2007), decided shortly before this retrial began, the Supreme Court held the three days notice did not mean business days. "The legislature intended for the phrase 'three days' to convey its ordinary meaning of three calendar days." 162 Wn.2d at 375.

The unlawful detainer notice is a three day waiting period for the landlord before an unlawful detainer action can be commenced rather than a deadline for the tenant to act.

Id., 162 Wn.2d at 377.

Furthermore, service of the notice does not result in physical eviction in three days.

Once a tenant is guilty of unlawful detainer under RCW 59.12.030(3), a landlord may commence an unlawful detainer action by service and filing of the statutory summons and complaint.

Id., 162 Wn.2d at 371; RCW 59.12.080. Thus the landlord must wait the three days, then still must file and serve a summons and complaint asking the court to order the tenant to leave.<sup>72</sup> The court's, and the prosecutor's, interpretation of

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<sup>72</sup> The prosecutor did articulate this procedural requirement in rebuttal. RP 3893-94.

this statute therefore was wrong as a matter of law.

This misinterpretation was conveyed to the jury in the state's arguments, claiming Mr. Hilton would feel compelled to kill the Ulrichs on March 20 because it was the "third business day" after he received the notice. RP 3811. The court's sua sponte sidebar conference limited the defense from articulating the alternative, and legally accurate, interpretation. RP 3671-72.

The judge best articulated the prejudice of this error. When the state proposed findings of fact regarding Laura Hilton, the court personally added the finding that March 20 was the third business day after March 15, 2002. RP 3943-45; CP 28-32.

Clearly ... the evening on which they died was the third business day after the State represented that a notice or inferred that a notice to pay or quit premises was delivered to the defendant. ... High relevancy.

RP 4014-15. If this erroneous interpretation of the evidence persuaded the judge, it was all the more likely to persuade the jury.

10. THIS COURT SHOULD GRANT APPELLATE COUNSEL THE RIGHT TO REVIEW THE SEALED EXHIBITS, OR CONDUCT AN *IN CAMERA* REVIEW OF THEM, TO DETERMINE WHETHER THE TRIAL COURT ERRED IN FINDING NO EVIDENCE WAS SUBJECT TO BRADY DISCLOSURE.

Due process guarantees criminal defendants access to material information in the possession of the court or the prosecution, including material impeachment evidence. Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); U.S. Const., amend. 14.

Evidence is material, for the purposes of this due process rule, if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" or if the information "probably would have changed the outcome of [the] trial." ... A reasonable probability is "a probability sufficient to undermine confidence in the outcome."

State v. Gregory, 158 Wn.2d 759, 797, 147 P.3d 1201 (2006) (citations omitted).

One shows a Brady violation

by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Kyles, supra, 514 U.S. at 435. Once the reviewing court finds constitutional error in the failure to

disclose, there is no need for further harmless-error review. Id.

In this case, the trial court conducted an *in camera* review of these materials and concluded it would not disclose them to the defense. The records were sealed, and so not available for counsel to review for appeal. Nonetheless, the defendant has a constitutional right to appeal, and the right to assistance of counsel on appeal. Const., art. I, § 22; U.S. Const., amends. 6, 14.

In State v. Gregory, supra, the trial court initially refused even an *in camera* review of a witness's dependency files. The Supreme Court concluded that refusal was an abuse of discretion and remanded for the *in camera* review. Id., 158 Wn.2d at 795-96. After remand, the Supreme Court granted in part the defense motion to unseal the records, transferred portions of them to counsel, and requested supplemental briefing. Id., at 796 n.17. Following this procedure, the Supreme Court concluded the withheld records were material to the credibility of a key state's witness. It reversed the rape conviction and remanded for a new trial.

Appellant respectfully asks this Court to grant counsel the right to review the sealed

documents to present supplemental argument of why the trial court erred in failing to disclose Brady evidence to the defense. State v. Gregory, supra.

In the alternative, this court should examine those materials to review the trial court's decision not to disclose it. State v. Gregory, supra. Of particular concern would be any evidence tending to impeach the credibility of the state's witnesses, whether police officers or civilians, or questioning the conduct of the prosecutor's office.

D. CONCLUSION

For all the reasons stated above, appellant respectfully asks this Court to reverse his judgment and sentence and remand for a new trial.

DATED this 9<sup>th</sup> day of October, 2009.

Respectfully submitted,



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