MEMORANDUM OF ADVICE

R v NAPIER AND JONES

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1. INTRODUCTION

Counsel has been briefed to advise the Director of Public Prosecutions on the prospects of successfully prosecuting William NAPIER and Henry JONES, each on two counts of aggravated burglary.

A. TABLE OF ABBREVIATIONS

		BURTON		
BUSH	2/6/2004	Richard BUSH	NAPIER friend	58
HINCH	1/6/2004	Michelle Cathryn HINCH	COLQUHOUN girlfriend	61
EDMOND	1/6/2004	Dorothy EDMOND	JONES (ex?) girlfriend	63
ANDREWS	3/6/2004	Phillip ANDREWS	Police 12 May	65
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2. FACTUAL THEORY

A. PROSECUTION THEORY

i. 13 January 2004

NAPIER registered a SIM in MURDOCH's name at his parents' address: 10 Hazeldene Crt, BERWICK.

ii. 3/23 Ellaswood burglary

At approximately 12.20pm on 10 February NAPIER, COLQUHOUN and JONES arrived at 3/23 Ellaswood Close. NAPIER and COLQUHOUN entered through the window. NAPIER, large and about 6 foot tall, was armed with a rifle. COLQUHOUN, medium build and about 5'8, was armed with a shotgun. COLQUHOUN told JONES to wait outside. JONES kept watch from outside while NAPIER and COLQUHOUN threatened tenants RICE, DAWSON and BOLTON and searched the premises for drugs and money. When NAPIER realised they were at the wrong premises, he yelled out "let's go" to COLQUHOUN. COLQUHOUN and NAPIER ran out the front door, yelling to JONES "Hurry up, we're leaving." The men stole money and RICE's mobile phone.

iii. 'Casing' of 12 Legana on 17 February

At approximately 6pm on 17 February NAPIER, COLQUHOUN and JONES were 'casing' 12 Legana Close to prepare for the burglary. NAPIER was the front passenger and the car the men were driving belonged the NAPIER.

iv. 12 Legana burglary

Early in the morning on 18 February NAPIER, COLQUHOUN and JONES entered 12 Legana. COLQUHOUN was armed with a cross-bow (which he later gave to NAPIER in exchange for NAPIER's rifle), NAPIER with a rifle (which he later exchanged with COLQUHOUN for COLQUHOUN's crossbow) and JONES with a shotgun. The men assaulted ANTON and SABINA and searched the premises for jewellery and money. They stole two mobile phones belonging to SABINA, along with jewellery, money and other items. At one point JONES said "I can't believe we got the wrong fucking place again." They left the premises through the rear window. JONES dropped his yellow handled knife as he was escaping over the back fence.

v. Post-Offence Conduct

NAPIER and COLQUHOUN both used RICE's phone to receive calls from their personal SIM cards. JONES used SABINA's phone with his own SIM card and NAPIER used SABINA's other phone with the SIM card he had acquired in MURDOCH's name. JONES fled to Queensland to hide from the police.

B. ANTICIPATED DEFENCE THEORY

This is not an element of the prosecution case. Counsel notes, however, that JONES and NAPIER will deny any involvement in either burglary. It is unclear whether JONES and NAPIER will attempt to explain how they came to be in possession of crime proceeds (SABINA's phone: JONES), (SABINA's phone: NAPIER; RICE's phone: NAPIER), such as by suggesting they were given these items by their friend, COLQUHOUN. Such a suggestion would likely require JONES and NAPIER to testify at trial.[1] JONES and NAPIER may instead wish to remain silent and force the prosecution to prove its case BRD.[2] Similarly, JONES may wish to provide an explanation for a knife bearing his fingerprints being found near 12 Legana, such as COLQUHOUN borrowing this knife. JONES may not need to testify- it is open to the court to infer that JONES had touched the knife on a previous occasion and did not drop it at the crime scene. It is also not clear whether the defence will lead evidence of any alibis.

[1] The defendant is not compellable (s17) nor can the judge or any party comment on the failure of the defendant to give evidence: s20(2).
[2] The prosecution cannot comment on any failure of the accused to give evidence as indicative of a consciousness of guilt: s20(2). *Weissensteiner* used evidence of the failure of Weissensteiner to testify as indicative that he had nothing exculpatory to reveal, however *Weissensteiner* has largely been confined to its facts (eg Azzopardi at 75: "cases in which a judge may comment on the failure of an accused to offer an explanation will be both rare and exceptional."), and its applicability to UEL jurisdictions has been questioned (See eg, Callinan re s20(2)).

3. REAL ISSUES

To succeed in its case, the Prosecution must prove all elements of the alleged crimes beyond reasonable doubt.

A. LEGAL ISSUES NOT IN DISPUTE

Counsel is instructed that it is not in dispute that the acts described by the witnesses occurred and that they constituted aggravated burglaries. We are therefore not concerned as to the state of mind of the intruders (s76(1) burglary) or possession of firearm/knowledge of persons present (s77 aggravated burglary). There is still a difficulty here. While the acts described by the witnesses of the intruders *they saw* clearly constituted aggravated burglaries, the act of waiting outside (not seen by the witnesses) (SEE BELOW: LEGAL ISSUES IN DISPUTE) does not meet the requirement of entering the ***building*** as per the definition of burglary (s76 Crimes Act) or aggravated burglary (s77 Crimes Act). Such an act still constitutes abetting (s323 Crimes Act) and can have the same consequences as a charge of aggravated burglary. Counsel will thus still attempt to prove that JONES was present at 3/23 Ellaswood and thus complicit in the aggravated burglary.

B. LEGAL ISSUES IN DISPUTE

Success for the prosecution rests on identifying BRD that the burglars present at 3/23 Ellaswood and 12 Legana were in fact NAPIER and JONES. Proof of these propositions relies on various strands of circumstantial reasoning. The Prosecution must therefore ascertain that there are no rational hypotheses consistent with innocence (Chamberlain).

The prosecution's case can be divided into four separate (but somewhat interrelated) propositions:

a. NAPIER WAS THE LARGER INTRUDER AT 3/23 ELLASWOOD on 10 February
b. JONES WAITED OUTSIDE AT 3/23 ELLASWOOD on 10 February
c. NAPIER WAS THE LARGER INTRUDER AT 12 LEGANA on 18 February
d. JONES WAS ONE OF THE SMALLER INTRUDERS AT 12 LEGANA[3] on 18 February

[3] It is the prosecution's theory that JONES was the third man identified by SABINA (ie not the man wearing overalls), however, on the evidence available, this is difficult to prove BRD. Seeing as all the intruders committed aggravated burglary, it suffices for a conviction that JONES be ONE of the two smaller intruders. Having said this, proving that

Counsel has made the decision not to argue that JONES entered the house on 10 February (thus committing aggravated burglary) or that he was one of the intruders identified by RICE, DAWSON and BOLTON. This decision was made because there is insufficient evidence to prove either of these propositions beyond reasonable doubt:

- Evidence that only two men were seen inside the house,[4] in conjunction with evidence that these two men were COLQUHOUN and NAPIER,[5] tends to exclude JONES as an intruder.
- COLQUHOUN's admission that he and NAPIER entered the house while JONES waited outside, used in conjunction with the proposition that COLQUHOUN would have known if JONES had entered the house, places JONES outside. There is no evidence to suggest COLQUHOUN was lying.
- Evidence implicating JONES in the first robbery is weak ,[6] and does not displace the contention that JONES remained outside.
- Evidence that nobody was heard exiting the house after COLQUHOUN and NAPIER[7], in conjunction with the assumption that the tenants would have heard someone else leave, supports the proposition that JONES remained outside.
- Evidence that JONES was told to wait outside, in conjunction with the generalisation that people normally do what they're told, also supports the proposition that JONES remained outside.
- Evidence that JONES admitted to the 3/23 Ellaswood burglary[8] is unlikely to displace the above evidence suggesting he was outside.

If JONES did not personally commit an aggravated burglary, he may still be liable as an abettor (s323 Crimes Act) and punishable as a principal offender. Counsel still therefore wants to prove BRD that JONES was the third man who waited outside.

C. RELEVANT CONSIDERATIONS

As the paramount issue in proving all these propositions relates to identity, it is worth noting that cases of identity are particularly infamous for miscarriages of justice (eg Button). The case against NAPIER and JONES relies largely on circumstantial evidence of identity, involving "the

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JONES is the third man identified by SABINA helps link JONES to 3/23 Ellaswood and thus will be discussed later as relevant to strengthening the prosecution case.

[4] DAWSON, RICE, BOLTON testimonies

[5] SEE CHART: COLQUHOUN committed the 3/23 Ellaswood burglary and CHART: NAPIER burglary 1

[6] SEE CHART: JONES burglary 1

[7] RICE, BOLTON, DAWSON testimony

[8] SEE CHART: JONES ADMISSION

drawing of inferences from a jigsaw of established facts" (Kirby in De Gruchy). The recognised danger in this form of reasoning means the mere consistency of the evidence is insufficient, there must be no other rational conclusion (Hodge's Case). Direct identification evidence[9] is also notoriously unreliable, such that s165(1)(b) lists identification evidence as a form of unreliable evidence and s116 mandates a caution and the reasons for the caution. The prosecution thus notes that its task of identifying the intruders as JONES and NAPIER to the court's satisfaction is a difficult one.

[9] Eg RICE, BOLTON, DAWSON, SABINA, ANTON, PORTER, COLQUHOUN

4. PROVING THE FACTUAL PROPOSITIONS

This section of prose only attempts to highlight strengths and weaknesses involved in proving certain factual propositions, and should be read in conjunction with the more comprehensive charts attached.

Preliminary points:

- Counsel notes some evidence missing that could have significant probative force in proving the factual propositions. In particular, counsel would benefit from information regarding whether the DNA samples taken from NAPIER match any of the DNA samples removed from 12 Legana.[10] Counsel would also like to know what items were seized from NAPIER and JONES' homes under the respective Search Warrants (assuming JONES' premises was searched), the IMEI numbers of the phones seized from COLQUHOUN's premises and the SIM card number of the SIM seized from COLQUHOUN's premises.
- Counsel wishes to note that it has no evidence to suggest any of the witnesses are not credible.

A. That JONES waited outside at 3/23 Ellaswood[11]:

i. The strongest piece of reasoning identifying JONES at 3/23 Ellaswood is COLQUHOUN's admission. Eyewitness testimony from RICE and BOLTON, from which we can infer that there was a third party on the property, helps corroborate COLQUHOUN's admission as true.[12] Eyewitness testimony on its own, however, provides no basis for inferring the identity of the man outside as JONES because no witness directly perceived this man.

ii. Other than COLQUHOUN's admission, identification of JONES thus relies upon various pieces of circumstantial evidence:

[10] Testimony: DEVLIN
[11] SEE CHART: JONES BURGLARY 1
[12] But note s164: Corroboration requirements abolished

a. Evidence that COLQUHOUN is linked to the 3/23 Ellaswood burglary[13] and evidence that NAPIER is linked to the 3/23 Ellaswood burglary,[14] used in conjunction with the premise that COLQUHOUN, NAPIER and JONES work as a team,[15] can be used to infer that if COLQUHOUN and NAPIER were the two intruders, JONES was the man waiting outside. The more strongly COLQUHOUN and NAPIER can be linked to the burglary, the more powerful this argument becomes. The notable weakness in the argument is the scarcity of evidence behind the premise that COLQUHOUN, NAPIER and JONES work as a team.[16] For JONES to be implicated at 3/23 Ellaswood, evidence that the three work together to commit crime must be such that the three men work only with each other to commit crime, and so must have been working as a team on this occasion. The scarcity of corroborative evidence placing JONES at 3/23 Ellaswood will make the jury more hesitant to draw the inference that the men were working as a team on this occasion.

b. Evidence that JONES committed the 12 Legana burglary,[17] in conjunction with the proposition that JONES has a tendency to commit aggravated burglaries, can be used to infer that JONES did commit the 3/23 Ellaswood burglary. This reasoning is quite weak because 12 Legana constitutes evidence of only ONE burglary- there is no evidence that JONES *regularly* committed aggravated burglaries. Furthermore, JONES has not been convicted of this second burglary.

c. Evidence that JONES committed the 12 Legana burglary can also be used in conjunction with evidence that the 12 Legana burglars had already committed an aggravated burglary to infer that the aggravated burglary JONES had already committed was 3/23 Ellaswood.[18] This reasoning is strengthened by using evidence that the burglars got the "wrong place" [19] on both occasions in conjunction with evidence that 3/23 Ellaswood was a "wrong place."[20] The reasoning here is that it is so unlikely that the other burglary referred to at 12 Legana be anywhere but 3/23 Ellaswood because of the unlikelihood that there could possibly be *another* burglary in the wrong place involving three men (one

[13] SEE CHART: COLQUHOUN committed the 3/23 Ellaswood burglary
[14] SEE CHART: NAPIER burglary 1
[15] SEE CHART: NAPIER COLQUHOUN JONES work as a team
[16] SEE CHART: NAPIER COLQUHOUN JONES work as a team
[17] SEE CHART: JONES burglary 2
[18] SEE CHART: The same people committed both burglaries
[19] SABINA testimony
[20] RICE, DAWSON, BOLTON testimony: the intruders wanted money and drugs, they did not have money and drugs

about 6 foot, one about 5 foot 8). The similarities between the two burglaries complement this reasoning (which infers the two burglaries were committed by the same people[21]): both occurred at night, in proximate locations, involving a rifle and a shotgun, in a short time period. In other words, the 12 Legana burglary (including the statement) and the 3/23 Ellaswood burglary could not have happened by coincidence. This reasoning is weakened by the fact that there were not more similar burglaries, the descriptions of the intruders lacked specificity and the motives of the burglars were slightly different.[22]

d. Proving that the man who said "I can't believe we got the wrong place again" was JONES further strengthens the inference that JONES was involved in 3/23 Ellaswood. If this statement is attributed to COLQUHOUN (the other possibility) it doesn't necessarily implicate JONES, as the jury could infer that "we" refers only to COLQUHOUN and NAPIER.

e. Arguments that JONES had the opportunity to commit the burglary and that his post-offence conduct was consistent with consciousness of guilt[23] are quite weak and are only useful to strengthen stronger lines of reasoning.

Overall, COLQUHOUN's admission is the strongest evidence linking JONES to this burglary. Of the circumstantial evidence, if JONES can be shown to have said "I can't believe we got the wrong fucking place again," this is the strongest corroboration to COLQUHOUN's admission. On the whole, the circumstantial evidence is relatively weak. The prosecution will have difficulty satisfying its burden of proof. (Cf strong circumstantial evidence in Eastman).

B. <u>That NAPIER was the larger man at 3/23 Ellaswood[24]</u>

1. Witness testimony of the intruder's stature merely places NAPIER in a group of people who fit the description of one of the intruders. The availability of direct witness testimony, however, does make the case against NAPIER stronger than the case against JONES.[25]

[21] SEE CHART: The same people committed both burglaries
[22] SEE CHART: The same people committed both burglaries
[23] SEE CHART: JONES Post offence conduct
[24] SEE CHART: NAPIER burglary 1
[25] SEE CHART: NAPIER was identified as present at 3/23 Ellaswood

2. Once again, COLQUHOUN's admission is the strongest piece of evidence identifying NAPIER.

3. The prosecution case still relies largely on circumstantial evidence linking NAPIER to 3/23 Ellaswood:

    a. Evidence linking NAPIER to 3/23 Ellaswood is stronger than for JONES because NAPIER had used proceeds of the crime (RICE's phone).[26]

    b. The tendency reasoning for NAPIER is also stronger than the tendency reasoning for JONES because if it can be established that NAPIER committed the 12 Legana burglary[27] then NAPIER fits into a small group of people with the tendency to commit aggravated burglary AND he is a member of a small group of people who fit the description of the intruder (Pfennig).

    c. As for JONES, evidence of NAPIER's post offence conduct and character are not overly strong.[28]

The strongest pieces of evidence implicating NAPIER are his use of RICE's phone (coupled with the generalisation that if someone uses a stolen phone, they were the person who stole the phone) and COLQUHOUN's testimony. Coincidence reasoning linking the two burglaries is stronger for NAPIER because his stature is more distinctive, providing a stronger link.[29]

C. <u>That JONES was one of the intruders at 12 Legana[30]</u>

1. Direct identification evidence of JONES is vague and, other than COLQUHOUN's admission, is unlikely to hold much probative force.[31]

2. The prosecution has a much stronger case against JONES in respect to 12 Legana than 3/23 Ellaswood because:

    a. The knife found by the rear fence of 3/23 Ellaswood bearing JONES' fingerprints has strong probative value in identifying JONES as one of the intruders.[32]

[26] SEE CHART: NAPIER burglary 1
[27] SEE CHART: NAPIER burglary 2
[28] SEE CHARTS: NAPIER CHARACTER and NAPIER: CONSCIOUSNESS OF GUILT
[29] Although note that NAPIER's stature can also be used to strengthen the coincidence argument for JONES: ie A team of three men, including one tall big man, committed both burglaries.
[30] SEE CHART: JONES burglary 2
[31] SEE CHART: JONES was identified at 12 Legana

b. The use by JONES of SABINA's phone handset strongly infers that JONES has the handset because he stole it during the burglary.[33]

c. Even so, the tendency reasoning implicating JONES in this burglary is much weaker than the reasoning used to implicate JONES in the first burglary, as the evidence that JONES committed an aggravated burglary (or was complicit in an aggravated burglary) at 3/23 Ellaswood is significantly weaker.[34]

d. Evidence of JONES' pre-offence conduct of 'casing' 12 Legana in NAPIER's car on 17 February relies largely on the premise that if NAPIER was in the car, and there were three men in the car, that COLQUHOUN and JONES must have been the other two men.[35] The lack of evidence to support this premise makes this argument weak.[36]

The strongest pieces of evidence are COLQUHOUN's testimony, JONES' fingerprints on the knife found near 12 Legana and evidence of JONES using SABINA's phone. These pieces of evidence converge to constitute a strong case identifying JONES as present at 12 Legana.

D. <u>That NAPIER was one of the intruders at 12 Legana[37]</u>

1. Again, direct witness testimony is largely generic. The admission of COLQUHOUN holds much more probative force.[38]

2. Circumstantial Evidence linking NAPIER to 12 Legana:

i. In some respects, the prosecution case against NAPIER in relation to 12 Legana is stronger than the case against JONES because there is evidence that NAPIER and NAPIER's car were 'casing' 12 Legana the day before the burglary.[39] PORTER's evidence identifying NAPIER and his car is weakened by PORTER's willingness to only state that the car and the tattoo appear "similar" (as opposed to the same). Defence counsel will also likely emphasise PORTER's elevated position, the sun glare and the lapse in time (a month and a half)[40] until PORTER made the photographic identification (coupled with the generalisation that peoples' memories fade with time) as reasons why the evidence may be unreliable.

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[32] SEE CHART: JONES KNIFE
[33] SEE CHART: JONES proceeds of 12 Legana
[34] SEE CHART: JONES burglary 1
[35] SEE CHART: NAPIER COLQUHOUN JONES work as a team
[36] SEE CHART: NAPIER COLQUHOUN JONES CAR
[37] SEE CHART: NAPIER burglary 2
[38] SEE CHART: NAPIER was identified at 12 Legana
[39] SEE CHART: NAPIER owned the 'casing' car; NAPIER pre 18 Feb.
[40] PORTER identification

ii. The tendency reasoning for NAPIER is also stronger than for JONES because there is more evidence to suggest that NAPIER was involved in 3/23 Ellaswood. This reasoning is weakened if the prosecution cannot prove BRD that NAPIER was present at 3/23 Ellaswood.

The strongest pieces of evidence are COLQUHOUN's testimony, NAPIER's use of SABINA's phone and identification evidence of NAPIER at 12 Legana the day before the burglary. These pieces of evidence converge to constitute a very strong case against NAPIER.

5. ADMISSIBILITY OF EVIDENCE

Counsel assumes for the purposes of this section that the operative law is governed by the Evidence Act 2008 (VIC) and that witnesses' testimonies will reflect their prior written statements. The admissibility of pieces of evidence are discussed in no particular order.

1. COLQUHOUN's admissions

The piece of evidence the prosecution will most want admitted is COLQUHOUN's admission.

Instructions to counsel tell us to assume that the admissions will be admissible for COLQUHOUN. We can therefore assume that the admission was not influenced by violence or other conduct, (s85) and is reliable. (See also s90, s135).

However, NAPIER and JONES are third parties to COLQUHOUN's admission: s83(4)(a). The s81 exception does not prevent the application of the hearsay or opinion rule to evidence of an admission in respect of the case of a third party: s83(1). As NAPIER and JONES are denying involvement, they will clearly not consent to the admissions' admissibility (s83(2)).

The hearsay rule (s59) thus prevents using the statements to prove their truth, in this case, that:

- COLQUHOUN and NAPIER *did* enter 3/23 Ellaswood Close on 10 February and that JONES *did* wait outside
- That all three *did* drive past 12 Legana in NAPIER's car on 17 February 2004 and
- That all three *did* enter 12 Legana Court on 18 February 2004

The prosecution must therefore prove that the admissions fall within an exception to the hearsay rule.

If COLQUHOUN was to testify, he could give evidence about his prior admissions: s66. As COLQUHOUN is objecting to the admissibility of the admissions, it is almost certain COLQUHOUN will not testify as to what he said. As an accused, COLQUHOUN is not compellable (s17) and thus is 'not available' for the purposes of the hearsay exceptions.

The officer to whom COLQUHOUN made his admissions may be compellable if the prosecution can bring the statements within an exception in s65.

The strongest argument is that the statement was made against COLQUHOUN's own interests at the time it was made and made in circumstances that make it likely that the representation be reliable: s65(d).

- The statement was clearly against COLQUHOUN's own interests, as he admitted his own guilt. The defence will argue that the statement is not reliable, however, because testimony of accomplices is notoriously unreliable. We do not know of any motives COLQUHOUN may have had for implicating other people, whether honestly or dishonestly. It is possible to refute this argument with the suggestion that COLQUHOUN's readiness to implicate himself showed a desire to be frank. He is not in the category of accomplices trying to shift blame.

Another possible argument is that the statement was made in circumstances that make it highly probable that the representation is reliable: s65(2)(c)

- COLQUHOUN was being interviewed by police. The importance of telling the truth is paramount when a person is being interviewed by police, and this importance would have been known to COLQUHOUN. The weakness in this argument is that people often lie to the police, and he was not under oath. Further, *Conway* reminds us that s65(2)(c) is an onerous test.

The statement will not be held to be "shortly after" as the admissions can be assumed to have been made after COLQUHOUN's arrest, almost a month after the alleged incidents: s65(2)(b).

It is unclear whether the statement will satisfy s65(2)(d), however if it does, the court still retains the discretion to exclude the evidence as unfairly prejudicial: s135. This is a case where both the prejudice to the defendant and probative value are incredibly high. The prejudice lies in the ability of the admission to neatly explain a factual theory otherwise based on circumstantial evidence. For this same reason the probative value (the extent to which the evidence can rationally affect the assessment of the probability of the existence of a fact in issue- in this case the identity of the co-offenders) of the evidence is incredibly high.

If the court finds that the probative value is outweighed by the danger of unfair prejudice to the defendant, they must exclude the evidence: s137. It is unclear what the court will decide here, but on the balance, given the caution with which courts treat admissions, the evidence may well be excluded as unfairly prejudicial. If the admissions are admitted, they will require a warning of being types of unreliable evidence: s165(1)(a);(d).

If admissions are excluded for JONES and NAPIER, but admissible against COLQUHOUN, it is likely that JONES and NAPIER will require a separate trial to COLQUHOUN to ensure they are not unfairly prejudiced.

2. PORTER's testimony that a car was 'casing' 12 Legana on 17 February

This evidence is relevant because it links the people in the car to the burglary at 12 Legana. Its relevance is therefore contingent on identifying either NAPIER as the front passenger or the car as NAPIER's car.

PORTER's testimony that the car was 'casing' is likely to be inadmissible to prove that the car was in fact 'casing,' as this is a breach of the opinion rule: s76

This is not critical to the prosecution case. PORTER is likely to be able to adequately describe the movements of the car to the jury such that the jury can independently form an opinion as to whether the movements involved 'casing.' If PORTER cannot do so, his statement should fall within the s78 exception for lay opinions. In this case, his opinion that the car is 'casing' is based on what he perceived about the event and this description is necessary to adequately describe his perception.

3. PORTER's evidence that the car 'casing' 12 Legana was similar to NAPIER's car

This evidence is relevant because it places NAPIER at the scene of the burglary, acting suspiciously, in a time proximate to the burglary.

This is not identification evidence within the meaning of Part 3.9 as it does not involve the identification of a person. PORTER may therefore give evidence that he chose cars 5 and 9 as "similar" to the car he saw 'casing.' Evidence of which cars he chose as "similar" from the booklet of photographs is evidence of a previous representation and thus hearsay: s59. The statement will be admissible under the first hand hearsay exceptions because PORTER is available to give evidence and he himself made the representation: s66(1); s66(2)(a).

This evidence must be used in conjunction with evidence from ANDREWS establishing the chain of custody of the car (and photograph- ie that car 5 was OTS942) and that the car OTS942 was NAPIER's car. Evidence that the car OTS942 was registered to NAPIER is hearsay because it relies on an out of court statement from VicRoads, but will be admissible under the s69 exception for business records.

4. PORTER's evidence that NAPIER was the front passenger 'casing' 12 Legana on 17 February

Evidence that PORTER picked out a photo of NAPIER's tattoo as "similar" to the tattoo on the arm of the front passenger is being used to infer that NAPIER *was* the front passenger. As this is an assertion by PORTER to the effect that NAPIER visually resembles the front passenger, this constitutes identification evidence for the purposes of the Act.

As PORTER examined a booklet of photographs, this constitutes picture identification evidence. PORTER had been arrested at the time the photograph of his tattoo was taken and thus the picture identification evidence is inadmissible (s115(5)) unless NAPIER refused to take part in an identification parade (a) or it would not have been reasonable to have held an identification parade (C). Given NAPIER complied with other requests (eg photograph and buccal swap), it seems unlikely he would have refused to take part in an identification parade. The prosecution will argue that it was reasonable not to hold an identification parade having regard to the appropriateness of holding the parade (s115(6);s114(3)(c); s114(3)(d)). Specifically, since PORTER was identifying the passenger on the basis of a tattoo, it was more appropriate to use picture identification. Similarly, the fact that the basis of identification was a tattoo (a predominantly 2D image) negates the underlying objection to photographic evidence- that 2D photos are poor representations of 3D people. The defence may note the gravity of the offence charged (aggravated burglary): s114(3)(a), however given the notions of "reasonableness" of identification parades under the Evidence Act are quite broad, the identification is likely to be admissible.

Identification evidence is regarded as unreliable, due in part to the tendency of juries to give more credence to identification evidence than it deserves, and will thus require a warning: s165(1)(b).

PORTER's evidence must be supported by evidence from ANDREWS that photograph 11 was in fact NAPIER's tattoo, and the chain of custody of the photograph. Counsel is instructed that Detective WONG complied with the relevant provisions of the Crimes Act when he sought NAPIER's consent to the photograph of the tattoo.

5. ROVER's 'indication' to CHRISTIE that he had found something matching the scent of the intruders at 12 Legana

ROVER's 'indication' to CHRISTIE is an out of court act, however it does not contravene the hearsay rule (s59) as dogs cannot make representations.

This evidence must be led in conjunction with evidence from CHRISTIE that ROVER is trained in tracking and can follow a line of human scent. The jury can then infer that ROVER's 'indication'

was a result of tracking an intruder's scent (relevance). This evidence links the knife to the intruders.

CHRISTIE's evidence of what ROVER's 'indication' means is prima facie inadmissible as an opinion: s76. It will fall within the s79 exception for opinions based on specialised knowledge, however, since CHRISTIE is a qualified Dog Handler. CHRISTIE's experience training and working with ROVER over 5 years amounts to specialised knowledge of ROVER and his abilities, such that CHRISTIE's opinion is substantially based on that acquired knowledge: s79(1). (*Leung and Wong)*

6. Evidence of the knife found adjacent to the rear fence at 12 Legana/ photos of the knife in situ at 12 Legana

This is a type of real evidence. CHRISTIE must tender the knife in evidence, testify as to how the evidence was obtained and establish the chain of custody. This will require testimony from BISHOP, DEVLIN and WARNE as to the movement of the knife.

The photos are also a type of real evidence and will require testimony from JACKSON as to the taking of the photos 'in situ.'

The relevance of this evidence is contingent on the admissibility of testimony from WARNE that the fingerprints on the knife match fingerprints taken from JONES. This is opinion evidence, but is admissible under the s79 exception for opinions based on specialised knowledge. WARNE has 16 years experience in the identification of persons by means of ridge characteristics commonly called fingerprints. In testifying, WARNE must identify the factual premises upon which his opinion is based and adequately explain his process of reasoning (Makita). This is not likely to be contentious given the widespread acceptance of fingerprinting and WARNE's specialised knowledge in this area. Counsel has been instructed that fingerprints were obtained from JONES in accordance with the relevant provisions of the *Crimes Act.*[41]

7. Evidence of items obtained from COLQUHOUN's premises

These are types of real evidence. To be admissible this evidence must be accompanied by a supporting testimony by BRADFORD as to how the evidence was obtained. Specifically, the evidence was obtained under a search warrant under S465 of the Crimes Act. Counsel is instructed that all search warrants were lawfully granted and executed. BRADFORD must be able to prove the chain of custody: that the items tendered in court are those seized at 4/25 Grant St. He must show that there was no opportunity for any interference with the objects. As

[41] S464N, 464Q

he handed possession to GREENBERG, GREENBERG may be required to testify. These items must also be relevant.

The items are relevant for different purposes.

GROUP 1: Machete, ammunition, duct tape[42], door ram, sledge hammer, jemmy bars, VIC police Radio Channel Guide, knuckle duster, handcuffs, black balaclava

These items are relevant to support proposition that COLQUHOUN had the means to commit aggravated burglary.[43]

GROUP 2: Gold necklace, men's citizen watch, gold bracelet, jewellery box containing sim card, Cyma ladies watch, ladies dress rings, ladies necklaces, 3 Nokia mobile phones

The jewellery is relevant if SABINA can testify that the goods are the same as the ones that were stolen from her. This testimony can be corroborated by her police report (17 JUNE 2004) of stolen goods. This document is an out of court statement and is prima facie inadmissible as hearsay: s59. It will be admissible under s66, however, as SABINA herself made the previous representation and is available to give evidence about the facts asserted within the document: s66(1) and (2).

The Nokia mobile phones are relevant if their IMEI numbers match those stolen from 3/23 Ellaswood or 12 Legana. This links the phones to the allegedly stolen goods.

This requires the prosecution to lead evidence from BARNES of the IMEI numbers of the stolen phones. This evidence will fall within the business records exception to the Hearsay rule: s69. This evidence must be led in conjunction with evidence from NAYLOR that each digital handset has a unique identification number known as an IMEI, that each digital handset has a unique IMEI that cannot be altered and that the IMEI can be viewed by looking at the back of the handset after removing the battery. This evidence is expert testimony and NAYLOR must therefore establish that he is qualified to give this information. NAYLOR has worked as support Liaison Officer at Optus for over 5 years. His expertise is in providing customer information to eligible law enforcement agencies, rather than mobile phone construction, but knowledge of the fact that each handset has a unique IMEI is well within the scope of expertise of someone working in law enforcement liaison in a phone company. The content of NAYLOR's testimony,

[42] I am not discussing the evidence linking the duct tape found at COLQUHOUN's premises with the duct tape found at 12 Legana because the linkage is limited to its colour, thus has so little probative force that it could not rationally affect the assessment of probability of the existence of a fact in issue in the proceeding: s55. It would also be an undue waste of time because it relates to COLQUHOUN rather than NAPIER or JONES.
[43] Whether this proposition is relevant to the prosecution of JONES and NAPIER will turn on whether the prosecution's tendency and coincidence reasoning is accepted.

furthermore, is peculiar enough to people with some expertise in phones that it would not be considered irrelevant as common knowledge (cf Faulkner, Clark v Ryan). NAYLOR will not be required to give an opinion as to whether the IMEI numbers match. This is a matter for the jury of fact.

8. Eyewitness descriptions of the intruders[44]

The majority of these testimonies constitute opinion evidence and are thus prima facie inadmissible to prove the existence of a fact about which the opinion was expressed: s76 (for example, that the gun was a rifle or the top was black or the man was fat). The statements clearly fall within the exception for lay opinions: s78. A descriptor of colour (eg black), a type of gun (eg rifle), accent (eg Australian) or size (eg fat) is necessary to obtain an adequate account of what the witness perceived.

Eyewitness descriptions of the intruders will be left for the jury to decide whether the descriptions of the perpetrators match the appearance of NAPIER and JONES. Testimony of any eyewitness that the intruder they saw is that same person sitting before them in court would be inadmissible as an opinion (s76). To circumvent this rule, a visual identification parade would have had to be held (s114).

The descriptions may also be relevant to support the proposition that both burglaries involved the same people. This involves coincidence reasoning, which is inadmissible unless the evidence has significant probative value (and notice is given): s98. In assessing probative value, we need to assess how strong the inference is that the two burglaries were not a coincidence. The difficulty for the prosecution is that the majority of "linkages" are common to most aggravated burglaries: black clothing, armed offenders, men (?!), occurring at night. The descriptions of the guns are not sufficiently detailed to definitively identify them as exactly the same type of gun, and the descriptions of the burglars themselves also lack specificity. Further, while Berwick and Endeavour Hills are proximate suburbs, this evidence would be more persuasive if the burglaries occurred in the same street. Neither of the burglaries have a particularly distinguishing feature and the difference in motive (to steal drugs/money in burglary one, to

[44] SEE APPENDIX 1

steal jewellery/money in burglary two) [45] is unlikely to have the 'underlying unity' (Thompson) that the two events could not have occurred coincidentally.

The prosecution may attempt to strengthen their case that the two burglaries were not a coincidence with evidence inferring that the men who committed the 18th February burglary had already committed another burglary.

The statement they will want to lead is SABINA's testimony that one of the intruders said "I can't believe we got the wrong fucking place again." SEE BELOW.

Even with this evidence, however, it is unclear whether the reasoning is significantly probative such as to constitute an exception to the coincidence rule: s98. On balance, given the inherent prejudice in coincidence reasoning (the reason for the rule), the court will probably find that it is not. Coincidence reasoning remains inadmissible even if the evidence is admissible for its identification purpose or to prove that the acts constituting an aggravated burglary occurred: s95.

The evidence of "the fat man" swearing "Pitch co mater" is not visual identification evidence, and thus does not fall within s114(1). Further, it is not being used for the truth of the statement, a hearsay purpose: s59. Its relevance is to identify the intruder as someone who uses the swear words "Pitch co mater." (a non hearsay use: s60). Should the evidence be admitted for an identification purpose it will require a warning: s116. It is likely, however, absent further evidence linking NAPIER to the swear words "Pitch co mater" that the evidence is irrelevant: s55.

SABINA and ANTON's testimonies as to what happened are also relevant (and admissible) to prove that JONES was the man who said "I can't believe we got the wrong fucking place again." (providing this statement is admissible)

9. SABINA's testimony that one of the intruders said "I can't believe we got the wrong fucking place again."

The relevance of this item of evidence involves using the statement for its truth (that the men *did* get the wrong place again) in conjunction with evidence that 3/23 Ellaswood was the wrong place, to infer that the men who committed 12 Legana also committed 3/23 Ellaswood.

[45] To prove the difference in motive, the defence may want to lead evidence from RICE/DAWSON/BOLTON that the intruders wanted "drugs and money" and from SABINA/ANTON that the intruders wanted "jewellery and money." These are out of court statements (hearsay, s59), however are admissible to prove the intruders' intentions: s66A.

As the statement is being used for its truth- to prove that the men *did* get the wrong place again- it is prima facie inadmissible as hearsay: s59.

The statement is first hand hearsay (SABINA testifying to what she heard the intruder say) and, given the intruder has not been identified, the maker of the statement is unavailable. The prosecution thus looks to fit the statement into an exception in s65. The best provision is the contemporaneity exception in s65(2)(b). The exclamation was made while the *second* burglary was still ongoing and in circumstances that make it unlikely that the representation be a fabrication, therefore would be admissible to prove that the men got the wrong place *again*. The fact that the statement was made in the heat of the moment, and the exasperation evident in the statement, make the circumstances highly likely that it be reliable. The defence may suggest that the statement is being used to prove that the burglars got the wrong place *last time* and thus, as this burglary (apparently) was 8 days earlier, it is unlikely to be considered "shortly after." This mistakes the chain of reasoning. The statement is made soon after the burglars *did* get the wrong place again (the occurrence of the asserted fact). That the men had previously got the wrong place is an inference drawn from this assertion, which does not breach the hearsay rule.

The probative force in this evidence lies in the prosecution also leading evidence that the 10 February burglary was the wrong place. This requires testimony from BOLTON or RICE that the intruders were demanding "money and drugs" in conjunction with testimony from BOLTON or RICE or DAWSON that they did not have money or drugs. The evidence of the intruders' remarks are out of court statements, but will be admissible as a contemporaneous statement about the intruders' intentions: s66A. They could also be analysed as admissible non-hearsay uses of the evidence (ie not for the truth of the statement- that the robbers did steal money and drugs, but to show the state of mind of the intruders- that they *wanted* money and drugs.)

The inference to be drawn from these pieces of evidence is that the burglars at 12 Legana committed the burglary at 3/23 Ellaswood. This requires on a chain of reasoning whereby it is so unlikely that there be *another* aggravated burglary, other than 3/23 Ellaswood, that *also* involves three men and that is *also* the "wrong place," such that the 3/23 Ellaswood burglary cannot be a coincidence. In essence, this reasoning *strengthens* the coincidence reasoning discussed above, however is likely to be inadmissible for the same reason: s98.

An alternative analysis of this statement is open if the prosecution can prove that the statement was spoken by JONES.

If we can ascertain the statement was made by JONES, it may constitute an admission that can be used against him (but not NAPIER: s83).[46] The hearsay rule and opinion rule do not apply to evidence of an admission: s81(1). The definition of admission in the Evidence Act is broad enough to encompass this statement, as JONES is a party to a criminal proceeding and the statement is adverse to his interest in the outcome of the proceeding because it implicates him in another burglary (not necessarily 3/23 Ellaswood- even if the statement only goes to establishing a tendency to commit crime, or even bad character, it is adverse to his interests).

Evidence of the admission would have to be given by SABINA, who heard first-hand JONES' statement. The admission was made voluntarily and not to an investigating official, avoiding the recording requirements of the Crimes Act. The court retains residual discretion to exclude the admission as unfair to JONES (s90), along with its residual discretion under s135. The prejudicial effect of admitting the admission is high, because it essentially gets coincidence reasoning in through the back door (although note that s95 provides that the evidence may not be used for its coincidence purpose). The admission implicates JONES in another burglary, but not specifically 3/23 Ellaswood. It seems highly likely, however, that the jury will readily assume (as per the coincidence reasoning) that this other burglary *is* 3/23 Ellaswood. For this reason it is likely this statement will be excluded as unfairly prejudicial: s135.

10. Tendency Reasoning linking the two burglaries

As NAPIER and JONES have not been convicted of either burglary, tendency reasoning will be considered inadmissible as insufficiently probative: s97. Instead, coincidence reasoning asserting that it can't be a coincidence that NAPIER and JONES have been linked to two aggravated burglaries, such that the burglaries couldn't have happened independently, is more appropriate. The admissibility of coincidence reasoning has been discussed above.

11. RICE testimony of intruders saying "wait outside" and "Hurry up, we're leaving" at 3/23 Ellaswood

These statements spoken by the intruders are out of court statements, however they are not being used for a hearsay purpose. In the case of both statements, the fact that the words are spoken is relevant to infer that there is another person present at the burglary who the words are directed at.

[46] The admission may be held to have provisional relevance (s57(1)) pending the prosecution proving the statement was spoken by JONES.

Seeing as the statements are admissible for a non-hearsay purpose, they may also be admitted for their hearsay purpose: s60. Thus the statement "wait outside" may be used to infer that JONES did in fact wait outside.

12. JONES' post-offence conduct
    a. JONES gave a no-comment record of interview

This interview is relevant to suggest that JONES had a consciousness of guilt. Unfavourable inferences from JONES' silence, however, may not be drawn: s89(1). Since this interview is only relevant to infer a consciousness of guilt, it is inadmissible: s89(2); s89(4)(a).

    b. JONES fled to Queensland

This post event conduct is being used to infer that JONES has a consciousness of guilt (and this is relevant as a foundation for an inference that JONES is in fact guilty.)

    c. JONES was in contact with NAPIER

This relies on the following pieces of evidence

6. That NAPIER used the number 0431427329
7. That JONES used the number 0415409625 OR
8. That JONES used EDMOND's phone 0410547682 to talk to NAPIER
9. Call records of 0431427329

1. The proposition that NAPIER used the number 0431427329 relies on the following pieces of evidence:
    - From NAYLOR that 0431427329 was registered to MURDOCH at 10 Hazeldene Drive
        - Hearsay but admissible under the s69 exception for business records
    - From MURDOCH that 0431427329 was not his own number
        - MURDOCH can testify that he had no knowledge of the number 0431427329 until police questioning
    - From MURDOCH that NAPIER had access to his personal details
        - Most likely admissible (cf NAPIER *did* access his personal details: inadmissible as <u>opinion:</u> s76). If it is objected to as an opinion, it is likely the jury can still infer from the address of registration (NAPIER's address) and that it is not MURDOCH's number and that NAPIER used the number (below) that NAPIER had access to MURDOCH's details.

- From MURDOCH that 10 Hazeldene Drive is the address of NAPIER's family
  - Admissible
- From BURTON that she recognises as "familiar" 0431427329
  - Admissible (eg Counsel in witness examination: "Do you recognise the number 0431427329?" BURTON "Yes it is familiar as one of the number's NAPIER has used) [47]
  - BUT BURTON, who was living with NAPIER until he was arrested, may be considered NAPIER's de facto and thus may object to giving evidence for the prosecution: s18(2). The factors suggesting BURTON may still be compelled to give evidence are that her relationship with NAPIER had only been going 5 months and that the gravity of the offence with which NAPIER is charged is high s18(7)(a). The fact that she is only giving evidence about his phone number might suggest that the importance of her evidence is low, particularly given she is only suggesting the number is "familiar:" s18(7)(b). On balance though, given she is only giving evidence on a public matter (NAPIER's phone number was known to many people), the chances of harm to her are low (s18(6)(a)) and she is likely to be compellable.
- From HINCH that she had 0431427329 in her phonebook for NAPIER (the same reasoning applies for EDMOND)
  - This is evidence of a previous representation (writing/typing the number 0431427329 in her phone book under NAPIER): s59. It is being used for the truth of the statement (that NAPIER's number is 0431427329). Furthermore it is second hand hearsay (her writing/typing the number relies on a third person (likely NAPIER) telling her the number.) This does not fall within the telecommunications exception for hearsay because s71 is restricted to proof of the identity, date and destination to which the communications were sent in a document recording such communications. Such documents would not prove that NAPIER used the number because the records would record the identity as MURDOCH, the owner. This second hand hearsay will be inadmissible.
  - It may make a difference if the representation HINCH was relying on to write down the number in her phonebook was a mobile phone message/call from NAPIER from the number 0431427329 (instead of

[47] Compare: Is NAPIER's number 0431427329? (Inadmissible as a leading question: s37)

him telling her the number). Here, when the number 0431427329 flashes up on the phone (upon receipt of call/message) the representation of the phone number is not from a person but a machine (technology deciphering origin of calls)[48] and thus does not contravene the hearsay rule. HINCH is still relying on a previous representation, however, which is the accompanying call/message, to discern that the message is from NAPIER (and thus that 0431427329 is NAPIER's number). If NAPIER's message/statement was "It's Will" the fact he is intending to assert is clearly that he sent the message, contravening s59. If instead the message was something like "Hi you look hot chicken" and from that HINCH determines the message was from NAPIER (maybe NAPIER calls her chicken), or his voice in answering the phone sounded like NAPIER, then the fact that his number is 0431427329 is not what he is intending to assert (and the statement is not being used for its truth), and so using his representation does not contravene s59.

- HINCH's recording of the number thus becomes first hand hearsay, and as she is available to testify, is admissible under s66(2)(a).
- There is still a difficulty here. HINCH is unlikely to be able to remember that 0431427329 was the number she recorded for NAPIER. She may need to revive her memory by referring to her phonebook. She must get leave for the court to be able to do this: s32(1). Leave is likely to be given because HINCH will not be able to recall the fact adequately without the document (eg remembering 6 of the 9 numbers has little probative force) and the phone number recording was clearly written when the "event" (her finding out the number) was fresh in her memory (otherwise she wouldn't be able to write it) and was found by the witness to be accurate (it must be as HINCH had received subsequent calls from NAPIER from this number).
- SO. The way in which HINCH discovered NAPIER's number becomes relevant.
- ALTERNATIVELY. NAPIER's conduct in telling HINCH his number could constitute an admission. NAPIER is a defendant in a criminal proceeding and knowledge of his phone number (because it implicates him in the 12 Legana burglary- see above) is adverse to his interest in the outcome of

[48] It is common knowledge that phones can track the origin of calls. An expert is unlikely to be needed to give this opinion.

the proceeding. It doesn't matter that he didn't know that the phone number he uses can link him to 12 Legana. The hearsay rule doesn't apply to evidence of an admission: s81(1) and HINCH can give first hand evidence of this admission. (see above re refreshing memory.)

- SO. It is likely that court will allow evidence from HINCH and EDMOND regarding NAPIER's use of 0431427329. As hearsay/admission this evidence will require a warning: s165. Given that this evidence is highly probative and has low prejudicial value (given that it is corroborated by a number of witnesses) it is unlikely the court will exercise its general discretion to exclude the evidence: s135.
- NOTE: As COLQUHOUN's de facto, HINCH may not be compellable if the three men have joint trials. For reasons discussed above, however, it seems likely that COLQUHOUN will have a separate trial, thus HINCH will be compellable in the trial for NAPIER and JONES.
- NOTE: EDMOND does not live with JONES, so is not classified as a de facto, and will be compellable.
- NOTE MISSING EVIDENCE: IF NAPIER's phone was seized at Lucknow st, that the sim in this phone used the number 0431427329 (this would circumvent the difficulty with the hearsay rule discussed above).

2. That JONES used the number 0415409625
    - This relies on testimony from EDMOND or BUSH that 0415409625 was the number JONES used. Both seem to know this number by heart and so can testify as to the number in court.
3. That JONES used EDMOND's phone to talk to NAPIER
    - This relies on EDMOND's testimony that she did not speak to NAPIER (admissible) and that JONES uses her phone (admissible) in conjunction with call records linking her number 61410547682 with 0431427329.
4. Call records of 0431427329
    - Admissible under the s71 hearsay exception for the identity of telecommunications transmissions.

NOTE: Evidence of JONES and NAPIER's mobile numbers is also relevant for other purposes, as discussed in the key factual propositions. It can be assumed that the evidence is also admissible for these purposes. The final piece of relevant phone evidence is the testimony of BARNES containing the phone records linking NAPIER and COLQUHOUN to SABINA's handset. These records will be admissible under the exception for business records: s69.

13. Other misconduct by NAPIER

The prosecution may seek to lead evidence to support the propositions that NAPIER signed his mobile phone in MURDOCH's name[49] (this is illegal), that NAPIER has an Intervention Order against him[50] and that NAPIER broke an intervention order against him[51] in order to place NAPIER in a group of people with a tendency to commit crime and to establish he is of bad character.

Prima facie the prosecution is not allowed to lead evidence of bad character except to rebut defence evidence that the accused is of good character: s110(2). For this reason, the defence is unlikely to lead evidence of good character.

Tendency reasoning is inadmissible unless it has significant probative value(and notice is given): s97. This is not the case here. Evidence of the Intervention Order is likely to be inadmissible, and given that the crime of forging a signature for a mobile phone and aggravated burglary are vastly different, the probative value of this evidence is minimal.

[49] See above

[50] To prove the proposition that NAPIER has an intervention order against him, FROST can testify that she has an Intervention Order against NAPIER. The defence may object to this evidence as unfairly prejudicial to NAPIER: s135(a). The probative value is arguably low, given it is only being used to promote an inference that NAPIER has bad character and/or a tendency not to abide by the law. A crime such as to substantiate an intervention order is of a vastly different genre to aggravated burglary, and is therefore not very probative in the tendency reasoning. The evidence in relation to character is highly prejudicial as it exposes, to some degree, NAPIER to be a perpetrator of the socially repugnant crime of domestic abuse. The court is likely to exclude this evidence under s137, which it must do so if it concludes that the probative value of the evidence is outweighed by the danger of unfair prejudice to NAPIER.

[51] To prove that NAPIER broke an intervention order against him, NAYLOR can lead evidence that the number 0431427329 contacted the number 0413 441 987. This evidence is being used for its truth and thus is prima facie inadmissible as hearsay (s59). The evidence will be admissible under the s71 exception for the identity of telecommunications. This evidence relies on proof of the proposition that NAPIER used the number 0431427329 (see above) and evidence from FROST that her phone number is 0413441987. This evidence must be led in conjunction with evidence of the terms of the Intervention Order prohibiting phone contact. FROST can testify as to the terms, but this is hearsay. S69 would tend to provide an exception for the Intervention Order as a "business record," however 69(3) states that the hearsay rule will still apply if the document was prepared in connection with an investigation relating or leading to a criminal proceeding. It is unclear whether an Intervention Order comes within the scope of s59(3). Even so, the court will likely exercise its discretion (s135/137) to exclude the evidence of the terms of the Intervention Order as unfairly prejudicial to NAPIER.

14. LIKELIHOOD OF CONVICTION

As each conviction stands alone, the prosecution will consider each separately:

- That JONES waited outside at 3/23 Ellaswood

As COLQUHOUN's admission is the strongest evidence linking JONES to this burglary, and this admission is likely to be inadmissible, counsel believes it will have difficulty placing JONES at 3/23 Ellaswood such as to satisfy a finding of complicity. JONES' statement[52] "we got the wrong fucking place again" is also likely to be excluded, such that there is no probative evidence placing JONES at 3/23.

- That NAPIER was the larger intruder at 3/23 Ellaswood

Absent COLQUHOUN's admission and coincidence reasoning linking the 12 Legana burglary, the prosecution case rests on circumstantial evidence, the strongest being NAPIER's use of RICE's phone. This is unlikely to satisfy the jury BRD that NAPIER was one of the intruders at 3/23 Ellaswood, as it is unlikely there is no possible theory that NAPIER could have this phone, and be of similar stature to the intruder, that is consistent with innocence.

- That JONES was one of the smaller intruders at 12 Legana

Even without COLQUHOUN's admission, the prosecution case here has better prospects of success. The knife with JONES' fingerprints, coupled with JONES' use of SABINA's phone, have strong probative force. It is unclear whether this will be sufficient to displace any alternative possible explanation of innocence (Chamberlain). More specific direct witness testimony (obviously impeded by the disguises) would have helped the prosecution case. On balance, conviction is probably unlikely.

- That NAPIER was the larger intruder at 12 Legana

The prosecution has a similar prospect of success here as for JONES. Evidence placing NAPIER at the scene of the crime the day before the burglary, along with NAPIER's use of SABINA's phone, have strong probative force. That NAPIER's height and weight described in witness testimony are slightly more unique is of benefit to the prosecution, however on balance, the force of the evidence may fall below the high standard of proof required for conviction.

[52] If it was indeed proven to be made by JONES, which is likely

i. APPENDIX 1:

INTRUDER 1: 10 FEBRUARY

- CLOTHES: “a guy wearing a black top and a black balaclava” (RICE)
- VOICE: “voice had just an Australian accent” (RICE)
- CLOTHES: “wearing the same kind of runners both blue and white” (BOLTON)
- CLOTHES: “also had a balaclava on” (BOLTON)
- STATURE: “bit taller about 5’10 or 5’11…a bit fat” (BOLTON)
- CLOTHES: “dark clothing” (BOLTON)
- STATURE: “taller about 5”10 or 5’11” (DAWSON)
- GUN: “…carrying some sort of gun, possibly a rifle. It was long and black with a single thin barrel.” (RICE)
- GUN: “long rifle” (BOLTON)
- GUN: “second person’s gun looked longer than the other” (DAWSON)

INTRUDER 2: 10 FEBRUARY

- CLOTHES: “wearing the same kind of runners both blue and white” (BOLTON)
- STATURE: “about 5’8-5’9 tall” (BOLTON)
- APPEARANCE: “large brown eyes” (BOLTON)
- CLOTHES: “man wearing a balaclava” (BOLTON)
- CLOTHES: “dark coloured windcheater and dark tight jeans with runners (BOLTON)
- CLOTHES: “gloves(?)” (BOLTON)
- STATURE: “about 5’7” (DAWSON)
- GUN: “…carrying a sawn off shot gun” (BOLTON)
- GUN: “short, like a sawn off with a brown handle and two barrels side by side” (BOLTON)
- GUN: “sawn off shotgun” (DAWSON)

INTRUDER 1 (ANTON): 18 FEBRUARY

- STATURE: “about 5 foot 8 inches in height” (ANTON)
- STATURE: “thin build” (ANTON)
- GUN: “carrying a crossbow” (ANTON)

- CLOTHES: “dressed in black with black woollen gloves and a black balaclava” (ANTON)

INTRUDER 2 (ANTON): 18 FEBRUARY

- STATURE: “about 6 foot tall with a fairly large build” (ANTON)
- STATURE: “it was like he was about four months pregnant” (ANTON)
- CLOTHES: “Black woollen gloves and a black balaclava” (ANTON)
- GUN: EITHER a “smaller type gun” or “a longer firearm with one barrel” (ANTON)

INTRUDER 3 (ANTON): 18 FEBRUAR[1]Y

- STATURE: “about 5 foot 8 with a thin build” (ANTON)
- CLOTHES: “black clothes, black woollen gloves and a black balaclava” (ANTON)
- GUN: EITHER a “smaller type gun” or “a longer firearm with one barrel” (ANTON)

INTRUDER 1 (SABINA): 18 FEBRUARY

- GUN: “it was a long gun like what is used for hunting. It had a wooden handle” (SABINA)
- STATURE: “the man was thin and medium height” (SABINA)
- CLOTHES: “he was wearing a dark balaclava that covered his face. There was only a hole for his eyes” (SABINA)
- CLOTHES: “Overalls that buttoned at the front. They were blue and looked faded like they had been washed” (SABINA)
- CLOTHES: “dark wool gloves” (SABINA)
- CLOTHES: “runners on that were white” (SABINA)

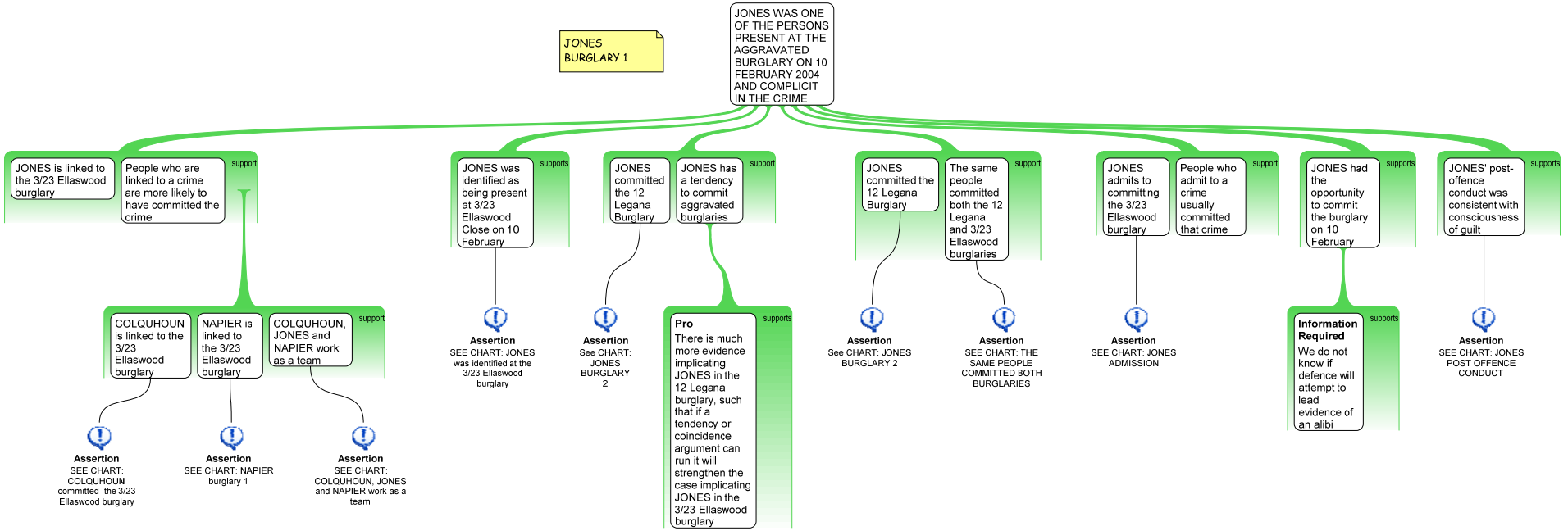
INTRUDER 2 (SABINA): 18 FEBRUARY

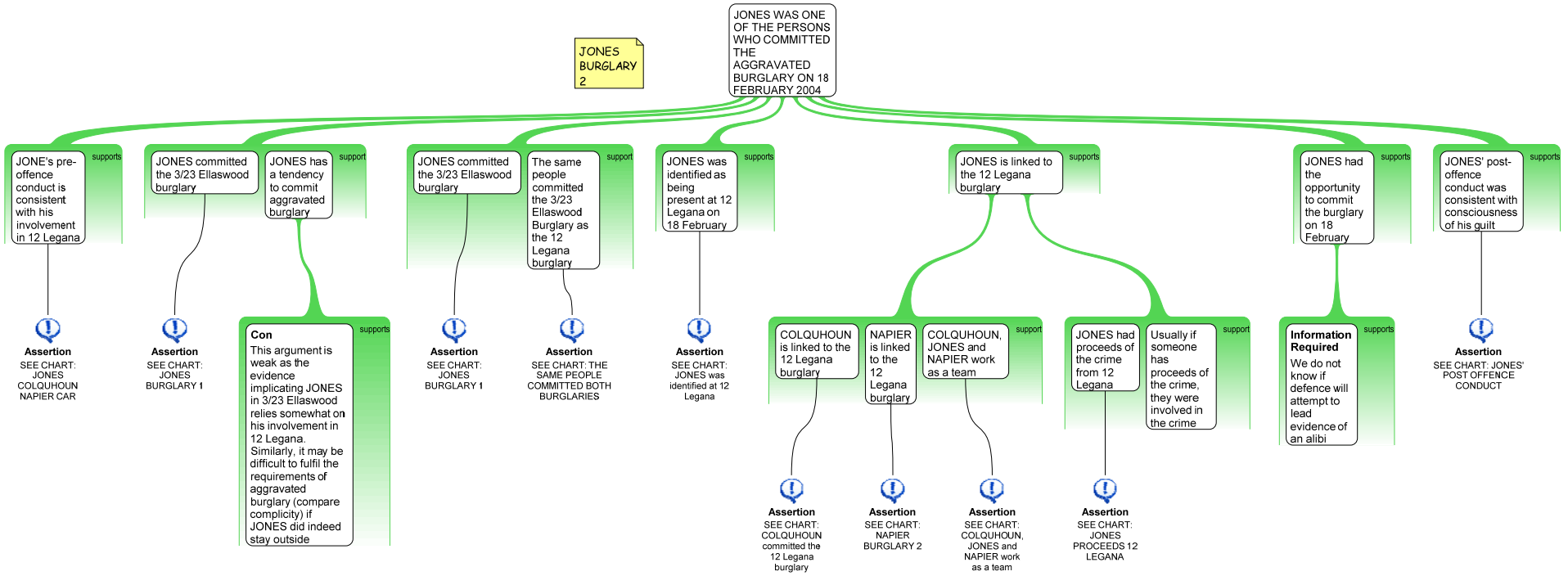
- STATURE: “big man who was tall” (SABINA)
- CLOTHES: “wearing dark clothes. He had dark pants and long dark sleeved top. The clothes looked new” (SABINA)
- CLOTHES: “He was wearing a balaclava and gloves” (SABINA)
- GUN: Later: “he was holding an arrow type weapon that had a curved front, like a crossbow” (SABINA)
- VOICE/ ETHNICITY?: Swearing “Pitch co mater” (SABINA)

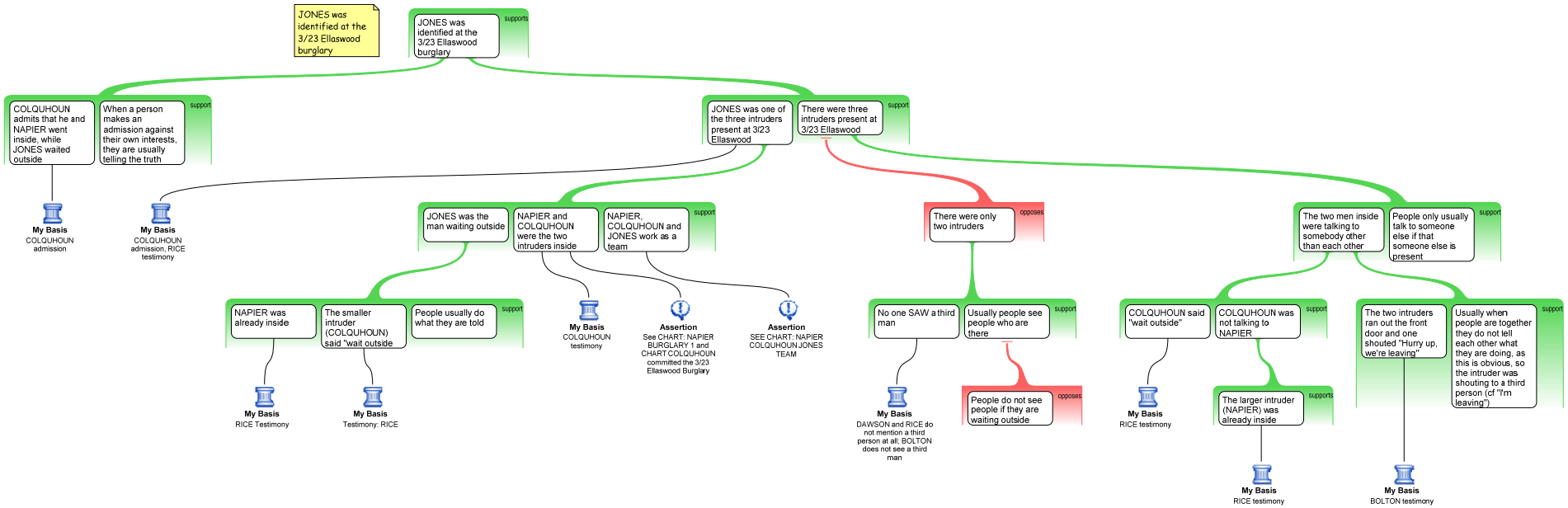
INTRUDER 3 (SABINA): 18 FEBRUARY

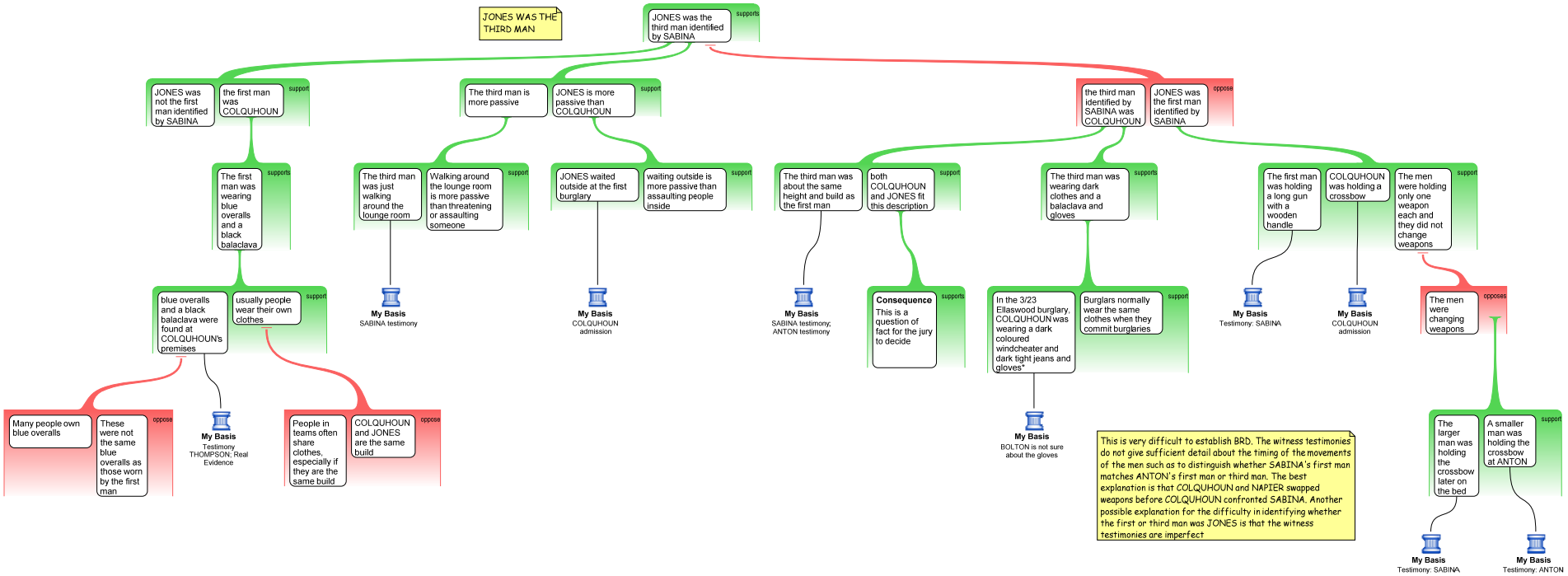
- “holding a short gun. It was about 30cm long and looked all metal” (SABINA)

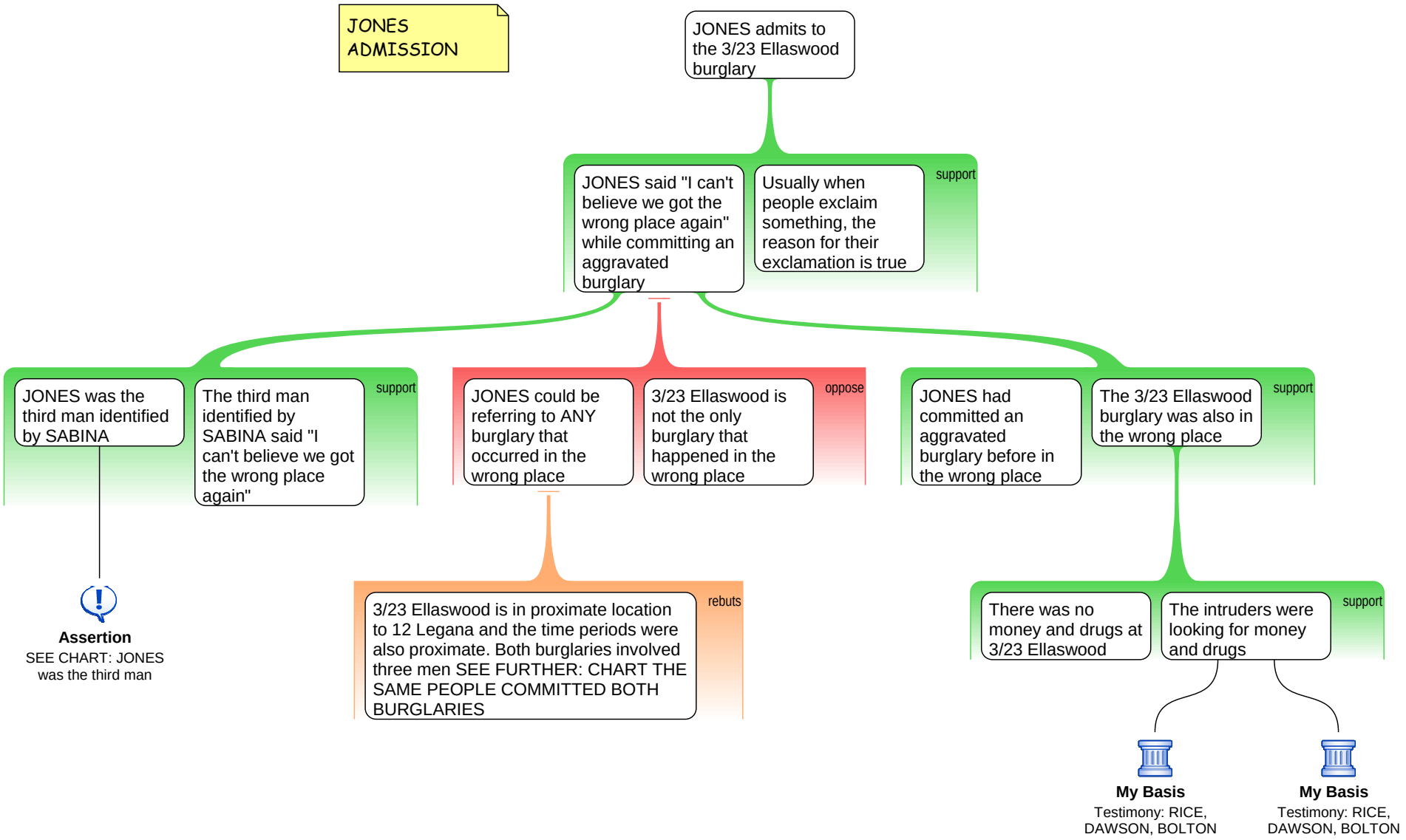
- “had a balaclava and gloves on too” (SABINA)
- “clothes were dark and he looked about the same height and build of the first man” (SABINA)

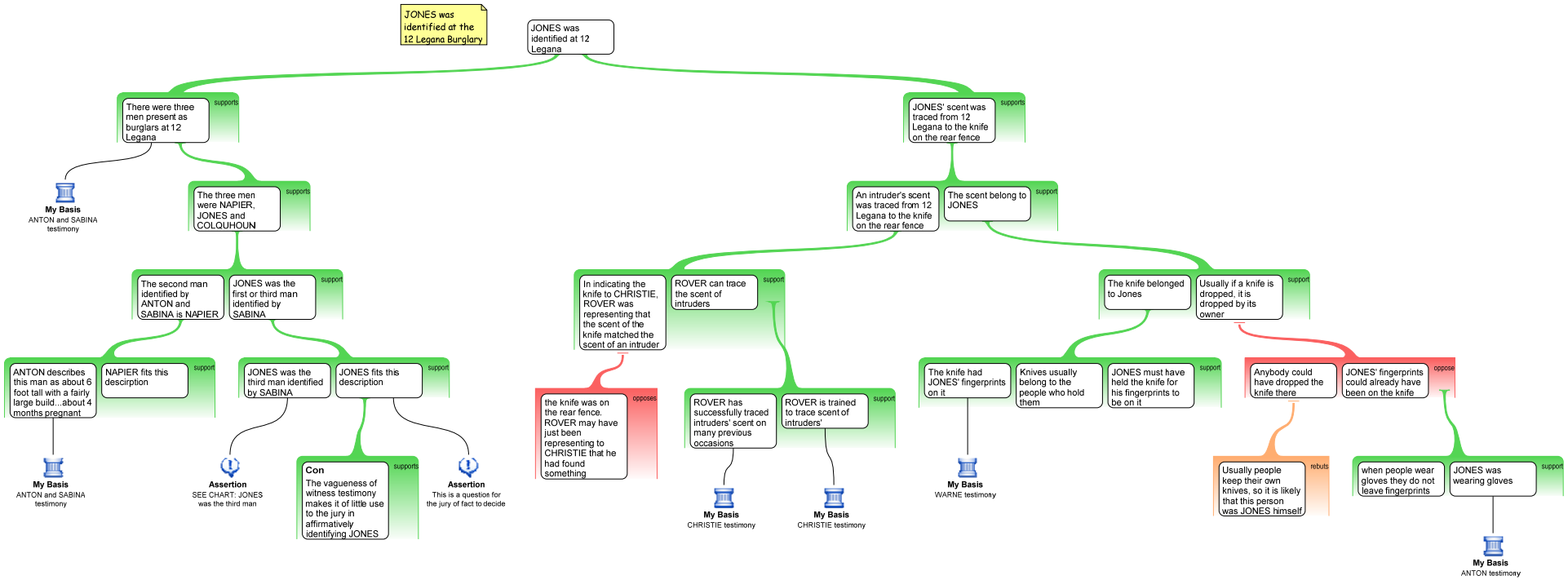

JONES BURGLARY 1
JONES WAS ONE OF THE PERSONS PRESENT AT THE AGGRAVATED BURGLARY ON 10 FEBRUARY 2004 AND COMPLICIT IN THE CRIME
JONES is linked to the 3/23 Ellaswood burglary
People who are linked to a crime are more likely to have committed the crime
support
COLQUHOUN is linked to the 3/23 Ellaswood burglary
NAPIER is linked to the 3/23 Ellaswood burglary
COLQUHOUN, JONES and NAPIER work as a team
support
Assertion
SEE CHART: COLQUHOUN committed the 3/23 Ellaswood burglary
Assertion
SEE CHART: NAPIER burglary 1
Assertion
SEE CHART: COLQUHOUN, JONES and NAPIER work as a team
JONES was identified as being present at 3/23 Ellaswood Close on 10 February
supports
Assertion
SEE CHART: JONES was identified at the 3/23 Ellaswood burglary
JONES committed the 12 Legana Burglary
JONES has a tendency to commit aggravated burglaries
support
Assertion
See CHART: JONES BURGLARY 2
Pro
There is much more evidence implicating JONES in the 12 Legana burglary, such that if a tendency or coincidence argument can run it will strengthen the case implicating JONES in the 3/23 Ellaswood burglary
supports
JONES committed the 12 Legana Burglary
The same people committed both the 12 Legana and 3/23 Ellaswood burglaries
support
Assertion
See CHART: JONES BURGLARY 2
Assertion
SEE CHART: THE SAME PEOPLE COMMITTED BOTH BURGLARIES
JONES admits to committing the 3/23 Ellaswood burglary
People who admit to a crime usually committed that crime
support
Assertion
SEE CHART: JONES ADMISSION
JONES had the opportunity to commit the burglary on 10 February
supports
Information Required
We do not know if defence will attempt to lead evidence of an alibi
JONES' post-offence conduct was consistent with consciousness of guilt
supports
Assertion
SEE CHART: JONES POST OFFENCE CONDUCT

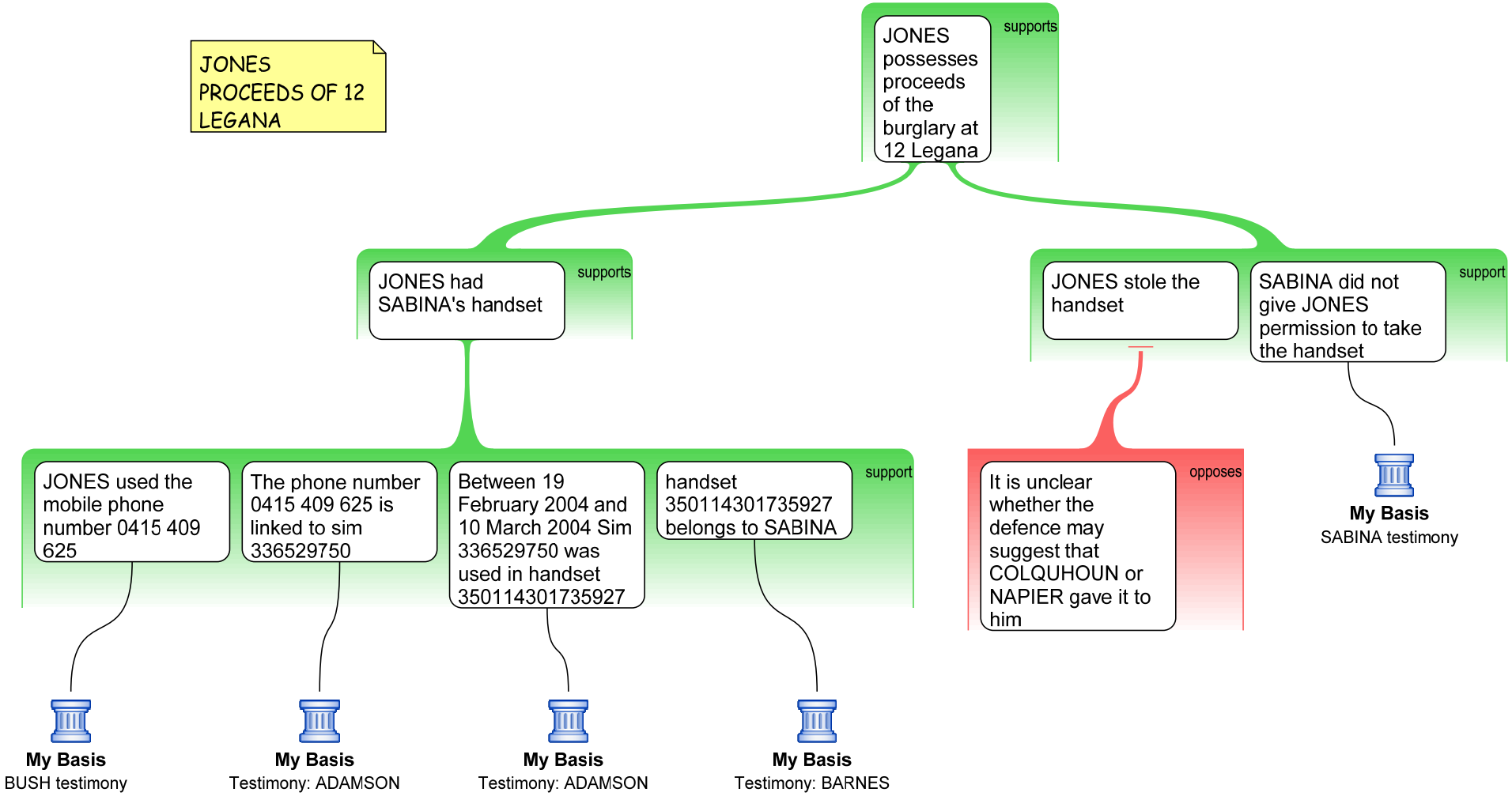

JONES BURGLARY 2
JONES WAS ONE OF THE PERSONS WHO COMMITTED THE AGGRAVATED BURGLARY ON 18 FEBRUARY 2004
JONE's pre-offence conduct is consistent with his involvement in 12 Legana
supports
Assertion
SEE CHART: JONES COLQUHOUN NAPIER CAR
JONES committed the 3/23 Ellaswood burglary
JONES has a tendency to commit aggravated burglary
support
Assertion
SEE CHART: JONES BURGLARY 1
Con
This argument is weak as the evidence implicating JONES in 3/23 Ellaswood relies somewhat on his involvement in 12 Legana. Similarly, it may be difficult to fulfil the requirements of aggravated burglary (compare complicity) if JONES did indeed stay outside
supports
JONES committed the 3/23 Ellaswood burglary
The same people committed the 3/23 Ellaswood Burglary as the 12 Legana burglary
support
Assertion
SEE CHART: JONES BURGLARY 1
Assertion
SEE CHART: THE SAME PEOPLE COMMITTED BOTH BURGLARIES
JONES was identified as being present at 12 Legana on 18 February
supports
Assertion
SEE CHART: JONES was identified at 12 Legana
JONES is linked to the 12 Legana burglary
supports
COLQUHOUN is linked to the 12 Legana burglary
NAPIER is linked to the 12 Legana burglary
COLQUHOUN, JONES and NAPIER work as a team
support
Assertion
SEE CHART: COLQUHOUN committed the 12 Legana burglary
Assertion
SEE CHART: NAPIER BURGLARY 2
Assertion
SEE CHART: COLQUHOUN, JONES and NAPIER work as a team
JONES had proceeds of the crime from 12 Legana
Usually if someone has proceeds of the crime, they were involved in the crime
support
Assertion
SEE CHART: JONES PROCEEDS 12 LEGANA
JONES had the opportunity to commit the burglary on 18 February
supports
Information Required
We do not know if defence will attempt to lead evidence of an alibi
supports
JONES' post-offence conduct was consistent with consciousness of his guilt
supports
Assertion
SEE CHART: JONES' POST OFFENCE CONDUCT

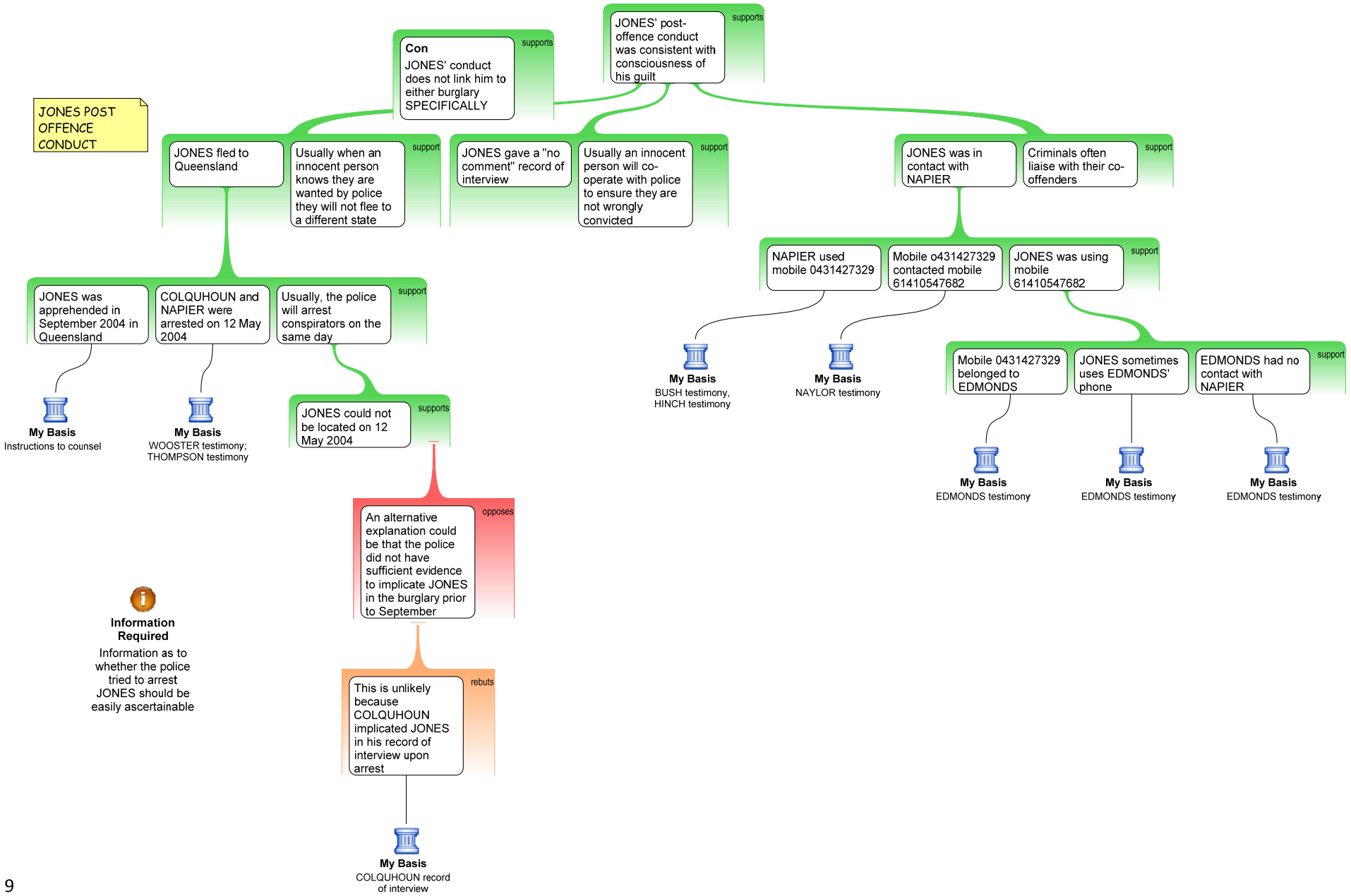

JONES was identified at the 3/23 Ellaswood burglary
JONES was identified at the 3/23 Ellaswood burglary
supports
COLQUHOUN admits that he and NAPIER went inside, while JONES waited outside
When a person makes an admission against their own interests, they are usually telling the truth
support
My Basis
COLQUHOUN admission
My Basis
COLQUHOUN admission, RICE testimony
JONES was one of the three intruders present at 3/23 Ellaswood
There were three intruders present at 3/23 Ellaswood
support
JONES was the man waiting outside
NAPIER and COLQUHOUN were the two intruders inside
NAPIER, COLQUHOUN and JONES work as a team
support
NAPIER was already inside
The smaller intruder (COLQUHOUN) said "wait outside
People usually do what they are told
support
My Basis
RICE Testimony
My Basis
Testimony: RICE
My Basis
COLQUHOUN testimony
Assertion
See CHART: NAPIER BURGLARY 1 and CHART COLQUHOUN committed the 3/23 Ellaswood Burglary
Assertion
SEE CHART: NAPIER COLQUHOUN JONES TEAM
There were only two intruders
opposes
No one SAW a third man
Usually people see people who are there
support
My Basis
DAWSON and RICE do not mention a third person at all; BOLTON does not see a third man
People do not see people if they are waiting outside
opposes
The two men inside were talking to somebody other than each other
People only usually talk to someone else if that someone else is present
support
COLQUHOUN said "wait outside"
COLQUHOUN was not talking to NAPIER
support
My Basis
RICE testimony
The larger intruder (NAPIER) was already inside
supports
My Basis
RICE testimony
The two intruders ran out the front door and one shouted "Hurry up, we're leaving"
Usually when people are together they do not tell each other what they are doing, as this is obvious, so the intruder was shouting to a third person (cf "I'm leaving")
support
My Basis
BOLTON testimony

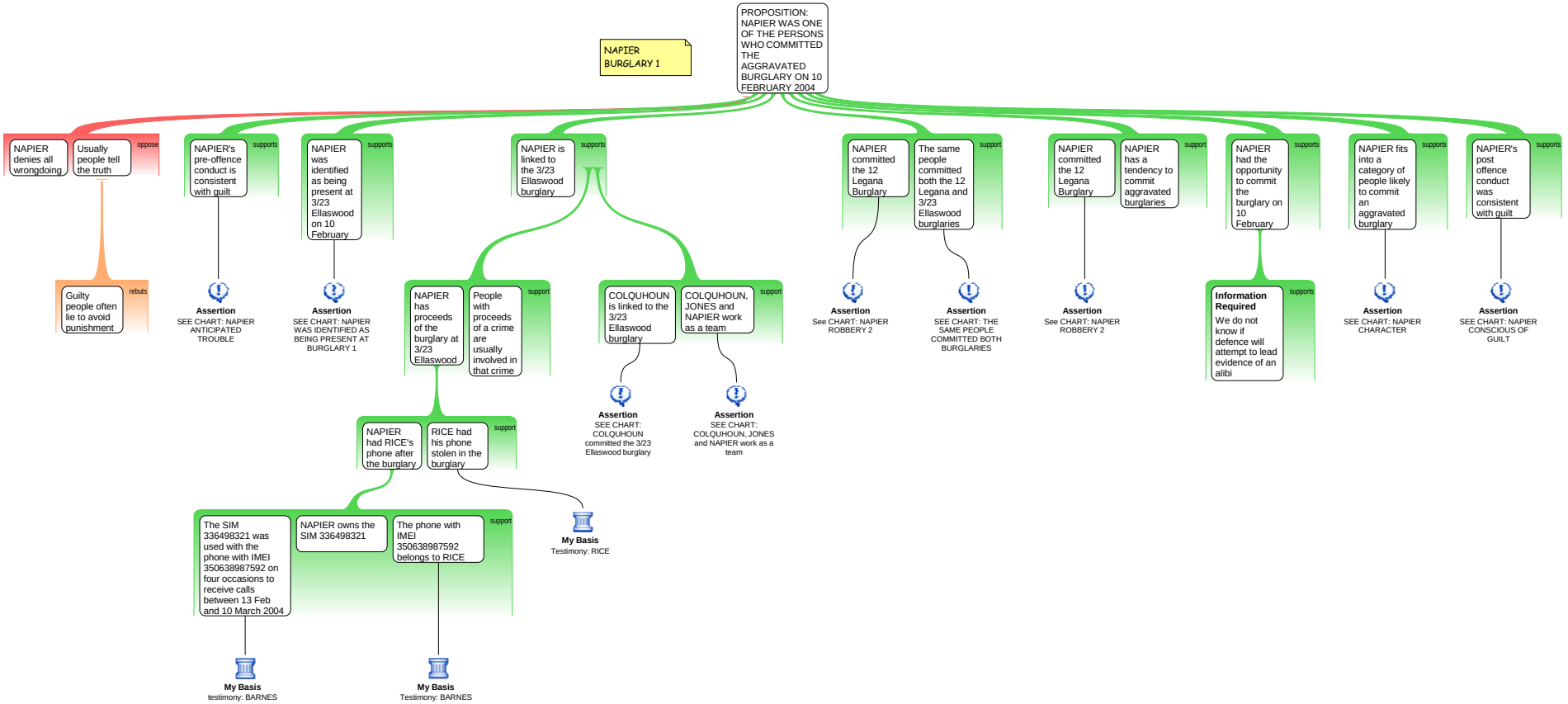

JONES WAS THE THIRD MAN
JONES was the third man identified by SABINA
supports
JONES was not the first man identified by SABINA
the first man was COLQUHOUN
support
The first man was wearing blue overalls and a black balaclava
supports
blue overalls and a black balaclava were found at COLQUHOUN's premises
usually people wear their own clothes
support
Many people own blue overalls
These were not the same blue overalls as those worn by the first man
oppose
My Basis
Testimony
THOMPSON: Real Evidence
People in teams often share clothes, especially if they are the same build
COLQUHOUN and JONES are the same build
oppose
The third man is more passive
JONES is more passive than COLQUHOUN
support
The third man was just walking around the lounge room
Walking around the lounge room is more passive than threatening or assaulting someone
support
My Basis
SABINA testimony
JONES waited outside at the first burglary
waiting outside is more passive than assaulting people inside
support
My Basis
COLQUHOUN admission
the third man identified by SABINA was COLQUHOUN
JONES was the first man identified by SABINA
oppose
The third man was about the same height and build as the first man
both COLQUHOUN and JONES fit this description
support
My Basis
SABINA testimony; ANTON testimony
Consequence
This is a question of fact for the jury to decide
supports
The third man was wearing dark clothes and a balaclava and gloves
supports
In the 3/23 Ellaswood burglary, COLQUHOUN was wearing a dark coloured windcheater and dark tight jeans and gloves*
Burglars normally wear the same clothes when they commit burglaries
support
My Basis
BOLTON is not sure about the gloves
This is very difficult to establish BRD. The witness testimonies do not give sufficient detail about the timing of the movements of the men such as to distinguish whether SABINA's first man matches ANTON's first man or third man. The best explanation is that COLQUHOUN and NAPIER swapped weapons before COLQUHOUN confronted SABINA. Another possible explanation for the difficulty in identifying whether the first or third man was JONES is that the witness testimonies are imperfect
The first man was holding a long gun with a wooden handle
COLQUHOUN was holding a crossbow
The men were holding only one weapon each and they did not change weapons
support
My Basis
Testimony: SABINA
My Basis
COLQUHOUN admission
The men were changing weapons
opposes
The larger man was holding the crossbow later on the bed
A smaller man was holding the crossbow at ANTON
support
My Basis
Testimony: SABINA
My Basis
Testimony: ANTON

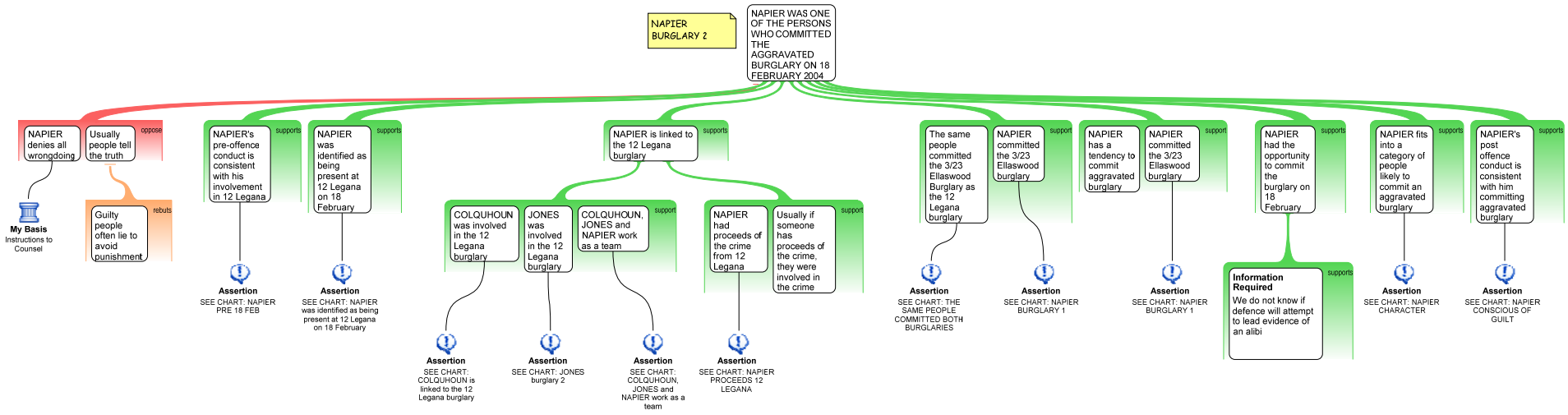

JONES ADMISSION
JONES admits to the 3/23 Ellaswood burglary
JONES said "I can't believe we got the wrong place again" while committing an aggravated burglary
Usually when people exclaim something, the reason for their exclamation is true
support
JONES was the third man identified by SABINA
The third man identified by SABINA said "I can't believe we got the wrong place again"
support
Assertion
SEE CHART: JONES was the third man
JONES could be referring to ANY burglary that occurred in the wrong place
3/23 Ellaswood is not the only burglary that happened in the wrong place
oppose
3/23 Ellaswood is in proximate location to 12 Legana and the time periods were also proximate. Both burglaries involved three men SEE FURTHER: CHART THE SAME PEOPLE COMMITTED BOTH BURGLARIES
rebuts
JONES had committed an aggravated burglary before in the wrong place
The 3/23 Ellaswood burglary was also in the wrong place
support
There was no money and drugs at 3/23 Ellaswood
The intruders were looking for money and drugs
support
My Basis
Testimony: RICE, DAWSON, BOLTON
My Basis
Testimony: RICE, DAWSON, BOLTON

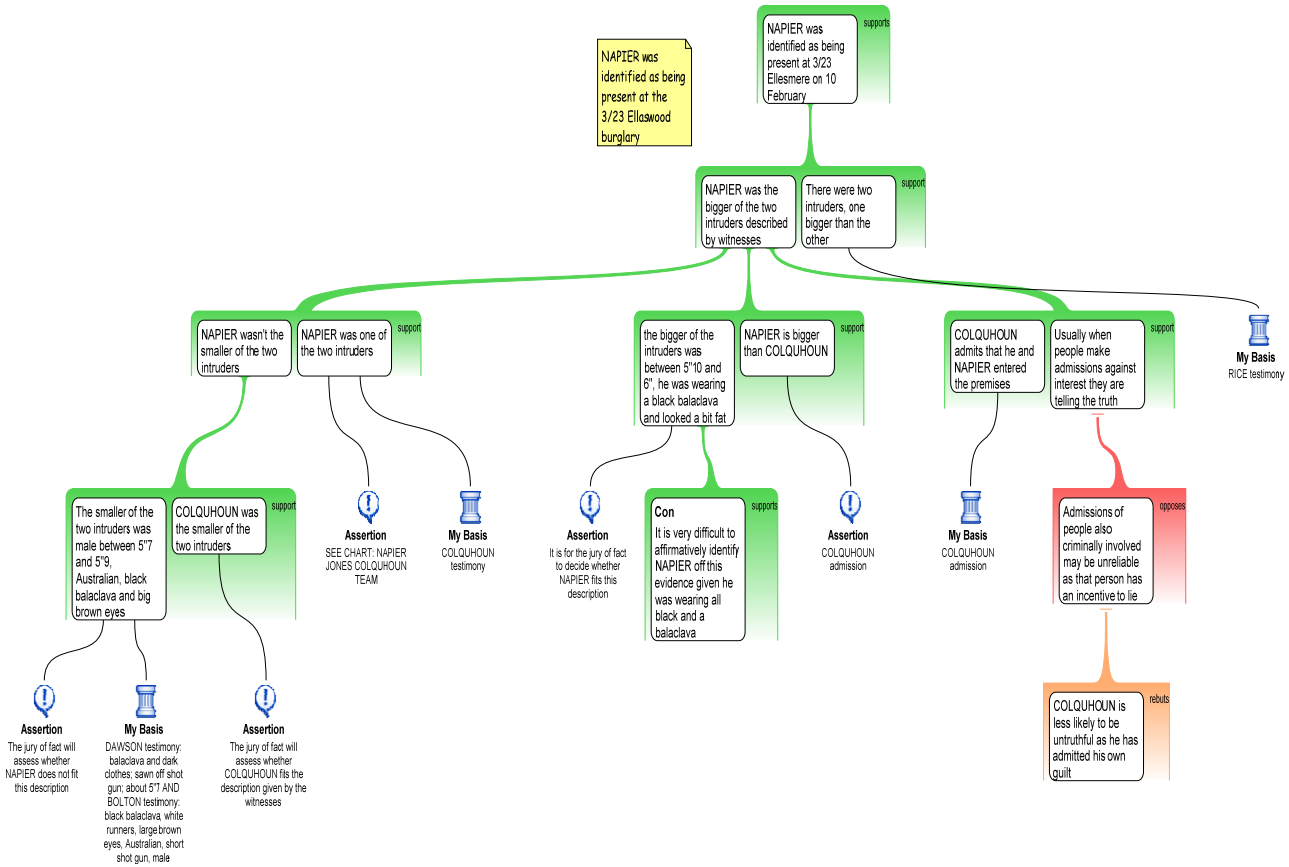

JONES was identified at the 12 Legana Burglary
JONES was identified at 12 Legana
There were three men present as burglars at 12 Legana
supports
My Basis
ANTON and SABINA testimony
The three men were NAPIER, JONES and COLQUHOUN
supports
The second man identified by ANTON and SABINA is NAPIER
JONES was the first or third man identified by SABINA
support
ANTON describes this man as about 6 foot tall with a fairly large build...about 4 months pregnant
NAPIER fits this descirption
support
My Basis
ANTON and SABINA testimony
JONES was the third man identified by SABINA
JONES fits this description
support
Assertion
SEE CHART: JONES was the third man
Con
The vagueness of witness testimony makes it of little use to the jury in affirmatively identifying JONES
supports
Assertion
This is a question for the jury of fact to decide
JONES' scent was traced from 12 Legana to the knife on the rear fence
supports
An intruder's scent was traced from 12 Legana to the knife on the rear fence
The scent belong to JONES
support
In indicating the knife to CHRISTIE, ROVER was representing that the scent of the knife matched the scent of an intruder
ROVER can trace the scent of intruders
support
the knife was on the rear fence. ROVER may have just been representing to CHRISTIE that he had found something
opposes
ROVER has successfully traced intruders' scent on many previous occasions
ROVER is trained to trace scent of intruders'
support
My Basis
CHRISTIE testimony
My Basis
CHRISTIE testimony
The knife belonged to Jones
Usually if a knife is dropped, it is dropped by its owner
support
The knife had JONES' fingerprints on it
Knives usually belong to the people who hold them
JONES must have held the knife for his fingerprints to be on it
support
My Basis
WARNE testimony
Anybody could have dropped the knife there
JONES' fingerprints could already have been on the knife
oppose
Usually people keep their own knives, so it is likely that this person was JONES himself
rebuts
when people wear gloves they do not leave fingerprints
JONES was wearing gloves
support
My Basis
ANTON testimony

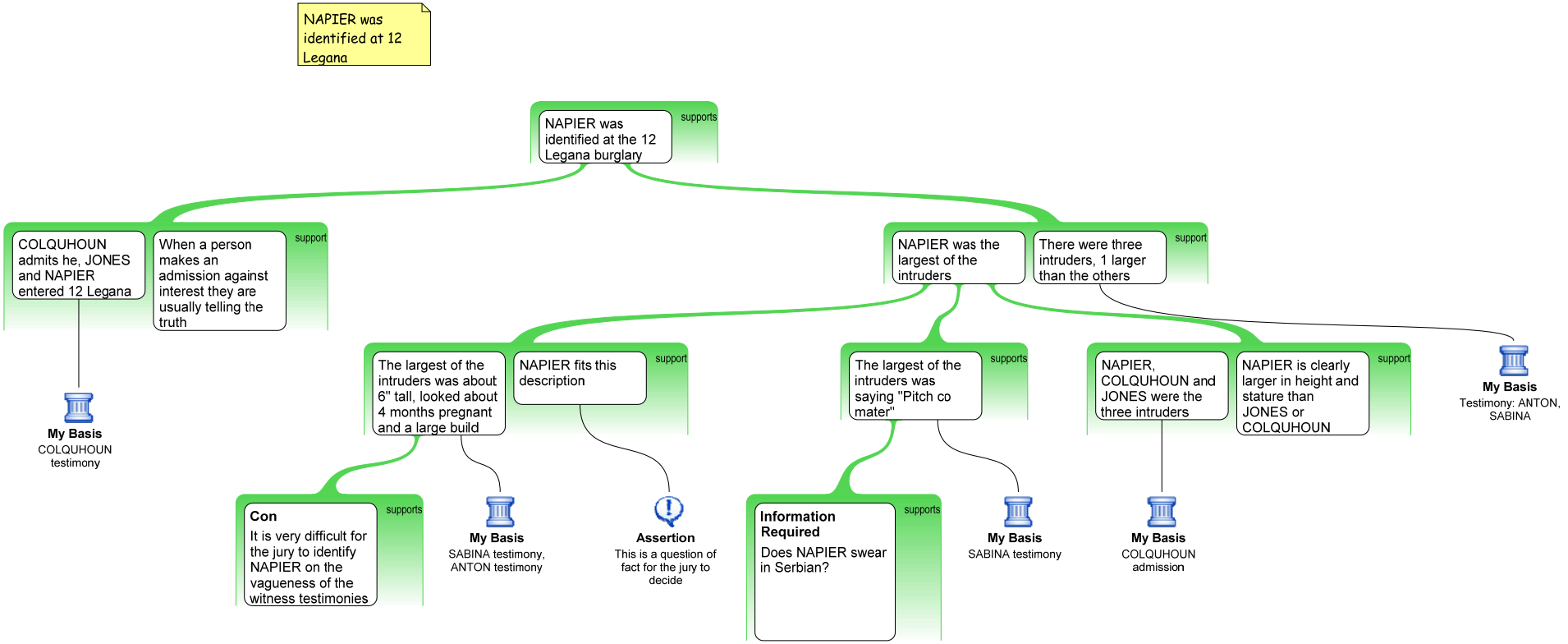

JONES PROCEEDS OF 12 LEGANA
JONES possesses proceeds of the burglary at 12 Legana
supports
JONES had SABINA's handset
supports
JONES stole the handset
SABINA did not give JONES permission to take the handset
support
JONES used the mobile phone number 0415 409 625
The phone number 0415 409 625 is linked to sim 336529750
Between 19 February 2004 and 10 March 2004 Sim 336529750 was used in handset 350114301735927
handset 350114301735927 belongs to SABINA
support
It is unclear whether the defence may suggest that COLQUHOUN or NAPIER gave it to him
opposes
My Basis
SABINA testimony
My Basis
BUSH testimony
My Basis
Testimony: ADAMSON
My Basis
Testimony: ADAMSON
My Basis
Testimony: BARNES

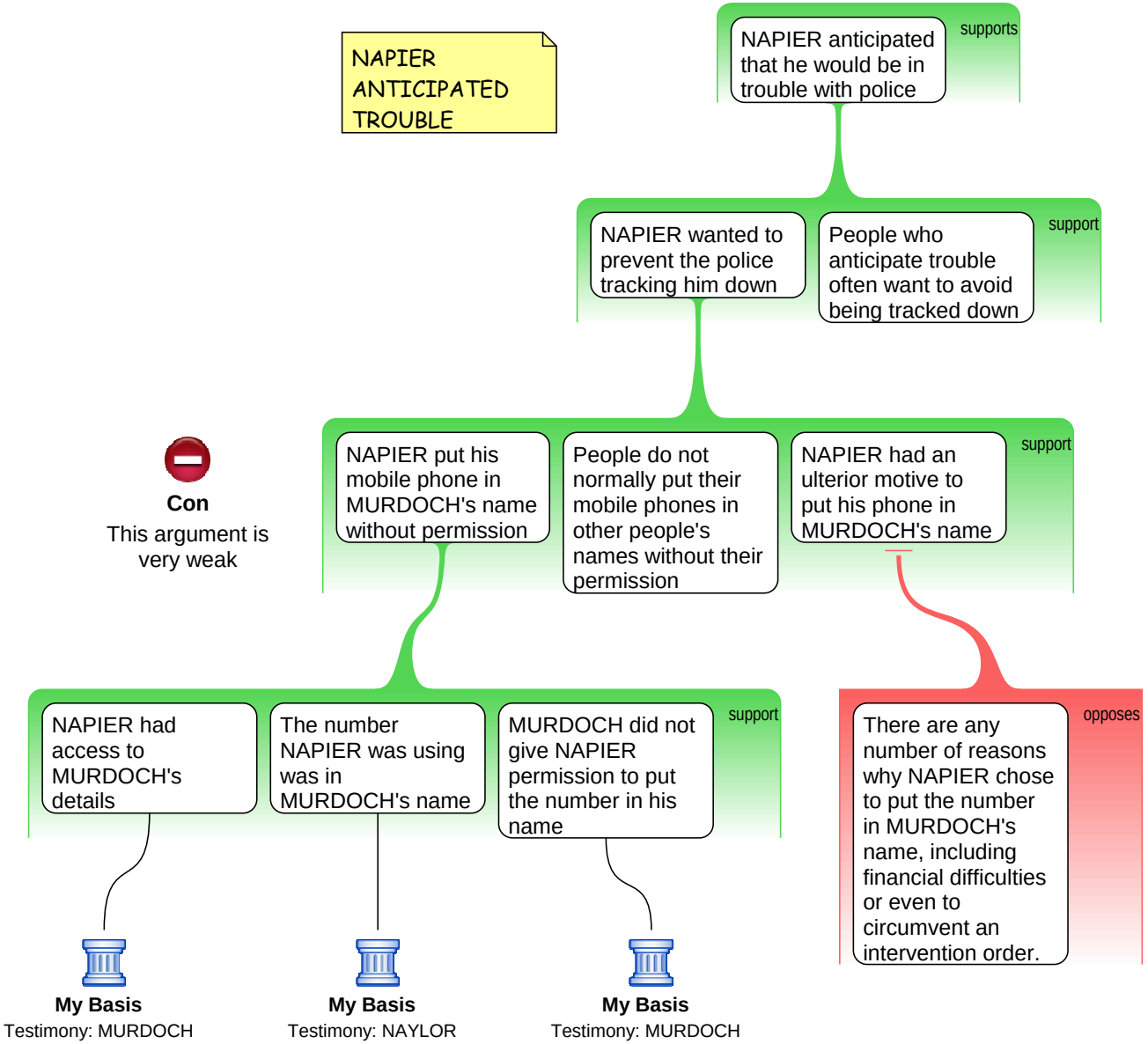

JONES POST OFFENCE CONDUCT
Con
JONES' conduct does not link him to either burglary SPECIFICALLY
supports
JONES' post-offence conduct was consistent with consciousness of his guilt
supports
JONES fled to Queensland
Usually when an innocent person knows they are wanted by police they will not flee to a different state
support
JONES gave a "no comment" record of interview
Usually an innocent person will co-operate with police to ensure they are not wrongly convicted
support
JONES was in contact with NAPIER
Criminals often liaise with their co-offenders
support
JONES was apprehended in September 2004 in Queensland
COLQUHOUN and NAPIER were arrested on 12 May 2004
Usually, the police will arrest conspirators on the same day
support
NAPIER used mobile 0431427329
Mobile 0431427329 contacted mobile 61410547682
JONES was using mobile 61410547682
support
My Basis
Instructions to counsel
My Basis
WOOSTER testimony; THOMPSON testimony
JONES could not be located on 12 May 2004
supports
My Basis
BUSH testimony, HINCH testimony
My Basis
NAYLOR testimony
Mobile 0431427329 belonged to EDMONDS
JONES sometimes uses EDMONDS' phone
EDMONDS had no contact with NAPIER
support
My Basis
EDMONDS testimony
My Basis
EDMONDS testimony
My Basis
EDMONDS testimony
An alternative explanation could be that the police did not have sufficient evidence to implicate JONES in the burglary prior to September
opposes
Information Required
Information as to whether the police tried to arrest JONES should be easily ascertainable
This is unlikely because COLQUHOUN implicated JONES in his record of interview upon arrest
rebuts
My Basis
COLQUHOUN record of interview

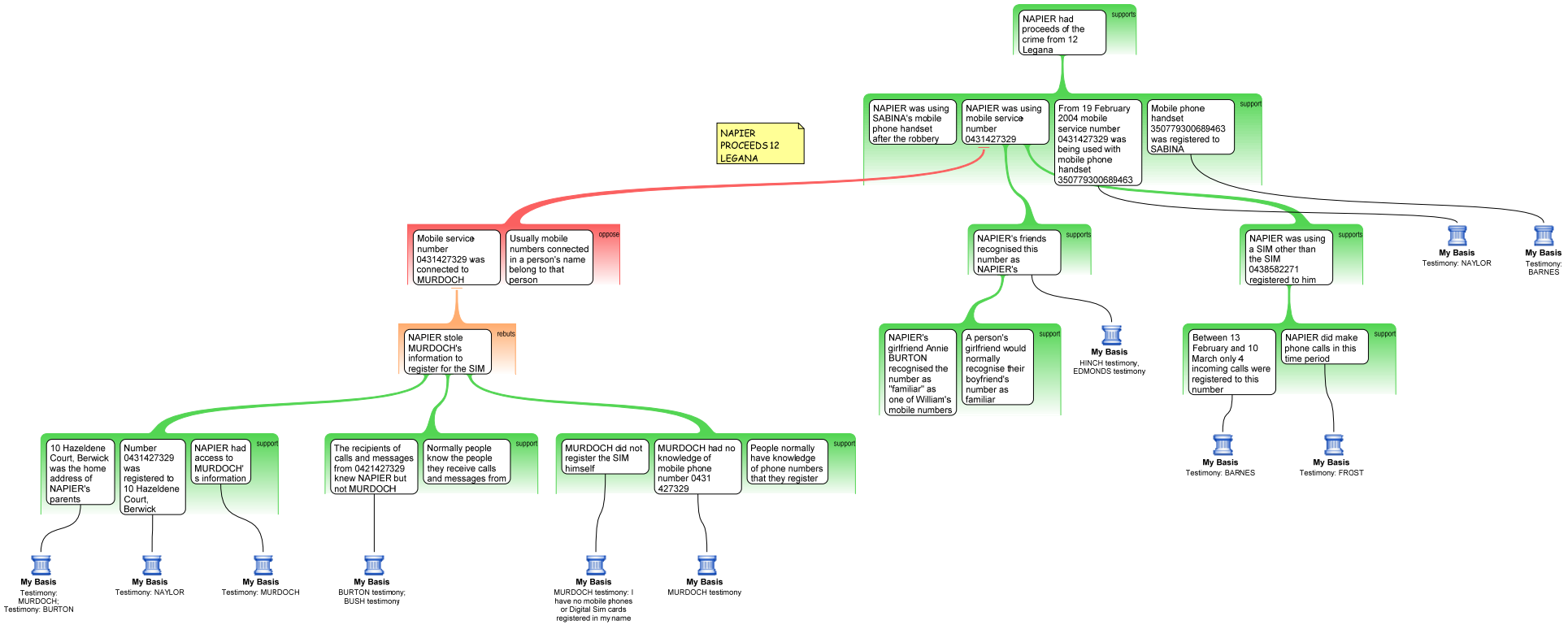

NAPIER BURGLARY 1
PROPOSITION: NAPIER WAS ONE OF THE PERSONS WHO COMMITTED THE AGGRAVATED BURGLARY ON 10 FEBRUARY 2004
NAPIER denies all wrongdoing
Usually people tell the truth
oppose
Guilty people often lie to avoid punishment
rebuts
NAPIER's pre-offence conduct is consistent with guilt
supports
Assertion
SEE CHART: NAPIER ANTICIPATED TROUBLE
NAPIER was identified as being present at 3/23 Ellaswood on 10 February
supports
Assertion
SEE CHART: NAPIER WAS IDENTIFIED AS BEING PRESENT AT BURGLARY 1
NAPIER is linked to the 3/23 Ellaswood burglary
supports
NAPIER has proceeds of the burglary at 3/23 Ellaswood
People with proceeds of a crime are usually involved in that crime
support
NAPIER had RICE's phone after the burglary
RICE had his phone stolen in the burglary
support
The SIM 336498321 was used with the phone with IMEI 350638987592 on four occasions to receive calls between 13 Feb and 10 March 2004
NAPIER owns the SIM 336498321
The phone with IMEI 350638987592 belongs to RICE
support
My Basis
testimony: BARNES
My Basis
Testimony: BARNES
My Basis
Testimony: RICE
COLQUHOUN is linked to the 3/23 Ellaswood burglary
COLQUHOUN, JONES and NAPIER work as a team
support
Assertion
SEE CHART: COLQUHOUN committed the 3/23 Ellaswood burglary
Assertion
SEE CHART: COLQUHOUN, JONES and NAPIER work as a team
NAPIER committed the 12 Legana Burglary
The same people committed both the 12 Legana and 3/23 Ellaswood burglaries
support
Assertion
See CHART: NAPIER ROBBERY 2
Assertion
SEE CHART: THE SAME PEOPLE COMMITTED BOTH BURGLARIES
NAPIER committed the 12 Legana Burglary
NAPIER has a tendency to commit aggravated burglaries
support
Assertion
See CHART: NAPIER ROBBERY 2
NAPIER had the opportunity to commit the burglary on 10 February
supports
Information Required
We do not know if defence will attempt to lead evidence of an alibi
NAPIER fits into a category of people likely to commit an aggravated burglary
supports
Assertion
SEE CHART: NAPIER CHARACTER
NAPIER's post offence conduct was consistent with guilt
supports
Assertion
SEE CHART: NAPIER CONSCIOUS OF GUILT

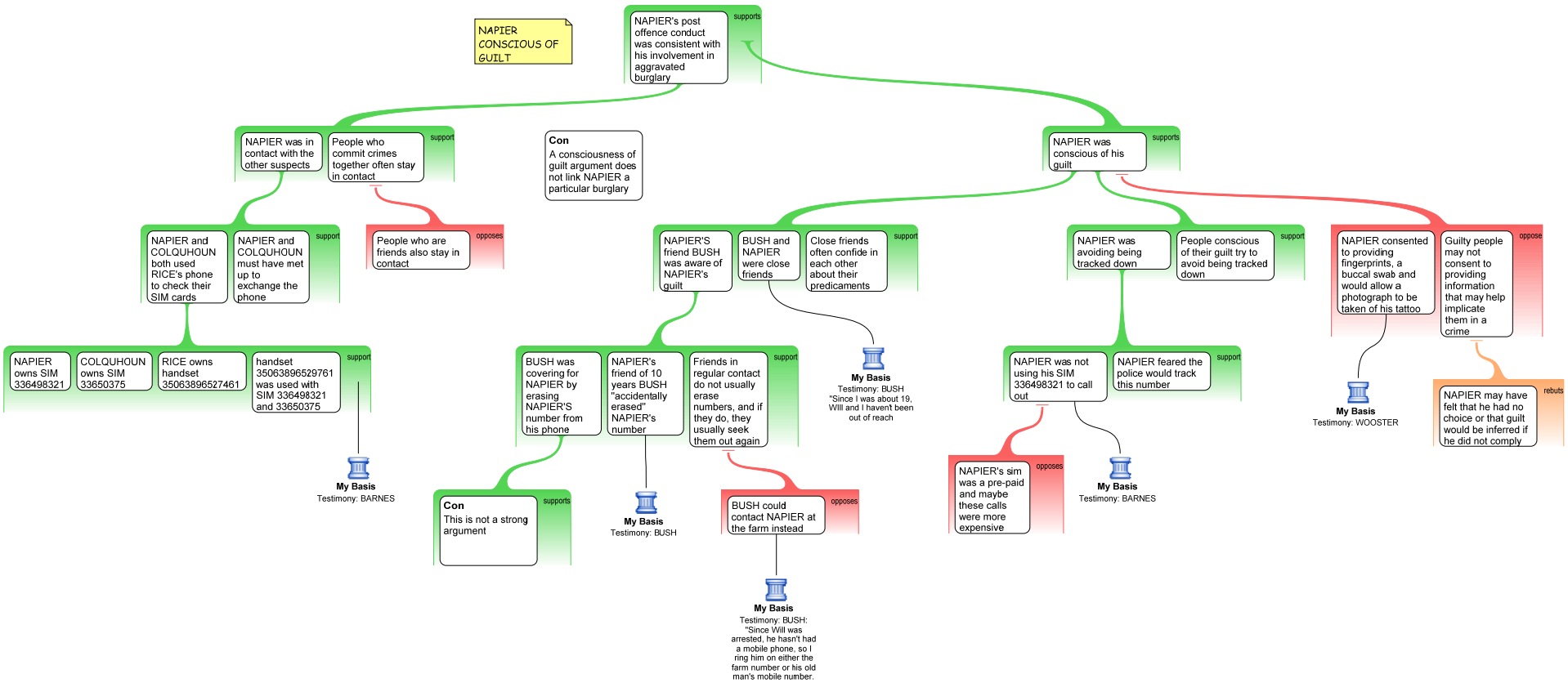

NAPIER BURGLARY 2
NAPIER WAS ONE OF THE PERSONS WHO COMMITTED THE AGGRAVATED BURGLARY ON 18 FEBRUARY 2004
NAPIER denies all wrongdoing
Usually people tell the truth
oppose
My Basis
Instructions to Counsel
Guilty people often lie to avoid punishment
rebuts
NAPIER's pre-offence conduct is consistent with his involvement in 12 Legana
supports
Assertion
SEE CHART: NAPIER PRE 18 FEB
NAPIER was identified as being present at 12 Legana on 18 February
supports
Assertion
SEE CHART: NAPIER was identified as being present at 12 Legana on 18 February
NAPIER is linked to the 12 Legana burglary
supports
COLQUHOUN was involved in the 12 Legana burglary
JONES was involved in the 12 Legana burglary
COLQUHOUN, JONES and NAPIER work as a team
support
Assertion
SEE CHART: COLQUHOUN is linked to the 12 Legana burglary
Assertion
SEE CHART: JONES burglary 2
Assertion
SEE CHART: COLQUHOUN, JONES and NAPIER work as a team
NAPIER had proceeds of the crime from 12 Legana
Usually if someone has proceeds of the crime, they were involved in the crime
support
Assertion
SEE CHART: NAPIER PROCEEDS 12 LEGANA
The same people committed the 3/23 Ellaswood Burglary as the 12 Legana burglary
NAPIER committed the 3/23 Ellaswood burglary
support
Assertion
SEE CHART: THE SAME PEOPLE COMMITTED BOTH BURGLARIES
Assertion
SEE CHART: NAPIER BURGLARY 1
NAPIER has a tendency to commit aggravated burglary
NAPIER committed the 3/23 Ellaswood burglary
support
Assertion
SEE CHART: NAPIER BURGLARY 1
NAPIER had the opportunity to commit the burglary on 18 February
supports
Information Required
We do not know if defence will attempt to lead evidence of an alibi
NAPIER fits into a category of people likely to commit an aggravated burglary
supports
Assertion
SEE CHART: NAPIER CHARACTER
NAPIER's post offence conduct is consistent with him committing aggravated burglary
supports
Assertion
SEE CHART: NAPIER CONSCIOUS OF GUILT

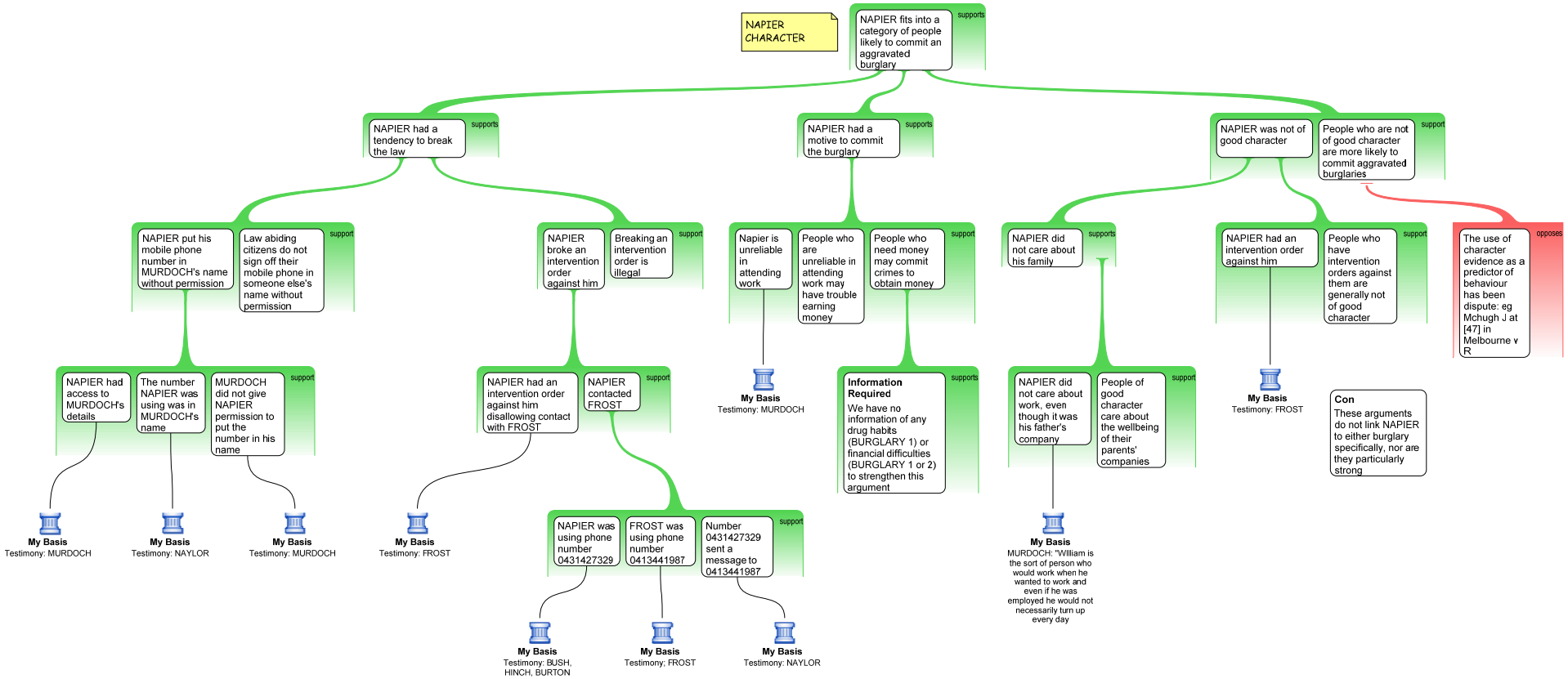

NAPIER was identified as being present at the 3/23 Ellaswood burglary
NAPIER was identified as being present at 3/23 Ellesmere on 10 February
supports
NAPIER was the bigger of the two intruders described by witnesses
There were two intruders, one bigger than the other
support
NAPIER wasn't the smaller of the two intruders
NAPIER was one of the two intruders
support
the bigger of the intruders was between 5"10 and 6", he was wearing a black balaclava and looked a bit fat
NAPIER is bigger than COLQUHOUN
support
COLQUHOUN admits that he and NAPIER entered the premises
Usually when people make admissions against interest they are telling the truth
support
My Basis
RICE testimony
The smaller of the two intruders was male between 5"7 and 5"9, Australian, black balaclava and big brown eyes
COLQUHOUN was the smaller of the two intruders
support
Assertion
SEE CHART: NAPIER JONES COLQUHOUN TEAM
My Basis
COLQUHOUN testimony
Assertion
It is for the jury of fact to decide whether NAPIER fits this description
Con
It is very difficult to affirmatively identify NAPIER off this evidence given he was wearing all black and a balaclava
supports
Assertion
COLQUHOUN admission
My Basis
COLQUHOUN admission
Admissions of people also criminally involved may be unreliable as that person has an incentive to lie
opposes
COLQUHOUN is less likely to be untruthful as he has admitted his own guilt
rebuts
Assertion
The jury of fact will assess whether NAPIER does not fit this description
My Basis
DAWSON testimony: balaclava and dark clothes; sawn off shot gun; about 5"7 AND BOLTON testimony: black balaclava, white runners, large brown eyes, Australian, short shot gun, male
Assertion
The jury of fact will assess whether COLQUHOUN fits the description given by the witnesses

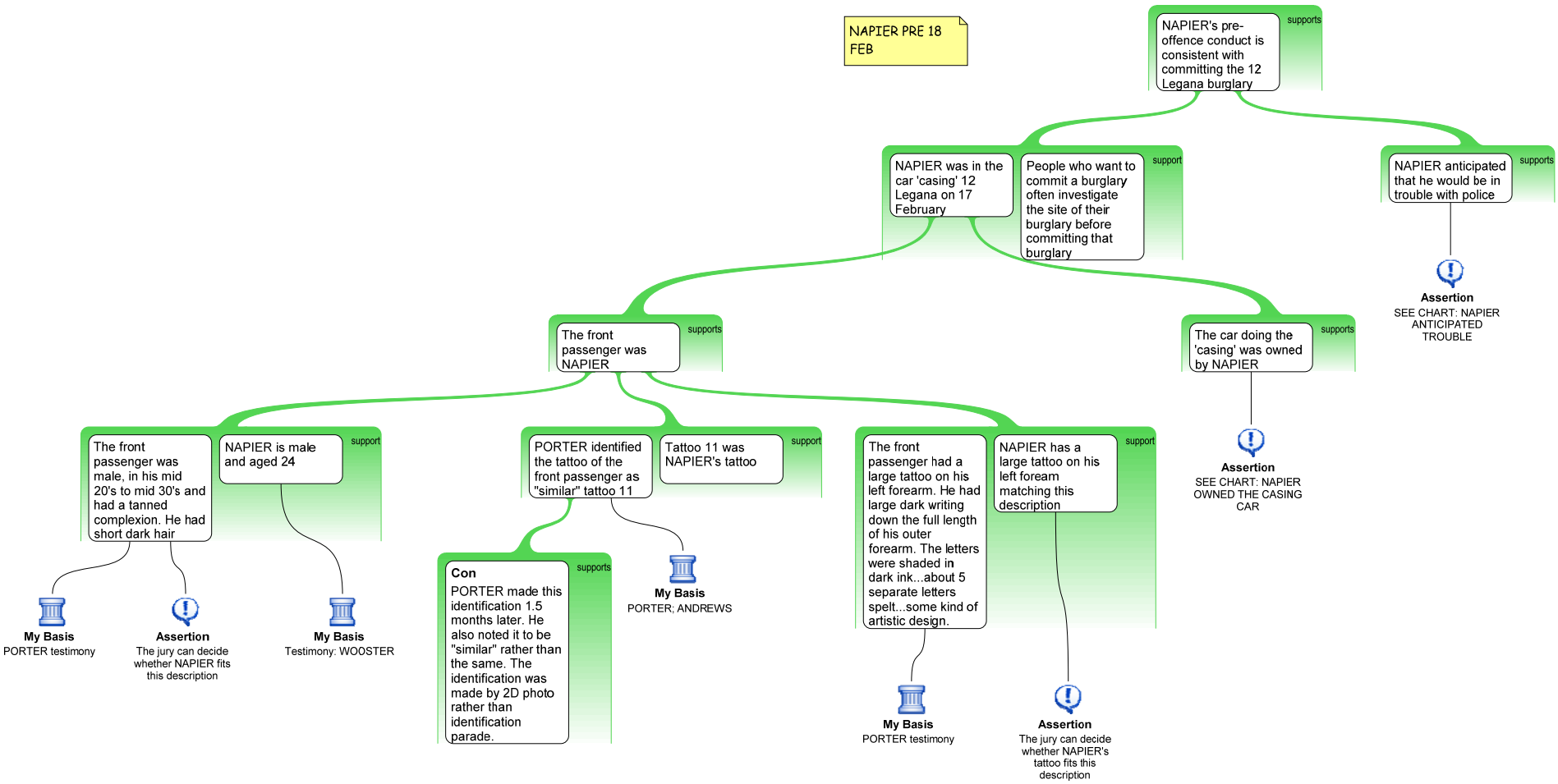

NAPIER was identified at 12 Legana
NAPIER was identified at the 12 Legana burglary
supports
COLQUHOUN admits he, JONES and NAPIER entered 12 Legana
When a person makes an admission against interest they are usually telling the truth
support
My Basis
COLQUHOUN testimony
NAPIER was the largest of the intruders
There were three intruders, 1 larger than the others
support
The largest of the intruders was about 6" tall, looked about 4 months pregnant and a large build
NAPIER fits this description
support
Con
It is very difficult for the jury to identify NAPIER on the vagueness of the witness testimonies
supports
My Basis
SABINA testimony, ANTON testimony
Assertion
This is a question of fact for the jury to decide
The largest of the intruders was saying "Pitch co mater"
supports
Information Required
Does NAPIER swear in Serbian?
supports
My Basis
SABINA testimony
NAPIER, COLQUHOUN and JONES were the three intruders
NAPIER is clearly larger in height and stature than JONES or COLQUHOUN
support
My Basis
COLQUHOUN admission
My Basis
Testimony: ANTON, SABINA

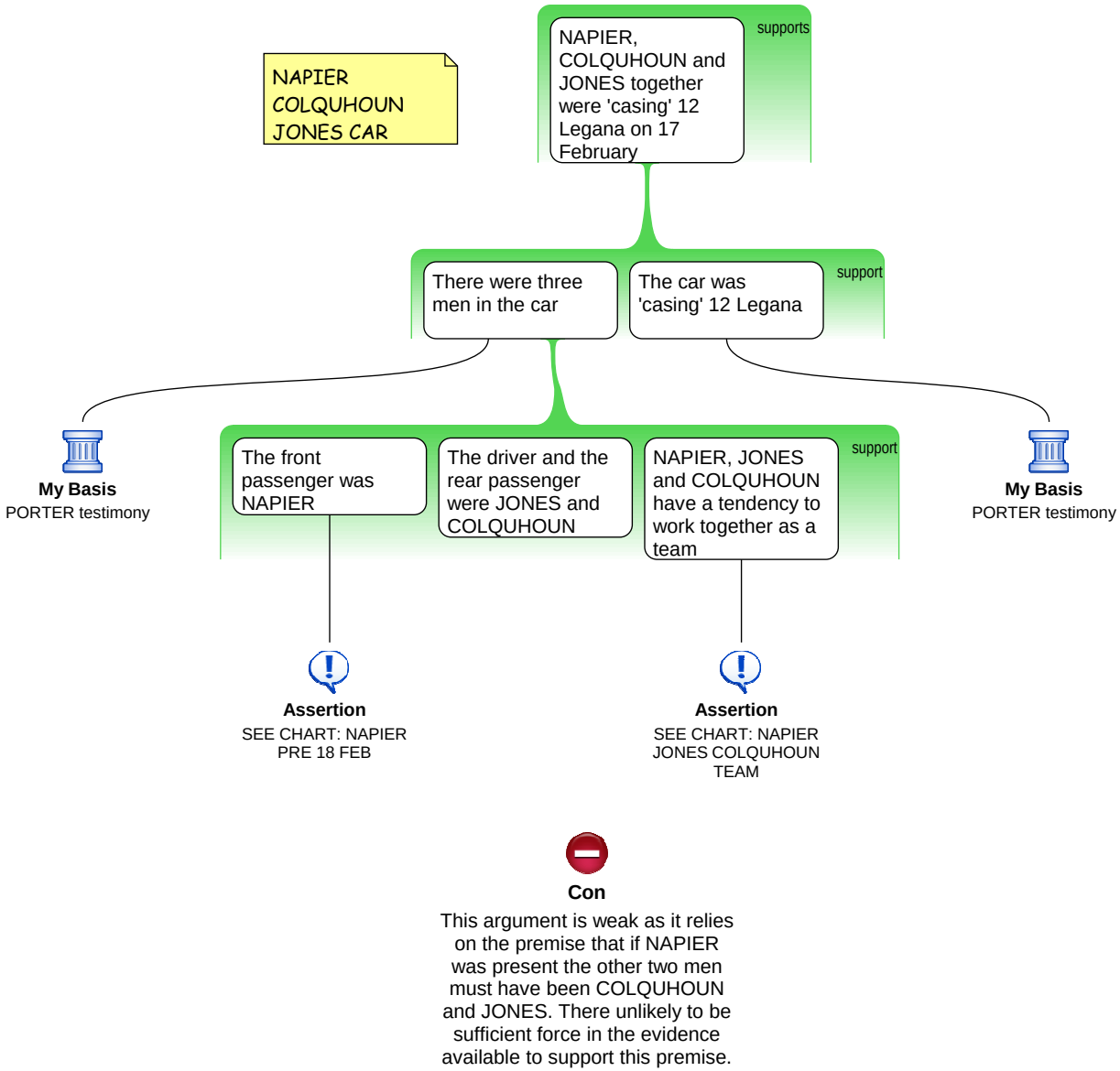

NAPIER ANTICIPATED TROUBLE
NAPIER anticipated that he would be in trouble with police
supports
NAPIER wanted to prevent the police tracking him down
People who anticipate trouble often want to avoid being tracked down
support
Con
This argument is very weak
NAPIER put his mobile phone in MURDOCH's name without permission
People do not normally put their mobile phones in other people's names without their permission
NAPIER had an ulterior motive to put his phone in MURDOCH's name
support
NAPIER had access to MURDOCH's details
The number NAPIER was using was in MURDOCH's name
MURDOCH did not give NAPIER permission to put the number in his name
support
There are any number of reasons why NAPIER chose to put the number in MURDOCH's name, including financial difficulties or even to circumvent an intervention order.
opposes
My Basis
Testimony: MURDOCH
My Basis
Testimony: NAYLOR
My Basis
Testimony: MURDOCH

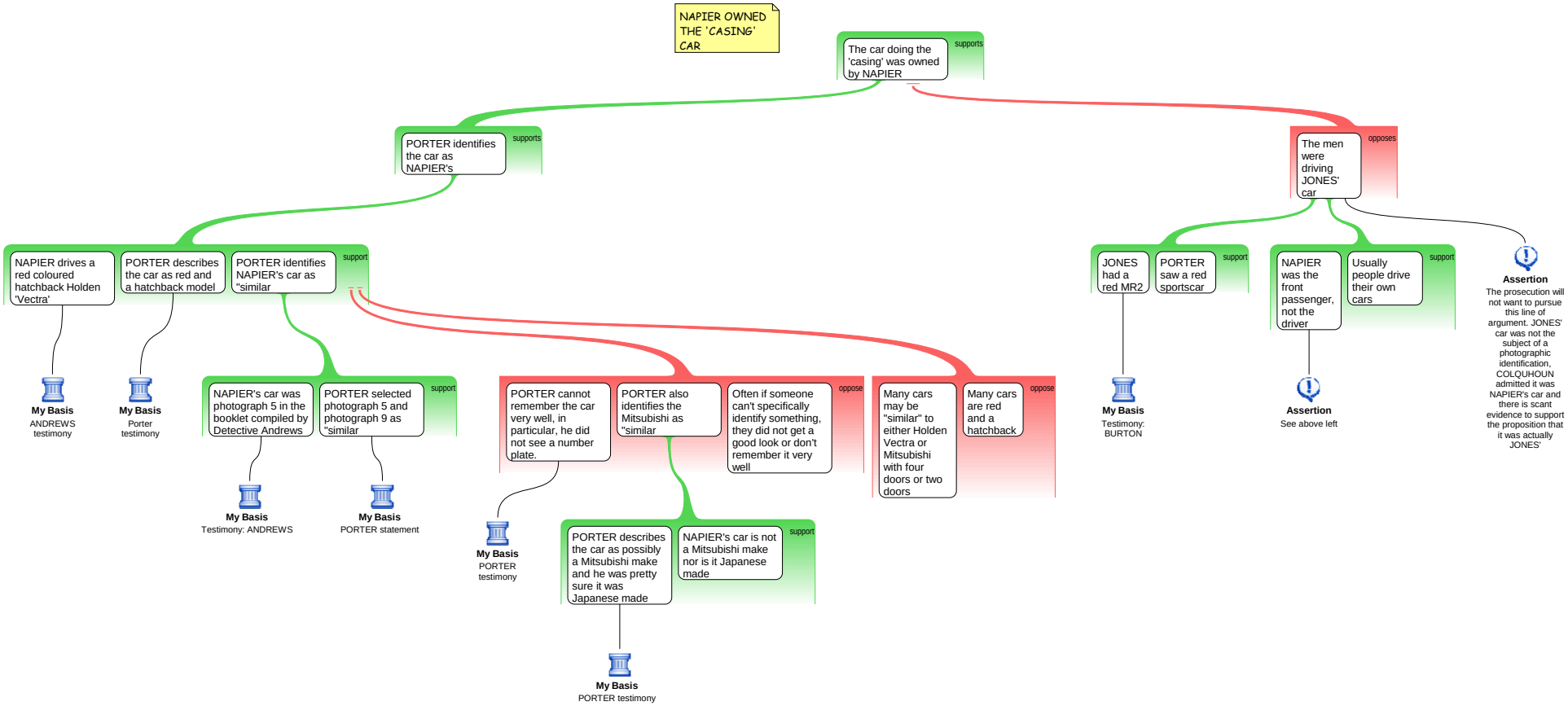

NAPIER PROCEEDS 12 LEGANA
NAPIER had proceeds of the crime from 12 Legana
supports
NAPIER was using SABINA's mobile phone handset after the robbery
NAPIER was using mobile service number 0431427329
From 19 February 2004 mobile service number 0431427329 was being used with mobile phone handset 350779300689463
Mobile phone handset 350779300689463 was registered to SABINA
support
My Basis
Testimony: NAYLOR
My Basis
Testimony: BARNES
Mobile service number 0431427329 was connected to MURDOCH
Usually mobile numbers connected in a person's name belong to that person
oppose
NAPIER's friends recognised this number as NAPIER's
NAPIER was using a SIM other than the SIM 0438582271 registered to him
NAPIER stole MURDOCH's information to register for the SIM
rebuts
NAPIER's girlfriend Annie BURTON recognised the number as "familiar" as one of William's mobile numbers
A person's girlfriend would normally recognise their boyfriend's number as familiar
My Basis
HINCH testimony; EDMONDS testimony
Between 13 February and 10 March only 4 incoming calls were registered to this number
NAPIER did make phone calls in this time period
My Basis
Testimony: BARNES
My Basis
Testimony: FROST
10 Hazeldene Court, Berwick was the home address of NAPIER's parents
Number 0431427329 was registered to 10 Hazeldene Court, Berwick
NAPIER had access to MURDOCH's information
My Basis
Testimony: MURDOCH; Testimony: BURTON
My Basis
Testimony: NAYLOR
My Basis
Testimony: MURDOCH
The recipients of calls and messages from 0421427329 knew NAPIER but not MURDOCH
Normally people know the people they receive calls and messages from
My Basis
BURTON testimony; BUSH testimony
MURDOCH did not register the SIM himself
MURDOCH had no knowledge of mobile phone number 0431 427329
People normally have knowledge of phone numbers that they register
My Basis
MURDOCH testimony: I have no mobile phones or Digital Sim cards registered in my name
My Basis
MURDOCH testimony

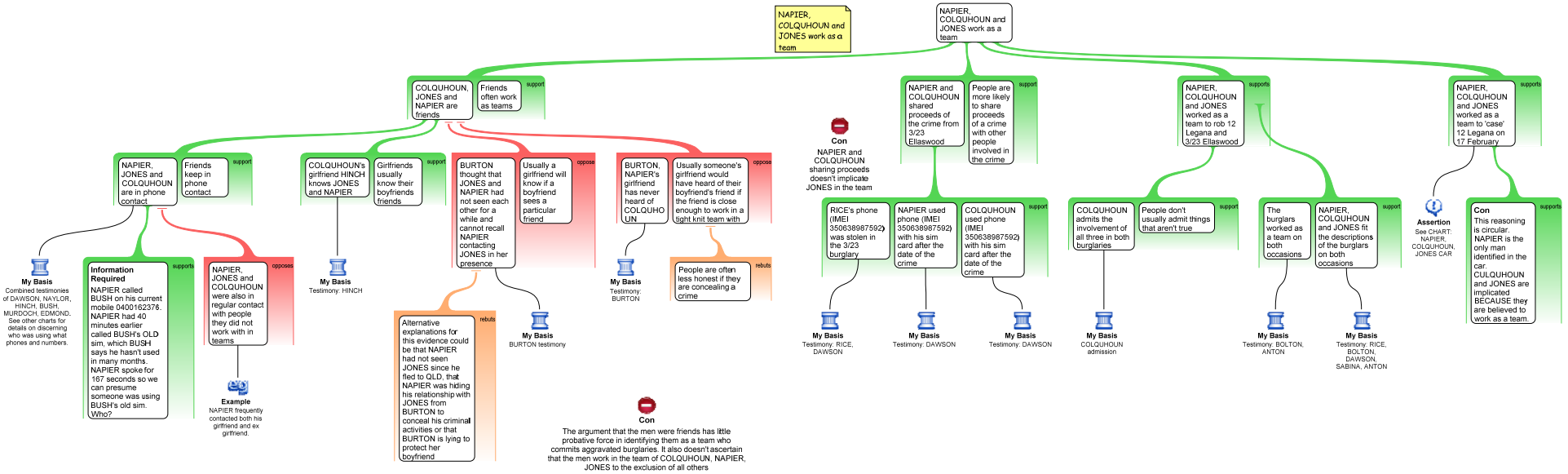

NAPIER CONSCIOUS OF GUILT
NAPIER's post offence conduct was consistent with his involvement in aggravated burglary
supports
NAPIER was in contact with the other suspects
People who commit crimes together often stay in contact
support
People who are friends also stay in contact
opposes
Con
A consciousness of guilt argument does not link NAPIER a particular burglary
NAPIER was conscious of his guilt
supports
NAPIER and COLQUHOUN both used RICE's phone to check their SIM cards
NAPIER and COLQUHOUN must have met up to exchange the phone
support
NAPIER owns SIM 336498321
COLQUHOUN owns SIM 33650375
RICE owns handset 35063896527461
handset 35063896529761 was used with SIM 336498321 and 33650375
support
My Basis
Testimony: BARNES
NAPIER'S friend BUSH was aware of NAPIER's guilt
BUSH and NAPIER were close friends
Close friends often confide in each other about their predicaments
support
My Basis
Testimony: BUSH
"Since I was about 19, Will and I haven't been out of reach
BUSH was covering for NAPIER by erasing NAPIER'S number from his phone
NAPIER's friend of 10 years BUSH "accidentally erased" NAPIER's number
Friends in regular contact do not usually erase numbers, and if they do, they usually seek them out again
support
Con
This is not a strong argument
supports
My Basis
Testimony: BUSH
BUSH could contact NAPIER at the farm instead
opposes
My Basis
Testimony: BUSH:
"Since Will was arrested, he hasn't had a mobile phone, so I ring him on either the farm number or his old man's mobile number.
NAPIER was avoiding being tracked down
People conscious of their guilt try to avoid being tracked down
support
NAPIER was not using his SIM 336498321 to call out
NAPIER feared the police would track this number
support
NAPIER's sim was a pre-paid and maybe these calls were more expensive
opposes
My Basis
Testimony: BARNES
NAPIER consented to providing fingerprints, a buccal swab and would allow a photograph to be taken of his tattoo
Guilty people may not consent to providing information that may help implicate them in a crime
oppose
My Basis
Testimony: WOOSTER
NAPIER may have felt that he had no choice or that guilt would be inferred if he did not comply
rebuts

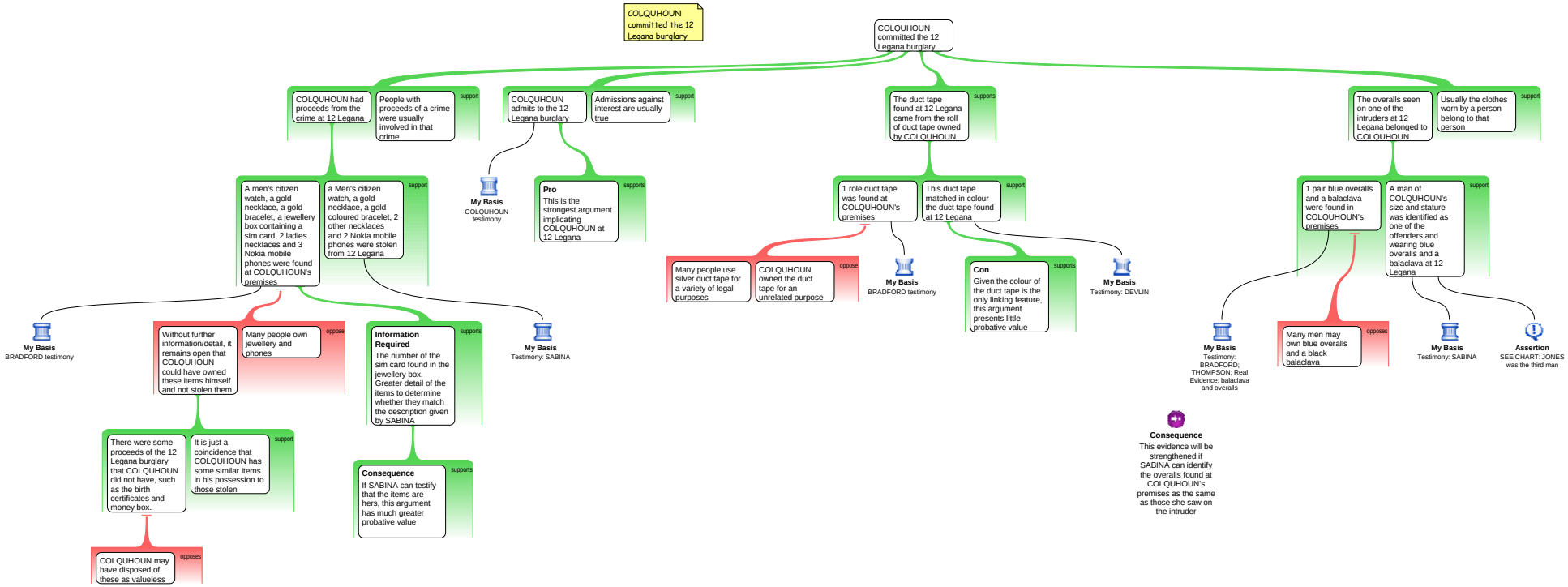

NAPIER CHARACTER
NAPIER fits into a category of people likely to commit an aggravated burglary
supports
NAPIER had a tendency to break the law
supports
NAPIER had a motive to commit the burglary
supports
NAPIER was not of good character
People who are not of good character are more likely to commit aggravated burglaries
support
NAPIER put his mobile phone number in MURDOCH's name without permission
Law abiding citizens do not sign off their mobile phone in someone else's name without permission
support
NAPIER had access to MURDOCH's details
The number NAPIER was using was in MURDOCH's name
MURDOCH did not give NAPIER permission to put the number in his name
support
My Basis
Testimony: MURDOCH
My Basis
Testimony: NAYLOR
My Basis
Testimony: MURDOCH
NAPIER broke an intervention order against him
Breaking an intervention order is illegal
support
NAPIER had an intervention order against him disallowing contact with FROST
NAPIER contacted FROST
support
My Basis
Testimony: FROST
NAPIER was using phone number 0431427329
FROST was using phone number 0413441987
Number 0431427329 sent a message to 0413441987
support
My Basis
Testimony: BUSH, HINCH, BURTON
My Basis
Testimony; FROST
My Basis
Testimony: NAYLOR
Napier is unreliable in attending work
People who are unreliable in attending work may have trouble earning money
People who need money may commit crimes to obtain money
support
My Basis
Testimony: MURDOCH
Information Required
We have no information of any drug habits (BURGLARY 1) or financial difficulties (BURGLARY 1 or 2) to strengthen this argument
supports
NAPIER did not care about his family
supports
NAPIER did not care about work, even though it was his father's company
People of good character care about the wellbeing of their parents' companies
support
My Basis
MURDOCH: "William is the sort of person who would work when he wanted to work and even if he was employed he would not neoessarily turn up every day
NAPIER had an intervention order against him
People who have intervention orders against them are generally not of good character
support
My Basis
Testimony: FROST
Con
These arguments do not link NAPIER to either burglary specifically, nor are they particularly strong
The use of character evidence as a predictor of behaviour has been dispute: eg Mchugh J at [47] in Melbourne v R
opposes

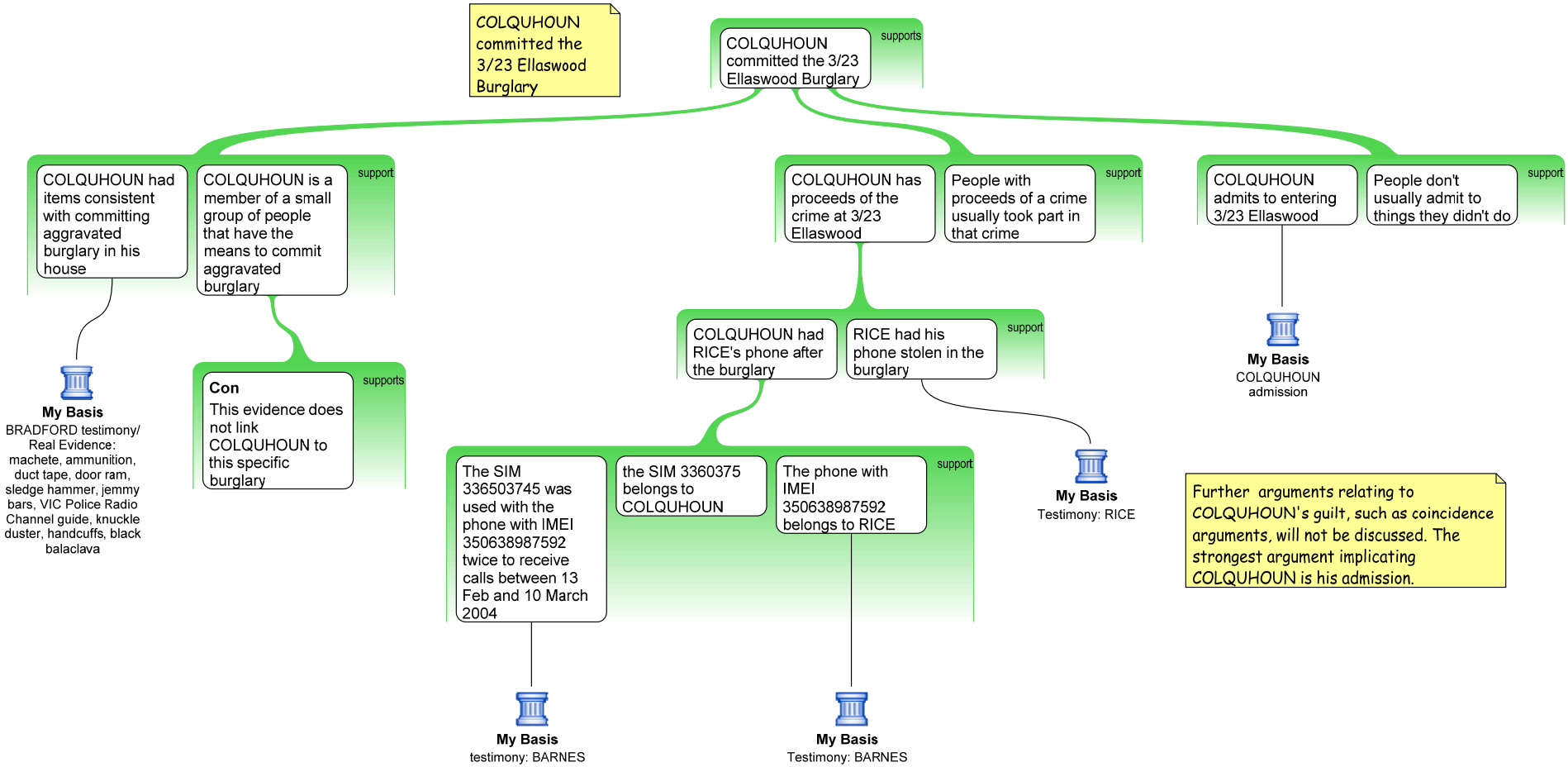

NAPIER PRE 18 FEB
NAPIER's pre-offence conduct is consistent with committing the 12 Legana burglary
supports
NAPIER was in the car 'casing' 12 Legana on 17 February
People who want to commit a burglary often investigate the site of their burglary before committing that burglary
support
NAPIER anticipated that he would be in trouble with police
supports
Assertion
SEE CHART: NAPIER ANTICIPATED TROUBLE
The front passenger was NAPIER
supports
The car doing the 'casing' was owned by NAPIER
supports
Assertion
SEE CHART: NAPIER OWNED THE CASING CAR
The front passenger was male, in his mid 20's to mid 30's and had a tanned complexion. He had short dark hair
NAPIER is male and aged 24
support
My Basis
PORTER testimony
Assertion
The jury can decide whether NAPIER fits this description
My Basis
Testimony: WOOSTER
PORTER identified the tattoo of the front passenger as "similar" tattoo 11
Tattoo 11 was NAPIER's tattoo
support
Con
PORTER made this identification 1.5 months later. He also noted it to be "similar" rather than the same. The identification was made by 2D photo rather than identification parade.
supports
My Basis
PORTER; ANDREWS
The front passenger had a large tattoo on his left forearm. He had large dark writing down the full length of his outer forearm. The letters were shaded in dark ink...about 5 separate letters spelt...some kind of artistic design.
NAPIER has a large tattoo on his left foream matching this description
support
My Basis
PORTER testimony
Assertion
The jury can decide whether NAPIER's tattoo fits this description

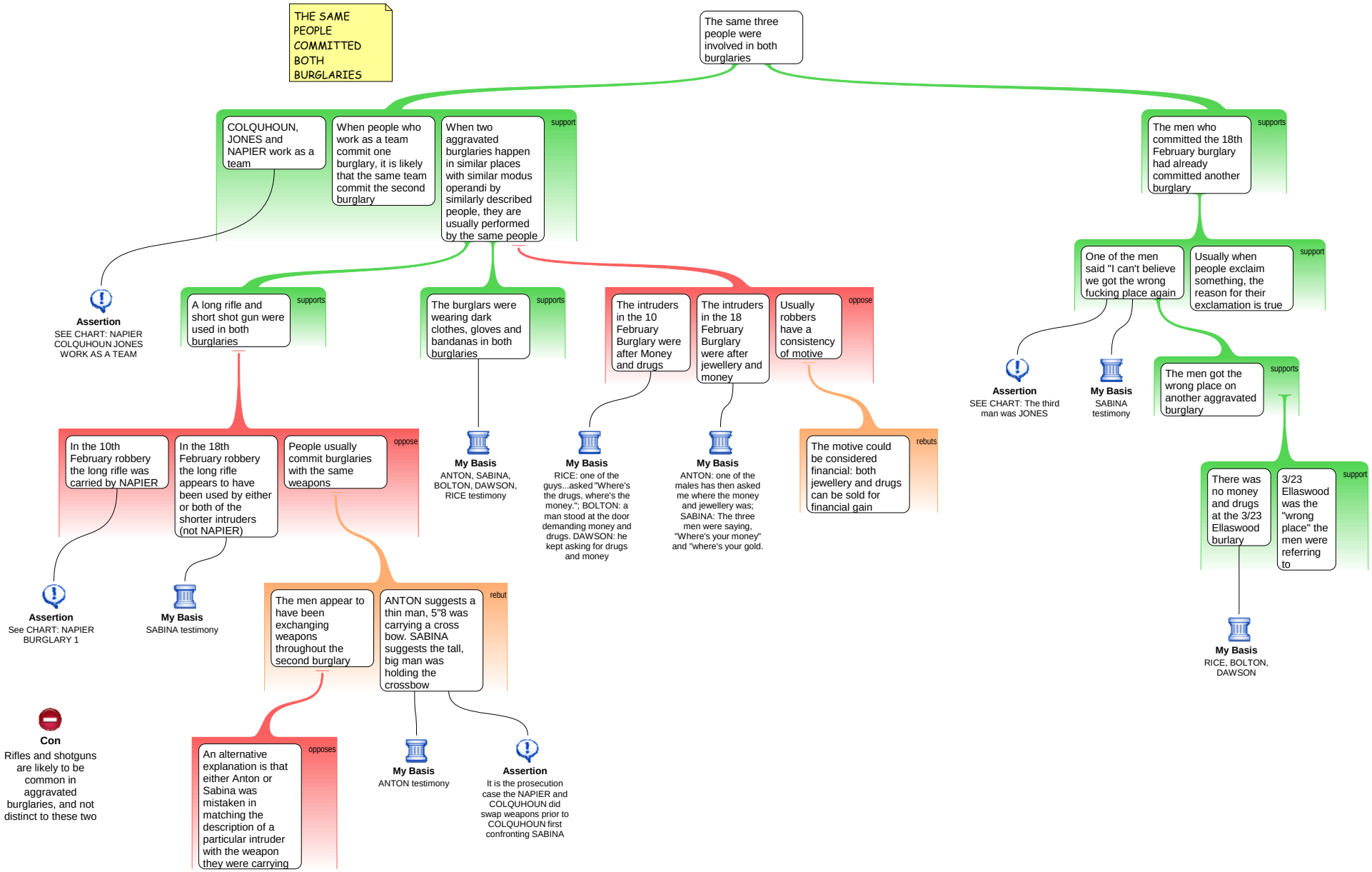

NAPIER
COLQUHOUN
JONES CAR
NAPIER, COLQUHOUN and JONES together were 'casing' 12 Legana on 17 February
supports
There were three men in the car
The car was 'casing' 12 Legana
support
My Basis
PORTER testimony
The front passenger was NAPIER
The driver and the rear passenger were JONES and COLQUHOUN
NAPIER, JONES and COLQUHOUN have a tendency to work together as a team
support
My Basis
PORTER testimony
Assertion
SEE CHART: NAPIER PRE 18 FEB
Assertion
SEE CHART: NAPIER JONES COLQUHOUN TEAM
Con
This argument is weak as it relies on the premise that if NAPIER was present the other two men must have been COLQUHOUN and JONES. There unlikely to be sufficient force in the evidence available to support this premise.


NAPIER OWNED THE 'CASING' CAR
The car doing the 'casing' was owned by NAPIER
supports
PORTER identifies the car as NAPIER's
supports
The men were driving JONES' car
opposes
NAPIER drives a red coloured hatchback Holden 'Vectra'
PORTER describes the car as red and a hatchback model
PORTER identifies NAPIER's car as "similar
support
My Basis
ANDREWS testimony
My Basis
Porter testimony
NAPIER's car was photograph 5 in the booklet compiled by Detective Andrews
PORTER selected photograph 5 and photograph 9 as "similar
support
My Basis
Testimony: ANDREWS
My Basis
PORTER statement
PORTER cannot remember the car very well, in particular, he did not see a number plate.
PORTER also identifies the Mitsubishi as "similar
Often if someone can't specifically identify something, they did not get a good look or don't remember it very well
oppose
My Basis
PORTER testimony
PORTER describes the car as possibly a Mitsubishi make and he was pretty sure it was Japanese made
NAPIER's car is not a Mitsubishi make nor is it Japanese made
support
My Basis
PORTER testimony
Many cars may be "similar" to either Holden Vectra or Mitsubishi with four doors or two doors
Many cars are red and a hatchback
oppose
JONES had a red MR2
PORTER saw a red sportscar
support
My Basis
Testimony: BURTON
NAPIER was the front passenger, not the driver
Usually people drive their own cars
support
Assertion
See above left
Assertion
The prosecution will not want to pursue this line of argument. JONES' car was not the subject of a photographic identification, COLQUHOUN admitted it was NAPIER's car and there is scant evidence to support the proposition that it was actually JONES'


NAPIER, COLQUHOUN and JONES work as a team
NAPIER, COLQUHOUN and JONES work as a team
COLQUHOUN, JONES and NAPIER are friends
Friends often work as teams
support
NAPIER, JONES and COLQUHOUN are in phone contact
Friends keep in phone contact
support
My Basis
Combined testimonies of DAWSON, NAYLOR, HINCH, BUSH, MURDOCH, EDMOND. See other charts for details on discerning who was using what phones and numbers.
Information Required
NAPIER called BUSH on his current mobile 0400162378. NAPIER had 40 minutes earlier called BUSH's OLD sim, which BUSH says he hasn't used in many months. NAPIER spoke for 167 seconds so we can presume someone was using BUSH's old sim. Who?
supports
NAPIER, JONES and COLQUHOUN were also in regular contact with people they did not work with in teams
opposes
Example
NAPIER frequently contacted both his girlfriend and ex girlfriend.
COLQUHOUN's girlfriend HINCH knows JONES and NAPIER
Girlfriends usually know their boyfriends friends
support
My Basis
Testimony: HINCH
BURTON thought that JONES and NAPIER had not seen each other for a while and cannot recall NAPIER contacting JONES in her presence
Usually a girlfriend will know if a boyfriend sees a particular friend
oppose
Alternative explanations for this evidence could be that NAPIER had not seen JONES since he fled to QLD, that NAPIER was hiding his relationship with JONES from BURTON to conceal his criminal activities or that BURTON is lying to protect her boyfriend
rebuts
My Basis
BURTON testimony
BURTON, NAPIER's girlfriend has never heard of COLQUHOUN
Usually someone's girlfriend would have heard of their boyfriend's friend if the friend is close enough to work in a tight knit team with
oppose
My Basis
Testimony: BURTON
People are often less honest if they are concealing a crime
rebuts
Con
The argument that the men were friends has little probative force in identifying them as a team who commits aggravated burglaries. It also doesn't ascertain that the men work in the team of COLQUHOUN, NAPIER, JONES to the exclusion of all others
Con
NAPIER and COLQUHOUN sharing proceeds doesn't implicate JONES in the team
NAPIER and COLQUHOUN shared proceeds of the crime from 3/23 Ellaswood
People are more likely to share proceeds of a crime with other people involved in the crime
support
RICE's phone (IMEI 350638987592) was stolen in the 3/23 burglary
NAPIER used phone (IMEI 350638987592) with his sim card after the date of the crime
COLQUHOUN used phone (IMEI 350638987592) with his sim card after the date of the crime
support
My Basis
Testimony: RICE, DAWSON
My Basis
Testimony: DAWSON
My Basis
Testimony: DAWSON
NAPIER, COLQUHOUN and JONES worked as a team to rob 12 Legana and 3/23 Ellaswood
supports
COLQUHOUN admits the involvement of all three in both burglaries
People don't usually admit things that aren't true
support
My Basis
COLQUHOUN admission
The burglars worked as a team on both occasions
NAPIER, COLQUHOUN and JONES fit the descriptions of the burglars on both occasions
support
My Basis
Testimony: BOLTON, ANTON
My Basis
Testimony: RICE, BOLTON, DAWSON, SABINA, ANTON
NAPIER, COLQUHOUN and JONES worked as a team to 'case' 12 Legana on 17 February
supports
Assertion
See CHART: NAPIER, COLQUHOUN, JONES CAR
Con
This reasoning is circular. NAPIER is the only man identified in the car. CULQUHOUN and JONES are implicated BECAUSE they are believed to work as a team.
supports


COLQUHOUN committed the 12 Legana burglary
COLQUHOUN committed the 12 Legana burglary
COLQUHOUN had proceeds from the crime at 12 Legana
People with proceeds of a crime were usually involved in that crime
support
COLQUHOUN admits to the 12 Legana burglary
Admissions against interest are usually true
support
The duct tape found at 12 Legana came from the roll of duct tape owned by COLQUHOUN
supports
The overalls seen on one of the intruders at 12 Legana belonged to COLQUHOUN
Usually the clothes worn by a person belong to that person
support
A men's citizen watch, a gold necklace, a gold bracelet, a jewellery box containing a sim card, 2 ladies necklaces and 3 Nokia mobile phones were found at COLQUHOUN's premises
a Men's citizen watch, a gold necklace, a gold coloured bracelet, 2 other necklaces and 2 Nokia mobile phones were stolen from 12 Legana
support
My Basis
COLQUHOUN testimony
Pro
This is the strongest argument implicating COLQUHOUN at 12 Legana
supports
1 role duct tape was found at COLQUHOUN's premises
This duct tape matched in colour the duct tape found at 12 Legana
support
1 pair blue overalls and a balaclava were found in COLQUHOUN's premises
A man of COLQUHOUN's size and stature was identified as one of the offenders and wearing blue overalls and a balaclava at 12 Legana
support
My Basis
BRADFORD testimony
Without further information/detail, it remains open that COLQUHOUN could have owned these items himself and not stolen them
Many people own jewellery and phones
oppose
Information Required
The number of the sim card found in the jewellery box. Greater detail of the items to determine whether they match the description given by SABINA
supports
My Basis
Testimony: SABINA
There were some proceeds of the 12 Legana burglary that COLQUHOUN did not have, such as the birth certificates and money box.
It is just a coincidence that COLQUHOUN has some similar items in his possession to those stolen
support
COLQUHOUN may have disposed of these as valueless
opposes
Consequence
If SABINA can testify that the items are hers, this argument has much greater probative value
supports
Many people use silver duct tape for a variety of legal purposes
COLQUHOUN owned the duct tape for an unrelated purpose
oppose
My Basis
BRADFORD testimony
Con
Given the colour of the duct tape is the only linking feature, this argument presents little probative value
supports
My Basis
Testimony: DEVLIN
My Basis
Testimony: BRADFORD; THOMPSON; Real Evidence: balaclava and overalls
Many men may own blue overalls and a black balaclava
opposes
My Basis
Testimony: SABINA
Assertion
SEE CHART: JONES was the third man
Consequence
This evidence will be strengthened if SABINA can identify the overalls found at COLQUHOUN's premises as the same as those she saw on the intruder


COLQUHOUN committed the 3/23 Ellaswood Burglary
COLQUHOUN committed the 3/23 Ellaswood Burglary
supports
COLQUHOUN had items consistent with committing aggravated burglary in his house
COLQUHOUN is a member of a small group of people that have the means to commit aggravated burglary
support
My Basis
BRADFORD testimony/ Real Evidence: machete, ammunition, duct tape, door ram, sledge hammer, jemmy bars, VIC Police Radio Channel guide, knuckle duster, handcuffs, black balaclava
Con
This evidence does not link COLQUHOUN to this specific burglary
supports
COLQUHOUN has proceeds of the crime at 3/23 Ellaswood
People with proceeds of a crime usually took part in that crime
support
COLQUHOUN had RICE's phone after the burglary
RICE had his phone stolen in the burglary
support
My Basis
Testimony: RICE
The SIM 336503745 was used with the phone with IMEI 350638987592 twice to receive calls between 13 Feb and 10 March 2004
the SIM 3360375 belongs to COLQUHOUN
The phone with IMEI 350638987592 belongs to RICE
support
My Basis
testimony: BARNES
My Basis
Testimony: BARNES
COLQUHOUN admits to entering 3/23 Ellaswood
People don't usually admit to things they didn't do
support
My Basis
COLQUHOUN admission
Further arguments relating to COLQUHOUN's guilt, such as coincidence arguments, will not be discussed. The strongest argument implicating COLQUHOUN is his admission.


THE SAME PEOPLE COMMITTED BOTH BURGLARIES
The same three people were involved in both burglaries
COLQUHOUN, JONES and NAPIER work as a team
When people who work as a team commit one burglary, it is likely that the same team commit the second burglary
When two aggravated burglaries happen in similar places with similar modus operandi by similarly described people, they are usually performed by the same people
support
Assertion
SEE CHART: NAPIER COLQUHOUN JONES WORK AS A TEAM
A long rifle and short shot gun were used in both burglaries
supports
The burglars were wearing dark clothes, gloves and bandanas in both burglaries
supports
The intruders in the 10 February Burglary were after Money and drugs
The intruders in the 18 February Burglary were after jewellery and money
Usually robbers have a consistency of motive
oppose
In the 10th February robbery the long rifle was carried by NAPIER
In the 18th February robbery the long rifle appears to have been used by either or both of the shorter intruders (not NAPIER)
People usually commit burglaries with the same weapons
oppose
My Basis
ANTON, SABINA, BOLTON, DAWSON, RICE testimony
My Basis
RICE: one of the guys...asked "Where's the drugs, where's the money."; BOLTON: a man stood at the door demanding money and drugs. DAWSON: he kept asking for drugs and money
My Basis
ANTON: one of the males has then asked me where the money and jewellery was; SABINA: The three men were saying, "Where's your money" and "where's your gold.
The motive could be considered financial: both jewellery and drugs can be sold for financial gain
rebuts
Assertion
See CHART: NAPIER BURGLARY 1
My Basis
SABINA testimony
The men appear to have been exchanging weapons throughout the second burglary
ANTON suggests a thin man, 5"8 was carrying a cross bow. SABINA suggests the tall, big man was holding the crossbow
rebut
Con
Rifles and shotguns are likely to be common in aggravated burglaries, and not distinct to these two
An alternative explanation is that either Anton or Sabina was mistaken in matching the description of a particular intruder with the weapon they were carrying
opposes
My Basis
ANTON testimony
Assertion
It is the prosecution case the NAPIER and COLQUHOUN did swap weapons prior to COLQUHOUN first confronting SABINA
The men who committed the 18th February burglary had already committed another burglary
supports
One of the men said "I can't believe we got the wrong fucking place again
Usually when people exclaim something, the reason for their exclamation is true
support
Assertion
SEE CHART: The third man was JONES
My Basis
SABINA testimony
The men got the wrong place on another aggravated burglary
supports
There was no money and drugs at the 3/23 Ellaswood burlary
3/23 Ellaswood was the "wrong place" the men were referring to
support
My Basis
RICE, BOLTON, DAWSON