

No. 55217-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

GLEN SEBASTIAN BURNS,

Appellant.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Charles Mertel

AMENDED BRIEF OF APPELLANT BURNS

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A. SUMMARY OF APPEAL

Sebastian Burns and his friend Atif Rafay found the Rafay family murdered in 1994. The Bellevue Police Department suspected Sebastian and Atif committed the murders, but did not have evidence to charge them until a reckless undercover police operation in Canada elicited their “confessions” to the murders in 1995. Sebastian and Atif appeal their 2004 convictions for three counts of aggravated murder.

Sebastian argues his constitutional right to present his defense was violated because the trial court excluded (1) a social scientist who was an expert on police interrogation and false confessions, (2) a former DEA agent who was an expert on undercover police operations and the practices and standards that protect against false confessions, and (3) evidence a radical faction within the local Islamic community had sought Dr. Rafay’s murder.

Sebastian also argues prosecutorial misconduct in closing argument denied him a fair trial and that his right to a speedy trial under both constitution and court rule was violated. Finally, pursuant to RAP 10.1(g), Sebastian adopts the arguments and factual statement presented by Atif in his Brief of Appellant.

B. ASSIGNMENTS OF ERROR

1. The trial court's exclusion of the testimony of Richard Leo, Ph.D., an expert on police interrogation and false confessions violated Sebastian's constitutional right to present a defense.

2. The trial court's exclusion of the testimony of Michael Levine, a former DEA agent and expert on undercover police practices, violated Sebastian's constitutional right to present a defense.

3. The trial court's exclusion of evidence that a radical religious group committed the crimes violated Sebastian's constitutional right to present a defense.

4. The prosecutor's misconduct in closing argument violated Sebastian's constitutional right to due process of law.

5. Sebastian was denied his constitutional right to a speedy trial.

6. Sebastian's right to a speedy trial under CrR 3.3 was violated when the State failed to make a diligent and good faith effort to secure his presence for trial.

7. Sebastian's constitutional right to effective assistance of counsel was violated when his attorneys agreed jurors would be told this was not a death penalty case.

8. The trial court erred by discharging a qualified juror during trial.

9. Sebastian's constitutional right to due process of law was violated when multiple witnesses expressed their opinions of his guilt.

10. The State's repeated violations of the court's in limine rulings violated Sebastian's constitutional right to a fair trial.

11. The cumulative effect of the above errors denied Sebastian his constitutional right to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions guarantee the accused the right to present a defense and call witnesses on his behalf. U.S. Const. amend. 6, 14; Wash. Const. art. 1 §§ 3, 22. Sebastian Burns was the target of an elaborate RCMP undercover operation that extracted his "confession" to the Rafay murders through deceptive promises and the implied threat of violence. Sebastian sought to call social scientist Richard Leo to testify about police interrogation practices and other factors that may contribute to false confessions. Where the "confessions" were essential to the State's case, did the trial court violate Sebastian's constitutional

right to present a defense when it prohibited him from calling the expert witness essential to his defense? (Assignment of Error 1)

2. Expert testimony is admissible if it will be of assistance to the jury even if the testimony addresses the ultimate issues in the case. The trial court excluded Dr. Leo's testimony on the theory it would not be helpful because jurors know people lie and because the testimony would invade the province of the jury. Did the trial court abuse its discretion where (1) the expert's testimony would have provided information not known by the lay person to assist the jury in assessing the "confessions" and (2) the expert would not testify the "confessions" were true or false? (Assignment of Error 1)

3. Sebastian sought to call Michael Levine, a former law enforcement officer with expertise in undercover police work, to testify about standards for undercover operations designed to guard against false confessions. The RCMP undercover unit had no written standards at the time it targeted Sebastian, but officers testified they were highly trained, downplayed the dangers of their practices, asserted Sebastian was not afraid of them, and opined his "confessions" were true. Where the "confessions" obtained by the RCMP undercover operatives were essential to the State's case, did the trial court violate Sebastian's constitution right to

present a defense when it prohibited him from calling the expert witness in undercover standards and practices? (Assignment of Error 2)

4. An expert witness may testify as to the ultimate issues to be decided by the jury, but Michael Levine stated he would not testify that Sebastian's inculpatory statements were coerced or false. The trial court nonetheless excluded the expert's testimony on the grounds he would testify Sebastian's confession was coerced and false and such testimony would invade the province of the jury. Did the trial court abuse its discretion in excluding the witness? (Assignment of Error 2).

5. Sebastian and Atif were accused of murdering three members of the Rafay family. Within days of the murders and before the police had released information identifying the murder weapon as a baseball bat, an FBI informant told police that a violent faction within the local Muslim community had sought the murder Dr. Rafay. A member of this group had nervously asked the informant whether he had seen a baseball bat in a group member's car prior to the murders. Did the exclusion of this evidence violate Sebastian's constitutional right to present a

defense and challenge the State's evidence? (Assignment of Error 3)

6. Shortly after the FBI informant provided this information, Seattle Police informed the Bellevue Police that a radical Islamic group called al Fuqra may have been responsible for the murder of the Rafay family. Al Fuqra was active in Seattle and assassinated individuals with whom it disagreed on religious matters including the interpretation of the Koran. Did the exclusion of this evidence further deny Sebastian his constitutional right to present a defense and challenge the State's evidence? (Assignment of Error 3)

7. The constitutional right to present a defense guarantees the accused may present evidence unless the State can demonstrate a compelling reason for its exclusion. To the extent Washington has adopted a more restrictive standard for the admission of other suspect evidence, does such a standard violate constitutional due process guarantees? (Assignment of Error 3)

8. Although the FBI provided the Bellevue Police Department with the names, addresses, and even telephone numbers of members of the extremist group, the police did not investigate any of these potential suspects or witnesses. In addition to offering the information to show that someone else

committed the murders, the defense offered this evidence to rebut the State's claim it conducted a thorough and complete investigation. Where the evidence was also relevant to impeach the police investigation, did its exclusion violate Sebastian's state and federal constitutional right to present a defense and challenge the State's evidence? (Assignment of Error 3)

9. A defendant's constitutional right to due process and a fair trial is violated when the prosecuting attorney argues in a manner that inflames the passions or prejudices of the jury. Here the prosecutor analogized the murders to the beheading of an American civilian by Islamic militants in Iraq, thus improperly appealing to the passions and prejudices of the jury. Did the misconduct violate Sebastian's constitutional right to a fair trial? (Assignment of Error 4)

10. The prosecuting attorney violates a defendant's right to a fair trial and proof beyond a reasonable doubt by misstating the burden of proof in closing argument. Here the prosecutor said the jury had to believe everything Sebastian said or everything the two Canadian undercover operatives said, a logical fallacy that misstates the jury's role and the burden of proof. Did the

misconduct violate Sebastian's constitutional right to a fair trial?

(Assignment of Error 4)

11. In closing argument the prosecutor also referred to the recent death of his own father in violation of a prior court ruling. By injecting the death of his own parent and comparing his reaction to the reactions of Sebastian and his co-defendant to the death of the Rafay family, did the prosecutor violate Sebastian's constitutional right to a fair trial? (Assignment of Error 4)

12. It is misconduct for the prosecuting attorney to argue facts not in evidence, thus becoming an unsworn witness against the defendant. The prosecutor claimed he personally smelled alcohol on a defense witness, thereby suggesting her testimony was not credible. Where there was no evidence that the critical witness had been drinking or smelled of alcohol, did the prosecutor's statement of facts not in evidence violate Sebastian's constitutional right to a fair trial? (Assignment of Error 4)

13. The prosecutor's closing argument contained several instances of misconduct that affected the jury verdict. Does the cumulative effect of the misconduct require reversal of Sebastian's convictions? (Assignment of Error 4)

14. A criminal defendant is entitled to a speedy trial. In the instant case, Sebastian was amenable to process, but when the State sought extradition from Canada, it failed to provide required assurances he would not be put to death if convicted in Washington State. When Sebastian was incarcerated but not brought to trial for six and a half years, was he denied his constitutional right to a speedy trial by the State's dilatory practices? (Assignment of Error 5)

15. Under CrR 3.3, the State must make a diligent good faith effort to secure the presence of an out-of-state defendant. In the instant case, the State could have provided the Canadian government assurances it would not seek the death penalty if Sebastian was convicted as required by law but failed to do so. Is reversal required, when a mechanism was available to obtain Sebastian's presence but the State failed to utilize that mechanism? (Assignment of Error 6)

16. In an aggravated first degree murder case, it is error to inform the jurors the death penalty is not an issue because it makes the jurors less careful during deliberations and more likely to convict. Here, Sebastian's attorneys agreed jurors could be told this was not a death penalty case. Where there was no legitimate

tactical reason for this costly mistake, did Sebastian receive ineffective assistance of counsel? (Assignment of Error 7)

17. A trial court may not remove a sitting juror without first conducting an adequate investigation and only after proof of the juror's unfitness to serve. RCW 2.36.110. The State repeatedly sought to remove a thoughtful, intelligent and fully qualified juror from this trial. Claims that the juror was sleeping, writing personal notes, or had complained to her husband on the telephone that she wanted to be removed from jury service were largely unsubstantiated and there was no evidence she was unfit. Did the trial court abuse its discretion by removing a sitting juror without an adequate investigation and in the absence of evidence to support a finding the juror was not fit? (Assignment of Error 8).

18. Witnesses in a criminal case may never offer an opinion, even by inference, as to the defendant's guilt. Multiple prosecution witnesses violated this prohibition. Did this violate Sebastian's constitutional right to a fair and impartial jury? (Assignment of Error 9)

19. Multiple prosecution witnesses testified to matters that had been excluded by the court. As a result, these witnesses improperly suggested that Sebastian and Atif had criminal histories,

suggested prosecutors were being prevented from revealing important evidence to the jurors, and permitted the State to undermine a key component of their defense. Did this serious misconduct deny Sebastian his constitutional right to a fair trial?

(Assignment of Error 10)

20. Did the cumulative effect of the above errors violate Sebastian's constitutional right to due process of law and a fair trial? (Assignments of Error 1-11)

D. STATEMENT OF THE CASE

1. SEBASTIAN AND ATIF DISCOVER THE MURDERS

Glen Sebastian Burns and Atif Rafay were friends from high school in West Vancouver, British Columbia. Ex. 22 at 1; Ex. 78 at 1. Atif's father Tariq, his mother Sultana, and his sister Basma had gradually moved to Washington from British Columbia after Tariq found employment here in 1992. The Rafays purchased a house in the Sommerset neighborhood of Bellevue in the spring of 1994, while Atif was a freshman at Cornell University. Ex. 78 at 1; 12/4/03RP 172-73; 12/11/03RP 76-77; 2/23/04RP 28, 30-31.

That summer Atif was traveling and visiting friends in Vancouver, and on July 7 he and Sebastian went to spend time with the Rafay family in their new home. Ex. 78 at 1. The two

young men spent several days relaxing at the house with occasional excursions into the community. Ex. 76 at 5; Ex. 72 at 4-11.¹ One day Sebastian and Atif drove to Vancouver where they went to Sebastian's home, did errands, and visited a friend, returning to Bellevue that evening. Ex. 76 at 8-11.

On the evening of July 12, Sebastian and Atif went to see a movie, using the Rafays' Honda. Ex. 78 at 1-2. The two went first to the Keg Restaurant in the nearby Factoria mall. Ex. 22 at 2; Ex. 78 at 1. Their waiter remembered serving the two young men a light dinner and stated they left the restaurant shortly after 9:25 p.m. 12/16/03RP 133-36, 143. He recalled Sebastian and Atif asked him about dance clubs, and he suggested the Weathered Wall in Seattle. *Id.* at 141.

At the Factoria Cinema across the street, "The Lion King" was playing, and Sebastian and Atif went to the showing that ran from 9:50 to 11:30 p.m. Ex. 22 at 2; Ex. 78 at 1-2; 12/15/03RP 115-16. Two people remembered seeing Sebastian and Atif at the theater. 12/1/03RP 139-40. An employee working the snack bar

¹ Exhibits 68, 69, 72 and 76 are transcripts of the Bellevue Police Department's taped witness interviews of Sebastian and Rafay. The jury heard the tape-recordings and were instructed the transcripts were not accurate and were not evidence. 12/17/03RP 65-71; 12/22/03RP 10-12, 29; 12/23/03RP 4-5. Sebastian refers to the written transcripts here for convenience.

saw them at 9:30 or 10:00 p.m. 12/15/03RP 125-30, 146. A manager saw the two joking around like typical teenagers in the theater. He also recalled Sebastian was one of three people to alert the management when the theater curtain did not open after the movie had begun. 12/15/03RP 112-14, 151, 154-57, 189-90.

After the movie, Sebastian and Atif went to an all-night café in Seattle, Steve's Broiler, where they ordered a snack, and inquired about nightclubs in the area. Ex. 22 at 2-3; Ex 78 at 2; 12/15/03RP 200-01; 12/16/03RP 16-20; 5/12/04RP 80. Three of the Steve's Broiler waitresses talked to Sebastian and Atif that evening. Waitress Jennifer Osteen Haslund talked to Sebastian and Atif around midnight or 12:30 and said the two were in the restaurant for at least another hour. 5/12/04RP 79, 91, 98-99. Karen Lundquist Brown thought the teens probably arrived between 12:00 and 12:30. 12/15/03RP 211-12. Christine Mars Kuykendall said she waited on them at about 12:50 or 1:00, and they were already seated. 12/16/03RP 23, 30. She said they were in the restaurant for another 30 minutes, and she also saw them return to the restaurant to use the restroom at about 1:40 a.m. 12/16/03RP 25-26, 29.

After eating, Sebastian and Atif went to the Weathered Wall, a nearby club, but they were not admitted because it was soon closing. Ex. 22 at 3; Ex. 78 at 2; 12/10/03RP 90-91, 94-97, 148, 150-51.

When Sebastian and Atif returned to the Rafays' home, they discovered Mrs. Rafay's dead body in the basement family room in a pool of blood. They ran upstairs and found Dr. Rafay's body on the bed in the master bedroom; the bed and the wall behind it were covered with blood. The boys could also hear Basma moaning from her upstairs bedroom.² The boys were afraid, so Sebastian immediately called 911 and the two quickly left the home. Ex. 22 at 3-4; Ex. 78 at 2; Ex. 446; 2/26/04RP 17-21.

Sebastian and Atif waited outside for the police. 2/26/04RP 51. When the first patrol car to arrive drove past the Rafay home, Sebastian and Atif ran towards it, shouting directions and pounding on the car. 12/2/03RP 191-93; 12/3/04RP 11. Officer Thomas Hromada described the boys as very emotional, almost incoherent, screaming, and on the verge of tears; they exclaimed they had seen blood and bodies everywhere. 12/2/03RP 192-98; 12/3/03RP

² Basma Rafay suffered from a developmental disability and was unable to speak, interact with others, or care for herself; she was 21 years old at the time of her death. 12/4/03RP 174-75; 12/8/03RP 209; 2/23/04RP 20, 31; 3/1/04RP 37-39.

12-13, 29-30. The officer ordered the boys to calm down and sit on the curb, and they complied. 12/2/03RP 199-201; 12/3/03RP 13-15, 68.

In response to Hromada's questions, Sebastian and Atif explained they were visiting from Vancouver, had gone out for the evening, returned to find the family dead, and called 911.³ 2/2/03 RP 203-04, 206; 2/3/03RP 30, 81. As they waited outside, the two young men sat close together on the curb, their knees to their chests, and murmured quietly to each other. 12/3/03RP 50-51; 12/4/03RP 72-74, 76-77; 12/9/03RP 199. At one point, Sebastian clutched his stomach and rocked back and forth, his face contorted in pain. 12/4/03RP 78-80, 104-05. Later Sebastian sat up and put his head on Atif's shoulder. Id. at 91-91.

2. THE MURDER SCENE

Numerous Bellevue police officers arrived in response to Sebastian's 911 call. Three soon entered the home with weapons in one hand and flashlights in the other, quickly checking every room. 12/1/03RP 78-79, 81-82, 107-08, 111-13, 128-29; 12/2/03RP 32-35, 54; 12/3/03RP 108, 158-63. The officers found Dr. Rafay's body on his bed in the master bedroom. 12/1/03RP

³ Officer Lisa Piculell also questioned Atif and Sebastian and they answered her questions. 12/4/03RP 82, 86-88, 92-95, 130-31, 137-38, 149-50.

118-19; 12/2/03RP 42-45; 12/3/03RP 107-08. Even from the hallway it was obvious Dr. Rafay was dead, and the room covered with blood and human tissue. 12/1/03RP 193-99; 12/2/03RP 81-83; 12/3/03RP 131-32; 12/15/03RP 40-46; 1/26/04RP 37-38; 2/23/04RP 179-83; 2/26/04RP 172. In addition, the police saw a men's wallet open on the floor and cash on the dresser. 12/1/03RP 144-46, 147; 12/2/03RP 42, 58. A sliding glass door was also open a few inches. 2/23/04RP 186-87.

The officers found Basma Rafay behind the door of another upstairs bedroom. Basma was obviously injured but was still breathing. 12/1/03RP 108-12, 120-23; 12/2/03RP 34-35, 104; 12/3/03RP 109-11. When the medics entered, Basma had no blood pressure or pulse. 12/2/03RP 170. Lifesaving measures were unsuccessful, and she was pronounced dead at 7:10 a.m. 12/2/03RP 49, 169-72; 12/3/03RP 118-21, 199; 12/4/03RP 99; 3/10/04RP 8.

In the downstairs recreation room, the officers found the body of Mrs. Rafay lying on the floor with a pool of blood near her head, which was covered with a shawl. 12/1/03RP 129-31; 12/2/03RP 49-51, 92; 12/3/03RP 112, 129-31. The downstairs recreation room contained boxes as if the Rafays were still

unpacking. 2/23/04RP 172-73. In the bedroom adjacent to the recreation room, similar boxes were tipped over, items were strewn on the bed, and desk drawers were open. 1/8/04RP 71-72; 2/23/04RP 173.

The living room, dining room, family room and kitchen were in order, but a VCR appeared to be missing from the entertainment center and the back sliding glass door was open a few feet. 2/23/04RP 176-77, 186-87. As they investigated, the police officers found no sign of forced entry inside or outside the home. 12/9/03RP 187; 12/1/03RP 81, 156; 12/2/03RP 57, 79.

3. SEBASTIAN AND ATIF COOPERATE WITH THE POLICE

After waiting outside the Rafay home with various officers, Sebastian and Atif were placed in Officer Mark Lewis's patrol car, where they were quiet and reflective, as if they had been through a traumatic event. 12/4/03RP 96-97; 12/23/03RP 15-16, 68-69. At one point Sebastian had his arm around Atif, and Atif had his head on Sebastian's shoulder. 12/4/03RP 100-01; 12/23/03RP 67-68. At another time Sebastian had his head in his hands, bent over at the knees. 12/23/03RP 68. Both appeared subdued, stunned, and shocked. 12/23/04RP 54-55, 68.

Officer Lewis took a detailed written statement from Atif in the patrol car. Ex. 78; 12/23/03RP 16-17, 42-47. Atif was cooperative, but the officer often had to ask Atif to repeat himself because he was speaking so softly and mumbling. 12/23/03RP 25-26, 55, 57-58. The process of creating the written statement took about two hours. 12/23/03RP 48.

Meanwhile Officer David Deffenbaugh spent two hours taking a detailed written witness statement from Sebastian. Ex. 22; 12/4/03RP 13-21, 36-37. Sebastian was not evasive, and he articulately answered the officer's questions. 12/4/03RP 38, 50. Lewis and Deffenbaugh then transported Sebastian and Atif separately to the Bellevue Police Department. 12/4/04RP 21; 12/23/03RP 48-49.

Both Sebastian and Atif had already undergone gun residue tests at the scene. 2/5/04RP 32, 34-35, 37. At the police station, the police placed them under an alternative light source to test for blood stains and collected their clothing. 12/3/03RP 29-31; 12/5/04RP 29-31, 41-42, 51-53; 12/23/03RP 49-50, 74; 2/5/04RP 51-53, 80; 2/26/04RP 75-76. The light test showed no blood on the defendants' clothing or bodies, nor did either appear injured. 2/26/04RP 78-80.

Detective Robert Thompson then conducted separate tape-recorded interviews of Sebastian and Atif at the police station; Detective Jeffrey Gomes participated in the interview of Atif. Ex. 68, 69; 2/5/04RP 38-40. Sebastian's interview was second and ended a little after 8 a.m. 2/24/04RP 58-59; Ex. 68, 69.

Sebastian had no clothing and neither boy had anywhere to stay. At about 9 a.m., Detective Molly A. McBride took Atif and Sebastian to purchase clothing and a meal, and she located a motel room for them to stay in. 12/10/03RP 37-46. This took about three hours during which the two boys were very quiet. 12/10/03RP 38-39. At one point McBride asked Atif how he was doing, and Sebastian answered angrily, "How do you think he's doing?" 12/10/03RP 127.

That afternoon Detectives Thompson and Gomes went to the motel, woke Sebastian and Atif, and took them back to the police station to obtain their fingerprints and photographs. 2/5/04RP 74-81, 85-87. Sebastian and Atif remained at the motel on July 13 and July 14.⁴

⁴ Unable to sleep, they rented a VCR and videos from a Bellevue Blockbuster Video store using Mr. Rafay's Blockbuster account. 12/15/03RP 66, 71; 12/22/03RP 17-19; 2/25/04RP 221-26.

Detective Thompson testified that he was suspicious of Atif and Sebastian because of their interviews.⁵ 2/23/04RP 195-97; 2/24/04RP 53-54, 61-77. Gomes added that the interviews left him with unanswered questions. 2/17/04RP 28-32. The next afternoon, the detectives decided to re-interview Sebastian and Atif, claiming the prior statements were “generic” and “lacking in detail.” 2/5/04RP 44-45, 56, 95; 2/24/04RP 95.

The detectives took Sebastian and Atif individually to a nearby park for lengthy tape-recorded interviews. Ex. 72, 76; 2/5/04RP 98-101; 12/17/04RP 24-26, 34-35; 2/24/04RP 101-02, 104-05. Gomes said Sebastian and Atif were relaxed and cooperative, but Thompson described them as “apprehensive” and said Sebastian was protective of Atif when the two were separated. 2/5/04RP 99-102; 2/24/04RP 103-04; 5/13/04RP 80.

The detectives first interviewed Atif for over three hours and then drove him to the motel where the boys were staying. Ex. 72; 2/5/04RP 102-03, 110; 2/24/04RP 108-214. During the interview, the detectives encouraged Atif to “visualize” his discovery of his

⁵ Thompson detailed the various “red flags” he noted in the interviews. For example, Atif did not go to the aid of his family members, Sebastian was able to provide time estimates even though he and Atif were not wearing watches, and Sebastian seemed “put out” by the detective’s questions. 2/23/04RP 195-97; 2/24/04RP 53-54, 61-77

parents' bodies. Ex. 72 at 41, 43, 44, 49, 51, 55, 61. They opined that the killer was close to the Rafay family and suggested it might be Sebastian. Id. at 85-88, 94-96. The detectives also told Atif they thought it was suspicious that he had not contacted any family members or arranged a funeral, but Atif expected Detective Gomes to help him. Ex. 72 at 91-94; 2/5/04RP 60-61, 69, 89-90; 2/24/04RP 87-88. Afterward Gomes pushed Atif to contact his family and arranged to have a telephone placed in the motel room. 2/17/04RP 17-18, 35, 170; 2/24/04RP 214-16. Meanwhile, Sebastian waited for the detectives, and he then underwent a 90 minute long interview. Ex. 76; 2/5/04RP 110; 2/17/04RP 24; 2/24/04RP 226-27.

4. SEBASTIAN AND ATIF RETURN HOME

Sebastian's parents placed several telephone calls to the Bellevue Police Department and the Canadian Consular General's office in Seattle on July 14 and July 15 attempting to locate their son and Atif.⁶ Ex. 532 at 10:17; 12/10/03RP 187-88; 3/1/04RP 15-19. Both Sebastian and Atif were Canadian citizens. Ex. 532 at 10:18; 12/10/03RP 193. A senior representative of the Canadian

⁶ Exhibit 532 is a video-recorded deposition of Cindy Taylor-Blakely, a Senior Program Manager for the Canadian Consular General. A small portion of the video-taped deposition was stricken by the court. 4/29/04RP 50, 56.

Consular General spoke to Detective Ed Mott, who asserted Sebastian and Atif were safe but would not disclose their location.⁷ Ex. 532 at 10:20; 12/10/03RP 209, 224. Still, the detective told the consul official the boys were not suspects and were free to go. Ex. 532 at 10:20 - 10:21; 12/10/03RP 193-95, 207. After speaking to Sebastian's mother, the consul's representative informed Detective Mott that Atif intended to return to Canada and stay with Sebastian's parents.⁸ Ex. 532 at 10:24.

The consul representative met Sebastian and Atif at the bus station in Seattle on the morning of July 15 to make sure they had the documents and funds they needed to return home, and the two rode to Vancouver by bus. Ex. 532 at 10:21; 12/23/03RP 148-49; 2/17/04RP 52-53. When Atif and Sebastian returned to Canada they initially stayed with Sebastian's parents.⁹ 2/23/04RP 124; 3/11/04RP 74; 5/11/04RP 105-06.

⁷ The detective also refused to reveal the young men's location to Sebastian's father or to friends of Atif who came to Bellevue to see him. 12/10/03RP 213, 221-22, 224; 12/11/03RP 15-17.

⁸ Mott could not remember the consul telling him the defendants were returning home, and testified he would have remembered that statement because it would have been a "red flag." 2/10/04RP 211.

⁹ Meanwhile, Dr. Rafay's cousin's husband, Waqar Saiyed, contacted Rafay family members and arranged a funeral at a mosque in the Northgate area. 2/23/04RP 12-13, 39-42, 45, 48, 54-55. Saiyed and family members who came to Seattle for the funeral did not know how to contact Atif; by the time they learned Atif's location he had checked out of the motel and missed the funeral. 2/4/04RP 156-57; 2/23/04RP 58-60, 112-13; 3/11/04RP 44-47, 83-84. Atif had a

The Bellevue police detectives still had questions and were disappointed when they realized Sebastian and Atif were no longer at the motel.¹⁰ 2/17/04RP 44-45, 49, 157-59. Sebastian had provided the police with his address and other contact information in West Vancouver, but the detectives complained Sebastian and Atif did not inform them they were returning home and did not contact the police after their return to Canada. Ex. 22; 2/17/04RP 103-04; 2/19/04RP 36; 2/25/04RP 175, 202-03.

Bellevue police personnel described their efforts to investigate in Canada, which were largely unsuccessful. 2/4/04RP 158-99; 2/17/04RP 59-62, 77; 2/25/04RP 179-91. The Bellevue officers soon returned to the United States, however, because they had not obtained the required permission from the Canadian government to investigate there. 2/25/04RP 192-98. Gomes

short, emotional meeting with some of his family members after the funeral at a distant relative's home in the Vancouver area. 3/10/04RP 50-56; 5/11/04RP 97.

¹⁰ Thompson continued his "red flag" theme in describing Sebastian and Atif's park statements. 2/23/04RP 194-97; 2/24/04RP 53-55, 56-57, 63-65, 66-69, 72-76, 115-117, 122. Thompson complained Atif and Sebastian provided too much detail for their trip to Factoria and Seattle but not enough detail about the discovery of the murders or the days they spent with the Rafays before the murders. 2/24/04RP 108-114; 2/25/04RP 19-26; 2/26/04RP 171-72. Thompson even felt it was suspicious that the young men drove to Seattle to eat after the movie because there were fast food restaurants in Bellevue. 2/26/04RP 151-54, 166-67. The court directed Detective Thompson to read the statements in a flat manner when defense counsel objected because the detective's tone of voice changed to dramatize these perceived differences. 2/24/04RP 103.

complained that after two or three trips to Canada, their questions were still not satisfactorily answered. 2/17/04RP 62, 77.

5. FORENSIC EVIDENCE

Employees of the Bellevue Police Department and the Washington State Patrol Crime Laboratory collected an abundance of evidence and samples from throughout the Rafay home. Several forensic scientists conducted tests on the evidence over the next few years. Virtually all of the evidence was admitted at trial, even physical evidence that was not tested. The results of the various tests obviously tied Sebastian and Atif to the home where they had been staying for several days, but did not link them to the murders.

Notably, DNA testing of a representative blood samples obtained from the downstairs shower walls revealed a genetic profile compatible with Dr. Rafay. 3/23/04RP 21-24, 28-30. Another sample was a mixture of two sources – one source was Dr. Rafay and the other was not Sebastian or Atif Rafay. 3/23/04RP 24-28, 114-18. A swabbing from laundry room wall was also consistent with Dr. Rafay's DNA profile. 3/23/04RP 57-58, 105-06.

DNA testing also revealed Dr. Rafay's blood was in Basma's room on the fitted sheet, top sheet, and wallboard. 3/23/004RP 53-

55, 53-54. Dr. Rafay's DNA was also found on a small cutting from Atif's blue jeans. 2/2/04RP 88-91; 3/23/04RP 74-76.

The police collected several hairs from the floor of the downstairs shower adjacent to the bedroom where Sebastian had been staying. In 1995, Ed Blake concluded that one hair found on the floor of the downstairs shower had a genetic profile consistent with Sebastian's and that profile occurs statistically once in every 10,000 individuals.¹¹ 3/22/04RP 133, 144-45. In 2001, Blake used the more advanced DNA technology then available to test four more of the hairs found on the floor of the downstairs shower. He was unable to obtain complete DNA profiles from any of the hairs, but said incomplete profiles from two of the hairs were compatible with Sebastian's genetic profile. 3/22/04RP 146-47; 3/23/04RP 13-20.

A hair found on Tariq Rafay's fitted sheet was never identified and was not consistent with any other evidence Blake evaluated. It was labeled "unknown male number one." 2/4/04RP 78; 3/23/04RP 9-10, 33-37, 86-87.

There was no evidence of blood in the interior or trunk of Dr. Rafay's Honda. 2/10/04RP 107-09. A swab from the garage floor

¹¹ Sebastian took a shower before he and Rafay went out to the movies. Ex. 76 at 15-16; Ex. 72 at 21.

showed DNA consistent with a mixture of the DNA of Dr. Rafay and two other people, one male and one female. Id. at 58-63, 122-23.

The investigative team also collected 276 fingerprints from the home, and the 38 of comparison value were compared with the known prints of Sebastian, Atif and the deceased Rafay family members. 1/26/04RP 100; 1/27/04RP 82-83, 96-97; 1/28/04RP 126, 145. None of the prints were mixed with blood, and there was no evidence that the perpetrators of the crime were wearing gloves. 1/28/04RP 191-92; 1/29/04RP 61, 83-85.

Prints of comparison value that were never identified and were thus made by an unknown person were found in critical areas of the home:

- Dr. Rafay's wallet 1/29/04RP 52-53, 76-77
- Mirrored closet door in the master bedroom 1/29/04RP 65-66
- Frame of door to Basma's bedroom 1/28/04RP 126-27, 186-87
- Frame of downstairs shower door 1/28/04RP 127-28
- Laundry room door 1/28/04RP 177
- Box found in basement bedroom that also had Sebastian's and Atif's prints 1/28/04RP 167-70
- Boxes found in basement bedroom that did not have Sebastian and Atif's prints 1/28/04RP 171-76
- Downstairs closet door near door to garage 1/28/04RP 150-52.

1/28/04RP 152. Some of these fingerprints were run through databases in the United States, but none were sent to Canadian databases. 1/29/04RP 66-71, 89.

Sebastian's fingerprints were found in five areas: (1) the upstairs living room on a large window, 1/27/04RP 34-35, 127-28, 137-38; 1/28/04RP 165; (2) in the downstairs bedroom where Sebastian was staying, on the desktop, a car brochure, a magazine, and a box that was tipped over, 1/27/04RP 172; 1/28/04RP 14-15, 59-62, 87, 92, 158-59; (3) the downstairs bathroom, on the toilet seat, toilet seat lid, and the partition between the shower and the sink, 1/27/04RP 95, 97-99, 107-08; 1/28/04RP 156-57; (4) the upstairs hall closet door, 1/27/04RP 158-59; 1/28/04RP 184-85, and (5) the Honda the boys had used, which was parked in the garage, 1/27/04RP 159-60, 163, 169, 170; 1/28/04RP 154-56.

Similarly, Atif Rafay's prints were located in some areas of the home. Downstairs, Atif's prints were on the car brochure that also contained Sebastian's print and on either side of the doorway to the family room. 1/27/04RP 141-43; 1/28/04RP 153-54. Upstairs Atif's fingerprints were on the door of the upstairs office/bedroom where he was sleeping and a telephone in the

master bedroom. 1/27/04RP 149-50; 1/28/04RP 85-87, 138, 178-82.

6. HOW THE CRIMES OCCURED

King County Medical Examiner Richard Harruff concluded that all three Rafay family members died as a result of blunt force injuries to the head. 3/9/04RP 47, 76-77, 133-34; 3/10/04RP 28. Dr. Harruff noted one incised wound on the right side of Dr. Rafay's neck that was not caused by blunt force trauma. That wound was caused by either a sharp-edged object, like a knife or screwdriver, or by a foreign object coming between Dr. Rafay and a weapon. 3/9/04RP 104-14.

Dr. Harruff opined all of the injuries but the incised wound could have been caused by an object like a baseball bat, but many other objects could have also caused the injuries. He could not say if more than one weapon was used. 3/9/04RP 66-69, 141-42, 147; 3/10/04RP 23-25, 50-51.

The State hired a private crime scene and bloodstain pattern analyst, Ross Gardner, to provide his opinion of how the murders occurred. 2/10/04RP 134-38, 142-49, 172-75, 180-83.

Gardner concluded Mrs. Rafay was struck two or three times to the right side of her head. She may have been kneeling at the

time of the first blow which knocked her to the floor and out of one of her sandals. Mrs. Rafay did not move from that position but she raised her head and was struck a second time. 2/10/04RP 186-87, 199-200, 202, 204; 2/11/04RP 25-26, 31-32. Gardner believed the perpetrator was probably within her peripheral vision. 2/11/04RP 25, 27-28. A shawl found over Mrs. Rafay's head was placed there after her death. 2/10/04RP 211; 2/11/04RP 8-10, 27.

Gardner could not determine the nature of the weapon used to kill Mrs. Rafay and did not rule out a bat-like object. 2/10/04RP 200-01. He also did not have an opinion as to how many perpetrators were involved in the attack on Mrs. Rafay. 2/10/04RP 204. He opined that Mrs. Rafay was probably killed before Dr. Rafay and Basma, but that conclusion was based only upon the assumption that the same weapon was used on all three family members. 2/12/04RP 66, 110-11.

Gardner believed Dr. Rafay was attacked while he was in bed and probably caught unaware as there was no sign of a struggle. 2/11/04RP 183. Gardner did not find evidence that more than one weapon was utilized. 2/11/03EP 191-93. Gardner concluded the blows were delivered first from one side of the bed and then the other. Id. at 184-85. A pillow that was originally on

the bed was displaced at some point during the attack; Gardner believed the movement of the pillow was deliberate and probably caused by a second person in the room. 2/11/04RP 184-87; 2/12/04RP 109, 152. Gardner could not rule out the possibility there were more than two people in Dr. Rafay's room when he was killed. 2/12/04RP 154.

Gardner opined Basma was on her bed when she was first attacked, receiving at least seven blows. 2/12/04RP 32-39, 41-43, 59-60. Basma collapsed next to the bed and was found behind the bedroom door. 2/12/04RP 60-61.

Gardner testified Dr. Rafay was killed before Basma, each was killed with a cylindrical object, and the same weapon was probably used on both. 2/12/04RP 11-12, 64-65, 121-23. His conclusions were based upon the similarity between cylindrical contact transfer patterns found in the master bedroom and on Basma's sheets and the presence of Dr. Rafay's blood in Basma's room. 2/11/04RP 185, 187-88; 2/12/04RP 9-11, 15-17, 23-24, 35-38. Gardner did not see signs that more than one weapon was used, but he also could not exclude that possibility. 2/11/04RP 191-93; 2/12/04RP 26, 125-30. Based upon later tests, the indentations in the wallboard above Basma's bed were found to be

consistent with an aluminum-based baseball bat. 16CP 3141-42;
2/3/04RP 23, 26-28; 5/11/04RP 94.

Given the amount of blood in the shower, Gardner opined that a person who had come into contact with Dr. Rafay's blood had used the shower and could have also washed the weapon.

2/12/04RP 69, 72-78, 113; 154-55, 170, 185-86. Concerning the blood stain on Atif's blue jeans, Gardner noted it is not unusual for someone arriving at a murder scene to come into contact with the victim's blood, but he was puzzled by the placement of the stain.

2/12/04RP 79-83, 91-93, 142-45.

7. THE TIME OF MURDERS

On the evening of the murders, three neighbors saw Dr. Rafay drive away from his house around 7:30 or 9:30 p.m. with his wife and/or daughter. 12/16/03RP 41-42, 44, 47, 80-84, 92; 12/17/03RP 30-35. No one reported seeing them return. The police canvassed the neighborhood, but located few people who had heard or seen anything unusual the evening of the murders.¹² 12/10/03RP 101-10, 124-33; 12/11/03RP 38-52, 78-96, 103-08; 1/8/04RP 24-28; 1/12/04RP 154-56, 160-62; 1/26/04RP 56-67;

¹² One neighbor thought she heard something like kids yelling. 1/26/04RP 66-67, 79. One or two noted unfamiliar cars parked in the neighborhood before the murders. 12/11/RP 85-87; 12/26/04RP 79-81; 1/26/04RP 79-81.

2/4/04RP 103-20. The medical examiner made no estimate as to the time of Dr. and Mrs. Rafay's deaths other than it occurred between the last time they were seen alive, about 8:30 p.m. on July 12, and Sebastian's 911 call at 2:01 a.m. on July 13. 3/10/04RP 20-21, 72.

Julie Rackley's house was immediately northeast of the Rafay house, about 25 feet away. 12/4/03RP 170, 174; 12/8/03RP 127. She heard repetitive hammering-type noises coming from the direction of the Rafay home some time between 9:00 and 11:00 p.m. on the evening of the murder. 12/8/03RP 85, 91-93, 96-97, 98-99, 133-35. Rackley later narrowed the time period to between 9:45 and 10:15 p.m. 12/8/03RP 101-03, 123-25. The noise Rackley heard was more muffled than a hammer hitting a nail, and she heard only one series of noises. 12/8/03RP 125, 133-35, 175-77.

Mark Sidell and his wife owned the home immediately to the west of the Rafays'. 12/8/03RP 191-93; 12/9/03RP 38. The couple arrived home about 8:30 p.m. on July 12. 12/9/03RP 40-41. Sidell went in and out of the house doing chores and looking for his missing cat. 12/9/03RP 49-53, 62, 77. Twice between 9:00 and 9:50 p.m., Sidell heard noises from the Rafay home which sounded

like someone unpacking boxes or hanging pictures. The first time the noises lasted for about 5 minutes, and the second time they were louder, included voices, and lasted for 15 minutes; still later he heard a car drive away. 12/9/03RP 60-61, 65-66, 69, 71-74, 108-09. Sidell also heard a few moans, possibly from a developmentally disabled person, including one after the house was quiet. Id. at 75-76, 107.

Ms. Rackley and Mr. Sidell later participated in “sound recreation” tests invented and conducted by the Bellevue Police Department.¹³ 12/8/03RP 111-12; 12/9/03RP 92; 12/10/03RP 199-200; 2/17/04RP 67-68. Both neighbors identified the sound made by a baseball bat in Basma’s room as similar to the sound they heard the evening of the murders. 12/8/03RP 113-14; 2/17/04RP 70. Sidell also said noises made by a baseball bat striking the mattress in the master bedroom and an axe head striking sheetrock sounded like the noises he heard the night of the murder. 12/8/04RP 60-62, 71.

¹³ Law enforcement officers used various implements, including a baseball bat, to beat on bedroom walls and other areas of the Rafay home. Rackley and Sidell listened from their homes while a detective took notes. 12/10/03RP 216-17; 2/17/04RP 67-70. Another test eliminated noises from a neighbor’s deck that was under repair at the time of the murders. 12/9/03RP 119; 2/18/04RP 54-59.

8. THE RAFAY ESTATE

The police collected numerous papers from the Rafay home, including financial information. 12/23/03RP 90-94, 97. They confirmed there was no unauthorized activity on Dr. Rafay's accounts or credit cards after his murder. Id. at 93-6. A detective with no background in financial planning investigated Dr. Rafay's financial situation and opined he had assets of \$218,000 in the United States and \$302,000 in Canadian funds and debts of \$177,200 at the time of his death.¹⁴ Id. at 98-123, 128, 130.

Atif Rafay hired an attorney in the United States to help him deal with his parents' estate. 12/23/03RP 125-27. He received \$125,000 Canadian as the beneficiary of one of his father's life insurance policies. 2/18/04RP 141-43. Police in the United States and Canada blocked the distribution of a separate insurance policy and bank accounts. 2/18/04RP 150, 164-65; 3/24/04RP 125-33, 144.

9. A CONTRACT ON THE RAFAY FAMILY'S LIFE

Two days before the Rafay family was killed, RCMP officer Patrice Gelinis was contacted by a confidential source. The confidential source had recently learned that a Vancouver area

¹⁴ The detective admitted he had failed to include liabilities such as Canadian and United States taxes in his calculations. 12/23/03RP 130-32, 135.

crime family, the Dosanjh brothers, had placed a contract on the lives of an East Indian family residing in Bellevue that was from Vancouver. The source had talked to Jesse Brar, who had been offered \$20,000 to execute the contract. 11/19/03RP 28; 5/4/04RP 54, 57-58, 64-68, 82; 5/12/04RP 26-31. The informant was not paid and did not otherwise benefit from providing the information. 5/4/04RP 68, 78.

Gelinas spoke to the Bellevue detectives and provided them with a packet of information about the informant and Brar, although he did not reveal the name of his source. 11/19/03RP 3-10; 2/18/04RP 41-48; 5/4/04RP 70-73. Gelinas said he would assist the Bellevue police in any way, but he never heard from them again. 5/4/04RP 74-75.

It was not until September 30, 1994, that Bellevue detectives went to Brar's home two times, but he was not home. Illustrating their concern for the possible threat in light of Brar's criminal record, a Canadian tactical response team accompanied them for protection. 2/18/04RP 50-51; 5/12/04RP 21-24. That was the detectives' only attempt to interview Brar.

10. RCMP UNDERCOVER INVESTIGATION

After the Rafay family was murdered, the news media in Vancouver and Seattle carried stories about the homicides, and Sebastian and Atif carefully followed the coverage which often suggested they had committed the crimes. 2/17/04RP 199-206; 3/22/04RP 78-79; 5/11/04RP 152-53. They felt shunned and isolated, and their attempts to return to college or to work were unsuccessful. 3/3/04RP 190-91; 3/22/04RP 80; 5/11/04RP 106-08; 5/13/04RP 21-23. In September, Sebastian and Atif moved in with high school friends Robin Puga and Jimmy Miyoshi in a house on Phillips Avenue in North Vancouver.¹⁵ 3/3/04RP 103-04; 5/11/04RP 109-10. The boys were largely unemployed, receiving assistance from Sebastian's parents and the government.¹⁶ 3/3/04RP 185-95; 3/24/04RP 133-34; 5/11/04RP 110-11, 113-14. They worried about the case as well as the reporters and police officers who relentlessly pursued them; they began to suspect police surveillance and the possibility that their telephones were wiretapped. 3/3/04RP 185, 190-91, 227; 5/11/04RP 111-13.

¹⁵ Puga later moved out of the house. 3/3/04RP 188-90.

¹⁶ Sebastian received government financial assistance after he had knee surgery and was on crutches. 5/11/04RP 110-11, 113.

The King County Prosecutor's Office requested assistance from the Royal Canadian Mounted Police (RCMP) in obtaining financial information and DNA samples from Sebastian and Atif. 2/25/04RP 199-201; 3/10/04RP 107-15. The Bellevue police shared the details of their investigation, and the RCMP agreed to help. The RCMP also decided to conduct its own investigation into the possibility that offenses occurred in British Columbia, such as insurance fraud or conspiracy. 2/26/04RP 26-34; 3/10/04RP 114-17; 3/23/04RP 131-33. The RCMP labeled their investigation "Project Estate." 3/11/04RP 158.

At the request of the RCMP investigators, the covert surveillance section, "Special O" targeted Sebastian, Atif and Miyoshi and began watching their movements. 3/10/04RP 119-25. The Special O officers obtained a paper napkin Sebastian had used to blow his nose and one of Atif's cigarette butts and provided them to the Bellevue Police for DNA testing. 2/26/04RP 34-37; 3/10/04RP 125-30; 3/22/04RP 17-18.

The RCMP continued covert surveillance in anticipation conducting further undercover investigation. 3/10/04RP 131-33. The "Special I" Unit wiretapped the young men's telephones and placed monitoring devices in the Phillips Avenue house. They also

wiretapped the homes and telephones of Sebastian's parents and some of boys' friends. Listening devices were later installed in Atif's Honda. 3/10/04RP 144-47, 149-54; 3/11/04RP 165-68; 3/22/04RP 63-69; 3/23/04RP 133-36, 151-53. RCMP even made copies of the house key and Honda key for their own use. 3/23/04RP 152; 3/24/04RP 49.

Civilian employees manning a "monitoring room" listened to all the conversations and took notes. 3/10/04RP 155-60. The RCMP accumulated over two filing cabinets full of tapes, but never heard the boys say anything indicating they committed the murders. 2/26/04RP 39-41; 3/22/04RP 63-64, 69-70; 3/24/04RP 155-56.

The British Columbia undercover unit works throughout Canada to obtain confessions.¹⁷ 4/6/04RP 97-101. The undercover operatives create a make-believe world to convince the target he is dealing with organized crime figures, displaying a wealthy lifestyle to attract the target. 3/22/04RP 23-25, 27. The undercover operatives believe "anybody is approachable" and can be pulled into the undercover operation "if handled in the right manner." 4/13/04RP 43.

¹⁷ The undercover unit is independent from the investigators, with separate funding and protocols. 3/10/04RP 119; 3/23/04/RP 139.

In this case, the undercover operators pretended to be part of a successful criminal organization with international connections that utilized violence and even murder to succeed. 3/22/04RP 28-29; 3/31/04RP 23; 4/12/04RP 63-64. They created the impression the organization had a hierarchy with lower level criminals doing the dirty work and higher level ones giving orders. 3/22/04RP 24. One operative, Gary Shinkaruk, developed a social bond with the Sebastian, while Al Haslett posed as "Mr. Big," a crime boss who remained aloof, businesslike, and intimidating. 2/10/04RP 165-66; 3/22/04 RP 24-25. Shinkaruk stressed that loyalty and respect for the leader was a requirement to participate in the organization and reap financial rewards, and he said Sebastian had to prove his reliability to Haslett. 3/22/04RP 29-31, 33; 3/31/04RP 24-26, 29-30; 4/13/04RP 119.

At the same time, the undercover operatives led Sebastian to believe he had gained information about the organization and would be a dangerous liability if he went to the police. 3/22/04RP 31-33; 4/1/04RP 37-38. With veiled comments, the undercover officers exploited Sebastian's impressions of organized crime absorbed from the media and entertainment to lead Sebastian to believe he would be in danger if he did not do whatever the

undercover operatives demanded of him. 4/7/04RP 148-49;
4/13/04RP 61; 4/27/04RP 117-19; 4/26/04RP 116-19, 121-23;
5/11/04RP 101-02.

a. Shinkaruk and Haslett meet Sebastian

Through the monitoring of Sebastian's telephone, the RCMP learned he had a haircut appointment on April 11, 1995. Ex. 549 at 1; 3/10/04RP 173-75; 3/23/04RP 136-37. They arranged for Shinkaruk to meet Sebastian as Sebastian left the establishment after his haircut. Shinkaruk pretended he had locked his keys in a car parked near Sebastian's vehicle and asked for a ride to get another set of keys. 3/10/04RP 174-75; 3/22/04RP 36; 3/25/04RP 31-33; 4/7/04RP Shinkaruk had waist-length hair in a pony tail and clothed himself in a dress shirt, jeans, and expensive cowboy boots; he was driving a new black Trans Am. 4/7/04RP 58, 71-72.

The ploy worked, and Sebastian drove Shinkaruk to an expensive Vancouver hotel, waited in the lounge, and then drove Shinkaruk back to his sports car. 4/7/04RP 73-77. In appreciation for Sebastian's help, Shinkaruk bought Sebastian a beer at the hotel and paid for his parking. 4/7/04RP 76-77, 84. Shinkaruk was successful in engaging Sebastian in conversation about automobiles and even philosophy, and Shinkaruk learned

Sebastian was interested in making a film and was looking for investors. 4/7/04RP 82-84, 89.

Shinkaruk volunteered he might know an investor for the movie, invited Sebastian to join him at another location, and arranged for Haslett to be there. 4/7/04RP 89-90; 4/13/04RP 43-45. Shinkaruk chose the Skyline Pub, a pub featuring strippers, for its "relaxed atmosphere." 3/25/04RP 37-40; 4/7/04RP 86, 91. Haslett was at the pub when Sebastian and Shinkaruk arrived. 4/7/04RP 93. Shinkaruk secretly informed Haslett about the movie investor idea and warned him that Sebastian was a little bit different than other targets he had encountered. 4/7/04RP 93, 96-97; 4/13/04RP 52. Playing his part, Haslett also had long hair and was dressed in a suit jacket, jeans and boots. 4/7/04RP 99; 4/13/04RP 45. Shinkaruk and Haslett consumed alcohol, but Sebastian had at most one beer and was not interested in the entertainment. 4/7/04RP 99-100, 109; 4/13/04RP 47.

At the end of the evening, Haslett leaned over in his seat and asked Sebastian if he wanted to make some money doing things with Shinkaruk from time to time. 4/13/04RP 54; 5/11/04RP 122-23, 124-25. Sebastian, who was unemployed, said he did and gave Haslett his telephone number. 4/13/04RP 55-56; 5/11/04RP

124-26. Haslett said not to tell anyone about him and erase any telephone messages he might leave. 4/13/04RP 57. Haslett left and told Sebastian he would call him in the next day or two.

4/13/04RP 58, 62. The evening ended when Shinkaruk returned Sebastian to his car at the parking lot. 4/7/04RP 106.

Sebastian thought Shinkaruk was an entrepreneur and liked him because he was friendly and showed an interest in Sebastian. 5/11/04RP 114-17. Sebastian exaggerated his plans to make his own movie and was in over his head when Shinkaruk said he might know a potential investor, but Shinkaruk encouraged him to discuss the movie with Haslett, stating Haslett would be more interested in Sebastian's confidence than details like a script. 5/11/04RP 117-122. Sebastian only suspected Haslett might be involved in criminal activity; Haslett did not yet come across as the "Big Al" character he later revealed to Sebastian. Id. at 123-24.

b. Whistler

Two days later Haslett called Sebastian and told him Shinkaruk would pick him up. 4/7/04RP 135-36; 4/13/04RP 62. The undercover team had decided to make it clear to Sebastian that they were criminals and to see if they could get Sebastian to

act as an accomplice in what would appear to be an auto theft.

3/22/04RP 40; 3/23/04RP 143-44; 3/25/04RP 42-43; 4/7/04RP 126.

They took Sebastian to Whistler, where it would be harder for him to back out, and instructed Sebastian to drive a car he had observed Shinkaruk appear to steal. 3/22/04RP 43-44; 3/23/04RP 144; 3/24/04RP 104; 3/31/04RP 38-40, 43; 4/7/04RP 141-42. The car had been modified and planted by the RCMP so it would look like Shinkaruk was breaking into it; a baby seat and/or baby toys were placed inside so it would look like a family vehicle and to show the organization would hurt a family. 3/10/04RP 187-91; 3/23/04RP 151-52; 3/25/04RP 52-53; 4/7/04RP 128; 4/9/04RP 48-50.

According to the undercover operatives, this event would give Shinkaruk an opportunity to “bond” with Sebastian, to establish Shinkaruk’s “credibility” as a member of organized crime, and to gauge Sebastian’s responses. 3/25/04RP 44, 46-47; 3/13/04RP 35-38; 4/7/04RP 138-39, 146-47.

Sebastian first learned that Haslett wanted him to drive the stolen vehicle when he and Shinkaruk arrived at a pub in Whistler. 4/7/04RP 141. Sebastian turned pale and looked very scared when he heard the news. 4/7/04RP 157, 35; 4/13/04RP 74-76, 80-83. Sebastian asked a lot of questions about security, and Shinkaruk

provided gloves and air freshener in an attempt to allay the concerns.¹⁸ 4/7/04RP 153-56, 158-59; 4/13/04RP 83, 85-86.

Haslett assured Sebastian the woman who owned the car would not miss it for several hours. 4/13/04RP 83-84, 95.

Sebastian was uncomfortable when Shinkaruk called him and had second thoughts about agreeing to work with him during the conversation at the pub. 5/11/04RP 125-26. Although Sebastian was not completely surprised when Haslett told him to participate in what appeared to be a crime, Sebastian felt tricked. Id. at 128-30. Sebastian was too scared and insecure, however, to refuse, and felt he could not go to the police because of the Bellevue murder investigation. Id. at 130-32. As he was instructed, Sebastian stood guard while Shinkaruk appeared to steal the planted car and then drove the car to Vancouver. 4/7/04RP 159-63; 5/11/04RP 132.

After they reached Vancouver, Sebastian and Shinkaruk met Haslett at a pub which was more sophisticated than the Skyline Pub. 3/25/04RP 56-57; 4/7/04RP 167-68. Sebastian was worried, upset, and unhappy; he asked what would have happened if he had

¹⁸ At first Haslett was unable to locate gloves, so he purchased air freshener and told Sebastian it would make fingerprints unobtainable. 4/7/04RP 153-56.

been stopped by the police.¹⁹ 4/7/04RP 168-73, 179-82; 4/8/04RP 37-38; 4/13/04RP 94-95, 102; 4/27/04RP 87-88. He was not placated when Haslett paid him \$200. 4/7/04RP 171; 4/13/04RP 96-100. At trial, Sebastian explained he was mad at himself for participating and tried to make excuses to avoid further involvement with Haslett. 5/11/04RP 133-34. Instinctively, Sebastian avoided showing he was afraid. Id.

Shinkaruk tried to calm Sebastian down and told him he would have to work his way up the organization slowly by proving himself to Haslett. 4/7/04RP 182. Shinkaruk asked Sebastian what jobs he thought were available in the criminal organization, and Sebastian mentioned drug dealer and sarcastically suggested hit man. 4/7/04RP 184; 4/9/04RP 66; 5/11/04RP 134-35.

c. Four Seasons Hotel

The undercover officers next wanted to make Sebastian believe their criminal organization was very financially successful, that it used violence and even murder, and it had international

¹⁹ Sebastian said he and his friends shoplifted and recycled ski tags, but they planned carefully so they would not get caught. Haslett told Sebastian such activity was “chickenshit.” 4/13/04RP 101-02. Later Shinkaruk warned Sebastian that Haslett would not take him seriously if he mentioned minor theft as an accomplishment. 4/12/04RP 29-31. On cross-examination, Shinkaruk grudgingly admitted a real crime boss might not be very impressed with a 19-year-old who was afraid to steal a car. 4/9/04RP 39-40.

connections. 3/25/04RP 61-65; 4/13/04RP 108-09, 118. They planned to invite him to an expensive hotel suite where they would display their wealth and imply it was gained through crime and violence. 3/11/04RP 131-40, 144; 3/23/04RP 157-60; 3/25/04RP 69. Sebastian would see Haslett directing the operations. 3/1/04RP 142.

Shinkaruk picked Sebastian up in a new black Corvette convertible and drove him to the Four Seasons Hotel. 4/8/04RP 60-61, 77-78. An attractive and provocatively dressed female police officer pretended to be Shinkaruk's date and sat on Sebastian's lap during the drive. 4/8/04RP 79-80; 4/13/04RP 112; 4/15/04RP 67-69, 71-76, 83. When they arrived at the hotel, Shinkaruk conspicuously gave her \$3,000 in cash so that Sebastian could see the money.²⁰ 4/8/04RP 61; 4/15/04RP 77, 83-84. Shinkaruk took Sebastian to a suite where alcohol was available, talked about fancy cars, and waited for Haslett.²¹ Ex. 507; Ex. 546 at 1-7; 3/23/04RP 159; 4/8/04RP 106.

²⁰ The expensive hotel suite, car, guns, and even the woman police officer were referred to as "props." 3/11/04RP 134-35.

²¹ The conversation inside the hotel suite was recorded. Ex. 507A, B, C; 3/11/04RP 149-50; 4/13/04RP 109. The appellant cites to the written transcript, Ex. 546, for convenience. It is not completely accurate, however, and some portions were excluded by the court. 3/15/04RP 6-7, 18-19; 4/8/04RP 100 (court instructs jury transcript only a guide); 4/9/04RP 19-20.

Shortly after Sebastian and Shinkaruk arrived, Scott Doran, an RCMP officer posing as a hardcore motorcycle gang member, arrived with about \$300,000 in cash for Haslett.²² Ex. 546 at 7-17, 72; 3/11/04RP 147-48; 3/22/04RP 59-61; 4/8/04RP 95; 4/13/04RP 12-13, 17-18. Doran was muscular, with a shaved head and goatee, and his dress included a leather vest and cowboy boots. 3/22/04RP 53, 158-59; 4/13/04RP 12-13. Doran and Shinkaruk had a friendly conversation in which Doran mentioned he and his associates needed false identification documents from Shinkaruk. Ex. 546 at 8, 12, 55-56; 4/8/04RP 104-05; 4/13/04RP 16.

Without warning Doran brandished two handguns so that Sebastian could see them and made statements suggesting one of the guns had very recently been used in criminal activity and needed to be disposed of.²³ Ex. 546 at 14-16, 56; 3/22/04RP 54-55; 3/25/04RP 66-67; 4/8/04RP 102; 4/13/04RP 19-20, 24-25. Sebastian was silent while Doran was in the room. Ex. 546 at 7-17.

Prior to arriving, Sebastian had decided he did not want any further involvement with Haslett, although he hoped to maintain

²² Doran referred to his performance as a "cameo role" designed to augment Shinkaruk's "credibility." 4/13/RP 9, 10.

²³ The guns were real but not operational. 3/22/04RP 58. Legal possession of handguns in Canada is extremely limited, so the officers expected the weapons to make a big impact on Sebastian. 3/11/04RP 136-37; 3/22/04RP 55.

some contact with Shinkaruk. 5/11/04RP 137-39. Sebastian tried to tell Shinkaruk that he did not want to do any more jobs for Haslett, using the movie and pending criminal investigation as excuses for not participating. 4/12/04RP 34, 36-37; 5/11/04RP 139-41, 143. Sebastian demurred he was too busy to work for Haslett and Shinkaruk, and claimed he had another investor for his movie. Ex. 546 at 17-20, 41, 45, 47, 50; 4/8/04RP 108-09; 4/9/04RP 66-67. Sebastian also explained he was under investigation for serious offenses and could not take risks. Ex. 546 at 23-25; 4/8/04RP 109-10. Shinkaruk dismissed Sebastian excuses and assured him the organization would protect him. Ex. 546 at 25-28; 4/8/04RP 112-13; 5/11/04RP 142.

Shinkaruk told Sebastian participating in the car theft showed his "trust and respect" for Haslett. Ex. 546 at 26. He explained the crime was "fool proof" because the car's owner owed Haslett and therefore would never press charges. Id. Haslett explained Haslett's point in having the car stolen was, "you think I'm fucking with you, I'll fuck with your family. I'm gonna fuckin' do your wife and shit like that." Id.

Shinkaruk also volunteered that he had murdered someone in the past and Haslett had "taken care" of the witnesses. Ex. 546

at 27; 4/8/04RP 111-15; 4/12/04RP 9-10, 20-22. "I fuckin' toasted a guy. You know how fuckin' solid Al [Haslett] is? . . . When it came time for fuckin' court, the person that could finger me, they're not around anymore, so I know that business gets taken care of." Ex. 546 at 27.

Shinkaruk emphasized trust and pressed Sebastian to level with him about his problems, and Sebastian explained he and his friend came home to find the friend's family murdered. Ex. 546 at 28-30. Sebastian explained that the police had been investigating the case for a long time and he was a suspect but the police could not prove whether or not he was involved. Ex. 546 at 30-31. Sebastian told Shinkaruk the press and police assumed he was guilty and treated him badly as a result. Id. at 29, 31-34, 36.

Shinkaruk, however, continued to encourage Sebastian to participate in criminal activity for Haslett. Ex. 546 at 38-53; 5/11/04RP 142. After Shinkaruk's confession to murder, his description of the organization's willingness to harm the families of people who had harmed the organization, and the display of the handguns, Sebastian decided he could not cross the undercover operatives and followed along with the discussion. Id.; 5/11/04RP

141-45. He did not want to show fear because they might believe he would go to the police. 5/11/04RP 143-44.

When Haslett arrived he ordered Shinkaruk and Sebastian to count the \$300,000 Doran, the pretend biker, had delivered; this task occupied about 30 minutes. Ex. 546 at 53-55, 57-59, 72; 4/8/04RP 115; 4/12/04RP 41. Haslett bragged that he would get the money out of Vancouver within 36 hours and it would triple “again and again and again.” Ex. 546 at 72; 4/12/04RP 64.

Haslett emphasized the importance of fidelity to the organization and his ability to protect Sebastian. He repeatedly confirmed he had helped Shinkaruk out of jail. Ex. 546 at 60-62, 66, 134, 139; 4/12/04RP 21-22.

Sebastian then tried to convince Haslett that he could not work for him, using the Bellevue police investigation, resulting press coverage, and his movie as excuses. Ex. 546 at 62-66, 69-72, 74, 77. Sebastian reiterated he did not commit the crime but the police were interested in him because they did not have any evidence or legitimate suspects. *Id.* at 62-68. When Sebastian said he had an investor and expected to make money on his movie, Haslett told Sebastian he would make more money in a high level position in Haslett’s organization, suggesting Sebastian could be in charge of

drug sales in North Vancouver. Id. at 71-72, 77-78, 87-89;
3/31/04RP 86, 88-89.

Haslett informed Sebastian he had already researched Sebastian, asserted Sebastian would immediately “give up” Haslett when the Bellevue police arrested him, and asked what happened in Bellevue. Ex. 546 at 73-75, 80; 4/15/04RP 19. Sebastian explained he and Atif came home to find Atif’s family murdered but the police were suspicious. Ex. 546 at 75-76. Haslett said he was going to check on Sebastian’s case in the United States whether Sebastian wanted him to or not. Ex. 546 at 80; 4/12/04RP 60; 5/11/04RP 147-48.

At this point in the conversation, Sebastian said he had copied Shinkaruk’s license plate number on the drive to Vancouver from Whistler. Ex. 546 at 81. The announcement was followed by a long silence during which Shinkaruk and Haslett looked at each other angrily. 4/1/04RP 12; 4/12/04RP 41-43; 4/26/04RP 123-24; 4/27/04RP 126. Sebastian thought Haslett and Shinkaruk were deciding whether or not to kill him during the long pause. 5/11/04RP 148. Haslett emphasized that he would never set up Sebastian or anyone who worked for him and that Haslett would go to jail or lose a lot of money if one of his people set him up. Ex. 546

at 84-85; 4/27/04RP 129-30. Shinkaruk pretended to calm Haslett, praised Sebastian for having “the balls to fuckin’ say it,” and playfully changed the topic to Sebastian’s movie. Ex. 546 at 85-87; 4/12/04RP 43-46; 4/27/04RP 126-27.

Haslett again turned the conversation to his research into the Bellevue murders, assuming Sebastian was guilty. Ex. 546 at 94-96. Haslett stated, “You did that murder. And that’s why you’re, it’s [sic] you’re, here today, because you’re fuckin’ solid.” Id. at 94. Haslett assumed Sebastian needed to get rid of incriminating evidence, but Sebastian said there was no incriminating evidence. Id. at 100-01, 140-43.

I-I don’t have a clue what, what, if anything that they’d be suggesting they tied to this crime . . . I don’t have a fuckin’ clue, alright.

Id. at 101. Sebastian assumed Haslett was interviewing him to determine if he would go to the police. 5/11/04RP 147-48.

Haslett emphasized that Bellevue had physical evidence against Sebastian and denigrated Sebastian’s attorney’s abilities to learn about the investigation. Ex. 546 at 68-69, 98-100, 133-35, 140; 4/13/04RP 133-34. Haslett declared:

Yeah, you left fuckin’ something down there that ah, is going to tie you to this fuckin’ murder. That’s why they’re after you, stop and think.

Ex. 546 at 100. The operatives gave Sebastian \$100 for a cab when he left the hotel. 4/15/04RP 40-41.

At trial, Haslett described his discussion of the Bellevue murders with Sebastian as “an opportunity [for Sebastian] to deny” his involvement in the crimes, and Haslett opined that Sebastian had not done so. 4/13/04RP 121-22. As the tape recording of Haslett’s conversation with Sebastian was played to the jury, Haslett pointed out twelve “opportunities to deny.” *Id.* at 122-25, 134-39; 4/15/04RP 19-21, 24-25. Haslett said that when he made a statement such as, “I know what you did down there,” he was giving Sebastian an opportunity to deny. 4/15/04RP 19-20. Haslett opined Sebastian’s explanation that the police thought he did it because they lacked other suspects and Sebastian’s discussion of the police theories were also not denials. 4/13/04RP 123-24, 136-37; 4/26/04RP 64, 67, 71-72. Similarly, Sebastian told him he and Atif came home and found the Rafay family dead, Haslett opined it was not a denial. 4/26/04RP 68-69.

d. North Shore News Article

About one week after the meeting, a North Vancouver newspaper printed an article about a different undercover RCMP

operation that helped convict a murderer using a ruse similar to Project Estate. 4/15/04RP 106; 4/19/04RP 17. The civilians monitoring the recording from the Phillips Avenue house heard Jimmy Miyoshi read the article aloud and someone else say, "Al and Gary."²⁴ Ex. 549 (Channel 34, 95/05/15, 23:20); 3/11/04RP 156-59; 3/24/04RP 50-52; 3/25/04RP 84-85; 4/15/04RP 104-06; 4/19/04RP 17, 24-25, 28-29. Shinkaruk therefore initiated telephone calls to Sebastian to see if he realized they were police officers, but Sebastian reacted as if he continued to believe Haslett and Shinkaruk were involved in organized crime. 3/11/04RP 162, 164; 4/15/04RP 106-10; 4/19/04RP 43-48; 5/5/04RP 13-20.

e. Royal Scott #1

The RCMP "Special O" undercover unit usually hooks its targets through money. 3/31/04RP 11-14. Because Sebastian did not appear to be interested in working for the "criminal organization," the operatives focused on making Sebastian believe they could help him with the Bellevue investigation. 3/25/04RP 73-78; 4/15/04RP 11-14. They decided to tell Sebastian the organization needed his computer expertise to make the criminal

²⁴ Ex. 549 contains selected recordings from the monitors in the Phillips Avenue house and on the telephones. The exhibit also contains summaries and some transcripts that are not always accurate.

organization's interest in Sebastian appear realistic. 3/25/04RP 80-82; 4/12/04RP 78-80.

To further this end, the undercover unit planned to pay Sebastian to pretend to launder money for their criminal organization, sensing he would shy away from more serious criminal activity. 4/19/04RP 54-57; 4/27/04RP 90-93. They arranged for Sebastian to visit Victoria on May 15 and stay at the Royal Scott Motel, thus taking Sebastian away from his comfort zone, forcing him to spend time with the undercover operatives, and keeping him under surveillance. 3/25/04RP 98-99; 4/19/04RP 58-59. Shinkaruk told Sebastian he could bring a friend. 4/19/04RP 67. When Sebastian brought Jimmy Miyoshi, the RCMP operatives were hopeful Miyoshi would be more willing than Sebastian to talk about the Bellevue murders because he was less involved and had less to lose. 3/25/04RP 99-100.

In Victoria, Haslett gave Sebastian and Miyoshi bundles of money and corresponding deposit slips.²⁵ Ex. 508; Ex. 540 (volume 1) at 12-15, 18-19; 4/12/04RP 75; 4/19/04RP 73-74. Shinkaruk took them to several banks to deposit the money.

²⁵ The conversations inside the motel room were recorded. Ex. 508. Appellant refers here to the written transcript for convenience, but it is not completely accurate. Ex. 540.

4/12/04RP 75-76. No effort was made to hide names or account numbers, thus making Sebastian even more vulnerable as a potential threat to Haslett's organization. 5/11/04RP 153-54.

Later that night, Haslett and Sebastian had a private conversation; Haslett said he had someone looking into Sebastian's case in the United States and would tell Sebastian when he knew something. 4/12/04RP 77-78; 4/19/04RP 101-02, 107-10; 5/11/04RP 156. When Sebastian asked Haslett about obtaining a good lawyer, Haslett told him not to tell his lawyer about Haslett and promised to get Sebastian a "Top Gun lawyer." Ex. 540 (volume 1) at 36-37, 39-40. Haslett also talked to Sebastian and Miyoshi about encrypted computer systems and the internet. Ex. 540 (volume 1) at 68-72, 76; Ex. 540 (volume 2) at 1-25; 4/19/04RP 111; 4/20/04RP 8-9.

The next day Shinkaruk took Sebastian and Miyoshi to five more banks. 4/20/04RP 31-32. Afterward they again discussed computers with Haslett, and he suggested Sebastian get rid of his lawyer. Ex. 540 (volume 4) at 20-21; Ex. 540 (volume 5) at 1.

Sebastian and Jimmy Miyoshi were provided with a free motel room, room service, \$300 per day for expenses, and paid \$2,000 for less than four hours of "work." Ex. 540 (volume 1) at 32-

33; Ex. 540 (volume 5) at 2; 4/19/04RP 90-91, 106; 4/20/04RP 19, 33-34. Afterwards, the undercover officers were confident that Sebastian and Miyoshi had “bought it all.” 4/12/04RP 88-90.

f. Unannounced Visit to the Phillips Avenue House

Continuing to pretend Haslett was interested in Sebastian’s computer expertise, Haslett and Shinkaruk went unannounced to the Phillips Avenue house on June 20, 1995, to see the computer system.²⁶ Ex. 549 (Channel 34, 95-06-20 at 21:14); 3/25/04RP 102-03; 4/12/04RP 82-84; 4/20/04RP 48; 4/21/04RP 14. Sebastian did not answer when they rang the doorbell and knocked. Sebastian stuck his head out of an upstairs window but would not let the undercover operators in until Haslett was aggressive and used a demanding tone of voice. 4/12/04RP 85-86; 4/21/04RP 11-13; 4/26/04RP 107-09; 4/27/04RP 107-08. Sebastian was obviously unhappy that Haslett and Shinkaruk came to his home unannounced. 3/31/04RP 44-45; 4/12/04RP 84; 4/21/04RP 11-13.

Shinkaruk pretended to be hung over and waited while Haslett and Sebastian went into a bedroom. 4/21/04RP 13-14. Haslett reported he had received a telephone call from his American contact, but the contact was too careful to talk on the

²⁶ The conversation inside the Phillips Avenue house was recorded and played to the jury. 4/21/04RP 18-21.

telephone. Ex. 549 at 2; 4/21/04RP 14. Haslett said the man must have some information because he was coming to see Haslett in person. Id; 5/5/04RP 31-32. Haslett was angry Sebastian did not immediately answer the door, and Sebastian apologized, explaining he had to watch out for reporters and policemen. Ex. 549 at 2-3; 4/21/04RP 14-15. Haslett and Shinkaruk then left. 4/21/094RP 15.

g. Royal Scott #2

The RCMP planned another money laundering “scenario” to give Haslett time alone with Sebastian so he could try to get Sebastian to admit involvement in the murders while discussing the information Haslett’s pretend contact had learned about the Bellevue investigation. 3/25/04RP 103-04; 4/21/04RP 22. Shinkaruk met Sebastian and Miyoshi at a pub near the ferry terminal and gave them expense money, and they again checked into the Royal Scott Motel.²⁷ Ex. 509; Ex. 541 at 1; 4/21/04RP 34-37; 5/5/04RP 35-36. Shinkaruk drove the boys to deposit money in several banks in Victoria and other Vancouver Island towns. 4/21/04RP 50-51.

Afterwards, the three met Haslett at the motel. Ex. 541 at 45. He arrived with a case of beer and two bottles of wine, and

²⁷ Exhibit 509 contains the audio recordings from the motel room, and Exhibit 541 is a written transcript.

they discussed computer encryption. Ex. 541 at 48, 53-78; 4/21/04RP 53-54. Shinkaruk then took Miyoshi to a strip club, leaving Haslett and Sebastian alone to talk. Ex. 541 at 78; 4/21/04 51-52.

Haslett told Sebastian that his contact had discovered the Bellevue Police had evidence linking Sebastian to the crimes. Ex. 541 at 80. Haslett asserted the police had found 21 or 22 of Sebastian's hairs in the shower mixed with the blood of both male and female victims and the last person to use the shower was the killer. Id. at 80, 86-88, 124. He reported the police had Sebastian's DNA and were "culturing" it in a lab. Id. at 80-81. Haslett claimed Sebastian's fingerprints were found on the shower and on a box that was tipped over. Id. at 81, 89. Haslett also declared Sebastian was the only person mentioned in the police reports. Id. at 80, 84; 4/5/04RP 15-16. At trial, Haslett opined Sebastian was surprised and frightened to hear the Bellevue Police had his DNA, and Haslett was confident Sebastian realized he would soon be matched to the murder scene. 4/27/04RP 58-60.

Haslett pressed Sebastian for details so that his contact would know what to look for and destroy, but Sebastian was unable to tell Haslett what evidence was critical and basically suggested

the contact check items mentioned in the report, such as blood and hair. Ex. 541 at 84-103, 113; 4/27/04RP 20-21; 4/27/04RP 34, 42-43. In his questioning, Haslett assumed Sebastian was guilty and suggested Sebastian may have washed the murder weapon, a two-by-four or a bat, in the shower. Ex. 541 at 86, 89, 101, 121; 4/27/04RP 34-39. "Well," Haslett proclaimed, "they have you in a pretty big fucking way down there . . . the report I read knows you did it." Ex. 541 at 80. Haslett assumed the crimes were committed for financial gain and assured Burns he had "no problem with that." Id. at 103, 131.

Sebastian did not initially respond when Haslett asked him what to look for in Bellevue. 4/5/04RP 20-21. Sebastian assured Haslett he would provide more details if he could, since he understood he would end up with a bullet in his head if he was not honest with Haslett. Ex. 541 at 90-91; 4/27/04RP 147-49. Haslett did not contradict Sebastian, hoping he would believe the threat of death was true. 4/27/04RP 153-55. Again Haslett wanted to know if Sebastian's attorneys were "worth their weight in salt." Ex. 541 at 109-10.

Sebastian did not have an "A to Z story" to tell Haslett and provided evasive answers because he had not committed the

crimes. 5/11/04RP 157-58. Eventually Sebastian suggested the contact look for hair, bodily fluids, and blood on Sebastian's clothing or in the car. Ex. 541 at 126. Haslett assured Sebastian he would help, but only if Sebastian gave him the complete story. Ex. 541 at 92-93, 97; 4/27/04RP 68-71. "But don't fuckin' sell me short, and don't ever let your fuckin' friends try to sell me short, because if they start selling me short, you being in the middle is going to get hurt, especially with what you know about yourself right now. Know what I mean?" Ex. 541 at 150.

Although Haslett's conversation with Sebastian was based upon the premise that Sebastian was guilty, Haslett testified the conversation was another opportunity for Sebastian to deny his involvement in the crimes. Ex. 541 at 87; 4/22/04RP 24; 4/26/04RP 72-76. Haslett felt Sebastian was talking in riddles and he believed Sebastian was not telling the truth. 4/26/04RP 75-80. Haslett also opined that Sebastian did not really believe he was being unfairly targeted by the police. 4/27/04RP 6-7, 10-17, 26-33, 53-55. Finally, Haslett said it never occurred to him that Sebastian wanted evidence destroyed because he was not guilty but concerned evidence was being fabricated against him. 4/27/04RP 19-22

Sebastian had already seen some reports about the crime, and he was worried that the Bellevue police would try to make a case against him any way they could. Ex. 541 at 103, 118; 5/11/04RP 162. Based upon what Haslett told him about the scientific evidence, Sebastian was convinced he would soon be arrested and tried based upon evidence that was fabricated or mischaracterized. 5/11/04RP 160-63. Sebastian believed Haslett and Shinkaruk were dangerous criminals. 3/4/04RP 108-09. He was afraid that if he made something up that later contradicted what Haslett's operative would discover, he might be killed. 5/11/04RP157-5.

The next day Shinkaruk again took Sebastian and Miyoshi to deposit money in banks, and two were well paid for a minimal amount of "work." 4/21/04RP 48, 51; 4/26/04RP 27.

h. Miyoshi's Solo Encounter with the Operatives

On July 10, 1995, Shinkaruk took Jimmy Miyoshi to "launder" \$50,000 without Sebastian. 3/24/04RP 89-90; 3/25/04RP 107. The undercover team hoped Miyoshi might say something about Sebastian and Atif, and they thought the focus on Miyoshi would keep the young men from suspecting the operatives were only interested in Sebastian's potential admissions. 3/24/04RP 88-89;

3/25/04RP 106-07; 4/12/04RP 121-22; 4/26/04RP 32. Shinkaruk did not, therefore, question Miyoshi about the Bellevue homicides. 4/12/04RP 121.

i. False Bellevue Police Department Report

Normally RCMP undercover operators are provided with little information about the crimes being investigated so that they cannot fabricate confessions or be accused of putting words in the target's mouth. 3/24/04RP 57; 4/1/04RP 22, 24. Instead, a manager or "cover person" acts as a go-between for the investigative and undercover units.²⁸ 3/25/04RP 17-18. "Cover person" John Henderson initially provided Haslett and Shinkaruk with limited facts about the case, such as the murder victims, the suspects and their possible motive.²⁹ 3/25/04RP 17, 23-26; 4/7/04RP 54-56; 4/13/04RP 41. Later, however, Haslett and Shinkaruk were given a thorough written "advisal," that contained most of the information the investigators had learned after spending several days in Bellevue reviewing the files and evidence. 3/24/04RP 57-59, 98-103; 3/25/04RP 88-94; 4/19/04RP 61-65.

²⁸ The cover person is the project manager. He develops the undercover goals and plans the contacts with the operatives, takes notes as the scenarios occur, and is responsible for the operatives' safety. 3/25/04RP 17-19; 4/6/04RP 103-04; 4/7/04RP 68-69.

Finally Haslett, Shinkaruk and Henderson took the unusual step of going to Bellevue to view the police file themselves on July 11 and 12 because they wanted to create a document that would appear to be a Bellevue Police Department memorandum about the case.³⁰ 3/24/04RP 90-91; 3/25/04RP 116-18; 4/6/04RP 46-47.

Haslett and Shinkaruk testified this was necessary because Sebastian was cunning and might “trick” them. 4/12/04RP 104-05; 4/19/04RP 18-19.

The undercover operatives planned to tell Sebastian they could assist him by getting rid of the evidence mentioned in the false report only if he told them he was responsible for the murders, thus creating a “logical reason to confess.” 3/24/04RP 120-21; 3/24/04RP 121-22. They also hoped the imaginary DNA test results would “turn the heat up” so that Sebastian or Atif would say something at home or on a telephone that would be picked up by the monitors. 3/24/04RP 110-11.

³⁰ The memo was marked as Exhibit 502. It was read to the jury and discussed in the “scenario” but not admitted as evidence. 11/18/03RP 25-27; 3/25/04RP 137-38. Like the money, guns, and cars they used, the RCMP witnesses referred to the false memo as a “prop.” 11/18/03(PM) 25; 3/25/04RP 112, 131.

Although other witnesses testified it was unusual to provide so much information to the undercover officers, Haslett said he normally had the details of the investigation by the end of a “Mr. Big” scenario. 4/19/04RP 20.

According to the false memorandum, the Bellevue Police hoped to arrest Sebastian and Atif as soon as DNA testing was completed. 3/25/04RP 116-17; Ex. 502. The report cited five tests that were critical:

- 1) the red fabric fibers found in the shower that were mixed with BURN'S [sic] hair
- 2) the stains on the boxer shorts from the washer
- 3) the bloodstains located in the garage
- 4) the saliva on Tariq's bedroom wall
- 5) analysis from murder weapon impressions on the bedroom wallboard

Ex. 502; 4/5/04RP 18-19. In fact, the test results did not give the Bellevue Police Department a basis to charge Sebastian and Atif, but the RCMP felt this was unimportant because the information was "potentially true." 3/25/04RP 125.

The false memorandum also said that the Bellevue Police Department was planning a news conference about the case. Ex. 503. The Department did in fact hold a press conference on July 11, the day after the date on the false memorandum, and the conference was covered in the press. Ex. 542 at 9; 4/6/04RP 48-49.

j. Ocean Point

Sebastian continued to believe Haslett and Shinkaruk were dangerous criminals who viewed him as a potential threat.

5/11/04RP 101-03. Before he met with Haslett again, Sebastian talked to Atif and Miyoshi about what he should say. Id. at 164-65.

The media coverage before this had included a number of details of the homicides. A Seattle Times article explained the Rafay family had been targeted and the scene staged to look like a burglary. 3/1/04RP 75-78; 3/3/04RP 43-45. A news article in Canada explained the murder weapon was probably a bat, the order of the killings, that Mr. Rafay and possibly Basma were asleep when attacked, that Mrs. Rafay was unpacking, and that Basma resisted her attackers. 3/1/04RP 80-82; 3/3/04RP 46-50; 4/5/04RP 50-52. Another paper had reported Sebastian and Atif may have left the movie to commit the crimes. 4/5/04RP 50.

After going over everything they knew from discovering the crime and learned from the Bellevue police, lawyers, the media and from Haslett himself, Sebastian, Atif and Miyoshi came up with a story Sebastian hoped would be satisfactory. 5/11/04RP 159, 164-65, 171-72; 5/14/04RP 76-77, 85. When Sebastian met with Haslett, he was nervous about presenting this story of how the crimes occurred, but relieved because he felt he was taking the safest course by doing what Haslett asked. 5/11/04RP 166-67. He tried to appear casual and relaxed. Id. at 167.

On July 18, Haslett met with Sebastian at the Ocean Point, an upscale Victoria waterfront hotel, told Sebastian the Bellevue Police were about to arrest him, and presented him with the false police memorandum.³¹ Ex. 510; Ex. 542 at 9-10; 3/24/04RP 94; 3/25/04RP 112; 4/27/04RP 73-74. Haslett later burned the document in front of Burns. Ex. 510 at 18. Sebastian was upset by the document, but told Haslett the “facts” only showed he was in the Rafay home, not that he committed the crime. Ex. 542 at 10-18. Sebastian was largely unable to explain items contained in the false memo that Haslett had not mentioned in his earlier discussion of the evidence – blood stains in the garage, boxer shorts in the laundry, saliva in the master bedroom and murder weapon impressions. Ex. 542 at 11-14; 4/27/04RP 177-79.

Haslett, however, again proclaimed that Sebastian would soon be arrested, Haslett’s contact in Bellevue had to act fast, and Haslett would not ask the contact to do anything unless Sebastian told him the whole story. Ex. 542 at 14. Sebastian reiterated innocent explanations for the information in the memorandum, but eventually he gave short answers to Haslett’s specific questions.

³¹ Exhibit 510 contains the video recording and Exhibit 542 is the written transcript for July 18. Exhibit 511 is the video recording for July 19, and Exhibit 543 is the written transcript for that date.

Ex. 542 at 18-25; 4/6/04RP 4. Sebastian related, for example, that he used a bat, he disposed of the bat and his clothing in various dumpsters, and that Dr. Rafay and Basma were sleeping at the time of the attacks.³² Ex. 542 at 18-21, 48. When asked about planning the crimes, Sebastian said they really did not plan them. Id. at 25. In contrast, Sebastian gave a detailed explanation of what he and Atif did that night; the narrative did not include the murders until Haslett asked directly when they occurred, and Sebastian said during the movie. Id. at 25-28. Later Sebastian said Atif was in the home but did not help, and he first killed Mrs. Rafay, then Dr. Rafay, and then Basma. Id. at 31-32. At one point he said he wore underwear when he committed the crimes and at another point Sebastian said the killer was naked. Id. at 28, 29. He could not remember where they obtained the bat. Id. at 32.

Haslett confidently announced there would be a fire at the crime laboratory, the case records would be destroyed, and Sebastian's hair would be replaced with someone else's. Ex. 542 at 36. Haslett declared he had an East Indian contact who would simultaneously claim responsibility for the murders, saving

³² The police had searched numerous dumpsters in Bellevue and in Seattle without locating any evidence related to the murders. 12/10/03RP 155-60; 12/11/03RP 115-26; 12/15/03RP 10-15.

Sebastian from jail. Id. The man would quickly leave the country so the police would never be able to find him. Id. at 36-37. Haslett ordered Sebastian to collect hairs that were not connected to him and not to say anything to his friends or his attorney. Id. at 37-38, 50. Sebastian assured Haslett he would not turn him in to the police for fear of being killed by Haslett's organization. Id. at 53-54.

During the conversation, Sebastian again asserted innocent explanations existed for the physical evidence and the Bellevue police might be misconstruing the facts. Ex. 542 at 12, 16-17, 4/27/04RP 75, 78. At trial, Haslett opined Sebastian did not really believe evidence would be fabricated. 4/27/04RP 76. "I have over 30 years' police experience dealing with people, and I can read body language and personalities and tone of voices fairly well." Id.

At Haslett's command, Sebastian called Atif and told him to join him in Victoria; Sebastian told Atif he needed to be picked up because he had been involved in a rollerblading accident. Ex. 549 (Channel 35, 95-07-19, 10:48); 5/5/04RP 64-66; 5/11/04RP 168-70. Sebastian later called Atif and repeated the name, address and room number of the motel. He said the room was under the name "Khan" and made other references to a Star Trek movie, as if talking in code. Ex. 549 (Channel 35, 95-07-19, 11:07); 4/27/04RP

183-85; 5/11/04RP 171. At trial, Sebastian explained he was referring to a joke that would cue Atif concerning what to say to Haslett.³³ 5/11/04RP 171-72.

The next day, Shinkaruk took Sebastian to Nanaimo where Shinkaruk pretended to be collecting money for Haslett. Shinkaruk instructed Sebastian to stand guard in the hallway while Shinkaruk pretended to beat up an undercover policeman. 3/25/04RP 148-53; 4/12/04RP 125-26, 129; 5/5/04RP 71-79, 92. Sebastian was nervous, scared, and afraid someone might use a weapon. When it was over Sebastian suggested his time would be better spent in another activity, such as making his movie. Ex. 511; Ex. 543 at 24; 4/12/04RP 129-30; 5/5/04RP 92-95.

After they returned from Nanaimo, Sebastian, Shinkaruk and Haslett counted the money Shinkaruk had collected. Ex. 511; Ex. 543 at 3-11; 5/5/04RP 81. Shinkaruk then picked up Atif and delivered him to Haslett's room. Ex. 543 at 11-14; 5/5/04RP 82. As they waited for Atif, Haslett asked Sebastian for more details about the crimes. Sebastian said his fingerprint was on a box because he and Atif had been looking through boxes earlier in their

³³ According to Atif's probate attorney and Robin Puga, Detective Thompson hypothesized that Sebastian and Atif committed the crimes in their underwear. After hearing this, the boys made a silly joke about Khan, a Star Trek character who often appears bare-chested. 5/11/04RP 171-72.

visit. Ex. 543 at 18. Sebastian also said for the first time that he was wearing garden gloves and thought they had purchased the bat but he did not know where. Id. at 19-20.

When Atif arrived at the hotel suite, Haslett continued to pretend he was interested in the young men's computer expertise and emphasized the importance of trust and his ability to protect his employees. Ex. 543 at 32-34, 38-39. Haslett told Atif that he and Sebastian would be arrested at any moment and let Sebastian relate the information in the false police memo. Ex. 543 at 35-37; 4/6/04RP 53-54. Both Sebastian and Atif were unable to explain much of the information the false memo contained. Ex. 543 at 36-38. At times Sebastian gave his interpretation of the evidence for Atif's benefit. 5/11/04RP 172-73.

Atif looked at Sebastian for help before answering questions about the case, and Sebastian tried to assist him. 4/6/04RP 54-55; 5/11/04RP 172-73. In response to Haslett's interrogation, Atif said he did not help Sebastian kill his family but only pulled out the VCR; Atif related he was much more upset than he had anticipated. Ex. 543 at 39, 41. Atif was not clear as to what he was wearing, but he said he "hucked" his clothes "out the window." Sebastian corrected Atif in light of his earlier story and said they put everything into trash

cans or dumpsters. Id. at 42-46. Sebastian added that he took care of the VCR while they were at Steve's Broiler. Id. at 46. Haslett then repeated his plan to save Sebastian with a fire at the crime lab. Id. at 47. He stressed the importance of Sebastian and Atif not talking to the police, the press, their lawyer, or Miyoshi. Id. at 47-48.

Haslett told Sebastian to go to the lobby and page Shinkaruk so Haslett could be alone with Atif. Ex. 543 at 52-53; 5/10/04RP 6-7. In the private conversation, Atif told Haslett about his inheritance, said he and Sebastian had planned the crime for only a few weeks, that they left via a sliding glass door, and they purchased the bat in Bellingham and gloves at a United States chain store. Ex. 543 at 53-55. Atif said they put the evidence in random dumpsters in downtown Seattle. Id. at 55. Atif related he felt terrible about killing his family but it was necessary due to the injustice in the world. Id. at 56.

k. Jimmy Miyoshi's admission

The undercover officers arranged for Miyoshi and Sebastian to meet with Haslett at the Landis Hotel on July 26, 1995. They thought Miyoshi might be a good witness against Sebastian and Atif even if Miyoshi had not been involved in the crimes. 3/25/04RP

158-59. Beforehand Sebastian encouraged Miyoshi to tell Haslett that he knew about the murders so that Haslett would go through with his offer to destroy evidence in Bellevue. 3/3/04RP 214-15, 223-24, 230-32, 243-44.

After emphasizing trust, Haslett asked Miyoshi several times if he knew about the crimes ahead of time but received only nonverbal responses or declarations like, “there’s nothing to rat about.”³⁴ Ex. 512; Ex. 544 at 2-3; 3/3/04RP 224-25. Miyoshi said he did not accompany Sebastian and Atif to Bellevue because he was working. Ex. 544 at 8. Somehow, Miyoshi’s nods and short responses won Haslett’s approval; Haslett exclaimed it was “solid” that Miyoshi knew about the murders in advance. Id. at 11-13. He reminded Sebastian and Miyoshi not to talk to the press or attorneys. Id. at 16.

I. Sebastian and Atif are arrested

Sebastian and Atif were arrested in North Vancouver on July 31, 1995, after the State of Washington charged them with the three murders. 3/11/04RP 181-83; 3/24/04RP 96; 1CP 1-9.³⁵

³⁴ Exhibit 512 is the audio recording of the “scenario” and Exhibit 544 is a written transcript.

³⁵ The appellate record contains multiple volumes of clerk’s papers. Those designated by Sebastian are referred to by volume number (1CP, 2CP

m. Jimmy Miyoshi's testimony

Miyoshi and his wife were also arrested by the RCMP on July 31 and interrogated individually.³⁶ 3/4/0/ RP 124. Officers also revealed Haslett as an undercover police officer and their belief that Sebastian and Atif were guilty. 3/4/04RP 124-27; 5/4/04RP 154-92, 195-205. The interrogating officers informed Miyoshi that significant forensic evidence and admissions tied Sebastian and Atif to murders and they faced the death penalty in Washington. The police described the brutality of the crimes, and told Miyoshi he needed to come to the side of the police in order to save himself and avoid disgracing his family. 3/4/04RP 130-32, 136-37, 156-58; 5/4/04RP 152-54, 165-75. The officers also suggested Sebastian and Atif would kill Miyoshi, his parents or his girlfriend to protect themselves and that Miyoshi's girlfriend would leave him if he did not cooperate. 5/4/04RP 180-85.

Miyoshi did not implicate Sebastian at that time, but he understood he was under investigation for conspiracy to commit three murders. 3/3/04RP 236-38; 3/4/04RP 81, 132-34. With the help of an attorney he gave statements to the RCMP and entered

etc.) and those designated by Rafay are referred to as RCP and volume number (1RCP, 2RCP, etc.).

³⁶ The two were not yet married at the time of the arrests. 3//3/04RP 132.

into an immunity agreement with the Regional Crown Counsel for British Columbia to assist in the prosecution of Sebastian and Atif in the United States and Canada. 3/3/04RP 238-40; 3/4/04RP 32-34, 38-40; Ex. 448A.

Despite the immunity agreement, Miyoshi did not come willingly to Seattle to testify. By 2003 he was using a different name and living in Japan hoping to avoid further involvement in the case. Ex. 551 at 300, 317-18, 337; 3/3/04RP 97-98. The Bellevue detectives contacted Miyoshi and his wife, then Interpol and finally Miyoshi's employer to force Miyoshi to come to the United States. 3/1/04RP 25-26, 31-32, 36-45; 3/2/04RP 203-12. Miyoshi believed this negatively affected his job and was afraid he might lose his job if he did not cooperate with the King County Prosecutor. He even sent an email to the King County Prosecutors threatening to sue if he or his wife were economically harmed by his participation in the case. 3/1/04RP 46-50; 3/4/04RP 67, 74, 76-78; Ex. 551 at 339-40.

Miyoshi eventually appeared with an attorney for a deposition in Washington in 2003. 3/4/04RP 45-46. His testimony was often vague or contradictory, but he did say that Sebastian and Atif told him about the murders before and after they occurred. Miyoshi said Atif mentioned the idea of killing his family when the

two were driving from Bellevue to Vancouver sometime before the murders. 3/3/04RP 130, 132-38, 159-60. Sebastian later asked Miyoshi if Atif had mentioned the idea. 3/3/04RP 139-40.

Miyoshi related that all three discussed the idea again by a creek near Miyoshi's family home a few weeks later. They talked about various ways of committing the murder painlessly, such as gassing the house or using a baseball bat. Miyoshi said he asked about DNA, and they decided it could be explained by Sebastian's and Atif's presence in the home. 3/4/04RP 142-51. Miyoshi understood they wanted to collect insurance money. 3/4/04RP 157-59, 160-61; Ex. 551 at 360-61.

Miyoshi said he vaguely remembered that Sebastian and Atif stopped at his Vancouver workplace when they were returning to Bellevue shortly before the murders. 3/4/04RP 162-63, 166-68; Ex. 551 at 367. Miyoshi also talked to the defendants on the telephone while they were visiting the Rafays. They reportedly said they were going to commit the murders and mentioned going out to eat or to a movie as an alibi. Ex. 551 at 390-95; 3/3/04RP 169-70.

Miyoshi further related that Sebastian and Rafay talked to him separately after the murders. According to Miyoshi, Atif said he lured his mother to the basement and Sebastian struck her with a

bat. Atif was very upset and did not go into his father or sister's rooms. Instead he took some things from the house so it would look like a robbery. Atif added that his sister was alive when they left. 3/3/04RP 175-76; Ex. 551 at 401.

Miyoshi claimed Sebastian separately related that Atif was distraught but there was no turning back after Sebastian hit Mrs. Rafay. 3/3/04RP 179. Sebastian said they threw things away in different places and took a VCR out of the home. 3/3/04RP 181-82. Sebastian also said if he was forced to discuss the crimes, he would only mention information that had been included in media coverage. 3/3/04RP 235-36; 3/4/04RP 28; Ex. 551 at 322.

Concerning the RCMP undercover sting, Miyoshi said he suspected Haslett and Shinkaruk were police officers, but Sebastian and Atif believed they were criminal operatives. Sebastian and Atif were genuinely afraid of Haslett and Shinkaruk and believed one or both had murdered someone in the past. 3/3/04RP 203, 226-27, 229; 3/4/04RP 115-17, 122-23.

11. PROCEDURE

The State of Washington charged Sebastian and Atif with three counts of aggravated murder in the first degree on July 31,

1995.³⁷ 3CP 1, 531; RCW 9A.32.030(1)(a); RCW 10.95.020(4),
(8). At the request of the United States, they were held in custody
in Canada on the charges pending extradition. 3CP 531, 542-46.

On September 25, 1995, the United States formally sought
extradition but did not provide Extradition Treaty assurances the
death penalty would not be imposed if Sebastian or Atif were
convicted. 3CP 531-32. Canadian Minister of Justice Allan Rock
declined to seek the required assurances and signed an
unconditional order of surrender. United States v. Burns, 1 S.C.R.
283, 295, 299, 2001 SCC 7 (2001). The British Columbia Court of
Appeal set aside the Minister's decision and ordered he obtain the
required assurances not to seek the death penalty (described in
Article 6 of the extradition treaty) as a condition of surrender.³⁸
Burns, 1 S.C.R. at 300, citing United States v. Burns, 94 B.C.A.C.
59 (1997).

³⁷ The State alleged two aggravating factors: (1) the murders were
committed pursuant to an agreement that the defendants would receive financial
benefits, or (2) the multiple murders were part of a common scheme or plan. Id.

³⁸ Article 6 provides:
When the offense for which extradition is requested is punishable by
death under the laws of the requesting State and the laws of the
requested State do not permit such punishment for that offense,
extradition may be refused unless the requesting State provides such
assurances as the requested State considers sufficient that the death
penalty shall not be imposed, or, if imposed, shall not be executed.

On October 19, 1999, Atif demanded a speedy trial. 2RCP 3575. Sebastian's defense counsel in the United States demanded a speedy trial with an agreement not to seek the death penalty on April 17, 2000, which the King County Prosecutor's Office rejected. 3CP 548-49. King County Prosecutor Norm Maleng encouraged the British Columbia prosecutors to appeal the British Columbia Court of Appeal decision requiring assurances from the United States government. 2RCP 3593; 12/2/99RP 5.

In 2001, the Supreme Court of Canada unanimously held the Minister of Justice erred and could not extradite a Canadian citizen to face the death penalty in another country. Burns, 1 S.C.R. at 353, 361. Following the Canadian Supreme Court decision, King County Prosecutor Maleng formally gave the Government of Canada assurances that he would not seek to execute Sebastian or Atif if convicted. 3CP 534; 2/18/03RP 99. The defendants were then released to the United States on March 21, 2001, and arraigned within two weeks of that date on April 6, 2001. Id. Sebastian's motion to dismiss his case for violation of his right to a speedy trial was denied. 3CP 530; 2/18/03RP 79.

Sebastian and Atif were convicted after a joint jury trial in King County of three counts of aggravated murder in the first

degree. 16CP 3175-77. Sebastian received three consecutive life sentences without the possibility of parole. 17CP 3322-28.

Sebastian appealed, and his case is consolidated with Atif's appeal in this Court. 17CP 3364-72; RAP 3.3(a).

E ARGUMENT

1. THE TRIAL COURT'S EXCLUSION OF DEFENSE EXPERT RICHARD LEO VIOLATED SEBASTIAN'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

a. The federal and state constitutions provide the accused the right to present a defense. The federal and state constitutions provide the accused the right to present a defense. The right is derived from (1) the guarantee of due process, which includes the opportunity to defend against the State's accusations; (2) the right to compulsory process, which ensures the right to present a defense; and (3) the right to confront the government's witnesses, which includes the right to meaningful cross-examination.³⁹ U.S.

³⁹ The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . ."

The Fourteenth Amendment states in part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

The compulsory process and confrontation clauses of the Sixth Amendment are essential components of due process that apply to the States through the Fourteenth Amendment. Washington v. Texas, 388 U.S. 14, 18-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 22; Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006); Davis v. Alaska, 415 U.S. 308, 314-15, 94 S.Ct. 1105, 39 L.Ed.2d 437 (1974); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

Thus, a defendant must be permitted to both introduce relevant, probative evidence and cross-examine the State's witnesses in a meaningful fashion. State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996). "Whether rooted 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.'" Holmes, 126 S.Ct. at 1731, quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).

Here, Sebastian's defense was critically restricted because the trial court prohibited him from presenting a social scientist who

Article 1, Section 3 of the Washington Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law."

Article 1, Section 22 provides specific rights in criminal cases. "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf . . ."

was an expert in police interrogation and false confessions.

Sebastian had the constitutional right to present this evidence so that the jury had the information needed to determine the truth. For the reasons stated here, the trial court's rulings violated Sebastian's constitutional right to present his defense.

b. Sebastian's "confessions" to the RCMP undercover officers were critical evidence against him, and he had the constitutional right to present a defense expert on police interrogation techniques and false confessions. In Sebastian's case, law enforcement personnel from both sides of the border exhaustively described their investigation in order to bolster their appearance of professionalism. The State presented repetitive testimony from numerous RCMP employees about their undercover operation. After explaining the structure of their organization and the role played by the undercover unit, the undercover and investigative officers explained the reasoning and planning behind each of the many "scenarios."⁴⁰ Participants and observers also

⁴⁰ See Ex. 501; 3/10/04RP 175, 189; 3/11/04RP 131-32, 142, 164, 172-73; 3/23/04RP 143-44; 3/24/04RP 49-50, 65-67, 88-89; 3/25/04RP 31-34, 42-47, 61-68, 73-83, 95-120, 131-42, 144-45; 4/6/04RP 109-13; 4/7/04RP 43-51, 59-67, 79-62, 87-92, 103-06, 109-11, 136-47; 4/8/04RP 11-16, 54-67, 71-74; 4/9/04RP 14-16; 4/10/04RP 7-12, 25; 4/13/04RP 35-39, 42, 64-71, 108-09, 117-21; 4/15/04RP 66-67, 104-06; 4/19/04RP 11-16, 36-40, 43, 54-60; 4/20/04RP 31-32; 4/21/04RP 22-25, 27-28; 4/23/04RP 28-29, 32-35.

described each of the encounters with Sebastian and his friends, even those which were audio or video-taped.⁴¹ The undercover officers testified about Sebastian's reactions, his thoughts, and finally that his "confession" was the truth.

Sebastian initially told the undercover officers that he was unjustly accused by the Bellevue Police Department, but he eventually retreated from this position, bending to the undercover officers' coercive pressure. Eventually, Sebastian's terse answers to Haslett's questions united to form a "confession" to the three murders. The undercover operation that netted this "confession" was designed to psychologically manipulate Sebastian so that he believed it was to his advantage to incriminate himself and very

⁴¹ See **Initial meeting** - 3/10/04RP 173-84; 3/25/04RP 61-41, 125; 4/7/04RP 56, 66, 70-125, 188; 4/13/04RP 43-64; **Whistler** - 3/10/04RP 187-93; 3/25/04RP 47-58; 4/7/04RP 129-36, 138-88; 4/9/04RP 8-10, 30-40; 4/13/04RP 71-104; **Telephone calls** - 3/11/04RP 127-28; 3/23/04RP 155-56, 3/25/04RP 58-60; 4/8/04RP 16-38, 49-53; **Four Seasons** - Ex. 507A, 507B, 507C, 507D; 3/11/04RP 129-55; 3/23/04RP 156-62; 3/24/04RP 41-48; 3/25/04RP 70-72; 4/8/04RP 77-80, 85-96, 97-117; 4/9/04RP 6-8, 12-13, 16-24; 4/13/04RP 12-27, 109-112, 115-17, 121-39, 4/15/04RP 10-25, 40-47, 67-84; **Newspaper article** - 3/11/04RP 156-62; 3/24/04RP 50-53; 3/25/04RP 84-87; 4/15/04RP 44-46, 104-110; 4/19/04RP 17-18, 23-35, 40, 44-53; 5/5/04RP 11-20; **Royal Scott #1**, Ex. 508; 3/11/04RP 169-72; 3/24/04RP 65-87; 3/25/04RP 86-87; 4/19/04RP 66-74, 82-111; 4/20/04RP 6-22, 27-41; 5/5/04RP 23-28; **Defendants' home** - 3/11/04RP 172-74, 177; 3/25/04RP 102-03; 4/20/04RP 46, 48-52; 4/21/04RP 6-15; 5/5/04RP 28-33; **Royal Scott #2** - Ex. 509A, 509B, 509C, 509D, 509E, 509F, 3/24/04RP 67-87; 3/25/04RP 103-06, 4/21/04RP 22-23, 25-29, 31-56; 5/5/04RP 33-39; **Ocean Point** - Ex. 510, 511; 3/24/04RP 92-95; 3/25/04RP 140-43, 146-57; 5/5/04RP 43-52, 63-83, 5/10/04RP 4-7, 19-24; 5/11/04RP 49-50; **Landis Hotel** - Ex. 512, 5/5/04RP 84-85; 5/10/04RP 28-60; 5/11/04RP 18-23, 48-49.

dangerous to deny responsibility for the murders – to make him an offer he thought he could not refuse. Thus, the reliability of Sebastian’s statements to the RCMP officers accepting responsibility for the crimes was the central issue at trial.

“A confession is like no other evidence. Indeed, ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.’” Arizona v. Fulminate, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Such persuasive evidence of guilt is difficult for any reasonable juror to dismiss. Fulminate, 499 U.S. at 296; State v. Mauchley, 67 P.3d 477, 489 (Utah 2003); Jacqueline McMurtrie, “The Role of Social Science in Preventing Wrongful Conviction,” 42 *Am. Crim. L. Rev.* 1271, 1280 (2005); Saul M. Kassin & Gisli H. Gudjonsson, “The Psychology of Confessions: A Review of the Literature and Issues,” 5 *Psychological Science in the Public Interest* 33, 56-57 (2004). Thus, when the credibility of a confession is central to the defendant’s claim of innocence, the exclusion of competent, reliable evidence bearing on that issue violates the defendant’s constitutional right to present his defense. Crane, 476 U.S. at 690-91.

In Crane the defendant was prohibited from presenting evidence concerning the circumstances surrounding his confession because the court had ruled the confession legally voluntary. Crane, 476 U.S. at 684. Reversing the trial court's ruling, the United States Supreme Court noted the importance of this evidence to the defendant's case.

Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly . . . a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

Id. at 688. Thus, a criminal defendant must be given the opportunity to explain to the jury the reasons behind his confession.

In Sebastian's case, the object and structure of "Project Estate" encouraged such unreliable admissions. In most RCMP undercover operations, the target's confession is a quid pro quo for acceptance into the purposed criminal organization which offers friendship and large financial rewards. Christopher Nowlin, "Excluding the Post-Offense Undercover Operation from Evidence – 'Warts and All,'" 8 Can. Crim. L. Rev. 381, 384-85 (2003). Here, the quid pro quo was not only easy money gained through entry

into a successful criminal organization, but also the promised destruction of evidence which purportedly tied Sebastian to the homicides. Given these inducements, the reliability of any statements Sebastian made to the undercover operatives was questionable.

[A]s the level of inducement increases, the risk of receiving a confession to an offense which one did not commit increases, and the reliability of the confession diminishes correspondingly.

Regina v. Mentuck, 2000 W.C.B.J. 515636, 122, 47 W.C.B.2d 526 (Manitoba Queen's Bench 2000).⁴² Sebastian's constitutional right to present his defense was violated when the trial court excluded the testimony of a social scientist to explain how the RCMP's techniques may lead to false "confessions."

c. The trial court improperly excluded Richard Leo's expert testimony. Sebastian sought to call Richard Leo, Ph.D., J.D., to testify about the social psychology of interrogation and the phenomenon of false confessions. Dr. Leo proposed to educate

⁴² In Mentuck, the RCMP undercover operation was unable to produce a confession through their normal technique of offering easy money from a false criminal organization combined with instilling fear of the organization's violence and power. The RCMP therefore upped the ante by telling the defendant (1) the paid undercover informant who befriended him was in trouble with Mr. Big because the defendant would not confess, (2) the criminal organization had found someone dying of AIDS to take the blame for the murder in question, and (3) Mentuck, who had already been prosecuted twice for the murder, could then sue the government and obtain a hefty settlement. Mentuck, 2000 W.C.B.J. at 79-113; Nowlin, 8 Can. Crim. L. Rev. at 385-88.

the jury about risk factors for false confessions and how they can be elicited even from people of normal or superior intelligence. Dr. Leo's testimony would have addressed how certain police interrogation techniques play a role in inducing false confessions and potential indicators of unreliable confessions that have been identified in current social science research. Dr. Leo did not intend to offer an opinion as to whether any of the specific statements obtained in this case were in fact true or false. 15CP 2833-34, 2937; 16CP 3135-37; 11/18/03RP 45-50, 55-60.

The trial court excluded Dr. Leo's testimony, reasoning that it is common knowledge that people lie and concluding Dr. Leo would testify that the confessions at issue were false or coerced. 11/19/03RP 64-65. The court stated:

It is in this court's opinion within the common experience and knowledge that people for a variety of reasons, limited only by the human imagination, tell lies, little lies and big lies, and this jury was questioned during its selection of that very proposition and indicated they would not at all be surprised if people did tell lies.

Ultimately what Dr. Leo is testifying to would be testifying to – though he may say it in a different manner – that this was a coerced, compliant, false confession, and that is the final analysis and question for this jury to decide, number one, if it's a confession and, number two, was it voluntary or coerced?

11/19/03RP 65. Sebastian asked the court to reconsider this ruling at several points during the trial, but the motion was denied every time.⁴³ Defense counsel later presented Dr. Leo's declaration as an offer of proof. 16CP 3135-37; 5/14/04RP 100-01.

i. Expert testimony is admissible if the witness is a qualified expert, the subject matter is generally accepted in the relevant scientific community, and the testimony will aid the trier of fact. Sebastian was entitled to present relevant, competent evidence in his own defense, including evidence bearing on the credibility of a "confession."⁴⁴ Crane, 476 U.S. at 690; ER 402.

The evidence rules concerning expert witnesses "reflect the widely held view that a reasoned evaluation of the facts is often

⁴³ When the trial court ruled the State could attempt to elicit testimony that the Rafay family considered Atif a genius and a philosopher, Sebastian asked the court to permit expert testimony that intelligent people are susceptible to false confessions, asserting this was beyond the understanding of the average juror. The court denied the motion without stating reasons. 3/10/04RP 198-205, 209-10.

Sebastian again pointed out the need for Dr. Leo's testimony after Haslett testified that during his discussion with Sebastian at the Four Seasons Hotel he gave Sebastian twelve opportunities to deny involvement in the murder and Sebastian failed to do so. Sebastian's expert would explain the lack of an earlier denial does not make a false confession more or less likely. 4/15/04RP 7-9. Sebastian later moved to prevent Haslett from providing characterizations of Sebastian's statements and argued this testimony opened the door to Dr. Leo's expert testimony about the factors leading to false confessions. 4/20/04RP 55-58. The court declined to reconsider its prior ruling excluding Leo, but prohibited Haslett from testifying Sebastian's statements were or were not denials. Id. at 59.

⁴⁴ Evidence is relevant if it has "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. Relevant evidence is generally admissible. ER 402.

impossible without the proper application of scientific, technical, or specialized knowledge.” Karl B. Tegland, 5B Washington Practice: Evidence Law and Practice, § 702.1 at 30 (4th ed. 1999). ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Expert testimony is admissible if (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the testimony will assist the trier of fact. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003); State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). An expert witness is permitted to express an opinion as to the ultimate issue to be decided by the jury. ER 704; State v. Kirkman, 159 Wn.2d 918, 929, 155 P.3d 125 (2007).

As a qualified expert, Dr. Leo’s proposed testimony was based upon explanatory theory generally accepted in the social science community. “It is beyond dispute that some people falsely confess to committing a crime that was never committed or was committed by someone else.” Mauchley, 67 P.3d at 483, citing Richard A. Leo & Richard J. Ofshe, “Criminal Law: The

Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation,” 88 J. Crim. 42, 432-33 & n.10 (1998) and Richard J. Ofshe & Richard A. Leo, “The Decision to Confess Falsely: Rational Choice and Irrational Action,” 74 Den. U. L. Rev. 979, 983 (1997).

Although there are divergent opinions in the social science community as to the rate of false confession and whether it is possible to estimate their frequency, false confessions clearly occur and social scientists can offer valuable insight into false confessions, police interrogation, and personal and situational risk factors. Kassin & Gudjonsson, 5 Psychological Science in the Public Interest at 34, 59. “In this new era of DNA exonerations . . . such testimony is amply supported not only by anecdotes and case studies of wrongful convictions, but also by a long history of basic psychology and an extensive forensic science literature, as summarized not only in this monograph but also in several recently published books.” *Id.* at 59, citing as examples Gisli H. Gudjonsson, The Psychology of Interrogations and Confessions: A Handbook (Chinchester, England 2003); G.D. Lassiter, Interrogations, Confessions, and Entrapment (New York 2004); A.

Memon, A. Vrij & R. Bull, Psychology and the Law: Truthfulness, Accuracy and Credibility (London 2003).

Dr. Leo was an associate professor of Criminology, Law and Society, and Psychology and Social Behavior at the University of California at the time of Sebastian's trial. He had performed research in the area of police interview and interrogation methods and practices, the social psychology of interrogation, coercion and confession, and the causes, indicia, and consequences of police-induced false confessions. 15CP 2937, 16CP 3135-37. He had also published in this area and testified in courts in several states.⁴⁵ Thus Dr. Leo was an expert in the field and his proposed testimony was based upon theories generally accepted in the relevant scientific community.

⁴⁵ See Richard A. Leo, "Inside the Interrogation Room," 86 J. Crim. L. & Criminology 266 (1996); Richard J. Ofshe & Richard A. Leo, "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions," 16 Stud. In L., Pol., & Soc'y 189 (1997); Richard A. Leo, "False Confessions: Causes, Consequences and Solutions," in Wrongly Convicted: Perspectives on Failed Justice, (Saundra D. Westervelt & John A. Humphrey, eds., Rutgers University Press 2001).

Leo is currently a professor at the University of San Francisco School of Law. www.usfca.edu/law/faculty/frames/Fulltime.html. (last viewed June 15, 2007). His current resume and a more complete list of his publications are available on the school's website. His new book, "Police Interrogation and American Justice" is scheduled for publication in 2008.

ii. The trial court abused its discretion by concluding Leo's testimony would not have assisted the jury because everyone knows people lie. Leo's testimony would have assisted the jury, which lacked insight into the psychological reasons a person would confess when subjected to manipulative police interrogation. Judge Mertel determined Leo's expert testimony would not assist the jury because it is common knowledge that people lie. 11/19/03RP 65. The court's ruling, however, misses the point of the proffered testimony. Leo was prepared to testify not that people are capable of lying, but that even people of normal intelligence sometimes falsely confess to crimes. Leo would also explain the interrogation techniques and other factors that may lead to false confessions. 16CP 3135-37; 11/18/04RP 45-47, 56-59.

The idea that a person would falsely confess to a serious offense is counterintuitive. Juries therefore give great weight to confessions, even in the absence of corroborating evidence. McMurtrie, 42 Am. Crim. L. Rev. at 1280; Steven A. Drizin & Richard A. Leo, "The Problem of False Confessions in the Post-DNA World," 82 N.C. L. Rev. 891, 960 (2004); Kassin & Gudjonsson, 5 Psychological Science in the Public Interest at 56-57. The possibility of a false confession being "accepted

uncritically by the jury” is, for example, a basis for the corpus delicti rule which prohibits the introduction of a confession to a crime absent independent evidence the crime actually occurred. State v. Aten, 130 Wn.2d 640, 656-57, 927 P.2d 210 (1996). Similarly, hearsay statements against penal interest are admissible even when the declarant is not available; their reliability is premised on the assumption a reasonable person would only make a statement against penal interest if it were true. ER 804(b)(3); State v. Parris, 98 Wn.2d 140, 151-52, 654 P.2d 77 (1982); FRE Advisory Committee’s Note to FRE 804.03(b)(3) .

As mentioned above, a defendant’s confession is probably the most probative and damaging testimony that can be admitted in a criminal case.⁴⁶ Fulminate, 499 U.S. at 26; Mauchley, 67 P.3d at 489. In the notorious Central Park jogger case, for example, five teenage boys “confessed” to a brutal beating and gang rape; the confessions, but not the earlier interrogation, were tape-recorded and the court found no evidence of undue police coercion. These

⁴⁶ The Innocence Project, a national organization working to exonerate wrongfully convicted individuals through DNA testing, reports over 25 percent of the project’s 200 exonerations utilizing DNA have involved some incriminating statements. www.Innocenceproject.org (last viewed June 15, 2007). See also Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, “Exonerations in the United States 1989 Through 2003,” 95 J. Crim. L. & Criminology 523 (2005).

confessions, although inconsistent, overshadowed the serious weaknesses in the prosecution's case and lack of physical evidence connecting the boys to the crime. It was not until 13 years later that another person confessed to the crime. DNA tests corroborated this confession and showed physical evidence of the crime was not connected to the five boys.⁴⁷ Sharon L. Davies, "The Reality of False Confessions – Lessons of the Central Park Jogger Case," 30 N.Y.U. Rev. L. & Soc. Change 209, 216-20 (2006); Kassin & Gudjonsson, 5 Psychological Science in the Public Interest at 34. "[O]nce a jury is exposed to a confession of guilt it is difficult for jurors to put it aside, even when it is uncorroborated or flatly contradicted by other evidence." Davies, 30 N.Y.U. Rev. L. & Soc. Change at 253.

Washington courts have long permitted expert testimony to explain psychological or social science concepts. State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993) (battered child's syndrome); State v. Ciskie, 110 Wn.2d 263, 271-72, 751 P.2d 1165 (1980) (battered women's syndrome); State v. Petrich, 101 Wn.2d 566,

⁴⁷ Even after the district attorney joined in the motion to vacate the convictions, former prosecutors and police involved in the case sharply criticized the district attorney's decision, and a police department investigation sought to show the boys committed the offense with the guilty person. Keith A. Findley & Michael S. Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases," 2006 Wis. L. Rev. 291, 308.

575-76, 683 P.2d 173 (1983) (delayed reporting); State v. Stevens, 58 Wn.App. 478, 496-98, 794 P.2d 38 (behavioral symptoms exhibited by sexually abused children), rev. denied, 115 Wn.2d1025 (1990); State v. Madison, 53 Wn.App. 754, 770 P.2d 662 (1989) (recantation phenomenon), rev. denied, 13 Wn.2d 1002 (1980). The expert testimony proposed by Sebastian would have assisted the jury in evaluating his statements to the undercover police interrogators.

Expert psychological testimony is admissible to assist jurors in understanding concepts not within the competence of an ordinary lay person. Cheatam, 150 Wn.2d at 646. An expert's opinion is particularly helpful to the jury "when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond their knowledge." United States v. Finley, 301 F.3d 1000, 1013 (9th Cir. 2002) (psychologist to corroborate mental defense); United States v. Smithers, 212 F.3d 306, 315-16 (6th Cir. 2000) (district court was "simply wrong" for assuming jurors would be skeptical of eyewitness testimony when many factors affecting memory are counter-intuitive, complex and not fully known by jurors). To explain this principle, the Washington Supreme Court gave the example that a reasonable juror would know that wet

pavement is more slippery than dry pavement, but the jury would still benefit from expert testimony concerning stopping distances under specific friction coefficients created when specific driving surfaces are wet. State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2002).

While it is well within the understanding of jurors that a person might lie and some jurors had heard of false confessions, the jurors were not familiar with the scientific research concerning the voluntariness of confessions or the tendency of certain techniques to contribute to a false confession. Nor would jurors be familiar with the elaborate techniques used by the RCMP, as these techniques are not utilized in the State of Washington and have only recently been publicized in Canada.⁴⁸ Dr. Leo's testimony would have explained circumstances that might lead someone in Sebastian's position to make a false confession. The exclusion of this evidence was in error.

⁴⁸ Press bans are common in Canadian criminal cases, and the names of the undercover operatives and their techniques are often the subject of a press ban. 6/10/03RP 104. See Regina v. Mentuck, 3 S.C.R. 442, 2001 SCC 76 (Can. 2001) (Supreme Court of Canada reverses press ban on undercover police practices, upholds one-year ban on undercover officers' identities). There was also a ban on the publication of likenesses or first names of the Canadian undercover officers in this case. 5/35/04RP 15-20.

Directly on point is United States v. Hall, where the defendant claimed his confession to kidnapping was false and the result of his desire to please the interrogating police officers. 93 F.3d 1337 (7th Cir. 1996). The trial court did not permit the defendant to call social psychologist Richard Ofshe to testify that people can be coerced into false confessions and what factors experts in the field rely on to distinguish between reliable and unreliable confessions. Id. at 1341. The court also excluded portions of a psychiatrist's testimony regarding the defendant's personality disorder, attention-seeking behavior, and suggestibility. Id. The appellate court reversed, finding Dr. Ofshe's testimony was admissible because it would have assisted the jury in deciding the case and that it went to the heart of the defense. Id. at 1344-45. Accord, Boyer v. State, 825 So.2d 418 (Fla.App. 2002) (adopting reasoning of Hall to reverse murder conviction where defendant not permitted to call expert regarding false confessions).

Similarly, the Illinois Supreme Court reversed a murder conviction because a mentally retarded defendant was precluded from calling Dr. Ofshe. Miller v. State, 770 N.E.2d 763, 770-74 (Ind. 2002). Dr. Ofshe was prepared to testify about police interrogation techniques, such as (1) the use of evidence ploys,

sometimes false evidence, to connect the suspect to the crime, (2) the use of motivational tactics to suggest the crime is less morally reprehensible as it might appear, (3) attempting to develop rapport with the suspect, and (4) attacking the suspect's confidence to a point where he believes conviction is virtually certain. Id. at 771-72. The court found the psychology of police interrogation and the interrogation of developmentally disabled people were outside the jurors' common knowledge and experience and the exclusion of the testimony deprived the defendant of his right to present his defense. Id. at 773-74. Accord United States v. Vallejo, 237 F.3d 1008, 1019-20 (9th Cir. 2001) (conviction reversed where school psychologist not permitted to testify special education students whose first language is not English have difficulty communicating in English in high pressure situations); United States v. Shay, 57 F.3d 126, 133 (1st Cir. 1995) (expert testimony concerning defendant's mental disorder necessary to show why he would make false statement inconsistent with his apparent self interest); Hannon v. State, 84 P.3d 320 (Wyo. 2004) (psychologist regarding defendant's low IQ to challenge credibility of his statements).

The trial court's determination that the jury would not benefit from Leo's testimony was largely based upon the judge's memory

of jury voir dire. 11/19/03RP 65. Because of the high level of publicity surrounding this case, potential jurors were questioned individually about their knowledge of the facts. 10/17/03RP 123-26. Many of the potential jurors had learned the defendants had “confessed” to the crimes, and some knew the “confessions” were the subject of a pretrial hearing. Of those jurors, however, most found it difficult if not impossible to believe the defendants would have confessed if they had not committed the offenses. 10/22/03RP 38-40, 43; 10/23/03RP 136-40, 164-65, 172-73; 10/27/03RP 90, 99-102; 10/28/03(AM)RP 90, 103; 10/30/03RP 177-79; 10/31/03RP 11-14; 11/3/03RP 156-57, 264, 269; 11/4/03RP 221-22; 11/5/03RP 220; 11/10/03RP 110-11, 129; 11/13/04RP 6-8. One potential juror’s comment was typical: “I certainly wouldn’t admit to any guilt if I was not guilty.” 10/23/03RP 136.

Contrary to the judge’s memory, only a few jurors were questioned about false confessions. 10/21/03RP 150-53; 10/28/03(AM)RP 101; 10/31/03RP 22-23; 11/3/03RP 158-60, 162; 11/4/03RP 61-62; 11/10/03RP 118, 138-39; 11/12/03RP 83-87. Some of these potential jurors admitted a false confession was

possible, but most felt it was extremely unusual. Id. A potential juror stated:

I don't understand why someone would confess if they didn't do something. If in your heart and your mind you didn't do it, you are talking about serious consequences, I don't understand why you wouldn't just stick to your guns and just hold true to it.

11/12/03RP 86-87. Without Dr. Leo's testimony, Sebastian could not show the jurors how such a false confession could occur.

iii. The trial court abused its discretion by excluding Dr. Leo's testimony on the ground it would invade the province of the jury. In addition to finding Leo's testimony would not be helpful because the jurors know that people lie, the trial court also excluded Leo's testimony because the court believed Leo would testify Sebastian's confession was "a coerced, compliant, false confession," which was an issue for the jury. 11/19/03RP 65. Once the court found the statements legally admissible, the jury still has the responsibility of determining if the statement was the result of coercion or undue pressure. Crane, 476 U.S. at 687-88. To the extent the court's ruling was based upon an understanding Dr. Leo would testify that the confessions were coerced, the decision was illogical.

Moreover, Dr. Leo declared he would not testify as to the ultimate issue for the jury: "I will not offer an opinion as to the truth or falsity of the confession obtained in this case." 16CP 3136. No evidence showed Leo planned to give his opinion that the confession was false and counsel did not argue he would. 11/18/03(PM)RP 45, 47. If the court nonetheless did not believe Dr. Leo's assertion, the court could have fashioned a ruling to insure that Dr. Leo was not permitted to testify in a manner that expressed an opinion about the confessions at issue.⁴⁹

d. Dr. Leo's testimony was crucial to Sebastian's defense.

Dr. Leo would testify about risk factors that contribute to false confessions. Many of those risk factors were used by the RCMP in this case, and Sebastian needed Dr. Leo to explain them to the jury.

Perhaps the most influential manual for police interrogation is Criminal Interrogation and Confessions, where the famous "Reid Technique" is found. Kassin & Gudjonsson, 5 Psychol. Science in the Pub. Interest at 42., referring to F.E. Inbau, J.E. Reid, J.P.

⁴⁹ Even if Dr. Leo did propose such testimony, the court's decision was legally incorrect. An expert witness is permitted to testify about the ultimate issues in the litigation. ER 704; Kirkman, 159 Wn.2d at 929; Hall, 93 F.3d at 1345-46.

Buckley & B.C. Jayne, Criminal Interrogation and Confessions (4th ed. 2001). The manual advises the interrogator to first separate the suspect from familiar people and surroundings. Kassin & Gudjonsson, 5 *Psycho. Science in Pub. Interest* at 42. It then suggests a nine-step process to extract a confession in which the interrogator:

- confronts suspect with unwavering assumption of suspect's guilt
- develops themes that psychologically justify or excuse the crime
- interrupts all efforts by the suspect to deny or defend himself
- overcome the suspect's factual, moral and emotional objections
- ensures that a passive suspect does not withdraw
- shows sympathy and understanding and urges suspect to cooperate
- offers a face-saving alternative construal of the act under investigation
- gets the suspect to recount details of crime
- converts oral statement into writing

Id. at 42-43. The Reid technique is designed to obtain confessions from suspects "by increasing the anxiety associated with denial, plunging them into a state of despair, and minimizing the perceived consequences of confession." Id. at 43. The police thus psychologically manipulate the suspects through techniques such as confrontation, refusal to accept denials, and presentation of moral justifications for the crime. Id. at 45-46.

Haslett was trained in the Reid technique, and some of its suggestions can be seen at work in the RCMP manipulation of Sebastian. 7/23/03RP 163. The operation painted Haslett as a commanding figure in a successful organization with international ties that would use violence if necessary. 3/22/04 RP 28-29; 3/3/104RP 23; 5/4/04RP 41-43. Haslett told Sebastian he had researched the case and he was only associating with Sebastian because Sebastian was a murderer. Ex. 546 at 73, 96. Haslett confronted Sebastian with unwavering belief that he committed the murders in Bellevue, and he quickly cut off Sebastian's denials and dismissed his alibi and explanations of the physical evidence. Ex. 541 at 80-151; Ex. 542; Ex. 546 at 94, 10-03, 134-35, 140-43; 4/12/04RP 112.

Haslett and Shinkaruk also used minimization by pretending murder was an acceptable part of doing business. Shinkaruk quickly told Sebastian he was a murderer and Haslett had "taken care of" the witnesses. Shinkaruk sympathized with Sebastian's situation and urged him to cooperate with Haslett. Ex. 546 at 27-28; 4/8/04RP 72-73, 111-15; 4/9/04RP 78-79.

The undercover operatives also offered Sebastian irresistible inducements to say he committed the offenses, certainly more than

any legitimate law enforcement officer could provide. On one hand, the criminal organization offered the hope of financial reward for continued association with the Haslett and Shinkaruk. 3/25/04RP 74-75, 81; 4/12/04RP 64. More powerfully, however, on the other hand the RCMP operatives implied that Sebastian and/or his friends and family would be harmed if Sebastian hurt them in any way. They explained that if Sebastian were arrested for the murders, he would be able to seek leniency by giving information about Haslett and Shinkaruk to the police. Thus, Sebastian would automatically be a threat to the organization if he did not follow their advice and was arrested for the murders. 7/28/03RP 66-67; 5/4/04RP 42-45.

The RCMP operatives also provided Burns with a false police department memorandum that included "evidence" that did not exist to convince Sebastian he no choice but to put himself in Haslett's hands. Ex. 502; 3/25/04RP 116-17; 4/5/04RP 18-19. When interrogators lie about the evidence tying a suspect to a crime, it increases the chance of a false confession. Kassin & Gudjonsson, 5 Psych. Science in the Pub. Interest at 54.

While American courts have generally permitted the police to lie to suspects, courts have been less enamored with false

evidence, like the memorandum in this case, especially if the false evidence is admitted in court.⁵⁰ Frazier v. Cupp, 394 U.S. 731, 737-39, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (officer providing false information to suspect part of totality of circumstances used in determining voluntariness of confession); State v. Patton, 362 N.J.Super. 16, 826 A.2d 783, 804 (2003) (per se violation of due process when police use fabricated evidence to induce confession and State introduces the fabricated evidence at trial to support voluntariness of confession).

The technique was especially potent here because Sebastian suspected that the Bellevue Police Department might misinterpret the physical evidence or even manufacture evidence in order to convict him of these murders. 5/11/04RP 160-63; 5/13/04RP 204-05; 5/14/04RP 78-79. Sebastian's fear of fabricated evidence was a genuine one, and the RCMP's reckless use of false evidence in this case was a risk factor Leo could have addressed.

⁵⁰ The police memorandum created by the RCMP was not admitted as evidence, but it was read to the jury and discussed in the "scenarios" played to the jury. Some of the false information was even included in an overhead presentation that was part of the prosecutor's closing argument. 5/19/04RP 56-57 (Sebastian's attorney objects because overhead mentions Sebastian's hair is mixed with the victims' blood in contrast with the scientific evidence).

On the witness stand, the RCMP witnesses offered their opinion that Sebastian's fear of fabricated evidence was not genuine. 3/31/04RP 95-96; 4/1/04RP 17-18; 4/27/04RP 16-17, 76. The possibility of fabricated or misrepresented evidence, however, is a real one. Haslett himself mentioned the Guy Paul Morin case while talking to Sebastian during one of the "scenarios." Ex. 541 at 83. Morin's acquittal after his second murder trial in a highly publicized case was affirmed by the Ontario, Canadian appellate court only a few months earlier. Among other problems, Morin's first conviction had been obtained by the misuse of hair analysis, the use of fiber evidence that had been contaminated at the crime lab, the withholding of exculpatory forensic evidence, and the introduction of irrelevant presumptive blood testing. The Commission on Proceedings Involving Guy Paul Morin, Executive Summary at 1-8 (1998).⁵¹ Police misconduct and the misuse of forensic evidence also contributed to notorious miscarriages of justice in Great Britain, of which a Canadian citizen would be aware. See, Gisli Gudjonsson, "Disputed Confessions and Miscarriage of Justice in Britain: Expert Psychological and

⁵¹ The Commission Report is available at www.attorneygeneral.jus.gov.on.ca/english/about/pub/morin. (last viewed July 4, 2007).

Psychiatric Evidence in the Court of Appeal,” 31 Manitoba L. J. 481, 499 (2006) (discussing 30 cases of miscarriage of justice in England, Wales and Northern Ireland, many high-profile and finding 33% involved police impropriety, including fabricated evidence and suppression of exculpatory evidence). Fabricated and misrepresented physical evidence has also contributed to unjust convictions in the United States. See State v. Lee, 778 So.2d 656 (La.App. 2001) (affirming granting of mistrial where prosecutor planted evidence in defendant’s clothing); Chamberlain v. Mantello, 954 F.Supp. 499, 512 (N.D.N.Y 1997) (granting habeas petition where supervising officer committed perjury and planted evidence, resulting in incorrect expert testimony); State v. Munson, 886 P.2d 999 (Okla.App. 1994) (prosecutor suppressed exculpatory evidence; opinion notes medical examiner later prosecuted for misconduct); Peek v. State, 488 So.2d 52, 53 (Fla. 1986) (expert testimony concerning hair comparison proved false); McMurtree, 42 Am. Crim. L. Rev. at 1271-73 (later DNA evidence exonerated individuals convicted on basis of bitemarks, hair, voiceprints, earprints and fingerprints).

Additionally, youth is a substantial risk factor for false confession, especially when interrogated by authority figures.

Kassin & Gudjonsson, 5 Psych. Science in Pub. Interest at 52-53. Teenagers, for example, are often more concerned about immediate consequences, like getting out of custody, than conviction and other long-term consequences of falsely confessing. Id. Here, Sebastian was legally an adult. He viewed Haslett, however, as deadly authority figure, and the high-school-educated 19-year-old was clearly no match for Haslett.

While the social science research discussed above has focused largely on in-custody interrogation, undercover police operations like “Project Estate” have not been overlooked. Well-known social psychologist Gudjonsson addressed a Canadian undercover police operation much like Project Estate in his text on the psychology of interrogation. Gudjonsson, The Psychology of Interrogations and Confessions, supra, at 573 (chapter entitled “Canadian and Israeli Cases”).⁵² Gudjonsson was asked to offer expert testimony in a case where the defendant was facing a third trial for two murders. A widow from California surfaced after the first two trials and was prepared to testify her husband told her he committed the crimes. The Canadian police therefore turned to

⁵² This chapter is attached as an appendix to Atif’s Brief of Appellant.

their undercover unit, including Al Haslett, to obtain a confession.

Id. at 574-75.

Using tactics remarkably similar to Sebastian's case, an undercover operative befriended the defendant over several months, pretended he was part of an organized crime family, claimed he had committed a murder but his powerful boss "Al" had taken care of it, involved the defendant in the purported criminal organization, and led the defendant to believe the organization could help him with his pending murder charge if the target told "Al" the details of the murder. Id. at 577. The undercover officers also told the suspect that Canadian authorities were interfering with the California witness who could clear him. Id. at 581.

Although the target of the investigation was of above average intelligence, Gudjonsson opined his psychological profile made him highly compliant. Id. at 576-77. Gudjonsson stated in his text that the high-pressure undercover tactics resulted in a confession of dubious reliability and also raised significant ethical issues. Id. at 581. Gudjonsson noted the chance of a false confession in such an undercover setting may be greater than during custodial interrogation because the target does not appreciate the adverse consequences of confessing to the

undercover officers. Id. at 581-82. Similarly, Dr. Leo's expertise in false confessions and interrogation techniques would also translate to the undercover setting.

Like modern American police interrogation, Project Estate was a "guilt-presumptive process, a theory-driven social interaction led by an authority figure who holds a strong a priori belief about the target and who measure success by the ability to extract a confession from that target." Kassin & Gudjonsson, 5 Psychol. Science in the Pub. Interest at 41. When interrogators in studies assume guilt, they ask more guilt-presumptive questions, exert more pressure to confess, view innocent suspects as anxious and defensive, and redouble efforts to obtain confessions in the face of plausible denials by innocent people. Id. at 42. Dr. Leo would have assisted the jury by explaining the phenomenon of false confessions and the interrogation techniques that are risk factors for false confessions.

e. Dr. Leo's testimony was necessary to rebut the RCMP officers' testimony that Sebastian's confession was truthful. In a criminal case, witnesses are generally not permitted to testify about the veracity of the defendant. Kirkman, 159 Wn.2d at 927. Here the RCMP officers testified as experts on their undercover

operations and confessions, thus bolstering the apparent veracity of the statements they obtained.

Shinkaruk, for example, was asked on cross-examination if he or Haslett ever told Sebastian it would be “okay” to just tell them he had not committed the crimes. 4/12/04RP 111-12. Shinkaruk admitted he did not say that, but added his “underlying theme” was “about truth and honesty, and we were setting a context for the target to be truthful.” 4/12/04RP 113. Haslett also asserted the purpose of the undercover operation was to seek the truth, not to obtain a confession. 4/26/04RP 41-56. The “cover person” for Project Estate, Henderson testified it would be highly unlikely for one of their targets to confess falsely because the RCMP officers were professionals and could determine if a confession was false: “[A false confession] would be possible, I mean, but highly unlikely because of the fact, you know, that’s our business to try and assess the conversations, whether we believe something or not.” 4/5/04 RP 41.

The undercover officers also testified they believed Sebastian was guilty. Haslett was confident Sebastian committed the crimes and that Sebastian’s confession was true. 5/4/04RP 36-37. Haslett opined, “At the end of the meeting July 19, taking the

whole operation into effect [sic], I am confident he was telling me the truth about what is involvement was.” Id. at 37. Shinkaruk said he felt Sebastian was guilty but Sebastian was cunning and did not want to admit his guilt. 4/12/04RP 105, 111. Henderson also testified he had the feeling Sebastian was guilty. 4/1/04RP 18. The officers were not experts in truth-telling, and none had even undergone training in false confessions.⁵³ Their opinions, however, were especially damaging because juries often give additional credence to the testimony of public servants like police officers. Kirkman, 159 Wn.2d at 928-29; State v. Demery, 144 Wn.2d 753, 762-63, 765, 30 P.3d 1278 (2001).

Dr. Leo would have been able to counter this testimony referring the jury to social science research concerning the ability of laypersons and law enforcement officers to detect false confessions. Research has shown that people are not very good at detecting false confessions; most people perform at no better than chance level at judging truth or deception. Kassin & Gudjonsson, 5 Psychological Science in the Public Interest at 37-38, 57. Police investigators and others with relevant job experience perform only

⁵³ In pretrial hearings, Henderson, Haslett and Shinkaruk all revealed they had no training in false confessions. 6/10/03RP 97; 7/7/03RP 65-66; 7/23/03RP 162.

slightly better than other people at detecting truth and deception, but are much more confident of their conclusions. Id. at 37-39. Additionally, experienced police officers are much more likely to disbelieve what other people have to say. Id. at 38-39. Dr. Leo's testimony would thus have provided Sebastian a needed tool in countering the police witnesses' opinions that Sebastian's "confessions" were true.

f. Dr. Leo's testimony would have assisted the jury in evaluating Miyoshi's testimony. Leo's testimony would not only have assisted the jury in its evaluation of Sebastian's and Atif's statements to the RCMP undercover officers, the information would also have helped the jury evaluate Jimmy Miyoshi's testimony. Miyoshi was also a target of the RCMP's undercover operation; he participated in faux money laundering for the imaginary criminal organization and eventually succumbed to pressure from Haslett and Sebastian to say he knew about the Rafay family murders before they occurred.

Miyoshi was the subject of an intense custodial interrogation by RCMP and Bellevue officers after his arrest. The interrogating officers used these questionable interrogation tactics to persuade Miyoshi to confess and incriminate Sebastian and Atif, assuring him

he was in serious peril and his only salvation was in helping the police. The officers painted horrible pictures of the crimes and suggested the defendants would kill Miyoshi or his loved ones to protect themselves. 3/4/04RP 81-82, 130-32, 136-37, 156-58; 5/4/04RP 152-54, 165-75, 180-85. Miyoshi understood he would go to jail if he did not tell the officers that Sebastian and Atif told him about the murders. 3/4/04RP 81-82. Eventually Miyoshi decided to cooperate, entered an immunity agreement, and testified to protect himself from prosecution in Canada. 3/3/04RP 238-40; 3/4/04RP 32-34, 38-40.

Dr. Leo's expertise includes insight into those police interrogation techniques, and he could have educated the jury concerning those techniques, how they are designed to overcome resistance and may lead to false confessions. 16CP 3135-36. In Miyoshi's case, these interrogation techniques were used not only by the undercover police officers but also after Miyoshi was arrested and knew he was in police custody speaking to officers.

Similar informants motivated by self interest have contributed to the conviction of innocent people. See The Innocence Project, www.innocenceproject.org (last viewed June 15, 2007) (informant testimony contributed to the conviction of more

than 15 per cent of the 200 exonerated through DNA); Northwestern University School of Law Center on Wrongful Convictions, "The Snitch System" (Winter 2004-05) (informant testimony responsible for convictions in over 45 per cent of death row exonerations since the 1970's). Sebastian's attorneys had a difficult time cross-examining Miyoshi to establish the weaknesses of his testimony because, when confronted with prior inconsistent statements, Miyoshi claimed those statements were made when he was trying to "protect" Sebastian and Atif. See 3/4/04RP 91-92, 105, 40-43, 182-82; Ex. 551 at 316. Dr. Leo's testimony would have assisted the jury by providing a much-needed context within which to view Miyoshi's testimony.

g. Leo's testimony was critical to Sebastian's defense, and its exclusion was not harmless beyond a reasonable doubt. The constitutional right to present a defense permits a defendant to introduce competent evidence on the reliability of a confession when it is central to his claim of innocence. Crane, 476 U.S. at 690. When constitutional error is identified on appeal, the conviction must be reversed unless the State can demonstrate beyond a reasonable doubt that the error did not contribute to the

defendant's conviction. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Maupin, 128 Wn.2d at 928-29.

The harmless error test is designed to block the reversal of convictions for small errors or defects that have little likelihood of changing the result of the trial. Chapman, 386 U.S. at 22. An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. Id. at 24.

The State had no physical evidence to connect Sebastian to the three murders beyond that associated with his having stayed in the house, and Sebastian had an alibi for the time period in which the murders occurred. Despite a thorough investigation, the State did not file charges until after Sebastian's "confession" to the undercover police officers. 1CP 1-9. That confession was obtained by an elaborate undercover operation that manipulated and frightened Sebastian until he told the gangsters he committed the murders, and it became the centerpiece of the prosecution's case.

Without Dr. Leo's testimony, the difficult task of persuading the jury that his confession was false fell to Sebastian alone. Sebastian explained his "confessions" to the undercover police officers were a lie he devised because he was afraid he or his

family would be harmed if he did not do and say what the officers wanted. But he was in the Catch-22 of trying to convince the jury he (1) was telling the truth when he spoke to the Bellevue law enforcement officers, (2) lied to the undercover policemen, but (3) was telling the truth on the witness stand. This would naturally lead a juror to question why he should believe Sebastian was not lying at trial when he admitted lying to the undercover officers. See Davies, 30 N.Y.U. Rev. L. & Soc. Change at 220 (explaining dilemma faced by innocent defendants in Central Park jogger case). Yet Sebastian was not permitted to present expert testimony to explain why someone might make a false confession to a police officer.

Expert testimony to explain the social science behind false confessions was a necessary part of Sebastian's defense, and its wrongful exclusion requires a new trial. The Illinois Supreme Court found the exclusion of testimony of a social psychologist concerning police interrogation and false confessions was not harmless even where the defendant's fingerprint was found in what appeared to be blood at the murder scene. Miller, 770 N.E.2d at 774. The Court noted the prosecution relied heavily upon the video taped confession and, as in this case, showed parts of it to the jury

in closing argument.⁵⁴ Id. Therefore, expert testimony was essential to counter and explain the State's evidence.

Similarly, this Court cannot be convinced beyond a reasonable doubt that expert testimony regarding factors that lead to false confessions, a matter outside the jury's common knowledge and experience, would not have lead to a different jury verdict. See Fulminante, 499 U.S. at 297-302 (admission of full, coerced confession was not harmless beyond a reasonable doubt despite admission of second non-coerced confession); Maupin, 128 Wn.2d at 928-30 (excluding defendant's alibi witness not harmless beyond a reasonable doubt); Boyer, 825 So.2d at 420 (proffered testimony on false confessions, police interrogation techniques, and parameters for evaluating confession's veracity went to the heart of the defense and exclusion not harmless beyond a reasonable doubt); People v. Lopez, 946 P.2d 478, 482-83 (Colo.App. 1997) (exclusion of evaluating psychologist's testimony concerning circumstances surrounding confession not harmless beyond a reasonable doubt). The error in excluding Leo's expert testimony went to the heart of Sebastian's defense and was not harmless

⁵⁴ The tape and video recordings of Sebastian confessions were not only the centerpiece of the State's evidence, they were an important part of the closing argument where several portions were played over two days. 5/18/04RP 44-46; 5/19/04RP 45-48, 54, 64-68, 101-07.

beyond a reasonable doubt. This Court must reverse Sebastian's convictions and remand for a new trial.

2. THE TRIAL COURT'S EXCLUSION OF MICHAEL LEVINE, AN EXPERT ON UNDERCOVER POLICE PRACTICES, VIOLATED SEBASTIAN'S CONSTITUTIONAL RIGHT TO PRESENT HIS DEFENSE

Sebastian needed to demonstrate the significant flaws in Project Estate to support his defense that his statements to the undercover officers were false. The RCMP undercover operatives created a make-believe world and worked upon Sebastian's fear and imagination until they found the combination of promises and threats that created "a logical reason to confess." 3/24/04RP 121-22. Sebastian's defense was to show the jury that the undercover operation recklessly created a situation ripe for a false confession. This evidence could not be elicited from the undercover agents through cross-examination because they were convinced of their own professionalism and considered themselves leaders in the field. When the trial court prohibited the defendants from calling Michael Levine, an expert witness who would testify about undercover practices and standards, Sebastian's constitutional right to present his defense was violated.

a. Sebastian and Atif sought to call Michael Levine to address undercover police practices and standards. Michael Levine had a distinguished career with the DEA, with special expertise in undercover operations. While at the DEA, Levine conducted, supervised, evaluated and trained undercover operations and officers, and he continued to instruct law enforcement officers in the United States and Canada after his retirement. Pretrial Ex. 105 at 2-5, 8, 9-10 and Appendix; 3RCP 3808, 3810-24; 4RCP 4054-56, 4058-59. Atif argued Mr. Levine's expertise would assist the jury in determining whether the Canadian undercover police tactics were likely to lead to bragging and unreliable confessions.⁵⁵ The trial court prohibited defense expert Michael Levine from testifying. 11/19/03RP 65-68.

First, Levine would have educated the jury about standards employed by law enforcement agencies in the United States, such as the DEA. 4RCP 4037, 4039. Levine could explain how responsible law enforcement agencies address concerns about entrapment and involuntary confessions in their undercover standards, training and regulatory review. Pretrial Ex. 105 at 5, 6-7; 4RCP 4055, 4057. Levine would have testified the RCMP

⁵⁵ Sebastian joined in Atif's argument. 15CP 2835; 11/18/04(PM)RP 96.

operation in this case significantly differed from prevailing standards. Pretrial Ex. 105 at 10-19. Without this testimony, attempts by the defendants to cross-examine the appropriate RCMP agents about their lack of training or written standards would have been fruitless, as the RCMP officers believed the British Columbia undercover operatives were the leaders in the field. 4RCP 4040-44.

Second, based upon his experience conducting and supervising undercover investigations, Mr. Levine would have testified that when undercover officers pose as members of organized crime, the targets commonly exaggerate or lie about their criminal experience. The target may engage in false bragging in order to impress and be accepted by the men he believes are criminals or to mask the target's fear and discomfort. Pretrial Ex. 105 at 6-7; 4RCP 4056-57, 4060.

Third, Levine proposed to testify about safety considerations that were ignored in planning Project Estate. Pretrial Ex. 105 at 7-8. For example, United States law enforcement agencies do not authorize elaborate undercover reverse sting operations against targets not already involved in the criminal acts being portrayed because of the risk of false confessions. Pretrial Ex. 105 at 7-8;

4RCP 4057-58. An American jury would not be familiar with the Canadian tactics or their dangers. The only path open for Atif and Sebastian to demonstrate the potential dangers of the RCMP's loose undercover methods was to compare Project Estate to the standards developed by responsible law enforcement agencies, as Levine was prepared to do. 4RCP 4040, 4059-65.

b. The trial court's reasons for excluding Levine's expert testimony were incorrect. The trial court found Levine was an expert, but excluded his testimony because the judge believed it would "invade the province of the jury" 11/19/04RP 65-68 The court stated:

I have no doubt that Mr. Levine is a former law enforcement officer in drug enforcement, a current TV and movie consultant and, apparently, someone with some experience as an expert witness in drug enforcement, money laundering and undercover operations, could no doubt entertain and inform this jury, as he's apparently done on Geraldo Rivera and Donahue shows in the past, but in the final analysis, what he does is simply, again, invade the province of the jury to decide whether or not in their common experience and common senses these statements made by these defendants to those undercover police officers are voluntary or involuntary, are accurate or – I think also one of the phrases they use, "or false bragging."

Id. at 66. The court's conclusion that Levine would testify that the confessions were false or coerced, however, is in conflict with the

offer of proof and Levine's assurances he would not testify about the truth of the statements at issue.

Based upon the pre-trial hearing, the trial judge was aware that the RCMP had no standards for their undercover operation in 1995, as the officers testified they were pioneers in their field. 11/19/03RP 67. The judge myopically, however, held that Levine's testimony about United States standards was irrelevant to the Canadians. *Id.* at 66. Finally, the court opined that Levine did not have a complete view of the evidence and Levine's judgment was skewed because he believed the teenage defendants were immature and gullible. *Id.* at 67-68.

The Canadian witnesses testified at length about their structure of the undercover operation and the procedures they employed. When defense counsel attempted to cross-examine the RCMP witnesses about the possibility their tactics could lead to false confessions, the witnesses asserted the operation would not obtain a false confession due to their personal professionalism. In light of this testimony, the court was asked several times to reconsider its ruling excluding Levine, but the motions were denied. 3/24/04RP 178-85, 191; 3/24/04RP 183-88 (motion to prevent undercover agents from testifying as experts to build up undercover

operations or, in the alternative, permit defense experts); 4RCP 4032-4714; 3/25/04RP 3-4, 6-10; 4/6/04RP 29-30 (after Henderson asserted he could tell a false confession); 4/15/04RP 9; 4/20/04RP 58-59. The court's decision excluding Levine's testimony was in error.

c. Levine's testimony was admissible. The trial court excluded Levine's testimony because it would "invade the province of the jury" based upon the mistaken belief Levine would really testify the confessions were false. Because Levine did not intend to testify the confessions at issue here were false, the court's ruling was untenable. Furthermore, expert testimony is admissible even if it addresses an ultimate issue in the litigation. ER 704; Kirkman, 159 Wn.2d at 929.

The trial court also asserted Levine did not have a complete view of the evidence and thought Sebastian and Atif were immature and gullible. In fact, Levine reviewed most if not all of the information about Project Estate available to the defense. 4RCP 4065-72. Levine described the 19-year-old defendants as unsophisticated only with respect to organized crime, not in general. 4RCP 4060-61. If Levine's view of the evidence was

incomplete or incorrect, the State was sure to reveal that in cross-examination; this was not a valid basis to exclude the testimony.

The trial court did not doubt Levine was an expert in the field of undercover police investigation. 11/19/03RP 65-66. Police officers with less experience than Levine have been allowed to testify as experts on criminal activity that the jury might not understand. State v. Zunker, 112 Wn.App. 130, 140-41, 48 P.3d 344 (2002) (methamphetamine labs), rev. denied, 148 Wn.2d 1012 (2003); State v. Campbell, 78 Wn.App. 813, 823, 901 P.2d 1050 (gangs), rev. denied, 128 Wn.2d 1004 (1995); State v. Simon, 64 Wn.App. 948, 963-64, 821 P.2d 1238 (1991) (prostitute/pimp relationship), reversed in part, aff'd in part on other grounds, 120 Wn.2d 196 (1992); United States v. Hankey, 203 F.3d 1160, 1169 (9th Cir.) (gang code of silence), cert. denied, 530 U.S. 1268 (2000). While these cases address criminal behavior and not police practices, the police investigation was at issue here.

Both Bellevue and Canadian police witnesses offered their opinions of common police practices, and the court gave the State great latitude to demonstrate the thoroughness and carefulness of the investigations. Expert testimony about police practices was thus relevant to the jury's evaluation of the facts of the case.

The trial court's conclusion the proffered evidence was irrelevant because it would hold the Canadians to the standards of the DEA was also incorrect. The point of the proposed testimony was to explain standards of practice in this country for legitimate undercover operations and why they are used. This would assist Sebastian and Atif in showing their confessions were unreliable. Levine's testimony about undercover operations and practices employed to avoid false confessions was admissible.

d. Levine's expert testimony was critical to Sebastian's defense. Sebastian sought to show the jury that the undercover operation employed by the RCMP was fraught with problems that could lead to false confession. These problems were either ignored or were not apparent to the RCMP undercover operatives. As the RCMP witnesses explained Project Estate in repetitive detail, they did not admit that fear was part of their psychological arsenal and even said Sebastian was not afraid of them. Without Levine's testimony, Sebastian could not adequately demonstrate the implied danger inherent in the "organized crime" undercover operation that left him no choice but to say he committed the crimes.

As already mentioned, the jury learned about the planning process and reasons behind each of the several undercover

escapades, heard and viewed recordings of six of them, and heard detailed descriptions of each encounter with Sebastian, often from several witnesses. The court admitted much of this testimony, which served to bolster the appearance of professionalism in the undercover operation, on the specious theory it showed the officers' "state of mind." 3/25/04RP 10. A police officer's state of mind, however, is rarely relevant in a criminal case. State v. Johnson, 61 Wn.App. 539, 545, 811 P.2d 687 (1991); State v. Aaron, 57 Wn.App. 277, 280, 787 P.2d 949 (1990). While of only questionable relevance, this testimony served to repeatedly show that the undercover operation as professional.

The jury learned Haslett and Shinkaruk were trained and highly experienced. 3/10/04RP 164-65; 3/22/04RP 76-77; 4/6/04RP 94-95, 99-100; 4/13/04RP 30-34. The undercover witnesses also testified that their operation was consistent with RCMP policy. 4/7/04RP 80. At the time of Project Estate, however, the RCMP had no written standards for undercover operations; instead they relied upon oral "best practices" handed down from officer to officer. In the pre-trial hearings, Henderson explained the British Columbia undercover unit was the only one using this type of operation to obtain confessions in murder cases,

and they were still developing their best practices. 6/10/03RP17, 23-24, 31-32. His three-week training for being a “cover person” focused on drug offenses, not the type of operation utilized here. Id. at 10-13.

Thus, the undercover unit was just developing its own procedures through trial and error. 4RCP 4008-4107. No written regulations governed the operative’s conduct, the inducements offered to targets, or the use of alcohol, and there were no limits as to the age of the targets or their lack of prior involvement in criminal activity. 4RCP 4012-13, 4080-90, 4094-99, 4107-08, 4141-42, 4164-68. In this case, for example, the undercover officers were not fazed by the fact Sebastian was only 19 years old and had no prior criminal record. 6/10/03RP 174-77. The undercover officers were permitted to approach Sebastian even though they knew he was represented by an attorney.⁵⁶ Id. at 178-79. The undercover operatives repeatedly offered Sebastian and his friends alcoholic beverages and laughed if they requested water. Ex. 540(volume 1) at 20-21, 23-31; Ex. 541 at 48-50; Ex. 542 at 2-3, 61-62, 65; Ex. 543 at 2, 31-33,59-61, 67; Ex. 546 at 1. Thus, the defendants

⁵⁶ Henderson testified at the pretrial hearings that he thought it was not normal to try to drive a wedge between a target and his counsel and he felt the practice was inappropriate. 6/10/04RP 178-81

needed Levine to show the jury that the RCMP's operation was not as professional or reliable as the officers asserted.

Levine was also necessary for Sebastian's defense because the RCMP witnesses downplayed their unsavory tactics, most notably the implied threat of violence used to obtain confessions. As part of their ruse, the Canadian undercover agents pretended to be part of a financially successful international crime organization. The officers involved Sebastian in their apparent criminal activities, displaying money, weapons, luxury cars, women, expensive hotel suites, and alcohol, and then paid Sebastian for "work" that involved little time or effort. The undercover officers also made sure Sebastian believed their organization used violence to conduct its business and to protect itself from the authorities. The officers acknowledged their "roles" and "props" were used to establish the "credibility" of their criminal organization, but asserted they were not designed to intimidate Sebastian. In fact, the undercover operation succeeded because Sebastian believed the undercover officers were violent criminals who would harm him and his family if necessary to further their enterprise. 7/28/03RP 66-67; 5/11/04RP 101-03, 143-44, 146-48, 167.

The undercover officers nevertheless staunchly maintained they never threatened Sebastian or his family and friends. 4/22/04RP 27-28, 116, 121. Haslett testified Sebastian was never afraid of him. 4/22/04RP 31; 4/27/04RP 143. The State played a number of intercepted recordings from Sebastian's home, and Haslett was even permitted to testify Sebastian did not sound fearful or intimidated. 4/15/04RP 97-99, 101-02; 4/19/04RP 48. The undercover officers testified the violence they discussed and displayed was necessary to demonstrate their "credibility." They admitted Sebastian could imagine that they would use violence, but refused to acknowledge the potency of the images they intentionally created. 4/27/04RP 141, 143-44, 153-56.

The officers' lack of candor concerning their operation was reflected in testimony concerning the "scenario" at the Four Seasons Hotel. An undercover officer pretended to be a motorcycle gang member, arrived with a large amount of money, displayed two handguns without warning, and implied the guns had been recently used in a crime. This officer testified he was not asked to intimidate Sebastian but was trying to make Sebastian feel welcome. 4/13/04RP 28-29. The RCMP witnesses asserted the

guns were to show a picture of the organization and not to intimidate Sebastian. 4/12/04RP 41.

During the same "scenario," Shinkaruk and Haslett looked at each other for about 30 seconds in ominous silence when Sebastian said he had copied Shinkaruk's license plate number. Shinkaruk, however, said this was not threatening because he immediately lightened the tone so Sebastian would feel welcome. 4/12/04RP 41-46.

Another example of the RCMP witnesses guile in explaining their tactics was their explanation of the "scenario" where they took Sebastian to Whistler, thus separating him from friends, family, transportation and familiar places and making it harder for him to leave or refuse to do what Haslett requested. The RCMP witnesses, however, asserted the long trip was designed for "relationship building." 3/11/04RP 178-79; 3/22/04RP 40-41; 3/23/04RP 144; 3/25/04RP 44; 3/31/04RP 35-36; 4/7/04RP 138-39. They explained they did not tell Sebastian in advance that they wanted him to commit a crime because that was what a real criminal organization would do; only one witness admitted this made it more difficult for Sebastian to back out. 4/7/04RP 141-142; 3/25/04RP 50-51; 3/31/04RP 34, 43. While Shinkaruk admitted the

toys or baby seat the RCMP had placed in the car sent the message that the criminal organization hurt families, others said the toys were to make Sebastian feel the car was safe to drive or so the car would not look like a police car. 3/22/04RP 46-47; 3/25/04RP 52-53; 4/9/04RP 50, 79-81, 89; 4/13/04RP 69. It was thus only through Levine, a former law enforcement officer, the defendants could establish that the undercover methods employed in this case created the possibility of a false confession because they worked on Sebastian's fear of the violent criminal organization.

Levine was prepared to testify specifically about the problem of "false bragging" by the targets of undercover operations. See Nowlin, 8 Can. Crim. L. R. at 385-405 (RCMP undercover investigations "encourage much false bravado about prior criminal acts" along the way to producing unreliable confessions). Levine would explain that targets may invent or exaggerate their prior criminal activities to gain the acceptance of the undercover operators. 4RCP 4056, 4060. The dangers of false bragging were extreme in this case where a 19-year old boy with a high school education is placed in a stressful social environment with older men who appear to be dangerous criminals.

Not only would this testimony place Sebastian's "confession" in perspective, it would also give the jury insight into the "arrogance" demonstrated in the recordings, stressed by the witnesses at trial, and emphasized by the State in closing argument. A review of any one of the undercover operatives encounters with Sebastian show that Shinkaruk and Haslett engaged in tasteless, misogynistic banter, often about sex and alcohol. The 19-year-old had little to offer in the way of locker room humor, but he was able to brag about his intelligence, the intelligence of his friends, and the closeness of their relationships. While the State presented Sebastian's egotism as a major character flaw that proved he committed the murder, Levine's testimony would have placed Sebastian's braggadocio into perspective.

Similarly, Sebastian could do little to counter the great weight of testimony detailing the undercover police methods. Sebastian testified that he told Haslett what he wanted to hear because he had no other options. Sebastian had been led to believe the Bellevue Police Department was misconstruing and/or falsifying forensic evidence and he would soon be arrested. Haslett had consistently told Sebastian he would be a liability to the

Haslett's organization if Sebastian was arrested. Haslett also made it clear his organization was capable of taking care of liabilities through violence. 5/11/04RP 101-03, 160-63, 166-67; 5/13/04RP 203.

Sebastian was in the position of asking the jury to believe him while explaining he lied convincingly to the Canadian undercover operators. Through Levine's testimony, he could show the jury how the undercover operative's methods made him afraid he or his family would be killed if he did not tell Haslett he murdered the Rafay family. The unbiased former law enforcement officer could explain how the undercover operation unreasonably manipulated Sebastian by playing upon his inexperience, lack of money, and ego on one hand and his fear on the other. As a veteran undercover officer, Levine would have testified the use of these extreme tactics on someone not already involved in organized crime sets the stage for bragging and unreliable confessions. The trial court's decision to exclude Levine limited the defendants' ability to tell their story and violated their constitutional right to present a defense.

e. The exclusion of Levine's testimony violated Sebastian's right to present and defense and was not harmless beyond a

reasonable doubt. Levine's proposed testimony was critical to Sebastian's defense and his proof that his statements to the undercover officers were false, and the exclusion of the expert violated Sebastian's constitutional right to present a defense. Crane, 476 U.S. at 690-91. This Court must reverse Sebastian's convictions unless the State can demonstrate beyond a reasonable doubt that the exclusion of Levine's testimony did not affect the jury verdict. Chapman, 386 U.S. at 24.

The RCMP undercover operation and the inculpatory statements it extracted from Sebastian were the State's strongest evidence. Given the absence of physical evidence connecting Sebastian to the crimes and his alibi for the time of the murders, this Court cannot say beyond a reasonable doubt that the jury verdict would have been the same if they had been told the RCMP undercover operation was lacking in the kind of standards routinely employed by other law enforcement agencies to protect against false confessions. Sebastian's convictions must be reversed and the case remanded for a new trial.

3. THE TRIAL COURT VIOLATED SEBASTIAN'S
CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY
EXCLUDING EVIDENCE OF ANOTHER SUSPECT
PROVIDED BY AN FBI INFORMANT AND BY LIMITING
THE EVIDENCE SEBASTIAN WAS ALLOWED TO
PRESENT CONCERNING ANOTHER SUSPECT
PROVIDED BY A RELIABLE CANADIAN INFORMANT

a. The trial court excluded evidence of another suspect with a religious motive to kill the Rafay family. Shortly after the murder of the Rafay family, Douglas Mohammed contacted the Bellevue Police to a report that members of a violent Muslim faction may have been responsible for the murders of the Rafay family. This faction believed those who disagreed with their interpretation of the Koran should be killed, including Dr. Rafay. Mohammed said one member of the group was nervous and asked Mohammed if he had seen the baseball bat he normally kept in his car. At the time of the tip, the police had not yet even determined the murder weapon was a bat. Mohammed had provided reliable information to the FBI in the past. 8/5/03RP 71-74, 150-53; 8/6/03RP 6-9, 13-15; 11/19/04RP 28-30; 12/8/04RP 8.

At the same time, Seattle Police Department officials informed the Bellevue detectives that the murders may have been associated with a radical Islamic group known as al Fuqra, which was known to murder those with whom it had religious differences.

Al Fuqra was suspected in criminal activity throughout the United States, including a triple homicide in Tacoma and bombing in Seattle.⁵⁷ 1CP 109, 117-18, 123-24.

The Rafay family was Muslim, and they had previously lived in Canada and Pakistan. Ex. 78 at 3; 2/23/04RP 16-18, 20-22, 105; 3/11/04RP 60, 65-66, 80. Bellevue police detectives admitted they did not investigate the information provided by Mohammed or follow up to determine if Dr. Rafay was a target of any extremist groups. 8/5/03RP 159-63; 8/6/04RP 10-12, 69, 76-78. Nevertheless, the trial court excluded all of the information provided by Mohammed or the Seattle Police Department tip concerning al Fuqra. 11/19/04RP 61-63; 1/14/04RP 192-96; 5/4/04RP 114-15.

The court eventually permitted Sebastian to question Bellevue Detective Thompson about his investigation of a religious motivation for the killings, but Sebastian was barred from questioning him about Mohammed or al Fuqra. 5/12/04RP 66. Thus, all the jury heard was that Detective Thompson talked to

⁵⁷ An Anti-Defamation League report prepared in 1993 shows what was then known about al Fuqra, a violent, extremist sect headed by a Pakistani but active in Canada and the United States. Anti-Defamation League, "Al-Fuqra Holy Wars of Terror (1993). Al Fuqra members were suspected of and/or connected to violent activity throughout the United States and Canada, including the Pacific Northwest. Moderate Muslims were among the group's targets. *Id.* at 5, 9. Available at www.adl.org/extremism/moa/al-fuqra.pdf.

friends and relatives of the Rafay family who mentioned splits in the Muslim community. 5/12/04RP 72-76.

Dr. Rafay was a prominent member of his community as a co-founder and president of the Pakistan-Canada Friendship Association. 3/11/04RP 92-93. An engineer, Dr. Rafay had participated in the discovery that North American mosques were not correctly facing Mecca. This discovery faced some resistance as it required redirection of mosques and supplicants in this continent. 3/11/04RP 88-91. Thus, the Bellevue Police should not have discounted militants' interest in Dr. Rafay.

b. The trial court also limited Sebastian's ability to present evidence of the Canadian murder contract on the Rafay family.

Patrice Gelinas testified about the confidential source who told him about a contract on the life of a Canadian East Indian family residing in Washington. 5/4/04RP 54-83. Although the court permitted Sebastian to elicit this testimony, it hamstrung the defense by excluding testimony that the source had provided reliable information in the past, including information about two prior homicides. 11/19/04RP 26, 59-61, 96-103; 4/29/04RP 98-99; 5/4/04RP 103. Sebastian was also not allowed to elicit testimony about Brar's criminal record, which included robbery and theft.

4/29/04RP 89-91. The defense was also not permitted to elicit testimony explaining the Dosanjh brothers were active in Vancouver's illegal drug trade at the time, although Detective Thompson was permitted to state his conclusion that they were not involved in this case because the Rafay family was unlikely to be connected to the Dosanjh brothers or Brar. 5/12/04RP 40-48.

c. Sebastian had a constitutional right to present relevant evidence in his defense. The right to present competent, relevant evidence on his own behalf means the accused has the constitutional right to offer probative evidence tending to show that a third person committed the charged crime. Chambers, 410 U.S. at 302. "[F]undamental standards of relevancy . . . require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged. United States v. Crosby, 75 F.3d 1343, 1347 (9th Cir. 1996), quoting United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980). Accord, United States v. Perkins, 937 F.2d 1397, 1400 (9th Cir. 1991); United States v. Brannon, 616 F.2d 413, 418 (9th Cir.), cert. denied, 447 U.S. 908 (1980).

Evidence is relevant if it has "any tendency to make the existence of a 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. (Emphasis added). Even minimally relevant evidence is normally admissible at trial. ER 401, 402; State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Thus, evidence may be admitted even though the proponent cannot demonstrate the evidence was actually involved in the crime. State v. Burkins, 94 Wn.App. 677, 693, 973 P.2d 15 (rope found at crime scene admitted even though not used in crime because it tended to support State’s theory), rev. denied 138 Wn.2d 1014 (1999). The court may exclude relevant evidence, however, if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue delay. ER 403; Holmes, 547 U.S. at 510; State v. Thomas, 150 Wn.2d 821, 858, 83 P.3d 970 (2004).

The admissibility of “other suspect” evidence is governed by these simple principles of relevancy. Thomas, 150 Wn.2d at 857-58; Armstrong, 621 F.2d at 953. Evidence tending to show another person committed the charged offense is admissible if there is evidence tending to connect the suspect to the crime. Thomas, 150 Wn.2d at 857; Maupin, 128 Wn.2d at 927. “[S]uch evidence may be excluded where it does not sufficiently connect the other

person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial" Holmes, 126 S.Ct. at 1733. For example, Washington courts have stated evidence that another person had a motive or opportunity, standing alone, is not enough to permit the introduction of evidence tending to show a another party committed the crime. Thomas 150 Wn.2d at 857; Maupin, 128 Wn.2d at 925.

Here, motive was a major issue at trial, and evidence that a radical Muslim sects had motive and opportunity to kill the Rafay family was relevant. While motive is not an element of aggravated murder, evidence of motive is admissible if it is relevant and necessary to prove an element of the crime, such as premeditation. State v. Powell, 126 Wn.2d 244, 259-60, 893 P.2d 615 (1995); State v. Matthews, 75 Wn.App. 278, 284-85, 877 P.2d 252 (1994), rev. denied, 125 Wn.2d 1022 (1995). Evidence of motive was highly relevant in this case because the State charged the defendants with aggravated murder, requiring proof of premeditation and that the murders were part of an agreement for money or part of a common scheme or plan. 1CP 1-9; RCW 9A.32.030(1)(a); RCW 10.95.020(4), (8).

The State thus tried to establish Sebastian had a financial motive to kill Rafay's family and focused on the costs of the movie the defendants were planning to make even though the plans were made long after the murders. While Sebastian was aware of the Rafay family's estate, the State's proof that he profited from the murders was limited to demonstrating he lived with Atif and was permitted to drive Atif's cars.

There was also circumstantial evidence that the murders may have been part of a burglary. The State was permitted to present testimony that the burglary appeared staged and the police had excluded theft as a motive. Similarly, Sebastian and Atif should have been permitted to explore the motive and opportunity of religious extremists to commit the murders.

The State itself first brought up the subject of a religious motive for the killings when it introduced Atif's statements to Bellevue police detectives. When asked who would want to kill his parents, Atif could not think of anyone, but then remembered his mother had told him about family enemies, including Shiites.⁵⁸ Ex. 72 at 87-88. Before the statement was admitted, Sebastian alerted

⁵⁸ The detectives did not follow up on that statement, choosing instead to question Atif about whether his religious choices hurt his parents and to suggest Sebastian was the murderer. *Id.* at 88-89, 95-96.

the court that its use would open the door to evidence of Mohammed's tip. 12/22/03RP 23-24. He moved the court to reconsider its ruling excluding the Mohammed evidence after Atif's statement was introduced. 1/12/04RP 4-18, 65-66.

While a contemporary American reader of Atif's statement may be familiar with Shiites and their violent relationship with other Muslim groups, the jury was hearing this testimony in 2003 and 2004, only shortly after the United States military invaded and occupied Iraq. The average juror may have heard of al-Qaeda, but might well be ignorant of the term Shiite, the differences between different Muslim groups, and the violence inspired by those differences. The evidence of religious motive posited by Mohammed was thus necessary to place Atif's statement in context. See State v. Warren, 134 Wn.App. 44, 63, 138 P.3d 1081 (2006) (fact admissible if bears on credibility or probative value of other evidence).

The possibility that a radical religious group had a motive to murder the Rafay family was crucial to Sebastian's defense. The murder of the family in their homes was unthinkable, and any juror would certainly ask themselves, "If Sebastian and Atif did not commit the murders, who did?" The information provided by

Mohammed and the Seattle Police Department about Muslim terrorists would have helped answer that question or at least demonstrated the defendants were not the only people with a motive to kill.

The excluded evidence did not add significant new issues to the case, as the issue of motive was before the jury and the court admitted evidence of the possible contract on the Rafay family from a Canadian crime family. Furthermore, the evidence would have assisted the jury in understanding Atif's statement that his mother had mentioned Shiites as possible enemies of his peaceful family. This evidence posed no risk of delay in this lengthy case, as it would have been presented through Bellevue police detectives and probably taken less than an hour.

d. Evidence of other suspects is admissible if it is relevant.

Some Washington cases have stated the relevancy standard for other suspect evidence requires the defendant to first establish "a trail of facts or circumstances that clearly point to someone other than the defendant as the guilty party." State v. Mezquia, 129 Wn.App. 118, 124, 118 P.3d 378 (2005); State v. Howard, 127 Wn.App. 862, 866, 113 P.3d 511 (2005), rev. denied, 156 Wn.2d 1014 (2006), both citing Maupin, 128 Wn.2d at 928. The State

argued below that a special three-part test must be met before the defendant could introduce evidence of other suspects. See 12/11/03RP 68. The connection test, however, is designed to assist the courts in determining if the other suspect evidence is relevant and does not create additional hurdles beyond simple relevance.

Should this Court read the connection test as an evidentiary hurdle in addition to relevance, such a test would violate Sebastian's constitutional right to a jury trial and to present a defense. Holmes, 126 S.Ct. at 1734-35 (unconstitutional to prohibit third party guilt evidence on basis that State's evidence supports guilty verdict; right to present defense cannot be conditioned upon strength of State's case); Chambers, 410 U.S. at 294 ("voucher" rule prohibiting defendant from impeaching own witness unconstitutional because rule denied defendant ability to show witness had made self-incriminating statements); State v. Whitt, 2007 W.Va. LEXIS 14, *38-39 (4/6/07) (West Virginia Supreme Court reversed conviction because defendant's right to present evidence was violated when he was not permitted to call acquitted co-defendant to witness stand even though she intended to exert her Fifth Amendment right not to incriminate herself); Stephen

Michael Everhart, "Putting the Burden of Production on the Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is it Constitutional?," 76 Neb. L. Rev. 272 (1997).

Additionally, the rationale for the "train of facts" requirement is to avoid lengthy trials where the defendant is permitted to show "hundreds of other persons had some motive or animus against a deceased." State v. Mak, 105 Wn.2d 692, 716-17, 718 P.2d 407 (1986), cert. denied, 479 U.S. 995 (1986), quoting People v. Mendez, 193 Cal. 39, 52, 223 Pac. 65 (1924).⁵⁹ This concern for the orderly administration of justice was not warranted in this case, where the evidence of other suspects was miniscule compared to the almost endless evidence introduced to show the thoroughness of the police investigation evidence whether relevant to the jury's determination or not.

e. The third party suspect information was also admissible to impeach the police investigation. Sebastian also sought to cross-examine the Bellevue Police detectives concerning tips the received about terrorists to impeach the thoroughness of their investigation. 12/8/03RP 4-21; 1/12/04RP 28-31, 65-66. Sebastian

⁵⁹ California, however, repudiated this approach in People v. Hall, 41 Cal.3d 826, 718 P.2d 99 (1986).

pointed out the Bellevue Police Department received detailed information from Mohammed on July 18. The detectives later sent the names of the defendants and some of the defendants' friends to the FBI to see if they were connected with hate crimes, but did not send any of the names provided by Mohammed, showing investigatory bias. 12/8/04RP 10-11; 12/11/03RP 55-58, 65-68. The detective did not investigate any of the information provided by the Seattle Police on al Fuqra. 8/5/03RP 152-53; 8/6/03RP 8-9. Sebastian also pointed out that this information was not shared with the RCMP, thus causing the Canadians to begin their undercover operations based upon the false conclusion the case against the defendants was stronger than it actually was. 15CP 2899-2912.

The trial court ruled evidence concerning Mohammed or al Fuqra was not admissible to impeach the Bellevue investigation. 12/8/04RP 45-47. The court noted that "the impeachment analysis is simply without boundaries" and a back-door way to admit evidence of other suspects. 12/8/04RP 45. The court, however, had given the State the boundary-less opportunity to introduce evidence, including police contacts with others, to show the thoroughness of their investigation. 11/18/03RP(AM) 16-19. As a result, the jury sat through months of testimony describing the

police investigation even though little of the evidence even tended to prove the defendants' culpability.

Sebastian should have been permitted to cross-examine the police detectives about their failure to investigate the information provided by Mohammed, who had provided reliable information to the FBI in the past. Evidence showing the failure of the police to adequately investigate the charged crime has been found to be relevant by the appellate courts. Commonwealth v. Phinney, 446 Mass. 155, 843 N.E.2d 1024, 1033 (Mass. 2006); Commonwealth v. Reynolds, 429 Mass. 388, 708 N.E.2d 658, 662 (1999). See Mendez v. Artuz, 303 F.3d 411 (2nd Cir. 2002) (granting habeas corpus for Brady violation because government did not share information of other suspect's motive which defendant could have used to cross-examine detective and cast reasonable doubt upon his guilt), cert. denied, 537 U.S. 1245 (2003).

Here, the police department's failure to pursue the Mohammed lead was, for example, more relevant than much of the testimony presented by the State. It was more relevant than testimony Sebastian was cut to one of the police officers while waiting outside the Rafay home after calling 911. 12/8/04RP 39-44. It was less misleading than the State's presentation of evidence

there was a small crust of possible blood on Sebastian's shirt. The State asserted the crust of blood was an "educational tool" and the court admitted it to show the police conducted a thorough investigation; in the end a DNA expert said it might have been an insect. 2/2/04RP 5-11, 100-06. Mohammed's tip was also as relevant as the hair comparison evidence which the State presented even though microscopic hair comparison is no longer used for forensic identification and results which appeared to implicate Sebastian were discredited by DNA testing. 2/3/04RP 90-269; 2/4/04RP 4-34, 58-101. The State even presented every fingerprint lifted from the Rafay residence, whether of comparison value or not. In fact, the needless testimony describing every piece of evidence collected or tested was so overpowering that the State's case was almost reminiscent of the "Big Lie" theory of propaganda – if we present enough evidence, the jury will think some of it must link the defendants to the crime.

Despite the tedious evidence admitted to demonstrate the thoroughness of the investigation, the court prohibited Sebastian from showing that Mohammed contacted the Bellevue detectives, posited religious fanatics committed the murders, and provided names, addresses and even a license plate number of members of

a radical religious faction likely responsible. The Seattle Police also suggested the crimes could be connected to the terrorist organization al Fuqra. The failure of the Bellevue police to follow these leads in 1994 effectively prevented the defendants from pursuing them in the following years, and the task became impossible after 9/11/2001. Sebastian should have been permitted to show the jury this hole in the Bellevue investigation, which in turn compromised the later Canadian approach to the case.

f. A new trial is required because the trial court did not permit Sebastian to introduce evidence of religious groups with a motive to kill the Rafay family. Sebastian thus had the right to introduce evidence that the police received a tip from a reliable FBI informant but failed to investigate it. Holmes, 126 S.Ct. at 1734-35. Examination of recent exonerations based upon DNA evidence show they are often the result of “tunnel vision” in the criminal justice system. Keith A. Findley & Michael S. Scott, “The Multiple Dimensions of Tunnel Vision in Criminal Cases,” 2006 Wis. L. Rev. 291, 295 (2006). Tunnel vision often begins at the investigative stage, and Sebastian should have had the opportunity to show that the investigation was flawed by its early focus on him and Atif to the exclusion of other viable suspects.

Here, the State was permitted to waste days of trial to show the Bellevue Police Department thoroughly investigated the murders. The trial court's exclusion of evidence that terrorist religious groups had a motive to kill the Rafay family and a member of one violent sect carried a baseball bat prior to the homicides violated Sebastian's constitutional right to present a defense. This Court should reverse Sebastian's convictions and remand for a new trial.

4. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED SEBASTIAN A FAIR TRIAL

A criminal defendant's right to due process of law protects the right to a fair trial. U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Washington courts have long emphasized the prosecutor's obligation to ensure the defendant receives a fair trial and the resulting need for decorum in closing argument. Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). When a prosecutor

commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may be violated. Charlton, 90 Wn.2d at 664-65.

To determine if a prosecutor's comments or argument constitute misconduct, the reviewing court must decide first if the comments were improper and, if so, whether a "substantial likelihood" exists that the comments affected the jury verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where the defendant does not object to the improper argument, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice would not have been cured with a limiting instruction. Id. If, however, the prosecutor's misconduct implicates the defendant's constitutional rights, the State must demonstrate the error was harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

In Sebastian's trial, the prosecutor's closing argument was improper because he (1) analogized the case to a recent beheading by Islamic militants, (2) made the false argument that the jury had to either believe everything Sebastian said on the witness stand or believe everything the undercover RCMP officers

said, and (3) told the jury his own father had died during the course of the trial, asking the jurors to think about the deaths of their own loved ones. Sebastian also adopts the section of Atif's opening brief addressing this issue, including the prosecutor's argument that a critical defense witness smelled like alcohol even though there was no evidence to support this assertion. Brief of Appellant Rafay at 177-87; RAP 10.1(g)(2). The prosecutor's inflammatory and improper argument requires a new trial.

a. The prosecutor's comparison of the murders in this case to the militants' beheading of an American citizen overseas was misconduct. It is improper for the prosecutor's closing argument to capitalize upon fear or prejudice against any ethnic, racial or religious group. Belgarde, 110 Wn.2d at 508-10; State v. Soto-Rodriguez, 134 Wn.App. 907, 915-16, 143 P.3d 838 (2006). Likewise, courts have condemned appeals to patriotism in closing argument. Viereck v. United States, 318 U.S. 236, 248, 63 S.Ct. 561, 87 L.Ed.2d 734 (1943); Soto-Rodriguez, 134 Wn.App. at 916. Finally, a prosecutor should not seek to draw analogies to infamous criminals. State v. Neidigh, 78 Wn.App. 71, 79, 895 P.2d 423 (1995).

In this case the prosecutor suggested the jury compare the facts of the Rafay family murders with the beheading of a United States citizen in Iraq that had recently been reported extensively in the media. 5/18/04RP 37. The court overruled the defendants' objection to this line of argument, and the prosecutor therefore continued to make the comparison, arguing the murder of the Rafay family was worse than the beheading. *Id.* at 37, 40-43. Sebastian and Atif later moved for a mistrial pointing out the prosecutor's argument was an emotional appeal to nationalism and religious and ethnic prejudice, but the motion was denied.⁶⁰ *Id.* at 124-25. The prosecutor later used words reminiscent of this argument, referring to the murders as "executions" and arguing Basma Rafay was a "captive" because she was unable to call for help due to her disability. 5/18/04RP 91, 123.

The reference to the beheading occurring at the beginning of the prosecutor's closing argument on May 18, 2004. On May 8, Iraqi militants beheaded Nick Berg in front of cameras and posted the beheading on the internet. Berg was an American civilian who was not involved in the military conflict, and the American

⁶⁰ Two days later, the State realized the argument was problematic and suggested a curative instruction, although refusing to acknowledge the argument was improper. 5/20/04RP 3-7.

government announced a search to find the terrorists.⁶¹ The jurors no doubt understood the reference because the incident had recently occurred and had been heavily covered by the news media.

By referring to the well-publicized beheading by Islamic extremists, the prosecutor's argument crossed the line from oratory to an appeal to passion and prejudice. The argument was improper because it (1) appealed to patriotism, (2) appealed to religious or ethnic prejudice, (3) compared the crimes to those of notorious terrorists, and (4) inflamed the passions and prejudice of the jury.

The prosecutor's reference to the beheading was first an appeal to patriotism and national pride. Just as the American

⁶¹ Photographs of Berg kneeling before several militants wearing head scarves and ski masks, one displaying a large knife, were on the cover of most American newspapers. American television did not show the beheading, but showed the video up to the point one of the militants pulled a long knife from his shirt. Those who cared to find the video on the internet, however, could see the militants wrestle Berg to the ground, decapitate him, and hold his head up at arm's length.

The militants claimed they had offered to trade their hostage for the prisoners of Abu Ghraib, an American military prison in Iraq. The militants also referred to the then-president of Pakistan, who had expressed support for the American invasion, as a "traitor agent."

A White House spokesman said the incident showed the true nature of the enemies of democracy, who had no regard for innocent men, women, and children. Not only the beheading, but also the posting of the execution on the internet was the subject of intense media coverage and public discussion. www.cbsnews.com/stories/2004/05/12/iraq/printtab:e616901.shtml; www.usatoday.com/news/world/iraq/2004-05-11-iraq-beheading_x.htm. www.newsdesigner.com/archives/001897.php.

president vowed to find and punish the people responsible, all Americans, whether patriotic or not, were outraged by the incident and revolted by its placement on the internet. The reference was thus the appeal to patriotism forbidden by due process. See Soto-Rodriguez, 134 Wn.App. at 917-18 (encouraging jurors to send a message to defendants that American citizens will not tolerate behavior, quoting from Declaration of Independence); State v. Echevarria, 71 Wn.App. 595, 860 P.2d 420 (1993) (references to war on drugs being fought in schools, lessons learned from Gulf and Vietnam Wars, was appeal to jurors' passion and prejudice and invitation to convict based upon fear of drug dealers rather than the evidence); Viereck, 318 U.S. at 248 (references to war and patriotic duty in prosecution of German national)

Additionally, Atif was from a Pakistani Muslim family, and he was a foreigner. One juror in this case had already been excused for, among other things, saying "that foreign boy" was glaring at him, an obvious reference to Atif. 12/11/03RP 178, 196. By talking about the beheading by a violent Muslim extremist group angry at the United States government and the Pakistani president, the prosecutor made a needless and improper reference to Atif's religion and national origin. See Belgarde, 110 Wn.2d at 506-07

(improper references to defendant's membership in American Indian Movement, which the prosecutor described as "deadly group of madmen"); Soto-Rodriguez, 134 Wn.App. at 918-19 (prosecutor improperly drew attention to ethnicity of Spanish-speaking defendants from Central America); State v. Torres, 16 Wn.App. 254, 257-58, 554 P.2d 1069 (1976) (prosecutor needlessly referred to defendants as Mexican-Americans several times in opening statement); United States v. Cabrera, 222 F.3d 590, 594 (9th Cir. 2000) (government's lead witness referred to defendants' Cuban origin).

Another form of argument that constitutes misconduct is a reference to infamous criminals or public figures in closing argument. Belgarde, 110 Wn.2d at 506-07 (comparing American Indian Movement to Sean Finn, Irish Republic Army, and Kadafi); Neidigh, 78 Wn.App. at 79; People v. Roman, 323 Ill.App.3d 988, 753 N.E.2d 1074, 1083-84 (2001) (comparing defendant to killers at Columbine High School); United States v. Thiel, 619 F.2d 778, 781-82 (8th Cir. 1980) (comparing defense to rationale behind Jonestown mass suicides and Holocaust). Here, the prosecutor's comparison of the murders in this case to the beheading and discussion of the killings as executions were references to

notorious terrorists whose actions were still being publicized and commented on in the media.

The deputy prosecutor's rhetoric combined three forms of misconduct – appeals to patriotism and national pride, references to the same religious and ethnic group as one of the defendants, and a reference to notorious terrorists. A similar closing argument was found to be prejudicial misconduct in Belgarde, supra.

Belgarde was on trial for first degree murder and attempted first degree murder, and he briefly mentioned that he was a member of the American Indian Movement (AIM), which he described as a group organized to protect Indian rights. 110 Wn.2d at 505-06. Two witnesses also said they delayed talking to the police because Belgarde said he would use AIM against them. Id. at 506. In closing argument, the prosecutor described AIM as a terrorist organization that participated in indiscriminate killing. Id. at 506-07.

Despite the lack of an objection by defense counsel, the Washington Supreme Court reversed Belgarde's conviction due to the prosecutor's misconduct. 110 Wn.2d at 510. The Court found the argument was inflammatory and a deliberate appeal to the jury's passion and prejudice. Id. at 507-08.

Here, the defendant posed a timely objection to the prosecutor's argument. 5/18/04RP 37. The objection and a later motion for a mistrial were unfortunately overruled, thus lending credence to the State's inflammatory argument. *Id.* at 37, 124-25. But like Belgarde, the prosecutor's argument was an improper use of nationalism, sensationalism and prejudice to inflame the jury, requiring reversal.

b. The prosecutor committed misconduct by arguing the jury had to believe everything Sebastian said or everything the Canadian undercover officers said. The main issue in this case was whether Sebastian was telling the truth or not when he told the Canadian undercover operatives he murdered the Rafay family. In order to resolve this issue, the jury was required to look at all of the evidence. Sebastian explained he lied to the undercover officers when he took responsibility for the murders, and it was therefore logically possible to believe Sebastian, Haslett and Shinkaruk and still acquit Sebastian. Under these circumstances, the prosecutor committed misconduct by arguing the jury had to believe Sebastian or believe the undercover police officers.

The prosecutor's penultimate remark to the jury was that they could only believe everything Sebastian said or everything the Canadian undercover operatives said. 5/20/04RP 190-91.

What I am suggesting to you is you can't believe for a moment what any of them [defendants] have said. They'd been living a lie for nine years about their involvement in these murders and you all know that's the truth. You must ignore every – when I stood up this morning or this afternoon I told you that we are now polarized.

You must either believe everything Sebastian Burns told you in order for this unbelievable story of his to be true, or it seems to me you have to believe what Gary [Shinkaruk] and Al [Haslett] told you as they documented it though the months that they attempted to let – or they attempted and/or encouraged to have these two killers let their guard down enough to believe they were among their own kind. And only after Sebastian Burns and Atif Rafay believed that they were among their own kind, did they confess to these murders.

Id. (Emphasis added).

The prosecutor's argument is incorrect. The jury was required to look at all the evidence and decide whether the State had proved every element of the crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 21, 22. A conviction cannot stand if the jury is instructed in a manner that relieves the State of this burden of proof. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124

L.Ed.2d 182 (1993); State v. Jackson, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999). Thus, the prosecutor may not argue to the jury in a manner that misstates the burden of proof. See State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984) (misconduct for prosecutor to argue accomplice liability in absence of accomplice liability instructions).

This Court has pointed out the logical fallacy in the prosecutor's argument and held that it is misconduct for the prosecutor to argue the jury must find the State's witnesses are lying or mistaken in order to find the defendant not guilty. State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997) (and cases cited therein). For example, in a prosecution for sale of a small amount of cocaine to an undercover police officer, the prosecutor argued in closing that the defendant essentially called the police officers liars by giving testimony contrary to the officers' testimony. State v. Barrow, 60 Wn.App. 869, 874, 809 P.2d 209, rev. denied, 118 Wn.2d 1007 (1991). As in the present case, the prosecutor later argued:

[I]n order for you to find the defendant not guilty on either of these charges, you have to believe his testimony and you have to completely disbelieve the officers' testimony. You have to believe the officers are lying.

Id. at 874-75. Looking at decisions from throughout the country, this Court concluded the argument was improper because it mischaracterized the evidence and the jury's role. The jurors did not need to "completely disbelieve" the officers' testimony in order to acquit Barrow; all that the needed was to entertain a reasonable doubt that it was Barrow who made the sale to the undercover officer. Id. at 875-76.

Similarly, in Fleming the prosecutor told the jury it could only acquit the defendants in a rape case if the jury found complainant was lying, confused or fantasizing. Fleming, 83 Wn.App. at 213. This Court explained the argument was improper because it misstated the law, the burden of proof, and the jury's function.

The prosecutor's argument misstated the law and misrepresented both the role of the jury and the burden of proof. The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find D.S. was lying or mistaken, in order to acquit.

Id. (Emphasis in original). See State v. Castaneda-Perez, 61 Wn.App. 354, 362-63, 810 P.2d 74, rev. denied, 118 Wn.2d 1007

(1991) (misconduct for prosecutor to cross-examine defendant about whether other witnesses lying, noting testimony of two witnesses may diverge even when both are trying to tell the truth).

In the foregoing cases, the State set up the fallacy that the jury had to believe either an eyewitness to the crime or the defendant. Here the error is even more glaring because the State argued the jury had to believe everything Sebastian said on the witness stand or everything said by the officers who were not witnesses or victims of the crimes. Instead, they created a false world and offered virtually irresistible carrots and sticks to force Sebastian to admit he committed the murders. Whether Sebastian's admissions were true was not even the undercover operatives' concern. In this circumstance, the prosecutor's argument is even more illogical and improper than in Barrow and Fleming.

c. The prosecutor committed misconduct by referring to the death of his father in violation of the trial court's ruling. During the course of this lengthy trial, one of the deputy prosecuting attorney's fathers died, and the prosecutor was absent from the trial for a few days to mourn and attend to family responsibilities. 4/28/04RP 228-30; 4/29/04RP 4; 5/3/04RP 10-12. Because this case involved

the alleged killing of Atif's parents and sister, the trial court did not tell the jury the specific reason for the prosecutor's absence, referring only to a family emergency. 4/28/04RP 228-30; 5/3/04RP 10-12; 5/20/04RP 206-07. The deputy prosecuting attorney nonetheless referred to the recent loss of his father during his closing argument, suggesting the jurors think about how they would feel and behave at the loss of a parent.⁶² This argument held additional emotional weight as one of the jurors was excused from jury service due to the loss of his father, and another excused when his grandson died. 4/26/04RP 19-20; 5/3/04RP 4-5.

Near the end of his rebuttal, the prosecutor criticized the defense lawyers for "telling stories about things that really have nothing to do with this case." 5/20/04RP 181. He immediately followed this criticism with the revelation that his father died during the trial and encouraged the jurors to think about a person would behave upon the death of a parent. Id. at 180-81.

I want to tell you something. I have just one little thing to share with you. I was gone for a couple of days because my father died, and for those of you who haven't lost a parent, I encourage you to go back there and listen to the people who have and listen to the people on this jury who have lost a parent, and then you attempt to make sense of the way that these

⁶² The deputy prosecutor asserted he did not know about the court's ruling, as it occurred during his absence from the trial. 5/20/04RP 206-07.

defendants laughed and giggled and snickered at the notion of their family, that is Atif Rafay's family, being murdered.

I encourage you to consider at the time that you do that the way they laughed about the notion of Bob Thompson being murdered. . . .

Id. The prosecutor continued to encourage the jury to think about the defendants' behavior after the murders and convict them based upon the bad character it demonstrated. Id. at 181-82. Although the defendants did not immediately object, they quickly moved for a mistrial on this basis and the motion was denied. Id. at 204-07.

The attorneys have considerable latitude in closing argument. However, they are expected to follow the rulings of the court. RPC 8.4(j). See Torres, 16 Wn.App. at 262 (misconduct for prosecutor to continue to pursue improper argument after court sustained defendant's constituent objections). While a prosecutor may argue reasonable inferences from the evidence, he may not mislead the jury by misstating the evidence or arguing facts not in the record. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); RPC 3.4(e), (f). When the prosecutor argues facts not in evidence, he becomes an unsworn witness against the defendant. Belgarde, 110 Wn.2d at 507. Thus, the prosecutor's argument in Belgarde describing AIM as a terrorist organization was improper

not only because it was inflammatory, but also because it was based upon facts not before the jury. Belgarde, 110 Wn.2d at 508-09.

Here, the prosecutor injected the death of his own parent and the emotions that evoked into the argument even though the court had ruled the jury was not be informed of the death. The case involved the death of Atif's parents, and the State's presentation of the case and closing argument suggested the jury should convict Sebastian and Atif for their bad character. Somewhat like the prosecutor in Albert Camus' "The Stranger," the prosecutor was asking the jurors to convict Atif and Sebastian because they did not show proper respect for the dead.⁶³

People express grief in different ways, and an American jury may not be in the best position to judge the grief of a Pakistani-Canadian defendant. 2/18/03RP 35-38. Where the defendants are accused of murdering one's family and two jurors were excused due to the loss of close family members during the course of the trial, the prosecutor's reference to his own father's death was especially prejudicial. It was also in violation of a court ruling;

⁶³ In the novel, "The Stranger," the main character is found guilty of his mother's murder and sentenced to death in part because he did not cry at her funeral. See Reed, 102 Wn.2d at 146, n.1.

although the prosecutor said he was not aware of that ruling, his co-counsel was. The misconduct was flagrant and ill-intentioned and requires reversal.

d. The cumulative effect of the misconduct mandates reversal. Sebastian has the burden of showing improper conduct by the prosecutor and prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). On review, the appellate court considered the alleged improper remarks in the context of the total argument, the issues in the case, and evidence addressed, and the instructions given the jury. Id. Given the facts and argument in this case, there was a substantial likelihood the prosecutor's comments affected the verdict and denied Sebastian a fair trial.

The prosecutor's comparison of the tragic murders in this case with the political videotaped beheading of an American citizen by Islamic terrorists in the Middle East was a nationalistic appeal to the jurors' patriotism and prejudice against the defendants based upon ethnic background, religion, and foreign citizenship. When both defendants are not citizens of the United States and one is from a Pakistani Muslim family, the referral to terrorist activities in the Middle East was bound to affect the jury's verdict and the

argument necessitates a new trial. This issue was properly preserved for review by the defense counsel's timely objections and request for a mistrial. Moreover, by overruling Sebastian's objection, the court lent an aura of legitimacy to the prosecutor's improper argument, thus augmenting its prejudicial effect. Davenport, 100 Wn.2d at 764; Soto-Rodriguez, 134 Wn.App. at 920. When the prosecutor urges the jury to convict based upon passion and prejudice, there is a substantial likelihood the remarks affected the verdict and the conviction must be reversed. Soto-Rodriguez, 134 Wn.App. at 920-21.⁶⁴

The cumulative effect of several instances of prosecutorial misconduct may deny the defendant the fair trial guaranteed by the constitution. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); Torres, 16 Wn.App. at 262-64. In addition to the beheading reference, the deputy prosecuting attorney tried to elicit further prejudice against the defendants and sympathy for the crime victims by referring to the death of his own father in violation of a prior court order. And just before he completed his rebuttal argument, the prosecutor misstated the burden of proof by telling

⁶⁴ The power of the prosecutor's closing argument was recently demonstrated when a jury acquitted Soto-Rodriguez of second degree murder at his new trial.

the jury they had to believe everything Sebastian said or everything the undercover officers.⁶⁵

Prosecutorial misconduct throughout closing argument – the last words heard by the jury – violated Sebastian’s constitutional right to a fair trial. Because the misconduct was serious and pervasive, his conviction must be reversed. Belgarde, 110 Wn.2d at 510; Reed, 102 Wn.2d at 146-47.

8. SEBASTIAN'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED WHEN THE STATE'S FAILURE TO PROVIDE ASSURANCES THAT SEBASTIAN WOULD NOT BE PUT TO DEATH IF CONVICTED IN THE UNITED STATES AS MANDATED BY THE CANADA/UNITED STATES EXTRADITION TREATY CAUSED AN UNNECESSARY DELAY IN BRINGING HIM TO TRIAL

a. The King County Prosecutor's Office failed to timely comply with clear treaty provisions regarding extradition between Canada and the United States. On July 31, 1995, the State of Washington charged Sebastian and Atif with three counts of aggravated murder in the first degree. 1CP 1; 3CP 531. The same day they were charged in Canada as “fugitives from the State of

⁶⁵ Sebastian did not object to this line of argument, coming at the end of a lengthy and exhausting trial. In light of the numerous cases from this Court, however, it is clear the argument was improper and the deputy prosecuting attorney was no doubt aware of this. The prosecutor’s incorrect statement that the jury had to believe everything Sebastian said or everything the RCMP undercover officers said was flagrant and ill-intentioned.

Washington” and incarcerated in a Canadian jail pending extradition pursuant to the Extradition Treaty between the United States and Canada.⁶⁶ 3CP 531, 542-46; Extradition Treaty between Canada and the United States of America, Can. T.S. 1976 No. 3 (hereinafter “Extradition Treaty”). On September 25, 1995, the United States formally sought extradition but did not provide any assurances the death penalty would not be imposed if Sebastian or Atif were convicted. 3CP 531-32. The Extradition Treaty permits Canada to refuse extradition of fugitives unless the United States provides assurances that if Canada extradites the fugitives to the United States and the Canadian citizens are convicted, they will not suffer the death penalty. United States v. Burns, 1 S.C.R. at 295.

At first, Canadian Minister of Justice Allan Rock declined to seek the required assurances, believing that assurances should only be sought in exceptional cases, which he deemed the instant matter was not. Id. at 295, 299. The Minister of Justice signed an unconditional Order for Surrender, allowing extradition to

⁶⁶ The Attorney General of British Columbia decided against prosecuting Sebastian and Atif in British Columbia for conspiracy to commit murder charges. United States v. Burns, 1 S.C.R. at 300.

Washington State without any assurances concerning the death penalty. Id. at 299.

The British Columbia Court of Appeal set aside the Minister's decision and ordered he seek the required assurances not to pursue the death penalty as a condition of surrender. Burns, 1 S.C.R. at 300, citing United States v. Burns, 94 B.C.A.C. 59 (1997). Following this 1997 ruling, on April 17, 2000, Sebastian's counsel in the United States specifically asked the King County Prosecutor to let his client stand trial with an agreement not to seek the death penalty, pointing out Sebastian and Atif were only 18 when the homicides were committed. The King County Prosecutor's Office rejected the request. 3CP 548-49.

The extradition question was ultimately decided by the Supreme Court of Canada, which unanimously held Canada was an abolitionist country which could not extradite a Canadian citizen to face the death penalty in another country. Burns, 1 S.C.R. at 361. Only following the Canada Supreme Court opinion did King County Prosecuting Attorney Norm Maleng give the Government of Canada assurances that the United States would not seek to execute Sebastian or Atif if convicted. 3CP 534; 2/18/03RP 99.

Following extradition to the United States, Sebastian moved to dismiss the King County prosecution for violation of his right to a speedy trial. 3CP 530; 2/18/03RP 79. Sebastian argued the State caused an unnecessary delay in violation of his speedy trial right. 2/18/03RP 79. Sebastian argued he was held in custody for these charges since 1995 and was amenable to process throughout, citing State v. Anderson,⁶⁷ and State v. Roman,⁶⁸ which held when a defendant is out of state but in custody, he is amenable to process. Id. at 80. Because the British Columbia Court of Appeal properly directed the Minister of Justice to seek assurances that Sebastian and Atif would not face the death penalty under the Extradition Treaty, the King County Prosecutor unnecessarily delayed the trial for years by waiting until the Supreme Court of Canada rendered its decision in February 2001. Id. at 81-82. Because Canada had never extradited a Canadian citizen to face the death penalty in any other jurisdiction, Sebastian contended the United States and the King County Prosecutor were unreasonable in not providing the extradition treaty assurances that would have permitted prompt extradition as early as 1995. Id. at 83-84.

⁶⁷ 121 Wn.2d 852, 855 P.2d 671 (1993).

⁶⁸ 94 Wn.App. 211, 216, 972 P.2d 511, rev. denied, 138 Wn.2d 1014 (1999).

Judge Mertel found the prosecutors had a right to seek the death penalty until the highest court of the abolitionist state concluded they would not release the defendants without the necessary assurances. 2/18/03RP 100. Judge Mertel denied Sebastian's motion to dismiss, concluding Sebastian and Atif were not amenable to process until they were in fact delivered to the United States following the Canadian Supreme Court's final ruling on February 15, 2001. Id. at 99. Once the King County Prosecutor's Office gave the assurances that the defendants would not face the death penalty, the defendants were turned over to the United States on March 21, 2001, and arraigned on April 6, 2001. Id.

b. The federal and state constitutions require the State to bring the accused to trial within a reasonable time. Under the Sixth Amendment to the United States Constitution, "in all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." As the United States Supreme Court has noted, "[o]n its face, the Speedy Trial Clause is written in such breadth that, taken literally, it would forbid the government to delay the trial of an 'accused' for any reason at all." Doggett v. United States, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Instead,

however, the Court has “qualified the literal sweep of the provision by specifically recognizing the relevance of four separate enquiries:”

1. whether delay before trial was uncommonly long;
2. whether the government or the criminal defendant is more to blame for that delay;
3. whether, in due course, the defendant asserted his right to a speedy trial; and
4. whether he suffered prejudice as the delay’s result.

Id., citing Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

The Doggett Court recognized that where delay is uncommonly long, prejudice can be presumed. 505 U.S. at 652. The Court held, “the presumption that pretrial delay has prejudiced the accused intensifies over time.” Id. The Court based this holding on its observations that in prior cases,

unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including ‘oppressive pretrial incarceration,’ ‘anxiety and concern of the accused,’ and ‘the possibility that the [accused’s] defense will be impaired’ by dimming memories and loss of exculpatory evidence.

Doggett, 505 U.S. at 529-30, citing Barker, 407 U.S. at 532; Smith v. Hooey, 393 U.S. 374, 377-79, 89 S.Ct. 575, 21 L.Ed.2d 607

(1969); United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966).

In Doggett, the defendant was indicted for a drug offense in February 1980, but when officers tried to arrest him on March 18, 1980, they found he had left for Colombia four days earlier. 505 U.S. at 648. The U.S. authorities assumed at first the defendant was in a Panamanian prison and later assumed he had settled in Colombia. Id. at 649. Instead, Mr. Doggett had been living openly and peacefully in the United States since 1982. Id. Not until September 1988, checking several thousand people for outstanding warrants, did the United States authorities discover that Mr. Doggett lived and worked in Virginia. They then arrested him eight and one half years after his indictment. Id. at 650.

The Government argued Mr. Doggett failed to make an affirmative showing the delay had weakened his ability to raise specific defenses, elicit specific testimony, or produce specific evidence. Doggett, 505 U.S. at 655. The Court rejected this argument, ruling, “affirmative proof of particularized prejudice is not essential to every speedy trial claim.” Id., citing Moore v. Arizona, 414 U.S. 25, 26, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973); Barker, 407 U.S. at 533. “[I]mpairment of one’s defense is the most difficult

form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" Doggett, 505 U.S. at 655, quoting Barker, 407 U.S. at 532. The Court concluded that both the government and the individual defendant can be prejudiced by delay and especially excessive delay "presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." Doggett, 505 U.S. at 655. While pretrial delay may sometimes be inevitable and wholly justifiable given diligent prosecution, when delay is so negligent it reaches the level of bad faith, the charges must be dismissed. 505 U.S. at 656, citing Barker, 407 U.S. at 531 (official bad faith in causing delay will be weighed heavily against the government). The Doggett Court found the eight and one half year delay amounted to an "egregious persistence in failing to prosecute Doggett." 505 U.S. at 657. The Court, therefore, reversed the conviction. Id.

In the instant case, the King County Prosecutor's Officer indicted Sebastian on July 31, 1995, but he was not arraigned until April 6, 2001. 1CP 1; 3CP 592; 2/18/03RP 99. During this six-year delay, the prosecutors refused to abandon the death penalty as a

possible punishment for Sebastian and Atif, with full realization that Canada had been an abolitionist country since 1976.

Because the delay was uncommonly long, caused by the government's failure to provide the assurance it would not put Sebastian to death if convicted in Washington State, and Sebastian sought a speedy trial, prejudice is proven and Sebastian's conviction must be reversed. Doggett, 505 U.S. at 657.

c. Because Washington State understood the Extradition Treaty expressly required assurances before a Canadian citizen was extradited, a request for extradition without the assurances created an unnecessary delay. Under the Supremacy Clause of the United States Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Thus, under federal law, treaties have the same legal effect as statutes. United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001), citing Whitney v. Robertson, 124 U.S. 190, 194, 8 S.Ct. 456, 331 L.Ed. 386 (1888); Breard v. Greene, 523 U.S. 371, 378, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998). Proper interpretation of a treaty presents a question of law a reviewing court reviews de novo. United States v. Page, 232 F.3d 536, 540 (6th Cir. 2000).

Interpretation of a treaty first begins with the language used in the treaty. Elcock v. United States, 80 F.Supp.2d 70, 78 (E. Dist. NY, 2000), citing Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180, 102 S.Ct. 374, 72 L.Ed.2d 765 (1982). Because a treaty is a contract between two nations, a reviewing court must give the specific words of the treaty meaning consistent with the shared expectations of the contracting parties. Elcock, 80 F.Supp.2d at 78, citing Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. Of Iowa, 482 U.S. 522, 533, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987); Air Furnace v. Saks, 470 U.S. 392, 399, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314, 7 L.Ed. 415 (1829) (Marshall, C.J.); Restatement (Third) of the Foreign Relations Law of the United States Sec. 325 reporter's note 4 (1987) (noting for United States courts "primary object of interpretation is to 'ascertain the meaning intended by the parties,'" quoting Restatement (Second) of the Foreign Relations Law of the United States secs. 146-147 (1965)).

The general purpose of an extradition treaty is to surrender fugitives to be tried for their alleged offenses, and the treaty should be liberally construed to effect this purpose. Elcock, 80 F.Supp.2d at 79. The Extradition Treaty between the United States and

Canada mandates no Canadian citizen will be extradited to the United States to face a trial without the assurance that the Canadian citizen will not be put to death by the United States Government upon a finding of guilt. Burns, 1 S.C.R. at 295, citing Extradition Treaty between Canada and the United States of America, Can. T.S. 1976 No. 3, Art. 6. By the clear terms of the extradition treaty, King County prosecutors understood that the Canadian government must first receive assurances before Sebastian and Atif would be extradited. Accordingly, when the prosecutors first asked for extradition, the required assurances should have been made.

d. The speedy trial rule in Washington requires a defendant to be brought to trial within 60 days from the date of arraignment and, if the defendant is amenable to process, the clock begins from the time the information is filed. CrR 3.3 requires the State to bring a defendant to trial within a 60 or 90-day period from the date of arraignment. CrR 3.3(c)(1). But “[w]hen a delay not contemplated by the rule occurs, and the accused is amenable to process, the speedy trial time under CrR 3.3 is deemed to operate from the time the information is filed. State v. Hunnel, 52 Wn.App. 380, 383, 760 P.2d 947 (1988), citing State v. Striker, 87 Wn.2d 870, 875, 877,

557 P.2d 847 (1976). CrR 3.3(g) allows for the exclusion of certain time periods in computing the time for trial, but when a criminal charge is otherwise not brought to trial within the time limits of the rule, the case shall be dismissed with prejudice under CrR 3.3(i).⁶⁹ Hunnel, 52 Wn.App. at 383.

In State v. Hessler, the Washington Supreme Court ruled,

[U]nder the Striker rule, when a defendant is amenable to process and there is a long delay between the filing of the charge and the first court appearance, through no fault or connivance of the defendant, the 60- or 90-day period within which the trial must be held commences on the "constructive arraignment date," which occurs 14 days after the charge was filed. But because this rule applies only to unnecessary delays, periods during which the State acts in good faith and with due diligence in attempting to bring the defendant to court are excluded from the time for trial calculation.

⁶⁹ CrR 3.3(g) Excluded Periods, states "the following periods shall be excluded in computing the time for arraignment and the time for trial:"

- (1) All proceedings relating to the competency of a defendant to stand trial, terminating when the court enters a written order finding the defendant to be competent;
- (2) Preliminary proceedings and trial on another charge except as otherwise provided by CrR 3.3(c)(5);
- (3) Delay granted by the court pursuant to section (h);
- (4) The time between the dismissal of a charge and the defendant's arraignment or rearraignment in superior court following the refiling of the same charge;
- (5) Delay resulting from a stay granted by an appellate court;
- (6) The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington;
- (7) All proceedings in juvenile court.

Hunnel, 52 Wn.App. at 384.

155 Wn.2d 604, 607, 121 P.3d 92 (2005). (Internal citations omitted). The rule places the initial burden on the defendant to show he was amenable to process. Id. Accordingly, where a defendant is amenable to process and the State has not acted to bring him to court, the trial court should dismiss the case with prejudice. CrR 3.3(h).⁷⁰

In State v. Anderson, the Supreme Court reiterated the State must act in good faith and with due diligence when bringing a defendant to stand trial. 121 Wn.2d 852, 858, 855 P.2d 671 (1993). The Anderson Court recognized this due diligence requirement is in line with the federal requirement that the State “make a diligent and good faith effort to secure the presence of an accused from another jurisdiction if a mechanism is available to do so.” 121 Wn.2d at 858, citing Dickey v. Florida, 398 U.S. 30, 37-38, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970); Smith v. Hooey, 393 U.S. 374, 383, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969). Recognizing the Interstate Agreement on Detainers gave the State a mechanism to secure the defendant’s presence in Washington, the Anderson Court ruled the prosecutor’s failure to file a detainer deprived the defendant of a

⁷⁰ CrR 3.3 was substantially amended in 2003, and the remedy section is now found at CrR 3.3(i).

mechanism for demanding a speedy trial. 121 Wn.2d at 862. The Court concluded fundamental fairness requires Washington prosecuting attorneys act in good faith and with due diligence in bringing a defendant to trial if detained out of state and the defendant is subjected to conditions of release not imposed by a court of the State of Washington. Id. at 864, citing CrR 3.3(g)(6). Because the prosecutor failed to make any effort to obtain Anderson's presence for trial after learning of his incarceration in federal prison, the time spent by Anderson in federal prison counted in calculation of his right to a speedy trial within 60 days. Id.

In the instant case, King County requested Canada place Sebastian and Atif in custody based on Washington aggravated murder charges and sought extradition. 3CP 542, 544; 2/18/03RP 98. When the United States sought extradition, however, the government failed to provide any assurance the Canadian citizens would not be put to death if convicted. In doing so the government thereby failed in making the necessary diligent and good faith effort to secure the presence of Sebastian and Atif from Canada when a simple mechanism was available – provide the expressly required extradition assurances to not seek the death penalty.

The deputy prosecutor below argued CrR 3.3 does not apply to Sebastian and Atif because they were residing outside of Washington in a foreign country, citing State v. Hudson. 2/18/03RP 89, 95. But in Hudson, the Supreme Court specifically held, “[f]or purposes of CrR 3.3, an out-of-state defendant who is not in custody is not amenable to process in the usual sense of the term.” 130 Wn.2d 48, 55, 921 P.2d 538 (1996). (Emphasis added).

In fact, the Hudson Court ruled that for at large defendants in a foreign jurisdiction, the same ease of obtaining the presence of a defendant as use of the Agreement of Detainers announced in Anderson is not apparent, since the State often has “no fingerprints, photographs or present location.” 130 Wn.2d at 57. The Hudson Court simply declined to extend Anderson to at large defendants in a foreign country under an extradition treaty. Id. The Hudson Court specifically held, “the Striker/Greenwood rule, which requires diligence in bringing a defendant before the court, does not apply to the periods of time while a defendant is out of state and not in custody.” Id. at 58.

The Hudson exception to the Striker rule was reaffirmed in State v. Roman:

State v. Anderson extended Greenwood to some but not all out-of-state defendants. Implicitly, Anderson held that a defendant is amenable to process when he or she is incarcerated in an out-of-state or federal jail or prison; the prosecutor is aware of that; and the defendant is actively demanding a speedy trial. Explicitly, Anderson held that the State fails to exercise due diligence if, under the circumstances just described, it ignores the defendant's demand. Anderson also held that these requirements inhere in CrR 3.3(g)(6).

94 Wn.App. 211, 216, 972 P.2d 511 (1999). Importantly, the Roman Court noted that Hudson only clarified Anderson insofar as ruling that a defendant is not amenable to process "while at large in another state" and only then is the State not required to exercise due diligence. Roman, 94 Wn.App. at 217, citing Hudson, 130 Wn.2d at 58.

In the instant case, as soon as the State sought extradition, Sebastian and Atif were incarcerated in Canada at the request of Washington State and Hudson no longer applied. According to the July 31, 1995, Information filed in British Columbia, Corporal Jim Dallin averred,

The Government of the United States of America has requested the provisional arrest of Glen Sebastian Burns and Atif Ahmad Rafay pending the presentation of a formal request pursuant to the said Treaty and has asserted these are crimes for which extradition may be sought under the Treaty.

3CP 544 (paragraph 5). Moreover Corporal Dallin averred King County Prosecutor Jeffrey Baird informed him about the defendants' travel to Montana and therefore believed the warrant should be issued immediately because Sebastian and Atif posed a substantial risk of flight. 3CP 545-46 (paragraph 10).

When a formal request for extradition was made, the two men were in custody and the extradition request should have included the proper assurances needed to fulfill the clear language of the Extradition Treaty. Had King County sought extradition with the proper assurances, Sebastian and Atif would have been extradited to the United States years before the eventual arraignment date of April 6, 2001.⁷¹ King County prosecutors certainly realized speedy trial could be fully satisfied with the assurances it would ultimately have to provide.⁷²

⁷¹ Sebastian objected to the date of arraignment, arguing the correct date of arraignment was either July 14, 1997, or at the latest, December 11, 1997, and the time for speedy trial had already elapsed. 3CP 592-93.

⁷² In State v. Pang, the Washington Supreme Court held that, where Brazil had extradited Martin Pang to the United States only to face arson charges, the State of Washington could not also try the defendant for the murder of those who died during the fire. 132 Wn.2d 852, 873, 914, 940 P.2d 1293 (1997). As the Pang Court explained,

International law is incorporated into our domestic law. Treaties are the supreme law of the land. They are binding on the states as well as the federal government. Courts must interpret treaties in good faith.

e. Alternatively, following the dismissal of the appeal of the committal order in 1997, King County had a duty to provide the required assurances as the defendants were in custody, amenable to process, and a mechanism was available to obtain their presence in King County Superior Court. Sebastian and Atif appealed the committal order that the United States had provided sufficient evidence to extradite them. Burns, 94 B.C.A.C. at 62-63; 3CP 3573. The appeal of the committal order was dismissed. Burns, 94 B.C.A.C. at 63.

The Canadian Court of Appeal found the Minister of Justice erred in surrendering Canadian citizens without seeking assurances they would not be put to death if convicted in Washington State. Burns, 94 B.C.A.C. at 75. The Court of Appeal specifically rejected the United States Counsel's argument that the Minister's decision of unconditional surrender is merely a step in the extradition process which had formally been held to be

132 Wn.2d at 909. Despite the Pang decision, the King County Prosecutors Office struggled for years to circumvent the extradition treaty in place in that case and here tried to circumvent the clear understanding of the extradition treaty between the United States and Canada.

Unlike Pang, Sebastian and Atif did not seek refuge in a foreign land; instead, they were Canadian citizens and the Extradition Treaty therefore expressly instructed required assurances before extradition could occur. Washington State failed to act in good faith when it failed to provide the required assurances not to seek the death penalty required before a Canadian citizen can be extradited to Washington to face a crime for which this State can impose the death penalty. Pang, 132 Wn.2d at 915.

constitutional in a number of cases such as United States v. Cotroni, 1 S.C.R. 1469; 96 N.R. 321 (1989). Id. at 75. The Court of Appeal ruled none of the cases cited by the United States involved the extradition of a Canadian citizen to face the death penalty. Id. The Court also ruled that Article 6 of the Extradition Treaty was “drawn to accommodate the difference between nations so that the requested State could give effect to its policy of abolition.” Id. at 74. The Court set aside the Minister’s decision to surrender without the required Treaty assurances and directed the Minister to seek the assurances as a condition of surrender. Id.

Although the Supreme Court of Canada accepted review of the British Columbia Court of Appeal decision concerning the Minister’s unconditional surrender of Canadian citizens without the proper assurances, the appeal against the committal order appeal was dismissed in 1997. Burns, 94 B.C.A.C. 46; 3CP 3574; 2/18/03RP 81. The Supreme Court refused to hear the appeal of the committal order on December 4, 1997. 2RCP 3582. The only issue remaining in Canada was solely an appeal of whether or not the Minister of Justice could unconditionally surrender Canadian citizens without assurances Washington State would not impose the death penalty if Sebastian and Atif were convicted. 2/18/03RP

82. Thus, the latest time for which Sebastian and Atif could be deemed amendable to process was January 29, 1998, when the defendants no longer fought extradition. 2RCP 3582.

Had the State simply provided the required Treaty assurances at that point, Sebastian and Atif would have been brought before King County Superior Court by the beginning of 1998. Despite the fact the Minister of Justice sought further review, the Court of Appeal ordered no surrender without assurances and King County knew a mechanism was available to obtain the defendants' presence in Washington State. Rather than proceed with that known mechanism, King County Prosecutor Norm Maleng actually encouraged the Canadian government to appeal the Court of Appeal decision to the Supreme Court of Canada. 2RCP 3583, 3593. Accordingly, Anderson applies and the State's failure to provide the Treaty assurances demonstrated a lack of due diligence and good faith requiring reversal. 121 Wn.2d at 862.

6. SEBASTIAN'S ATTORNEYS WERE INEFFECTIVE FOR INFORMING JURORS THE CASE DID NOT INVOLVE THE DEATH PENALTY

Sebastian incorporates this argument from Atif's opening brief. Brief of Appellant Atif Rafay at 92-101; RAP 10.1(g)(2).

7. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO EXCUSE JUROR 4 (DONNA PERRY)

Sebastian incorporates this argument from Atif's opening brief. Brief of Appellant Atif Rafay at 128-54; RAP 10.1(g)(2).

8. REPEATED AND FLAGRANT MISCONDUCT FROM BELLEVUE POLICE WITNESSES DENIED SEBASTIAN A FAIR TRIAL

Sebastian incorporates this argument from Atif's opening brief. Brief of Appellant Atif Rafay at 128-77; RAP 10.1(g)(2).

9. THE CUMULATIVE ERRECT OF THE ABOVE ERRORS DENIED SEBASTIAN A FAIR TRIAL

The due process clauses of the federal and state constitutions provide that a criminal defendant receive a fair trial. U.S. Const. amend. 14; Wash. Const. art. 1, § 3, 22. Reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Thus, in State v. Alexander, this Court ordered a new trial because (1) a counselor impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony at trial

and in closing. State v. Alexander, 64 Wn.App. 147, 158, 822 P.2d 1250 (1992). And in Coe, the court reversed four rape convictions based upon numerous evidentiary errors and a violation of discovery rules by the prosecutor. 101 Wn.2d at 774-86, 788-89.

If this Court concludes none of the above errors alone require reversal of Sebastian's convictions, the combination of the errors do require a new trial. Cumulatively, the above errors cannot be deemed harmless since they demonstrate Sebastian was denied an opportunity to present his defense and fatally undermine the State's evidence that he committed the crimes. In light of Sebastian's alibi for the time of the murders, the lack of physical evidence connecting him to the crimes, and the recklessness of the British Columbia undercover operation, this Court cannot be convinced beyond a reasonable doubt the combined errors did not affect the jury verdict. Sebastian's convictions must be reversed and remanded for a new trial.

F. CONCLUSION

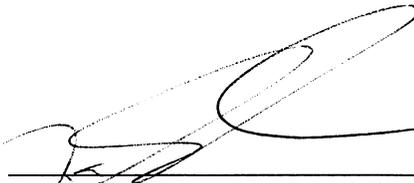
Glen Sebastian Burns' rights to a speedy trial under the federal and state constitutions and CrR 3.3 were violated, and his convictions must be reversed and dismissed. In the alternative, his convictions should be reversed and the case remanded for a new trial based upon the violations of his constitutional right to present a defense, his constitutional right to a fair trial, and the other errors addressed above.

DATED this 30th day of July 2007.

Respectfully submitted,



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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 GLEN SEBASTIAN BURNS,)
)
 Appellant.)

NO. 55217-1-I

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STATE OF WASHINGTON
2007 JUL 30 PM 4:56

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 30TH DAY OF JULY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] GLEN SEBASTIAN BURNS
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WASHINGTON STATE PENITENTIARY
1313 N 13 TH AVENUE
WALLA WALLA, WA 99362 | (X)
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() | U.S. MAIL
HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JULY, 2007.

x _____ *me*