

NO. 55217-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

GLEN SEBASTIAN BURNS,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 JUN 30 PM 4:56  
*[Handwritten Signature]*

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

The Honorable Charles W. Mertel

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APPELLANT BURNS' REPLY BRIEF

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## A. STATEMENT OF THE CASE

The parties have referred this Court to the written transcripts of some of the interactions between the Royal Canadian Mounted Police (RCMP) undercover officers and Glen Sebastian Burns and Atif Rafay. The transcripts must be viewed with caution, as they are not accurate and were admitted only to aid the jury in listening to the audio and video taped exhibits.<sup>1</sup> 4/8/04RP 88; 4/9/04RP 73-74. The jury was instructed not to rely upon the written transcripts, but to listen to the audio and video tapes. 4/8/04RP 100; 4/15/04RP 35.

In its response brief, the State includes the descriptive comments added by the transcriber, such as "LAUGHTER." Consolidated Brief of Respondent at 60-61, 63, 76, 78-79, 82, 130-31. These comments were excluded by the trial court. 3/15/04RP 5-7.

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<sup>1</sup> As an example, when an RCMP undercover operative asked Sebastian why his hair would be found on the murder victims, he replied, "If you're standing close to a person, your hair falls off just randomly, okay?" Ex. 509, part C. The RCMP transcript quotes Sebastian as saying, "I was standing close to a person, your falls off just randomly, okay?" Ex. 531 at 99.

According to the transcripts, Sebastian said "fantastic" when he was unexpectedly paid \$2,000 by Haslett, but it is unclear from the audio tape if the remark was made by Sebastian or Jimmy Miyoshi. Consolidated Brief of Respondent at 54, quoting Ex. 540 (transcript 5) at 2; Ex. 508 (#5 at 2:37).

The written transcripts do not convey the wide range of emotions displayed by the various participants. The comments such as “laughter” and “chuckles” are not representative of what might more accurately be described as a nervous snicker.

B. ARGUMENT

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

Given the defendants’ alibi and the dearth of physical evidence tying them to the crimes, the State’s case rested heavily upon Sebastian Burns’ incriminating statements to RCMP undercover officers. In an intricate undercover operation unparalleled in the United States, the operatives convinced Sebastian that they were members of a successful organized crime syndicate with the power to kill Sebastian and harm his friends if he appeared to be a threat to the organization. The operatives claimed to have contacts in the United States and convinced Sebastian that he and Atif would soon be arrested and charged with murdering the Rafay family, based in part upon fabricated evidence. If, however, Sebastian was “honest” with the crime boss

and admitted committing the murders, the organization would be able to have any incriminating evidence in Bellevue destroyed.

While false confessions have been known throughout American legal history, the recent exoneration of numerous defendants through the use of DNA technology has sparked greater study of the phenomenon by social science researchers. Saul M. Kassin, The Psychology of Confessions, 4 Annu. Rev. Law Soc. Sci. 193, 194 (2008) (hereafter Psychology of Confessions). Sebastian sought to call a leading expert on police interrogation, Richard Leo, J.D., Ph.D., to testify concerning false confessions and the factors that might cause a person of normal intelligence to confess falsely. 11/13/03(PM)RP 45-50; CP 2833-34.

The court ruled that Dr. Leo could not testify, reasoning that the testimony would not be helpful to the jury because it was within the normal juror's understanding and knowledge that people lie. 11/19/03RP 65. The court also concluded, in contrast with defense counsel's assertions, that Dr. Leo would testify that Sebastian's confession was "a coerced, compliant, false confession," which was a question for the jury to decide. Id.

a. The trial court's exclusion of Dr. Leo presents a constitutional issue under the due process and compulsory process clauses of the federal and state constitutions which this Court should review *de novo*.

i. This Court must address whether the trial court's decision prohibiting Sebastian from calling his expert witness violated Sebastian's constitutional right to present a defense. The State asserts the trial court's exclusion of Dr. Leo's testimony is an evidentiary and not a constitutional issue. Consolidated Brief of Respondent at 245-49, 293-99. The constitutional right at issue here is the right to present a complete defense, which is derived from the constitutional rights to due process and to compulsory process. First, the accused's right to due process is protected by the due process clauses of the federal and state constitutions. U.S. Const. amend. 14; Const. art. I, §§ 3, 22; Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). Essential to the right to due process is the right to be heard. Crane, 476 U.S. at 690; Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is

central to the defendant's claim of innocence." Crane, 476 U.S. at 294.

The Sixth Amendment's compulsory process clause also guarantees the defendant the right to subpoena and call witnesses in order to present his side of the case. U.S. Const. amends. 6, 14; Const. art. 1 § 22; Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The right to compulsory process is essential to the working of our adversarial system. Taylor v. Illinois, 484 U.S. 400, 408-09, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). This right is violated when a defendant is arbitrarily deprived of the opportunity to call witnesses whose testimony would be relevant, material, and essential to the defense. Washington, 388 U.S. at 16. Both of these rights are "fundamental" and must be carefully guarded by the courts. Chambers, 410 U.S. at 302; State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

According to the State, the exclusion of Dr. Leo's testimony did not violate Sebastian's constitutional right to present a defense because the court did not cut off every avenue of challenging Sebastian's statements to the RCMP undercover operatives. The State notes defense counsel was permitted to cross-examine the officers concerning the undercover operation and the

circumstances of the Sebastian's admissions. Consolidated Brief of Respondent at 245-49, 289-99. The State is incorrect.

A defendant's constitutional rights may be violated even if they are not completely curtailed. The Constitution does not guarantee the accused the right to present part of his defense; it protects the right "to a meaningful opportunity to present a complete defense." Crane, 476 U.S. at 690 (emphasis added). For example, the defendant's constitutional right to present a defense was violated when she was allowed to testify, but her testimony was limited so that she could not refer to anything she remembered after undergoing hypnosis with a neuropsychologist. Rock v. Arkansas, 483 U.S. 44, 46-48, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). Acknowledging the defendant's right to present evidence is not limitless, the court held the right may not be arbitrarily restricted and restrictions may not be "disproportionate to the interests they are designed to serve." Rock, 483 U.S. at 55-56.

The Rock Court reviewed the scientific evidence concerning the use and reliability of hypnosis and rules adopted by various states, noting that the use of hypnosis in criminal investigations was

controversial.<sup>2</sup> Id. at 58-61. The Court, however, concluded the State had not shown hypnosis was so untrustworthy and so immune from traditional means of evaluating credibility that the defendant's testimony should be excluded. Id. Thus, while Arkansas's per se rule prohibiting hypnotically refreshed testimony could be constitutionally applied to witnesses, further constitutional analysis was required when the rule implicated the defendant's constitutional right to testify. Id. at 57-58.

Similarly, the defendant's constitutional right to confront the witnesses against him may be violated when his cross-examination of a witness is limited but not completely curtailed. In Davis v. Alaska, 415 U.S. 308, 310-12, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the defendant was prohibited from cross-examining a critical witness about his juvenile record. Counsel "did his best" and was able to show through cross-examination that the witness knew he was a possible suspect, but the defendant was nonetheless unconstitutionally hampered in showing the jury why the witness might be biased or prejudiced. Davis, 415 U.S. at 312-14, 318. Thus, the Court held the defendant's constitutional right to

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<sup>2</sup> Washington, for example, prohibits witnesses from testifying about information recalled under hypnosis. State v. Martin, 101 Wn.2d 713, 722, 724, 730, 684 P.2d 651 (1984).

confront the witnesses against him was violated because he was precluded from cross-examining the witness on one point. The State misrepresents the holding, which did not address the complete denial of cross-examination.

States have discretion under the constitution to establish evidentiary and procedural rules which the defendant may not ignore in presenting his defense. Taylor, 484 U.S. at 410; Chambers, 401 U.S. at 302; Maupin, 128 Wn.2d at 925. Yet the arbitrary, rigid, or mechanistic application of court rules to exclude exculpatory evidence may result in the violation of a defendant's constitutional rights and defeat the ends of justice. Chambers, 410 U.S. at 302 ("where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice"). The evidence rule at issue here does not create a blanket exclusion of evidence concerning a confession as in Crane, but the exclusion of an expert witness to explain to the jury what factors may lead to a false confession was nonetheless essential to Sebastian's defense. Sebastian presents a constitutional issue that this Court must review in light of the facts and circumstances of his case. See Chambers, 410 U.S. at 303 ("we hold quite simply that under the

facts of this case the rulings of the trial court deprived Chambers of a fair trial.”).

ii. This Court should review the decision to exclude Dr. Leo’s proposed testimony de novo. The State argues that the trial court’s decision not to permit Dr. Leo to testify is an evidentiary issue reviewed under the forgiving abuse of discretion standard applies. Consolidated Brief of Respondent at 245-49. The abuse of discretion standard has been utilized in reviewing the admissibility of expert testimony in criminal cases. State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004) (expert on suggestibility and child interview techniques); State v. Cheatam, 150 Wn.2d 626, 649, 81 P.3d 830 (2003) (expert on factors influencing eyewitness identification). Whether or not the court properly applied the evidence rule, however, does not necessarily answer the constitutional question. When, as here, an evidentiary ruling impacts a constitutional right, this Court should apply de novo review in determining if the defendant’s constitutional right was violated.

Alleged violations of the confrontation clause, for example, are reviewed de novo even though the lower court ruling at issue is an evidentiary ruling, such as the admission of hearsay. Davis, 415

U.S. at 318 (improper limitation of cross-examination); State v. Koslowski, \_\_\_ Wn.2d \_\_\_, 2009 WL 1709639 at \*3 (No. 80427-3, June 18, 2009) (hearsay); State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007) (hearsay). The Supreme Court appeared to engage in de novo review of a ruling excluding a local social worker considered an expert on battered woman syndrome. State v. Allery, 101 Wn.2d 591, 595-98, 682 P.2d 312 (1984). The opinion does not mention the defendant's constitutional right, although it is obviously implicated in the case because the expert was needed to explain the reasonableness of the defendant's fear in evaluating her claim of self-defense. Allery, 101 Wn.2d at 598.

Even when an evidentiary ruling does not implicate a constitutional right, the lower court's interpretation of the evidence rules and "the application of a court rule to the facts in the case," is reviewed de novo. State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2002). Similarly, the determination of whether expert scientific evidence meets the Frye<sup>3</sup> standard is always de novo, whether or not constitutional rights are implicated.<sup>4</sup> State v.

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<sup>3</sup> Frye v. United States, 293 F. 1013 (D.C.Cir. 1923)

<sup>4</sup> Other examples of de novo review of evidentiary rulings are those included in an appeal from a grant of summary judgment, Seybold v. Neu, 105

Copeland, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996). Moreover, if the court finds the trial court abused its discretion in making an evidentiary ruling that impacts a constitutional right, the constitutional harmless error standard is utilized to determine if the error requires reversal of the convictions. Maupin, 128 Wn.2d at 928-30.

Here, Sebastian's constitutional right to present a defense is at issue. Like the right to confrontation, it is a component of due process and a "fundamental" constitutional right. This Court must therefore engage in de novo review of the trial court's decision to exclude an expert witness critical to Sebastian's defense.

b. The trial court erred by excluding Dr. Leo's testimony. In determining the admissibility of expert testimony, ER 702 requires the court to consider whether (1) the witness is qualified as an expert and (2) the testimony will be helpful to the jury. In re Personal Restraint of Young, 122 Wn.2d 1, 857 P.2d 989 (1993). If the expert's testimony is based upon novel scientific theories, the court must also determine if those theories are generally accepted

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Wn.App. 666, 678, 19 P.3d 1068 (2001), and the taking of judicial notice, Fusato v. Washington Interscholastic Activities Ass'n, 93 Wn.App. 762, 771, 970 P. 2d 774 (1999).

in the scientific community. Young, 122 Wn.2d at 56; Allery, 101 Wn.2d at 596 (both citing Frye v. United States, 293 F. 1013, 1014 (D.C.Cir. 1923)). Failure to properly apply the appropriate evidentiary rule constitutes an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 173, 163 P.3d 786 (2007) (ER 404(b)); Neal, 144 Wn.2d at 609 (CrR 6.13). Even under this standard, the trial court's ruling excluding Dr. Leo's testimony was incorrect.

i. The trial court abused its discretion by basing its decision upon the determination that Dr. Leo would testify Sebastian's confession was coerced or false. Defense counsel made it clear that Dr. Leo, who has degrees in law and social science but not mind reading, would not testify as to whether Sebastian and Atif's confessions were true or false.

11/18/03(AM)RP 24-25; 11/18/03(PM)RP45-47, 55, 57, 58-60.

[W]e are not getting to the point where . . . he's just going to be testifying about credibility of the statements. He is not. I don't know how many other ways I can say that.

He's not going to say Al Haslet is telling the truth.  
He's not going to say Sebastian Burns is telling the truth. He's not going to say Gary Shinkaruk is lying.  
He's not going to say Atif Rafay is telling the truth.  
He's not going to say anything like that.

11/18/03(PM)RP at 60. In the defense trial memo, Dr. Leo's testimony was summarized as covering false confessions in general, factors that impact false confessions, and opinion about the "indicia of reliability" of the defendants' admissions. 15CP 2833-34.

In its response brief, the State cites a letter from defense counsel stating that Dr. Leo would say that, if the defendants' statements were false, they fit within the "coerced compliant" category. Consolidated Brief of Respondent at 239 (citing 15CP 2937). As the letter was never mentioned by the trial court or counsel, it does not appear to have been considered by the trial court in making its decision. Moreover, this portion of the letter contradicts defense counsel's assertions at oral argument as well as Dr. Leo's own declaration, in which he stated, "I will not offer an opinion as to the truth or falsity of the confessions obtained in this case." 16CP 3136.

The trial court nonetheless prohibited the defense from calling Dr. Leo because the court believed Dr. Leo would testify that Sebastian and Atif gave false confessions. 11/19/03RP 65. The court's ruling appears to be based upon the judge's belief that defense counsel was misrepresenting the witness's testimony or

the court's suspicion that defense counsel wanted to clothe an opinion on the truth of Sebastian's statements in social science language. This is not what defense counsel or the expert proposed to do.

A court abuses its discretion if its ruling is manifestly unreasonable or based upon untenable grounds. State v. Hudson, \_\_\_ Wn.App. \_\_\_, 2009 WL 1524901 at \*3 (No. 36642-8-II, June 2, 2009). Basing an evidentiary ruling upon the court's own prejudices, unsupported facts, or a misunderstanding of the proposed testimony constitutes an abuse of discretion. Id.; United States v. Cohen, 510 F.3d 1114, 1123 (9<sup>th</sup> Cir. 2007) (abuse of discretion to exclude expert testimony based upon erroneous view of law or clearly erroneous assessment of facts); see Mason, 160 Wn.2d at 931 (reviewing admission of expert testimony based upon expert's affidavit outlining his testimony rather than party's mistaken belief of what expert would say).

Additionally, the court had the power to limit Dr. Leo's testimony to prevent him from expressing an opinion about the inculpatory statements in this case and to sustain the State's objections to any questions that would elicit improper testimony. See Cohen, 510 F.3d at 1126 (district court should have limited

psychologist's testimony so that did not draw conclusion as defendant's mens rea prohibited by FRE 704(b)). The trial court abused its discretion by excluding Dr. Leo's testimony based upon an unwarranted assumption that Dr. Leo would testify Sebastian's confessions to the RCMP undercover police were false or coerced.

ii. The trial court's conclusion that the expert's testimony would not assist the jury because everyone knows people lie is based upon a misunderstanding of the testimony and misapplication of the law governing expert testimony. The trial court held Dr. Leo's testimony concerning police interrogation techniques and other factors contributing to false confessions would not be helpful to the jury because the jurors knew people sometimes tell lies, even "big lies." 11/19/03RP 65. The State asserts the trial court's ruling was correct, not because everyone knows people lie, but because (1) Dr. Leo was an expert on custodial interrogation and the interrogation in this case did not occur in formal police custody, (2) the jury could see the videotapes of the undercover operations, and (3) an expert may not testify about the credibility of a witness. Consolidated Brief of Respondent at 249-72. Each argument must be rejected.

A witness who is an expert in a particular area may or may not have information that will assist the jury in that area, depending upon the facts of the case. See Cheatam, 150 Wn.2d at 649-50 (pointing out why expert on eyewitness identification not helpful given specific facts of case, not because expert testimony in that area is never helpful); In re Detention of Law, 146 Wn.App. 28, 204 P.3d 230, 236 (2008) (Leo's testimony properly excluded after respondent denied making the statements at issue), rev. denied, 165 Wn.2d 1028 (2009). The expert's testimony need only be helpful and relevant to an issue in the case to "assist" the jury; it is not essential that everything the expert may discuss is unknown to the average juror. ER 702; United States v. Hall, 93 F.3d 1337, 1342, 1344 (7<sup>th</sup> Cir. 1996) (court need not exclude expert testimony that "may overlap with matters in the jury's experience").

Social science research often shows that commonly held beliefs are in error. Hall, 93 F.3d at 1345. Jurors are unlikely to understand what factors and interrogation techniques have contributed to false confessions. Danielle E. Chojnacki, Michael D. Cicchini & Lawrence T. White, An Empirical Basis for the Admission of Expert Testimony on False Confessions, 40 Ariz. St. L.J. 1 (2008). Moreover, the RCMP obtained the confessions in this case

in an elaborate clandestine operation of which little is known in Canada, let alone the United States. Timothy Moore, Peter Copeland & Regina Schuller, Deceit, betrayal and the search for the truth: Legal and psychological perspectives on the 'Mr. Big' strategy, \_\_\_ Crim. Law Quarterly (forthcoming March 2010), manuscript at 2 (hereafter Deceit). The jurors' common sense understanding that people are capable of lying does not provide the experience needed to gauge the interrogation techniques and susceptibility factors in this case.

iii. Dr. Leo's proposed testimony concerning the factors and interrogation techniques that contribute to false confessions would have helped the jury even though the interrogation in this case was not custodial. Dr. Leo has extensively studied interrogation in the United States, where suspects are in police custody, are aware they are speaking to a law enforcement officer, and are given Miranda warnings informing them of their constitutional rights.<sup>5</sup> Dr. Leo's expertise, however, does not render him incapable of providing helpful testimony in this case. Despite the differences between custodial interrogation and

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<sup>5</sup> Dr. Leo's recent book addresses police interrogation in this country. Richard A. Leo, Police Interrogation and American Justice (Harvard U. Press 2008).

covert undercover operations, Canadian social scientists believe the information gleaned from the study of custodial interrogation will be useful in evaluating whether the Mr. Big procedures invite false confessions. Moore, et al., Deceit at 5.

Although it is not clear that the social science on police interrogations can be simply transferred to the context of Mr. Big investigations, forensic researchers are quite capable of explaining how the manipulation of motives and inducements develop in a Mr. Big operation.

Id. Psychologists and social scientists may “reason by analogy and experience.” Id. at 55.

The psychological interrogation techniques used by the RCMP undercover operatives in this case, such as minimizing the severity of the crime, assuming guilt, and lying about the strength of the evidence, are similar to those utilized by police officers in the United States and studied by Dr. Leo. The Reid interview techniques utilized by police in this country and studied by social scientists like Dr. Leo are taught internationally and have gained almost universal acceptance. Major Joshua E. Kastenberg, A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses Before the Trier of Fact, 26 Seattle U. L. Rev. 783, 797 (2003). The John E.

Reid and Associates, Inc. website states that the Reid technique is the most widely used approach to questioning suspects in the world, that they have conducted training in many countries, including Canada, and that their book Criminal Interrogation and Confessions is the “Bible” for interview and interrogation techniques.<sup>6</sup> Discussion of these techniques by Canadian legal scholars further demonstrates their use in that country.<sup>7</sup> Bruce MacFarlane, Convicting the Innocent: A Triple Failure of the Justice System, 31 Man. L.J. 403, 474 (2006); Danny Ciraco, Reverse Engineering, 11 Windsor Rev. Leg. & Soc. Iss. 41, 48-52 (2001) (discussing interview techniques from the manual because they are often utilized by Canadian investigators). It is thus not surprising that the interview techniques Dr. Leo has studied mirrored those utilized by the undercover police operatives in Sebastian’s case. See Amended Brief of Appellant Burns at 101-10.

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<sup>6</sup> [www.reid.com/r\\_about.html](http://www.reid.com/r_about.html). Fred E. Inbau, John E. Reid, Joseph P. Buckley III & Brian C. Jayne, Criminal Interrogation and Confessions (4<sup>th</sup> ed. 2001).

<sup>7</sup> Canadian courts and legal scholars have also looked to the work of social scientists such as Richard Leo in evaluating confessions in their legal system. See Regina v. Oickle, [2000] 2 S.C.R. 3, paras. 34-45, 2000 SCC 38; Christopher Sherrin, False Confessions and Admissions in Canadian Law, 30 Queen’s L. J. 601 (2005).

The State is correct that Sebastian was not in a police station and was unaware that he was being interrogated by police officers. The differences between Sebastian's situation and the custodial interrogation studied by Dr. Leo, however, demonstrate an even greater potential for the production of a false confession in the undercover situation.

In many ways, the RCMP undercover operators exercise an even greater amount of control over their targets than does a police officer over a suspect in police custody. Moore, et. al., Deceit at 15-16, 35. While a suspect in police custody may be interrogated for a few hours or held in jail, the undercover operators placed Sebastian in a state of uncertainty for several months. 3/10/04RP 119-21, 144-58; 3/22/04RP 21-22, 65-66, 83; 3/24/04RP 155-56. While a person in police custody may fear loss of income, here the RCMP worked to create actual financial insecurity for Atif by making sure he did not receive proceedings from his father's life insurance. 3/24/04RP 62-65, 126-32, 172.

From a psychological perspective, the custodial bright line can be illusory in terms of the exercise of control. The state's superior "resources and power" are not restricted to the interrogation room or a jail cell. The engineering of a new social world and the orchestration of the target's actions for months at a

time may constitute, in psychological terms, the quintessential “control.”

Moore, et. al., Deceit at 35.

A person in police custody in North American further has little or no fear that the police will kill him or harm family members if he does not say what the police want him to say. Sebastian, in contrast, believed he was dealing with members of organized crime who were willing to use violence for revenge or self-protection. 3/25/04RP 65-66; 4/12/04RP 63-64; 4/27/04RP 147-49, 153-55, 173. Additionally, a person in police custody who has been advised of his Miranda rights understands a confession will be used against him in court. Sebastian believed he was speaking to a crime boss. Instead of knowing his conversations would be used to convict him, the undercover officers told him a confession was needed so that the organization would destroy physical evidence so that he could not even be charged with the crimes. 5/4/04RP 7-9, 42-45.

While Dr. Leo may not have written about undercover interrogation such as occurred in Sebastian’s case, he would nonetheless have been able to educate the jury about the factors that may lead to false confessions, giving the jury the opportunity to decide if and how these factors came into play in this case. See

Moore, et. al., Deceit at 60. The State would then have ample opportunity to cross-examine Dr. Leo concerning his research and limitations on his expertise. This Court should reject the State's argument that Dr. Leo's testimony was not admissible because the interrogation here was not custodial.

*iv. Dr. Leo's proposed testimony concerning the factors and interrogation techniques that contribute to false confessions would have assisted the jury in evaluating the RCMP's videotaped conversations with Sebastian.* The State also asserts that Dr. Leo's testimony would not have been helpful to the jury because the final statements to the undercover police operatives were on videotape. Consolidated Brief of Respondent at 253-57. The State correctly points out that Dr. Leo and others have suggested videotaping of the interrogation of suspects, along with reform of police interrogation practices, as a tool to curb false confessions.<sup>8</sup> The hope is that by revealing the entire interrogation process, police investigators, prosecutors, and fact-finders will be better able to discern what interrogation techniques are used and whether they support or undermine the confession's reliability. The

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<sup>8</sup> A similar recommendation was made by a working group of Canadian provincial and territorial prosecutors in 2004 and by Canadian social scientists studying Mr. Big Operations. Moore, et. al., Deceit at 50, 59.

experts do not recommend videotaping as substitute for expert testimony in appropriate cases, as an expert can assist the jury to evaluate what it is viewing.

The legal commentators and social scientists do not view videotaping of confessions as a complete fix for the problem of false confessions. In the articles cited by the State, the writers also call for other reforms, such as police training, reform of techniques police are permitted to utilize, increased scrutiny of confession evidence by the prosecuting authority, and a more stringent review of the reliability of confessions by the court. Saul Kassin & Gisli Gudjonsson, The Psychology of Confessions: A Review of the Literature and Issues, 5 Psychol. Sci. Pub. Int. 33, 59-61 (2004) (hereafter Review of Literature) (recommends revisiting the legal standard for admission of custodial statements, ending use of interrogation practices such as lengthy isolation, the use of false evidence, and minimization of the crime under investigation); Steven A. Drizin & Richard A. Leo, The Problems of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 1001-06 (2004) (hereafter Problems of False Confessions) (recommending education and training of police officers and educating prosecutors and judges concerning false confessions); Richard J. Ofshe &

Richard A. Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. U. L. Rev. 979, 1118-19 (1997) (calling for more stringent judicial review of the reliability of confession, better training of police officers); Richard A. Leo & Richard J. Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim. L. & Criminology 429, 492-96 (1988) (recommending reform of shoddy police practices and police criminality, videotaping of interrogation, and careful comparison of confession with facts). Importantly, Drizin and Leo recommend special training for police officers in how to interrogate developmentally disabled and juvenile suspects due to their particular vulnerability to falsely confessing when faced with psychological interrogation techniques. Drizin & Leo, Problems of False Confessions, 82 N.C.L.Rev. at 1003-05. Paul Cassell, in contrast, recommends videotaping of confessions as a substitute for Miranda warnings, which he believes unnecessarily restrict police interrogation. Paul G. Cassell, Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo and Alschuler, 74 Denv. U. L. Rev. 1123, 1133 (1997).

The prosecutor's quotation from Drizin & Leo's article The Problems of False Confessions, is thus misleading, as the authors' suggestions go beyond arguing that a videotaping requirement will permit the jurors to make a more informed evaluation of the defendant's confession. Consolidated Brief of Respondent at 254 (quoting Drizin & Leo, Problems of False Confessions, 82 N.C.L. Rev. at 997-99). They opine that videotaping police interrogations (1) creates a reviewable record, (2) leads to a higher level scrutiny of interrogations that will deter misconduct and improve interrogation practices, and (3) will enable prosecutors and judges to keep false confessions out of court. Drizin & Leo, Problems of False Confessions, 82 N.C.L. Rev. at 997-98. They recommend videotaping as a technique to protect against false confessions, not as a substitute for juror education.

The experts' call for videotaping is tempered by warnings that the entire interrogation session be taped, not only the ultimate confession. Richard A. Leo, Steven A. Drizin, Peter J. Neufeld, Bradly R. Hall & Amy Vatner, Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century, 2006 Wis. L. Rev. 479, 499-501 (hereafter Bringing Reliability Back In) (in infamous Central Park jogger case, jury saw videotaped

confessions, but earlier interrogation process not recorded); Kassin & Gudjonsson, Review of Literature, 5 Psychol. Sci. in Pub. Int. at 60-61.

Additionally, the experts opine the videotape must show both the suspect and the interrogator, as studies have shown both juries and experienced judges are influenced by camera angle and are more likely to believe a suspect has been coerced if the camera focuses on the interrogator rather than the suspect. Kassin, Psychology of Confessions, 4 Annu. Rev. Law. Soc. Sci. at 210 (2008); Jessica Silbey, Videotaped Confessions and the Genre of Documentary, 16 Fordham Intell. Prop. Media & Ent. L.J. 789, 803 (2006). Here, where the conversations are videotaped, the camera is focused on Sebastian and Atif; Haslett and Shinkaruk are rarely if ever seen. Ex. 510, 511.

In this case, many of the initial interactions between the undercover operatives and Sebastian were not recorded, leaving him with only a minimal record to support his perceptions of the operatives. None of Sebastian's first two meetings with Shinkaruk and Haslett were recorded. 3/25/04RP 54-55, 57, 72; 4/7/04RP 143-44, 182; 5/5/04RP 90. Although Burns often talked alone with Gary, the audio device in Shinkaruk's car was not used to record

those conversations. 3/11/04RP 39-40; 3/25/04RP 54-55. At one point, Haslett deliberately took Burns away from the motel room equipped with audio recording devices to talk to him about his involvement in the homicides. 4/12/04RP 98-99; 4/22/04RP 36-37.

The operatives testified about those interactions based upon their notes. Shinkaruk explained the notes were often made some time after the interactions and admitted they were not always reliable. 4/9/04RP 8-9, 55-56; 4/12/04RP 18. 3/25/04RP 54-55, 72; 4/7/04RP 143-44, 182; 5/5/04RP 90. This is true of other Mr. Big undercover operations, where the jury does not see the hours of time spent establishing a false criminal world with its own moral code. Deceit at 3-4, 44-45, 48. Instead, the police operatives testify from notes that may reflect their own biases concerning their covert interactions with their targets. Id. at 51-53.

The State's claim that a number of other courts have found social science experts unnecessary where the confession is videotaped is also somewhat misleading. Consolidated Brief of Respondent at 255-57. The State refers this Court to two cases, first a Mississippi case where the trial court would not authorize funds for the indigent mentally retarded defendant to obtain Dr. Leo's assistance. Thorson v. State, 895 So.2d 85 (Miss. 2004),

cert. denied, 546 U.S. 831 (2005), post-conviction relief granted in part, 994 So.2d 707 (Miss. 2007). The Mississippi Supreme Court upheld the denial of funds, not because the confession was videotaped, but because the defendant did not demonstrate “a substantial need” for the expert. Id. at 123. The defendant was able to mount a challenge to his confession, however, through the testimony of his psychologist who testified about his mental aptitude and personality. Id. at 121-22.

The State’s quotation from a Minnesota case also omits some of the factors relied upon by the court. In State v. Ritt, 599 N.W.2d 802, 810 (Minn. 1999), cert. denied, 528 U.S. 1165 (2000), the defendant sought to call Dr. Ralph Underwager to take the jury through the videotaped statement and point out how the use of specific interview techniques coerced the defendant into certain statements. In Minnesota, the courts have traditionally limited expert testimony that might influence the jury’s opinion of the credibility of a witness. In the area of battered woman syndrome, for example, Minnesota permits an expert to provide a general explanation of the syndrome but not opine a particular person suffers from it. Ritt, 599 N.W.2d at 811. This is in contrast to

Washington, which has long permitted a battered woman syndrome diagnosis in appropriate cases. Allery, 101 Wn.2d at 597.

A videotape of interrogation provides a record for the jury to view, but does not offer any guidance for what to look for in evaluating the reliability of the confession. The Indiana Supreme Court understood this in Miller v. State, 770 N.E.2d 763 (Ind. 2002), where the trial court found the mentally retarded defendant's statements were voluntary, and the jury viewed his videotaped confession to murdering an elderly woman. Even though the confession was videotaped and there was thus no dispute as to its contents, the court noted the defendant was permitted to dispute its voluntariness at trial and should have been permitted to call psychologist Richard Ofshe to testify about police interrogation and interrogation techniques that may lead to false confession. Miller, 770 N.E.2d at 770-74. "[T]he general substance of Dr. Ofshe's testimony would have assisted the jury regarding the psychology of relevant aspects of police interrogation and the interrogation of mentally retarded persons, topics outside common knowledge and experience." Id. at 774.

Similarly, the jury in this case viewed videotapes of the confessions obtained by the RCMP in two scenarios. The video

tapes do not substitute for the knowledge Dr. Leo would have provided to the jury to assist them in judging the interrogation techniques involved, the susceptibility of the target, and the reliability of the confessions they heard. The videotape does not justify the exclusion of Dr. Leo's testimony.

v. Dr. Leo's proposed testimony about what factors make individual defendants more susceptible to providing false confessions would have aided the jury. The State argues that Dr. Leo's testimony was not needed because Sebastian did not claim a specific trait, such as a mental disorder or developmental disability, created special concern for the reliability of his confession. Consolidated Brief of Respondent at 272. The State argues the cases cited by the appellant only address defendants who had such a special condition that required expert testimony. Id. at 266-71. This argument ignores the important factor of Sebastian's age.

In their evaluation of cases of wrongful convictions where the defendants confessed falsely, social scientists have identified juveniles as a vulnerable population. Kassin, Psychology of Confessions, 4 Annu. Rev. Soc. Sci. at 203-05 (any discussion of dispositional risk factors must begin with consideration of suspect's age); Drizin & Leo, Problems of False Confessions, 82 N.C. L. Rev.

at 1005. In contrast to most adults, juveniles are eager to comply with authority figures, are impulsive, lack judgment, and are unable to recognize and weigh risks in decision making. They are therefore at greater risk to falsely confess when subjected to psychological interrogation techniques. Drizin & Leo, Problems of False Confessions, 82 N.C. L. Rev. at 1005.

Sebastian was 19 and Atif 18 when they were targeted by the RCMP. The human brain does not complete maturing until into the person's 20's, concluding around age 25. The prefrontal cortex, governing reasoning, advanced thought, and impulse control, is the last area of the brain to mature. This immaturity makes juveniles more likely to falsely confess. Kassin, Psychology of Confessions, 4 Annu. Rev. Law. Soc. Sci. at 204-05.

This immaturity also explains the "laughing and joking" the State claims demonstrate that Sebastian and Atif's confessions were true. Consolidated Brief of Respondent at 146-47. In the Central Park jogger case, teenagers were convicted of a highly publicized rape and assault based largely upon their five individual confessions; thirteen years later a confession by a serial rapist and review of the DNA evidence exonerated them. Leo, et. al., Bringing Reliability Back In, 2006 Wis. L. Rev. at 479-84. In finding the

confession of a 16-year-old defendant voluntary, the trial court had been swayed by similar evidence, noting the codefendants laughed and joked with each other in the holding cell and thus could not prove the confession was given under duress. Id. at 481. The laughing and joking were actually a sign of immaturity and nervousness, not guilt.

The State argues that the cases Sebastian cited in his opening brief are unlike his own because each involved a defendant with a mental condition that might affect the reliability of his or her confession. Consolidated Brief of Respondent at 266-71. The point of these cases, however, is that the defendant is entitled to present testimony concerning the circumstances surrounding his confession when that confession is admitted at trial. Crane, 476 U.S. at 690; Hannon v. State, 84 P.3d 320, 347 (Wyo. 2004); Miller, 770 N.E.2d at 772-73.

In Hall, for example, the defendant's mental health problems were important; the trial court thus permitted him to call one psychologist and one psychiatrist, who testified about the defendant's mental condition and his susceptibility to police pressure, as well as a social worker who testified the defendant was treated at a mental health facility. Hall, 93 F.3d at 1341. It

was the court's exclusion of Dr. Ofshe and limitation of the psychiatrist's testimony, however, that caused the court to reverse Hall's conviction. Dr. Ofshe was prepared to testify, much like Leo in this case, that false confessions exist, that individuals may be coerced into false confessions, and that certain indicia can reveal when false confessions are more likely to occur. Id. The district court was reversed in large part because "Dr. Ofshe's testimony went to the heart of Hall's defense." Id. at 1345.

The Florida appellate court, relying heavily upon Hall, reversed a murder conviction where the defendant was not permitted to call Dr. Ofshe. Boyer v. State, 825 So.2d 418 (Fla.App. 2002). In this case the need for the expert opinion was not tied to any mental condition of the defendant. The court simply found that the expert's testimony would have assisted the jury by informing them about false confessions. Boyer, 825 So.2d at 419-20. Because the expert's testimony "went to the heart" of the defense, the conviction was reversed. Id. at 420.

Dr. Ofshe's testimony was thus admissible in Miller to explain both the psychology of police interrogation and its impact upon someone who is mentally retarded. Miller, 770 N.E.2d at 774. Dr. Ofshe's offer of proof, however, emphasized the psychological

impact of various interrogation techniques rather than the defendant's mental retardation. Id. at 770-72.

The Indiana Supreme Court opinion relies in part upon an earlier appellate court opinion, Callis v. State, 684 N.E.2d 233 (Ind.App. 1997), rev. denied, 698 N.E.2d 1194 (1998). Miller, 770 N.E.2d at 773. In Callis, the trial court had limited Dr. Ofshe's testimony to false confessions in general and did not permit him to offer his opinion concerning the interrogation at issue. The Callis Court reversed the conviction even though the teenage defendant had no special mental health problems that distinguished him from other suspects. Callis, 684 N.E.2d at 239.

vi. A defendant may offer testimony concerning his own credibility. Both here and in the trial court, the State asserts an expert witness may not testify about another witness's credibility. CP 2892-93; Consolidated Brief of Respondent at 249.

Presumably, the State believes Dr. Leo's testimony would be that Sebastian and Atif were lying when they spoke to the Canadian undercover operatives. Dr. Leo would, of course, not be saying that any particular witness was lying. Rather, he proposed to explain factors that lead to false confessions, such as isolation or age. Excluding his testimony on the grounds that he would offer

expert testimony about the credibility of another witness is thus incorrect. Even if he were, however, a defendant may place his own credibility into issue.

Washington evidence rules permit a defendant to bring his own veracity into issue.<sup>9</sup> ER 404(a)(1); State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). ER 704 also permits an expert to testify as to the ultimate issue before the jury. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); Mason, 160 Wn.2d at 932.

We allow experts to express opinions concerning their fields of expertise when those opinions will assist the trier of fact. The mere fact that an expert opinion covers an issue that the jury has to pass upon does not call for automatic exclusion.

Montgomery, 163 Wn.2d at 590. Because of the defendant's constitutional rights, this rule is tempered in criminal cases so that an expert may not normally testify the defendant is guilty or offer an opinion concerning the defendant's credibility unless the defendant offers affirmative testimony bringing his veracity into issue. Id. at 591; Kirkman, 159 Wn.2d at 927-28. This rule does not prohibit the defendant from raising the issue himself.

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<sup>9</sup> Atif did not testify and was thus a hearsay declarant. He should nonetheless be permitted to impeach his own statements. United States v. Shay, 57 F.3d 126, 131-32 (1<sup>st</sup> Cir. 1995) (addressing FRE 806).

An explanation of why the federal evidence rules permit an expert to render an opinion that may impact the jury's credibility determinations is found in United States v. Shay, 57 F.3d 126 (1<sup>st</sup> Cir. 1995). The case is instructive as the federal and Washington evidence rules that apply to this issue are similar. In Shay, the district court excluded the defendant's psychiatrist's proposed testimony that the defendant suffered from a mental disorder that caused him to tell grandiose and incriminating lies; the district court found the jury did not need expert testimony on the issue of the defendant's credibility. Id. at 129-30.

On appeal, the government asserted that expert opinion is never admissible if it bears on credibility questions. Shay, 57 F.3d at 131. The appellate court explained the government's argument misinterpreted federal case law. Id. The court explained that the cases relied upon by the government do not preclude an expert from every addressing witness credibility, but simply "stand for the more limited proposition" that such an opinion "is ordinarily inadmissible pursuant to Rule 702 because the opinion exceeds the scope of the expert's specialized knowledge." Id. at 131. The First Circuit then reviewed the federal evidence rules and found they

“permit expert testimony to be offered in appropriate circumstances to establish a witness’s truthful or untruthful character.” Id.

Washington evidence rules should be similarly interpreted. As with FRE 402, ER 402 provides all relevant evidence is admissible barring exclusion by constitution, statute or another rule. “The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible.” State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). ER 607 permits any party to attack the credibility of any witness. Additionally, a party may attack or support the credibility of a witness with evidence of the witness’s reputation for truthfulness or lack of truthfulness. ER 608;<sup>10</sup> State v. Petrich, 101 Wn.2d 566, 575-76, 683 P.2d 173 (1984), overruled on other grounds, State v. Kitchen, 110 Wn.2d 403 (1988). Finally, an expert witness may testify about any specialized knowledge that will assist the trier of fact, including the ultimate issue the jury has before it. ER 702, ER 704; Kirkman, 159 Wn.2d at 929.

At common law, witnesses were not permitted to testify about the credibility of another witness. Anne Bowen Poulin,

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<sup>10</sup> ER 608 differs from FRE 608 in that it does not permit character evidence in the form of an opinion but requires proof of reputation.

Credibility: A Fair Subject for Expert Testimony?, 59 Fla. L. Rev. 991, 992 (2007). In the case cited by the State, the Tenth Circuit stated credibility of witnesses is not “generally” an appropriate subject for expert testimony. United States v. Adams, 271 F.3d 1236, 1245 (10<sup>th</sup> Cir. 2001), cert. denied, 535 U.S. 978 (2002). There the federal court found the testimony at issue would simply show that the defendant was the kind of person who might have lied to the police about his involvement in the crime. Id. at 1246. In so doing, the court distinguished other federal appellate cases where psychiatric experts’ testimony was admissible as it was helpful to the jury in reviewing confession evidence. Id.

In support of its argument, the State refers this Court to a number of cases from other states holding that an expert such as Dr. Leo would only provide information that is “common sense” and thus not appropriate for expert testimony. Consolidated Brief of Respondent at 258-64. Only two of the cited cases hold that the expert testimony would improperly address witness credibility, pointing to the jury’s role to determine the reliability of the defendant’s statement. State v. Davis, 32 S.W.3d 603 (Mo.App. 2000); Adams, 271 F.3d at 1246 (expert’s testimony that defendant type of person likely to falsely confess simply vouches for credibility

of another witness). These cases all involved custodial interrogation in the United States, a subject matter a U.S. jury could be expected to have some knowledge of. Thus, an American jury would be able to evaluate the effect of interrogation techniques.

Here, however, the jury was evaluating a lengthy and complex Canadian undercover operation unlike those known in the United States. The RCMP created a false criminal world, far from the protections of an American police department interview and far from the juror's common experience or knowledge. The cases referred to by the State thus do not support the trial court's determination that the jury's knowledge that people lie rendered them capable of an educated evaluation of the confessions harvested by the RCMP's undercover operation.

The trial court's ruling that Dr. Leo's testimony would not aid the jury was based in large part upon his memory of the jury selection process. 11/19/03RP 65. Jury voir dire in this case was lengthy, as over half of the venire stated in their questionnaires that they could not be fair based upon information they had learned about the case in the media. 10/17/03RP 123; 10/13/03RP 131. The State suggests Sebastian misrepresented the potential jurors' comments concerning false confessions because the venire

member quoted was thinking about custodial statements, not those obtained from an undercover police officer.<sup>11</sup> Consolidated Brief of Respondent at 264-66. Sebastian's point, however, is the court improperly looked to the infrequent juror discussion of false confessions to determine that no expert testimony was needed. Jurors have no expertise in recognizing false confessions. Kassir, Psychology of Confessions, 4 Annu. Rev. Law. Soc. Sci. at 209-10. Research has shown that even mock jurors who are told a confession is coerced convict at a higher rate when the confession is admitted as evidence. Id. at 209.

It is also important to consider this issue in light of the evidence presented to the jury about Sebastian's bad conduct and statements throughout his interaction with the undercover operation. In any "Mr. Big" case, the defendant's interactions with the purported criminals necessarily brings into evidence many incidents of other misconduct – the target's willingness to associate with the pretend organized crime members, the target's actions in committing apparent crimes for the undercover operatives, and the

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<sup>11</sup> A few potential jurors knew the defendants' statements were the subject of a pre-trial ruling and even that an undercover police operation was involved. 10/27/03RP 90; 10/28/03(AM)RP 101, 105. One had difficulty with the idea that the jury would independently review the reliability of a confession the court had already ruled was admissible. 10/23/03(AM)RP 102-04.

target's discussions of past and future criminal activity with the operatives. Moore, et. al, Deceit at 33; Christopher Nowlin, Excluding the Post-Offence Undercover Operation from Evidence – "Warts and All", 18 Can. Crim. L. Rev. 381, 384-93 (2003). In this case the jury learned about the purported criminal conduct Sebastian participated in at the directions of the undercover operators as well as his discussions with them about crime, including what crimes he had committed in the past and was interested in committing in the future. Sebastian's character and veracity were before the jury.

When the defendants asked to exclude some of the other misconduct mentioned within Sebastian's conversations with the undercover officers, the State argued that everything said in every conversation was admissible and relevant "to the veracity, the ultimate veracity of the confessions." 11/18/04(AM)RP 21-22. The court agreed that the normal ER 404(b) analysis was improper because the defendants were challenging the veracity of the confessions to the undercover officers, so any admissions of prior bad acts to the undercover officers were admissible no matter how prejudicial. 11/18/03(AM)RP 20-25, 34-35 ("all of this sort of baggage as to their life experiences goes into that pot"). Clearly

Sebastian's character and veracity were at issue in this case, and he should have been permitted to call his expert, even if the testimony could be construed as addressing his credibility or the credibility of the confessions.

Dr. Leo's expert testimony would have assisted the jury in evaluating the defendants' statements to the undercover police detectives. His testimony would address police interrogation techniques and factors like youth that are found in false confessions cases, not the individual statements at issue. The State's misleading argument that Dr. Leo's testimony would have been an improper opinion on the credibility of another witness must be rejected.

c. Dr. Leo's proposed testimony was based upon principles generally accepted in the social science community. For the first time on appeal, the State argues that Dr. Leo's proposed testimony was not based upon information or theory generally accepted in the relevant scientific community. Consolidated Brief of Respondent at 272-81. This argument must be rejected because it is incorrect. Moreover, Sebastian's failure to offer proof on this issue in the trial court is the result of the State's failure to object on this basis or request a Frye hearing.

i. The theory underlying Dr. Leo's proposed testimony is generally accepted in the relevant scientific community. An appellate court reviewing a trial court's determination that a theory or method is or is not generally accepted in the scientific community may look at the scientific evidence up to the current date. Copeland, 130 Wn.2d at 255-56. The Journal of the American Psychology and Law Society will soon issue a "White Paper" addressing the risk factors for false confessions and making recommendations for policy change. Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo, & Allison D. Redlich, Police-Induced Confessions: Risk Factors and Recommendations, Law and Human Behavior (forthcoming 2009) (hereafter White Paper).<sup>12</sup> Authored by noted scholars in clinical psychology, experimental psychology, and criminology, the White Paper demonstrates the general acceptance in the social science community of Dr. Leo's proposed testimony.

The White Paper conclusively refutes the State's suggestion that Dr. Leo's proposed testimony is suspect because of a lack of empirical research or acceptance in the social science community.

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<sup>12</sup> The last such "White Paper" was published in 1998 and addressed eyewitness identification procedures.

The White Paper confirms that, despite the explainable lack of a empirically-based estimate of the percentage of false confessions, it is clear from research to date that a small but significant number of people do confess falsely. White Paper at 7-9.

The prosecutor does not refer to any articles by social scientists critical of Dr. Leo's scholarship or the underpinnings of his proposed testimony on false confessions. Instead, the state refers to two 1999 law review articles.<sup>13</sup> Under Frye, the theory underlying an expert's testimony need be "generally" accepted in the relevant scientific community; unanimity is not required. Copeland, 130 Wn.2d at 270; State v. Bander, \_\_\_ Wn.App. \_\_\_, 2009 WL 1578936 at \*3 (No. 61125-9-I, June 8, 2009); see In re Young, 122 Wn.2d at 55-57 (rejecting petitioner's argument, supported by Washington State Psychiatric Association, concerning lack of general acceptance in scientific community to support

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<sup>13</sup> Paul G. Cassell, The Guilty and the "Innocent" An Examination of Alleged Cases of Wrongful Conviction from False Confessions, 22 Harv. J. L. & Pub. Pol'y 523 (1999) (arguing a significant number of the innocent were actually guilty and concluding "the false confession problem" is limited to the mentally retarded). Cassell's impressive resume, which does not include advanced degrees in any social science, can be found at the University of Utah's web site, [www.law.utah.edu/profiles/default.asp?PersonID=57](http://www.law.utah.edu/profiles/default.asp?PersonID=57) (last viewed June 24, 2009).

Major R. Agar II, The Admissibility of False Confession Expert Testimony, 1999-AUG Army Law. 26. Major Agar is described as a "litigation attorney." Despite his concerns, he states much of the theory of false confessions does meet the Daubert test and probably the Frye test. Id. at 40.

testimony that a particular mental abnormality or personality disorder makes person likely to rape; finding level of acceptance of testimony concerning mental disorders “sufficient” to merit consideration at trial). There is no requirement of acceptance among legal scholars who are not scientists, let alone unanimous acceptance. While the legal scholars rely upon information from the social science community, they do not create the psychological precepts or data upon which Dr. Leo’s testimony would have been based.<sup>14</sup>

The State’s attempt to utilize the debate in legal journals concerning how frequently our criminal justice system produces false confessions is thus a red herring. It is important to note, however, that Professor Cassell is in a small minority of legal scholars in his criticism of the underlying basis of social scientists’ work in this area. See, Talia Fisher, The Confession Penalty, 30 *Cardoza L. Rev.* 871, 877-78 n.29 (2008) (citing Cassell as the “well-known exception” to general premise that confessions are overused and systematic change is necessary to reduce incidence

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<sup>14</sup> Sebastian cited law review articles rather than social science abstracts as the court and parties can easily access the legal literature and because the law review articles provide summaries of the social scientist’s research and conclusions of interest to the legal reader.

of false confessions); Marvin Zalman & Brad W. Smith, The Attitudes of Police Executives Towards *Miranda* and Interrogation Policies, 97 J. Crim. L. & Criminology 873, 896, n.141 (2007) (noting Cassell's "tenaciousness has tended to cloud the accuracy of his scholarship," but agreeing evidence shows that false confessions occur most frequently with teenagers and those with mental disabilities). Cassell's own methods of quantifying false confessions have also been attacked as lacking an empirical foundation. Welsh S. White, What is an Involuntary Confession Now?, 50 U. Rutgers L. Rev. 2001, 2030 n.189 (1998) (criticizing Cassell's estimates in a 1998 law review article addressing false confessions as "garbage in – garbage out"); Welsh S. White, False Confessions and the Constitution: Safeguarding Against Untrustworthy Confessions, 32 Harv. C.R.-C.L. L. Rev. 105, 132 n.190 (1997) (Cassell's calculations of frequency of false confessions "essentially plucked from thin air"). Leo and Ofshe have accused Cassel of deliberately misreading their work. Richard A. Leo & Richard H. Ofshe, The Truth about False Confessions Advocacy Scholarship, 37 Crim. L. Bull. 392 (2001); Richard A. Leo & Richard J. Ofshe, Using the Innocent to Scapegoat *Miranda*: Another Reply to Paul Cassell, 88 J. Crim. L.

& Criminology 557, 558 (1998); Richard A. Leo & Richard J. Ofshe, Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem, 74 Denv. U. L. Rev. 1135 (1997).

Importantly, the debate between legal scholars is primarily centered on whether there is a need for reform of police interrogation practices and, if so, what changes should be made. There is certainly no consensus that the information utilized by social scientists like Dr. Leo is fraudulent. Cassell argues false confessions are not a pervasive problem but also suggests videotaping of custodial interrogation in exchange for reform close to his heart – the elimination of Miranda's requirements of a voluntary and knowing waiver by the suspect and the cessation of interrogation when a suspect requests an attorney.<sup>15</sup> Paul G. Cassell, The Guilty and the "Innocent": An Examination of Alleged

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<sup>15</sup> Cassell has written several articles arguing the costs of Miranda are too high and suggesting legal attacks on the opinion. These include, Miranda's Social Costs: An Empirical Reassessment, 90 N.W. L. Rev. 387 (1996); Miranda's "Negligible" Effect on Law Enforcement: Some Skeptical Observations, 20 Harv. J. Law & Pub. Pol'y 325 (1997); Falling Clearance Rates After Miranda: Coincidence or Consequence, 50 Stan. L. Rev. 1181 (1998); Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement, 50 Stan. L. Rev. 1055 (1998); The Statute that Time Forgot: 18 U.S.C. § 350 and the Overhauling of Miranda, 85 Iowa L. Rev. 175 (1999); Paths Not Taken: The Supreme Court's Failures in Dickerson, 99 Mich. L. Rev. 898 (2001).

Cases of Wrongful Conviction from False Confessions, 22 Harv. J. L. & Pub. Pol'y 523, 533-34 (1999); Paul G. Cassell, Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler, 74 Denv. U. L. Rev. 1123, 1133-34 (1997).

Finally, the State refers this court to a number of reported cases from other jurisdictions where trial courts excluded social scientists like Dr. Leo from testifying about the susceptibility factors or interrogation techniques that accompany false confessions. Consolidated Brief of Respondent at 275-81. Given the government's limited ability to appeal a trial court ruling concerning an expert witness, it is not unusual that many reported decisions address the exclusion of a defense expert. Courts throughout the country, however, commonly allow social scientists to testify about false confessions, as their testimony is based upon a substantial body of accepted scientific research. Richard A. Leo, Police Interrogation and American Justice 314-15 (Harvard U. Press 2008).

ii. Any deficiencies in the record concerning the acceptance in the scientific community of the content of Dr. Leo's testimony is due to the State's failure to request a Frye hearing in the trial court. In arguing the underpinnings of Dr. Leo's testimony was not generally accepted in the relevant scientific community, the State chides defense counsel for doing little to establish Dr. Leo's testimony met the Frye standard for novel scientific knowledge. Consolidated Brief of Respondent at 273. The lack of support in the record, however, is the fault of the State, which did not raise that issue in its objections to Dr. Leo's testimony.

The State did not request a Frye hearing in this case or argue that Dr. Leo's testimony was based upon novel or untested scientific theories. 15CP 2891-93. Instead, the State argued the expert would not assist the jury and would express an opinion as to the credibility of unnamed witnesses.<sup>16</sup> 15CP 2892-93, 11/18/03(PM)RP 50-55, 64-65. As a result, there was no Frye

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<sup>16</sup> The State cited, inter alia, State v. Smissaert, 41 Wn.App. 813, 706 P.2d 647 (trial court did not abuse discretion in excluding expert concerning effects of alcohol because they are commonly known), rev. denied, 104 Wn.2d 1026 (1985); State v. Alexander, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992) (child's counselor's testimony that child was telling truth was impermissible comment on defendant's guilt in rape of child case).

hearing and the court did not address the scientific underpinning of Dr. Leo's testimony in its oral ruling. 11/19/03RP 64-65.

Relevant evidence is admissible at trial. ER 401; ER 402. Absent objection, an expert's testimony is admissible; the evidence rule only requires the expert's testimony be helpful to the trier of fact. ER 702. If a party believes an expert's testimony is based upon novel or untried scientific theories, the party must speak up. See State v. Wilbur-Bobb, 134 Wn.App. 627, 633-34, 141 P.3d 665 (2006); Hall, 93 F.3d at 1344-45 (assuming scientific basis of expert's testimony because not challenged by government).

Today, the social science community is in agreement that the scientific underpinnings of Dr. Leo's proposed testimony concerning false confessions are sound. White Paper, supra. Any absence in the record concerning the acceptance of Dr. Leo's theories in the social science community, additionally, is explained by the State's failure to attack his testimony upon that ground. Dr. Leo's testimony was not excluded because it did not meet the Frye standard, and the trial court's ruling may not be upheld on this alternative ground.

d. The defendants' character and veracity were before the jury. The State counters Sebastian's argument that the State's witnesses opened the door to Dr. Leo's testimony, and points out that appellate counsel referred to testimony elicited in cross-examination. Consolidated Brief of Respondent at 281-89. As mentioned above, however, Sebastian's character and veracity were before the jury throughout most of the State's case, especially testimony from Bellevue and RCMP officers concerning his interactions with them.

For example, during Al Haslett's testimony, the State played the covert tape recordings of his conversations with Sebastian at the Four Seasons Hotel and Haslett offered commentary. 4/13/04RP 115, 122-39; 4/15/04RP 11-25, 40-43. Specifically, Haslett said his goal was not to obtain a confession from Sebastian, but to provide him with "opportunities to deny his involvement" in the homicides. 4/13/04RP 121. He then went through twelve separate "opportunities to deny." Each could just as easily been referred to as a "refusal to confess;" they include, for example, Sebastian's statement that the Bellevue Police believed he was a murderer. 4/13/04RP 122-130; 4/15/04RP 19-21. Sebastian's

objections to Haslett's testimony that Sebastian failed to deny his guilt were overruled. 4/13/04RP 124-25.

Sebastian's attorney then moved to exclude this testimony and asked the court to reconsider the exclusion of Dr. Leo, pointing out that Dr. Leo would testify that a suspect's failure to deny his involvement in a crime does not demonstrate the reliability of a later confession. 4/15/04RP 6-7; 4/20/04RP 56-58. The court refused to change its ruling concerning Dr. Leo and did not limit Haslett's testimony except to prohibit him from characterizing Burns' statements as a denial or an admission. 4/20/04RP 59-60.

The State offered further opinions from Haslett. Haslett repeated the "opportunities to deny" theme in discussing his interactions with Sebastian in Victoria. 4/22/04RP 24. Haslett also reviewed various taped intercepts from Sebastian's residence and over objection offered the opinion that he did not hear anything that led him to conclude Sebastian was afraid of the undercover operatives when these tapes were played for the jury. 4/15/04RP 94, 97-98, 101-02. He also opined that Sebastian never appeared frightened in interacting with Haslett. 4/22/04RP 31 (Victoria). The RCMP undercover evidence highlighted Sebastian's character and veracity, and Sebastian should have been permitted to call Dr. Leo

to counter the RCMP officer's confidence in the truth of the confession.

e. The error in prohibiting Sebastian from calling Dr. Leo to testify for the defense is not harmless. In a criminal case, a defendant's confession is highly damning evidence. Arizona v. Fulminate, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). As one respected legal scholar stated, "the introduction of a confession makes the other aspects of the trial superficial." C.T. McCormick, Handbook of the Law of Evidence, p. 315 (2<sup>nd</sup> ed. Minn. 1972) (quoted in Kassin, Psychology of Confessions, 4 Annu. Rev. Law. Soc. Sci. at 208). The accused's constitutional rights to due process and to present a defense therefore require that he be permitted to address that confession at trial. Crane, 476 U.S. at 689-90; Rock, 483 U.S. at 52. This is especially true here because State's case rested so heavily upon the defendants' clandestine conversations with the RCMP undercover officers. In this case, the trial court's exclusion of Dr. Leo's testimony so severely hampered Sebastian's defense that it constituted a violation of his right to present witnesses.

Constitutional error is presumed prejudicial and requires reversal unless the State can demonstrate beyond a reasonable

doubt that the error had no impact on the guilty verdict. Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Maupin, 128 Wn.2d at 928-29. The standard for non-constitutional error is lower; the appellate court determines whether the outcome of the case would have been materially affected if the error had not occurred. Neal, 144 Wn.2d 611. Evidentiary errors are harmless if the evidence in question is of “minor significance in reference to the evidence as a whole.” Id. Errors in excluding evidence may be harmless, for example, if the excluded testimony would have been cumulative or would address an uncontested issue. Karl B. Tegland, 5 Wash. Prac: Evidence Law and Practice § 103-24 (5<sup>th</sup> ed. 2007) (citing inter alia Brown v. Quick Mix Co., Division of Koehring Co., 75 Wn.2d 833, 838, 454 P.2d 205 (1969); Holmes v. Raffo, 60 Wn.2d 421, 424, 374 P.2d 536 (1962)); see Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004) (expert’s opinion not admissible because he has no opinion).

The State argues that any error in excluding Dr. Leo’s expert testimony is harmless because the jury was able to view Sebastian’s confessions on video tape and defense counsel was able to cross-examine the Mounties, point out why Sebastian’s statements were inconsistent with the evidence, and present these

points in closing. Consolidated Brief of Respondent at 290-93. The jury's evaluation of the video tapes, however, would have been altered had the jury been educated by Dr. Leo about the factors contributing to false confessions. The jury would then have been able to determine if RCMP exploited those factors to such a degree as to put the reliability of the statements into question.

Additionally, whether or not the exclusion of evidence was prejudicial is dependent upon the importance of the evidence to the case, not the quality of defense counsel's performance. See, Davis, 415 U.S. at 312-14. Without Dr. Leo, defense counsel was forced to try to educate the jury about the factors surrounding false confessions by cross-examining the officers who responded they were confident the confessions were genuine. The RCMP officers, for example, testified that Sebastian was guilty but simply too "cunning" to admit his guilt, did not really believe the Bellevue Police Department would fabricate evidence to incriminate him, and was "playing the alibi." 4/12/04RP 104-05; 4/27/04RP 64, 76; 5/4/04RP 36-37. No amount of cross-examination could counter their confident opinions. And, as mentioned above, relying only on the jury's common sense to view the videotapes is particularly inappropriate in this case because the jurors were left without tools

to evaluate the interrogation techniques and because the secretive Canadian undercover operation is unlike traditional custodial interrogation.

Additionally, without the assistance of Dr. Leo's testimony, Sebastian was placed in the position where he had to testify in order to explain his statements to the undercover officers were not true. This in turn gave the State the opportunity to impeach him with damaging testimony that had been ruled inadmissible.

The State, for example, elicited on cross-examination an incident when Sebastian was 16 and tried to avoid responsibility for damaging his father's car by claiming the damage occurred while the car was parked in a movie theater parking lot and asking a friend to lie for him. 13CP 2423; 5/12/04RP 139-41; 5/14/04RP 29-33. Additionally, the State was able to cross-examine Sebastian about his statement to a high school friend, Nozgol Shifteh, in a late-night philosophical discussion that he thought it would be enjoyable to kill another person.<sup>17</sup> The trial court had ruled Ms.

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<sup>17</sup> The State was so interested in presenting this evidence that the prosecutor flew Ms. Shifteh in from California to make an offer of proof, moved the court to reconsider its decision, and then unsuccessfully sought discretionary review in this Court. 3/30/04RP 2-13, 26-27, 48; 16CP 3144-49.

Shifteh's testimony inadmissible in the State's case-in-chief. 16CP 3105-06; 3/29/04RP 29; 5/14/04RP 61-64, 193-94.

The cross-examination of Sebastian was such an important part of the trial to the prosecutors that they were granted, over defense objection, an unusual day-long hiatus after the end of his direct testimony to prepare for the cross-examination. 5/11/04RP 176-181; 5/12/04RP 5-9, 11-13, 115-16; 5/13/04RP 4. While Sebastian was able to explain his motivation in speaking to the undercover officers he believed were mobsters, his testimony came at a high price.

Given the defendant's strong interest in the outcome of a criminal case, the jury may view his testimony with caution.<sup>18</sup> An independent expert on interrogation and confessions was sure to be more persuasive to the jury than Sebastian's testimony that he was not telling the truth when he talked to the undercover police officers about committing the murders.

In Miller, the Indiana Supreme Court reversed murder and sexual assault convictions because the trial court had limited Dr. Ofshe's testimony concerning police interrogations so that he could

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<sup>18</sup> At common law, criminal defendants were not permitted to testify because their testimony was presumptively untrustworthy. Rock, 483 U.S. at 49 (citing 2 J. Wigmore, Evidence §§ 576, 579 (J. Chadbourn rev. 1979)).

not offer an opinion concerning the defendant's interrogation during which he confessed to murdering and sexually assaulting an elderly woman. Miller, 770 N.E.2d at 766. Although the jury saw the videotaped confession, the Indiana Supreme Court ruled that Dr. Ofshe's testimony would have assisted the jury in understanding the psychology of relevant aspects of police interrogation as well as the interrogation of the mentally retarded. Id. at 774. In addition to the defendant's confession, the defendant's fingerprint was found in what appeared to be blood at the crime scene. Id. In determining the error was not harmless, however, the court noted the prosecutor's great emphasis on the video-taped confession in closing argument, including replaying the tape to point out where the defendant showed how he strangled the victim. Id. In this case the videotapes were also a key component of the prosecutor's closing argument. 5/18/04RP 44-46; 5/19/04RP 45-48, 54, 64-68, 101-07.

Sebastian's defense was dramatically limited by the trial court's decision to exclude Dr. Leo's expert testimony concerning the human factors and interrogation techniques that have been noted in cases of false confession. Looking at the evidence without considering the confessions, this Court cannot be convinced

beyond a reasonable doubt that Dr. Leo's testimony would not have resulted in a different jury verdict. See Maupin, 128 Wn.2d at 928-30; Miller, 770 N.E.2d at 774. The defendant's convictions must be reversed and remanded for a new trial.

2. THE TRIAL COURT'S EXCLUSION OF MICHAEL LEVINE'S TESTIMONY ON UNDERCOVER POLICE PRACTICES VIOLATED SEBASTIAN'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

Atif Rafay sought to call Michael Levine to testify concerning undercover police operations and the methods that may be used to ensure the reliability of any confessions they produce. 3RCP 3806-24. Levine was not an academician or scientist, but a former federal law enforcement officer. While at the DEA, he was a top undercover specialist, and since retirement he worked as an instructor, lecturer, consultant, and expert witness. 3CP 3810-24; 4RCP 4054-56.

Levine's proposed testimony would have addressed procedures developed by police agencies to address problems of entrapment, involuntary confessions, and to ensure confessions are corroborated with independent evidence. 4RCP 4056-58; 11/18/04(PM)RP 67-68. Levine opined the reverse sting undercover operation in this case did not meet professional

standards. 4RCP 4059-65. He proposed testimony would address specific RCMP decisions, such as providing the operatives with only limited information about the homicides, taping some encounters with Sebastian and not others, and not pursuing inconsistent statements in the confessions. 11/18/04(PM)RP 71-75.

The trial court ruled Levine could not testify because his testimony would invade the province of the jury, although counsel explained Levine would not offer an opinion as to whether the confessions were coerced. 11/18/04(PM)RP 68; 11/19/04RP 65-66, 68. The court added that Levine had not proved there were any standards for undercover operations in the United States or Canada in 1994-95 and criticized Levine's knowledge of the underlying facts of this case. 11/18/04(PM)RP 77; 11/19/04RP 67-68.

In supporting the trial court's decision to forbid Levine from testifying, the State argues the defendants did not provide the proper foundation for his testimony and that it would not have been helpful to the jury. Consolidated Brief of Respondent at 305-14. These arguments are both based upon the premise that the undercover murder investigation occurred in Canada and Levine's

experience was not useful because he worked in the United States investigating drug cases. This Court should reject the limited view of the relevance of an expert's opinion. A U.S. expert is qualified to offer an opinion in a Washington court about whether a police investigation in another country had features that U.S. law enforcement agencies have rejected due to the danger of coercion.

The State first claims a foundation for Levine's testimony was lacking because it was not based upon a "generally accepted theory."<sup>19</sup> Consolidated Brief of Respondent at 305. All that is required for expert testimony, however, is a qualified witness with helpful testimony. ER 702; State v. Cauthron, 120 Wn.2d 879, 890, 846 P.2d 502 (1993), overruled in part on other grounds, State v. Buckner, 133 Wn.2d 63, 65-67 (1997). Witnesses may offer expert testimony based upon their experience in an area that is not known to the average juror. State v. Yates, 161 Wn.2d 714, 762-63, 763-66, 168 P.3d 359 (2007) (FBI agent called as expert in crime scene investigation and crime scene "linkage;" health department worker as expert on prostitution), cert. denied, 128 S.Ct. 2964 (2008);

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<sup>19</sup> At trial, the State told the judge a Frye hearing was not warranted. 11/18/04(PM)RP 88-89.

State v. Ortiz, 119 Wn.2d 294, 308-11, 831 P.2d 1060 (1992)

(border patrol tracker's interpretation of physical trail).

In Ortiz the defendant challenged the testimony of United States Border Patrol agent who offered opinions based upon his experience in tracking, arguing the evidence did not meet the Frye standard. Ortiz, 119 Wn.2d at 297-98, 310. In rejecting the defendant's argument, the court explained no Frye hearing is necessary for testimony that is not based upon new scientific principles or methods of proof. Id. at 311. "Practical experience is sufficient to qualify a witness as an expert." Id. Nor are academic credentials required. State v. McPherson, 111 Wn.App. 747, 761-62, 46 P.3d 282 (2002) (detective without college degree permitted to testify as expert on methamphetamine production based upon experience and specialized training); Goodman v. Boeing Co., 75 Wn.App. 60, 81, 877 P.2d 703 (1994) (nurse properly testified about whether plaintiff's medical condition would worsen over next 12 years), aff'd, 127 Wn.2d 401 (1995).

The State argues Levine's testimony was not admissible because his expertise was in undercover drug operations rather than the undercover murder operations used in Canada.

Consolidated Brief of Respondent at 306-07. The State does not

explain why drug undercover experience was inapplicable to murder cases. The RCMP officers had experience and training in undercover drug cases, and later moved into the Mr. Big type operation. 6/10/03RP 3-7, 10-12, 29, 32. The RCMP officers begin with drug cases and work from there; as the prosecutor told the trial court, "It all starts with drugs." 11/18/04(PM)RP 89.

The State's analogy to medical malpractice cases is also inappropriate. Consolidated Brief of Respondent at 306-07. The standard of care in Washington is a critical element of the cause of action in a medical malpractice case. Here, the issue is not whether the RCMP met its own standards, U.S. standards, or European standards, but simply whether this particular operation was so unchecked that it could produce a false confession. In that case, an expert with experience in federal law enforcement would be just as helpful as a Canadian expert.

The fact that an expert is not licensed in Washington, for example, is not a proper basis to exclude his or her testimony. Walker v. Bangs, 92 Wn.2d 854, 858-59, 601 P.2d 1279 (1979) (attorney in legal malpractice action); Channel v. Mills, 77 Wn.App. 268, 282-83, 890 P.2d 535 (1995) (engineer and accident reconstruction expert in personal injury case). This type of

deficiency is a subject for cross-examination, not a basis for exclusion. Walker, 92 Wn.2d at 858; Channel, 77 Wn.App. at 283.

The State illogically argues Levine was not a competent witness because the RCMP did not have any standards in place in 1995 for its Mr. Big operations.<sup>20</sup> Consolidated Brief of Respondent at 307. The absence of standards in Canada does not mean that standards developed in other countries are irrelevant. In fact, the absence of standards of practice would in itself have been of interest to the jury, especially if the jury knew United States law enforcement agencies develop standards to prevent targeting people who are not clearly members of organized crime or already involved in the crimes portrayed in an undercover sting operation. 4RCP 4058.

Very little information about Canadian undercover activities is available. Moore, et. al, Deceit at 8; Jean-Paul Brodner, Undercover Policing in Canada: A Study of Its Consequences, in Undercover Police Surveillance In Comparative Perspective 78-79 (Cyrille Fijnaut & Gary T. Marx, eds. 1995); 6/10/03RP 102-04 (press bans in many Mr. Big cases). No manuals, for example, are

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<sup>20</sup> RCMP had "policy" for holdback evidence and a "best practice" to provide only limited information to undercover operatives. 6/10/03RP 22-23.

available to the public. Deceit at 8. The lack of public knowledge of undercover operations, especially the one utilized here, is precisely why Levine's testimony would have assisted the jury in viewing the evidence.

Countries such as the United States and the United Kingdom do not use the Mr. Big technique – not because they lack the imagination of Al Haslett<sup>21</sup> -- but because law enforcement in these countries fear the procedure is dangerous and/or illegal. Deceit at 2-3. This, too, would be of help to the jury in evaluating the statements elicited by the undercover operatives in this case.

In his opening brief, Sebastian pointed to many Washington cases where police officers were permitted to provide expert testimony based upon their experience and training in areas the jury might be unfamiliar with, such as criminal gangs or prostitution. Amended Brief of Appellant Burns at 125. The State attempts to distinguish these cases, again by arguing Levine was not an expert in Canadian undercover murder investigations. Consolidated Brief of Respondent at 306-08. Again, this distinction misses the point of Levine's testimony, which would address how undercover

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<sup>21</sup> Haslett claims to have invented the Mr. Big operation. Moore, et. al, Deceit at 4 n.6.

operations are limited to protect against false confessions. Where the Canadian government had no known standards governing the Mr. Big operations, the jury would benefit from learning how another country addresses this problem.

Additionally, it is important to note that the trial court excluded Levine's testimony in part because the court doubted its reliability – pointing to the lack of Canadian standards and Levine's comment that the defendants were unsophisticated. 2/19/04RP 93. In fact, Levine referred to the defendants as unsophisticated "with respect to the world of organized crime." 4RCP 4057. Of the RCMP witnesses, Shinkaruk spent the most time with Sebastian. Shinkaruk described Sebastian as intelligent and easy to talk to, but "pretty naïve" at times. 5/5/04RP 97. Much of the conversations Shinkaruk had with Sebastian were about movies, music and philosophy. 5/5/04RP 96-97, 100. The operatives explained they relied upon their target's imagination and then played to his expectations of a criminal organization, and they complained Sebastian's expectations were unrealistic. 3/22/04RP 34; 3/31/04RP 6-8, 13-14, 18-20, 22, 92-93; 3/25/04RP 69; 4/13/04RP 61; 4/27/04RP 65-68, 117-19. Levine's comment that the defendants were naïve concerning organized crime was thus

shared by the Canadians and is not a valid basis to exclude his testimony.

Finally, the State argues the RCMP officers' testimony did not open the door to Levine. Appellate counsel did not make this argument, but argued Levine's testimony was critical to the defense. Amended Brief of Appellant Burns at 126-34.

Atif's trial counsel carefully explained that during pre-trial hearings the RCMP officers posited that Operation Estate comported with their standards and was therefore safe. Levine's testimony was necessary to permit the defense to cross-examine the officers about their training and experience in undercover operations, the history of the use of the undercover operations for murder cases, what standards exist and what safeguards are employed in light of the possibility of coercion. 4RCP 4040-43; 11/18/04(PM)RP 71-73. Importantly, the cross-examination would have revealed the lack of standards upon which the court illogically excluded Levine's testimony.

Levine's lack of experience in Canadian undercover murder investigations is not a legally adequate reason to exclude his testimony. The prosecution was free and capable of cross-examining Levine on these points. See State v. Francisco, 148

Wn.App. 168, 177-78, 199 P.3d 478 (2009) (when police officer testified as expert that drug users do not usually give away drugs, he admitted on cross-examination that drug users do share drugs). Put simply, the limits on Levine's experience or knowledge went to the weight the jury should give the evidence, not its admissibility. Walker, 92 Wn.2d at 859.

As mentioned in Argument 1(a), above, the defendant's constitutional right to present a defense, guaranteed by the due process and confrontation clauses, may be violated if he is prohibited from presenting evidence critical to his defense. Attacking the reliability of the defendants' inculpatory statements to the RCMP officers was an important component of the defense. Levine would have offered illuminating testimony concerning undercover police operations, the danger of extracting unreliable confessions, and the standards used in the United States to protect against this danger. The trial court's decision to prohibit Levine from testifying violated the defendants' constitutional right to a complete defense and requires reversal of their convictions.

### 3. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED SEBASTIAN A FAIR TRIAL

In a criminal case, the prosecutor's office is obligated to ensure the defendant receives a fair trial and must therefore refrain from overzealous or improper statements in closing argument.

State v. Reed, 102 Wn.2d 140, 146-49, 684 P.2d 699 (1984).

Sebastian argues his constitutional right to due process and fair trial were violated by prosecutorial misconduct in closing argument, pointing to the prosecutor's reference to a beheading by terrorists posted on the internet, the argument that the jury must either believe everything Sebastian said or everything the RCMP witnesses said, and a reference to the death of the prosecutor's father. The State argues that each comment was proper.

Consolidated Brief of the Respondent at 351-63, 370-78.

a. The prosecutor's reference to the internet beheading was improper. During closing argument, 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 State claims these comments were proper references to the horrible nature of the Rafay murders. The State also attempts to differentiate this

reference from improper comments in State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988). Finally, the State claims this issue has been waived on appeal. For the reasons asserted below, these contentions are without merit.

The State first asserts these comments were proper because they were made to remind the jury of the horrific nature of the crimes. Consolidated Brief of Respondent at 354, 357-58, citing State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006). In Borboa, the prosecutor referred to the underlying crime as “horrible” during closing argument. The Supreme Court held that a prosecutor may refer to a crime as “horrible” when the crime was factually horrible. Borboa, 157 Wn.2d at 123.

The prosecutor’s references to the Iraq beheading do not fall within the narrow scope of Borboa. In this case, the prosecutor stated,

Last week, or some days ago, an American civilian was beheaded.... He was beheaded as an apparent retaliation for mistreatment of Iraq’s war prisoners, as I understand it, at the hands of American military personnel. So that Mr. Robinson is clear and that you are all clear as well, I don’t raise this subject to somehow make light of an American civilian being executed. Even more grotesque is the notion that they took the time to video tape it before they did, and that is ultimately what led to the outrage all over the world about what had happened. I bring this up

because as grotesque and as horrible as that notion is, what these two did to Tariq Rafay, Sultana, and Basma Rafay is even worse.

5/18/04RP 36-38.

Unlike in Borboa, the prosecutor in this case referred to the defendants' alleged crimes as more "grotesque" and "horrible" than a well-publicized terrorist attack on an American. This goes beyond a factual description of a crime as "horrible" and, accordingly, is not permissible under Borboa's narrow holding.

The State also attempts to differentiate the prosecutor's comments in this case from those in State v. Belgarde. The defendant in Belgarde was associated with the American Indian Movement (AIM). The prosecutor referenced terrorist attacks committed by AIM during closing argument. Belgarde, 110 Wn.2d at 507. The Supreme Court remanded for a new trial, holding, "The prosecutor stepped far outside his proper role as a quasi-judicial officer and an advocate to give the jury highly inflammatory 'information.'" Belgarde, 110 Wn.2d at 509.

The State attempts to distinguish the present case by characterizing the Belgarde comments as "arguably irrelevant and prejudicial information that had never been offered at trial." Consolidated Brief of Respondent at 360. However, the remarks in

the present case are less relevant than those in Belgarde: whereas the defendant in Belgarde was actually associated with AIM, in the present case the defendants had no connection to the Iraqi terrorists whatsoever. Also, as in Belgarde, the prejudicial comments in this case were not based upon evidence presented at trial. Thus, if the Belgarde comments were improper because they were irrelevant and not offered at trial, the comments in this case were equally improper, if not more so.

The State next claims this issue has been waived on appeal because the defendants failed to request a curative instruction after objecting to the prosecutor's comments. Consolidated Brief of Respondent at 361-62, citing State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 493 U.S. 1046 (1991). However, in Swan the Supreme Court held defendants may preserve issues for appeal by either requesting a curative instruction *or* moving for a mistrial. Swan, 114 Wn2d at 661 (“[I]n order for an appellate court to consider an alleged error in the State’s closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction.”). As the State concedes, the defendants moved for a mistrial after objecting to the prosecutor’s references to the Iraq beheading. 5/18/04RP 124-125;

Br. of Resp't at 356. Therefore, this issue was preserved for appeal and should be considered by this Court.

b. The prosecutor's reference to the death of his father was improper misconduct. During the course of the trial, the father of one of the deputy prosecuting attorney 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 family, the trial court ruled the jury should not be told the specific reason for the prosecutor's absence. 4/28/04RP 228-30; 5/3/04RP 10-12; 5/20/04RP 206-07. Nevertheless, the prosecutor referred to the death of his father during closing argument. 5/20/04RP 206-07. The State contends this reference was proper because the defense also made references to personal experiences during closing argument, because the prosecutor did not know he was barred from referring to the death of his father, and because no reasonable juror would believe the reference was evidence. For the reasons discussed below, these contentions are meritless.

First, the State asserts the prosecutor's reference is proper because defense counsel also referred to personal experiences in closing argument; the State contends this invited the prosecutor's

reference. Consolidated Brief of Respondent at 370-71, 373. The references made by defense counsel, however, are distinguishable from those made by the prosecutor. Notably, defense counsel's personal experiences were not barred from trial by a court ruling. Furthermore, defense counsel referred to common experiences that were not emotionally related to the case. For example, Robinson pointed out that he usually removes his glasses and sets them next to him when he is "doing something." 5/20/04RP 59.

In contrast, the prosecutor referred to the death of his father in direct violation of the court's order. 4/28/04RP 228-30; 5/3/04RP 10-12; 5/20/04RP 206-07. Additionally, the prosecutor's comments carried emotional weight with the jury: one juror was excused during trial due to the death of his father, and another was excused due to the death of his grandson. 4/26/04RP 19-20; 5/3/04RP 4-5. Defense counsel's references to personal experiences were thus distinguishable from those of the prosecutor and in no way invited the prosecutor's comments.

The State also asserts the prosecutor's reference to the death of his father was permissible because he was not present when the court ordered the prosecution not to mention the death. Consolidated Brief of Respondent at 372 n.115. The State has

cited no authority to support this assertion—nor could it. The failure of the State to inform one of its own prosecutors of a court ruling does not condone the State’s violation of that ruling. RPC 8.4(j) (attorneys are expected to follow the rulings of the court); see also State v. Torres, 16 Wn.App. 254, 262, 554 P.2d 1069 (1976) (misconduct for prosecutor to continue to pursue improper argument after court sustained defendant’s constituent objections).

Finally, the State claims the prosecutor’s reference to the death of his father is not prejudicial because the jury would not believe the reference constituted evidence. Consolidated Brief of Respondent at 373. However, this misstates the prejudicial effect of the reference: irrespective of the jury’s knowledge that it was not evidence, the reference improperly ignored the court’s earlier ruling and appealed to the emotions of the jury. Accordingly, the prosecutor’s reference to the death of his father was improper and warrants reversal.

c. The prosecutor’s statement that the jury must believe everything Sebastian said or believe everything the RCMP witnesses said was improper misconduct. During closing argument, the prosecutor committed misconduct by telling the jury, “You must either believe everything Sebastian Burns told you in

order for this unbelievable story of his to be true, or it seems you have to believe what [the RCMP] told you....” 5/20/04RP 190-91. The State contends this issue was waived because no objection was made at trial. The State also attempts to distinguish this misconduct from prosecutorial misconduct in State v. Fleming, 83 Wn.App. 209, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997), and State v. Barrow, 60 Wn.App. 869, 809 P.2d 209, rev. denied, 118 Wn.2d 1007 (1991). Finally, the State asserts State v. Wright, 76 Wn.App. 811, 888 P.2d 1214, rev. denied, 127 Wn.2d 1010 (1995), condones the prosecutor’s comment. For the reasons below, the State’s contentions fail.

The State first argues this issue has been waived on appeal because no objection was raised during trial. Consolidated Brief of Respondent at 374-75. The failure to object to an improper statement constitutes a waiver unless the statement is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Contrary to the State’s position, the prosecutor’s comment was flagrant and ill-intentioned. This court has repeatedly held prosecutors may not imply acquittal requires the jury to find police

are lying or mistaken. State v. Casteneda-Perez, 61 Wn.App. 354, 362-63, 810 P.2d 74 (“it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying”), rev. denied, 118 Wn.2d 1007 (1991); Barrow, 60 Wn.App. at 874-75 (improper to argue the jury must “completely disbelieve” the police in order to believe the defendant). Because of the frequency with which such arguments have been found improper, in Fleming, this court held such an argument to be flagrant and ill-intentioned by the mere fact that such argument was made. Fleming, 83 Wn.App. at 213.

In this case, the prosecutor argued the jury must disbelieve the testimony of the police in its entirety in order to believe Sebastian’s version of what happened. 5/20/04RP 190-91. This is exactly what Barrow held to be improper. Barrow, 60 Wn.App. at 874-75. Under Barrow and Fleming, this argument is assumed to be flagrant and ill-intentioned; accordingly, this issue has not been waived and is properly presented to this court.

The State next claims the facts of this case are distinguishable from the facts of Fleming and Barrow. The State notes the prosecution did not say the jury could only acquit the defendants if it found the State’s witnesses were lying or mistaken.

Consolidated Brief of Respondent at 377. This point is irrelevant. The prosecutor told the jury it must believe everything the defendants said or everything the police said. If the jury believed the police, it must disbelieve everything the defendant said. It strains logic to see how a jury that disbelieves everything the defense says could acquit. The prosecutor's argument was thus factually indistinguishable from the improper arguments in Fleming and Barrow.

Finally, the State asserts State v. Wright is more applicable to the facts of this case than Fleming and Barrow. Wright held a prosecutor may "stat[e] the obvious: that if the jury accepts one version of the facts, it must necessarily reject the others." Wright, 76 Wn.App. at 818. Unlike in Wright, in this case the prosecutor did not state that a jury can only believe one set of facts to be true. Rather, the prosecutor told the jury it must believe either the facts as stated by the defendants or the facts as stated by the police. This is not true.

For example, a jury is permitted to believe parts of witnesses' testimony and parts of other witnesses' testimony. Furthermore, a jury may believe two witnesses with divergent versions of facts are both telling the truth as best as possible. The

prosecutor's argument thus misstated the law to the jury, just as in Fleming and Barrow.

d. The convictions must be reversed and remanded for a new trial. Given the emotional facts of this case, it is likely the prosecutor's misconduct affected the jury verdict and require a new trial. The prosecutor's comparison of the murders to terrorist activity in the Middle East was an unnecessary appeal to nationalism and prejudice. The prosecutor's attempt to elicit sympathy by referring to his own father's death was especially prejudicial because the defendants were on trial for murdering Atif's parents and sister. The prosecutor also stated the jury had to believe everything said by Sebastian or everything said by the undercover officers. In a case where Sebastian's confession to the undercover officers was key, the prosecutor's argument misrepresented the jury's duty to review the evidence and draw conclusions, urging it to do so in an overly simplistic manner. Sebastian's convictions must be reversed due to the serious misconduct in closing argument. Belgarde, 110 Wn.2d at 510; Reed, 102 Wn.2d at 145-47.

4. 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 CAUSED AN UNNECESSARY DELAY IN BRINGING HIM TO TRIAL

Sebastian and Atif were charged with this offense by information filed in King County on July 31, 1995, and they were simultaneously arrested and charged as fugitives in British Columbia. 1CP 1; 3CP 531, 542-46. The United States formally applied for extradition on September 25, 1995, without providing assurances that the death penalty would not be imposed if the defendants were convicted at trial. 3CP 531-32. The Minister of Justice approved the extradition, but the defendants appealed to the Court of Appeals of British Columbia. United States v. Burns, [2001] 1 S.C.R. 283, 295, 299, 2001 SCC 7.

The British Columbia appellate court overruled the Minister of Justice's decision, finding he should not have acquiesced to the extradition request without assurances the defendants did not face execution. Burns, 1 S.C.R. at 300; United States v. Burns, [1997] 94 B.C.A.C. 59. Instead of abiding by the British Columbia court's decision, the State appealed to the Supreme Court of Canada, which upheld the ruling, albeit on other grounds. Burns, 1 S.C.R. at

360-61. Meanwhile, Sebastian's counsel asked the prosecutor to let his client stand trial without facing the death penalty, but the prosecutor declined. 3CP 548-49. The State finally agreed not to seek the death penalty in March 2001, and the young men were arraigned in King County on April 6, 2001. Both had been held in jail in British Columbia on the extradition warrant almost six years. 3CP 530.

On the date of arraignment, defense counsel filed a motion to dismiss due to the speedy trial violation. 3CP 530-91. In February 2003, the State finally filed its reply, and the motion was denied that month. 11CP 2171-2379. Sebastian asserts his right to a speedy trial was violated because the King County Prosecutor did not accede to the British Columbia Court's ruling and agree not to seek the death penalty for the two Canadian citizens in 1997.

The State argues that Sebastian's motion in the trial court was based upon CrR 3.3 and he may therefore not make a constitutional argument on appeal. Sebastian's argument is based upon the rule announced in State v. Striker, 87 Wn.2d 870, 557 P.2d 847 (1976), a case addressing the constitutional right to a speedy trial. In addition, constitutional speedy trial violation may be

raised for the first time on appeal. This Court must therefore reject the State's argument.

The State is correct that CrR 3.3 and the constitutional right to a speedy trial are not co-equal. CrR 3.3 is, however, an attempt to insure that the defendant's constitutional right to a speedy trial is honored. Criminal rules like CrR 3.3, however, may not be interpreted in a manner "to affect or derogate from the constitutional rights of any defendant." CrR 1.1.

In Striker, the Washington Supreme Court addressed a significant delay between the filing of an information and the defendant's preliminary appearance. Striker, 87 Wn.2d at 871. CrR 3.3 provided a 90-day deadline for trying a criminal case, with the 90-day period beginning at the date of first appearance; CrR 4.1 called for prompt arraignment after the filing of an information. Id.

The Striker Court looked at the defendant's right to a speedy trial under the federal and state constitutions and to the ABA Standards Relating to Speedy Trial, designed to implement those rights. The court then developed a rule based, not on the language of CrR 3.3, but on the need to protect the defendant's constitutional rights and the public's interest in ensuring prompt resolution of criminal cases. Id. at 872-74, 876. The court concluded that CrR

3.3 should operate from the time of the filing of the information, not the date of first appearance, when a undue delay occurs between the filing of the information and the arraignment and the defendant is amenable to process. Id. at 875. If not, the case must be dismissed. Id. at 877.

[A] due regard for the protection of the petitioners' constitutional rights, as well as consideration of policy in the administration of justice, compel us to the conclusion that where, contrary to the expectation expressed in the rules, a delay has occurred between the filing of the information and the bringing of the accused before the court, CrR 3.3 must be deemed to operate from the time the information is filed.

Id. at 875 (emphasis added).

The Striker Court thus created a new rule, not found in the language of CrR 3.3, in order to protect the defendant's constitutional right to a speedy trial in a fact situation not contemplated by the rule. Defense counsel cited Striker, State v. Greenwood, 120 Wn.2d 585, 845 P.2d 971 (1993), and CrR 3.3 in moving to dismiss the prosecution for a speedy trial violation. 3CP 535-40. The State similarly addressed these cases in its response brief to the "Striker motions." 11CP 2171-83. The defendant's constitutional right to a speedy trial was thus at issue.

Additionally, violations of constitutional rights are an exception to the general rule that appellate courts will not review issues not brought to the attention of the trial court because those issues so often result in a serious injustice to the accused. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). In determining whether to review a purported constitutional error for the first time on appeal, the appellate court first determines if the error is truly of constitutional magnitude and, if so, determines the effect the error had on the trial using the constitutional harmless error standard. Scott, 110 Wn.2d at 688.

Sebastian's claim that his constitutional right to a speedy trial was violated is a constitutional issue. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); State v. Monson, 84 Wn.App. 703, 711, 929 P.2d 1186, rev. denied, 133 Wn.2d 1015 (1997); U.S. Const. amends. 6, 14; Const. art. 1 § 22. It is the government's responsibility to bring the defendant promptly to trial, not the defendant's. Barker, 407 U.S. at 527. As a result, a defendant does not waive his speedy trial rights by failing to demand a speed trial. Id. at 528. Instead, the defendant's assertion or failure to assert his constitutional right to a speedy trial is but one the factors to consider in determining if a constitutional

violation occurred. Id. The post-indictment delay in this case, from July 1995 to arraignment in April 2001, resulted in lengthy pre-trial incarceration. This Court should review whether the delay caused by the State's appeal of the British Columbia court's ruling violated Sebastian's constitutional right to a speedy trial.

In any event, alleged violations of CrR 3.3 and alleged violations of the constitutional right to a speedy trial are both reviewed de novo. State v. Carney, 129 Wn.App. 742, 748, 119 P.3d 922 (2005) (CrR 3.3); United States v. Manning, 56 F.3d 1188, 1193 (9<sup>th</sup> Cir. 1995) (post-indictment speedy trial claims). The time for trial set by CrR 3.3 is a fixed date, whereas the constitutional right to a speedy trial looks at whether trial occurred during a reasonable period of time. Monson, 84 Wn.App. at 711.

If the State had agreed not to seek the death penalty, Sebastian and Atif could have been extradited shortly after the decision by the British Columbia appellate court on June 30, 1997. The State argues, however, that the delay was the fault of the defendants, who apparently would have agreed to face the death penalty if they really wanted a speedy trial. Sebastian's legal position, however, was the correct one – Canada will not extradite Canadian citizens to a foreign country to face the death penalty

absent extraordinary circumstances not found here. Burns, 1 S.C.R. at 361.

The State's discussion of the Canadian Supreme Court's decision in this case exaggerates the importance of the two prior cases where Canada extradited fugitives to the United States to face the death penalty. Consolidated Brief of Respondent at 119-20 (discussing Kindler v. Canada, [1991] 2 S.C.R. 779 and Reference re Ng Extradition, [1991] 2 S.C.R. 858. Each of those cases involved fugitives who fled to Canada to avoid prosecution or the imposition of sentence in the United States; neither was a Canadian citizen. Thus, neither had rights under the Canadian Charter as did the defendants, who were Canadian citizens.

The federal cases cited by the State to show the defendants were responsible for the delay also involve greatly different fact patterns than the present case. In Manning, for example, the district court found the defendant resisted all efforts to bring him back to the United States. United States v. Manning, 56 F.3d at 1195. In the other federal cases cited by the state the defendants also appear to be United States citizens who fled the country to avoid discovery or extradition. United States v. Mitchell, 957 F.2d 465, 466 (7<sup>th</sup> Cir. 1992) (U.S. citizen fled to Columbia where he lived

under an assumed name and took advantage of the Columbian government's internal battles concerning extradition policy); United States v. Thirion, 813 F.3d 146, 149, 150 (8<sup>th</sup> Cir. 1987) (defendant secreted himself in Monaco). Here, in contrast, the defendants were in custody in their home country willing to consent to extradition as soon as the State provided assurances the death penalty would not be sought.

Sebastian's constitutional right to a speedy trial was violated when, after the decision of the British Columbia Court of Appeals, the State refused to assure the Canadian government that Sebastian and Atif did not face the death penalty. Instead, the State appealed the decision to the Supreme Court of Canada and did not offer assurances until losing in that Court. This lengthy delay in arraignment was the fault of the State, not the defendants, and their convictions should be dismissed.

#### 5. THE CUMULATIVE EFFECT 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; Const. art. 1, § 3, 22. Sebastian argues the cumulative effect of the trial court errs in his case require

reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

The State counters the cumulative error doctrine is not applicable to this case, stating, "Most of the claims of error raised by the defendants are meritless. Any that might have merit nevertheless had no effect on the outcome of this six-month trial." Consolidated Brief of Respondent at 378-79.

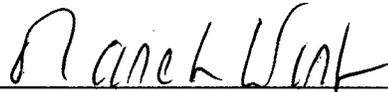
The State ignores the entire point of the cumulative error doctrine: claims that do not individually affect the outcome of a trial may nevertheless, as a whole, prejudice the trial to the point of violating a defendant's right to due process. U.S. Const. amend. 14; Const. art. 1 §3, 22.

C. CONCLUSION

Glen Sebastian Burns' right 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 and in the appellants' opening briefs.

DATED this 30<sup>th</sup> day of June 2009.

Respectfully submitted,



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Washington Appellate Project (91052)  
Attorneys for Appellant Burns

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. ) NO. 55217-1-I  
 )  
 GLEN SEBASTIAN BURNS, )  
 )  
 Appellant. )

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STATE OF WASHINGTON  
2009 JUN 30 PM 4:56

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] BRIAN MCDONALD<br>DEBORAH DWYER<br>KING COUNTY PROSECUTING ATTORNEY<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] DAVID KOCH<br>ATTORNEY AT LAW<br>NIELSEN, BROMAN & KOCH, PLLC<br>1908 E MADISON ST.<br>SEATTLE, WA 98122  | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] GLEN SEBASTIAN BURNS<br>876360<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13 <sup>TH</sup> AVENUE<br>WALLA WALLA, WA 99362                                      | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF JUNE, 2009.

X \_\_\_\_\_ 

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