

**Instructions to Counsel**

***R v Napier and Jones***

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## **1) FACTUAL THEORY.**

### First Burglary:

On the morning of 10 February 2004 WILLIAM NAPIER and HENRY JONES carried out an armed burglary at 3/23 Ellaswood Close, Berwick.

NAPIER and accomplice Scott Colquhoun entered the house by breaking a front window, telling JONES to wait outside. (For the purposes of this brief it is presumed that proving Jones waited outside the house is sufficient for proving he was one of the persons who committed the aggravated burglary.)

NAPIER and Colquhoun were dressed in all dark clothing, balaclavas and white runners and were armed with a rifle and a sawn-off shotgun. At gunpoint they repeatedly demanded “drugs and money” from the occupants of the house, Warren Rice, Daisy Bolton and Peter Dawson. They stole a small amount of cash, a jar with coins in it and Mr Rice’s phone and wallet, calling out to JONES as they left.

Between 13 February and 10 March 2004 NAPIER, having inserted own his SIM card into Rice’s phone, received four phone calls on the stolen mobile.

### Second Burglary:

NAPIER and JONES (in the company of Colquhoun) again committed an aggravated burglary on the morning of 18 February 2004 at 12 Legana Court, Endeavor Hills.

After “casing” the house at about 6.30pm on 17 February, they entered the house by breaking a window that led into the lounge room. The defendants were armed, at different stages, with a sawn-off shotgun, a rifle and a crossbow.

The defendants bound Anton and Sabina Petrescu with duct tape and demanded money and gold. The defendants left the house with property belonging to the Petrescus including six items of jewellery and two mobile phones. The defendants escaped via the fence at the rear of the property, where JONES dropped a yellow-handled knife.

Between 19 February and 10 March JONES, having inserted his SIM card with the identification number 336529750 into Sabina Petrescu's phone (#1), received two calls on the stolen mobile.

Between 19 February and 20 February NAPIER, having inserted his SIM card into Sabina Petrescu's phone (#2), made eighteen phone calls on the stolen mobile.

## 2) REAL ISSUES IN THE CASE

- i) NAPIER and JONES committed both of the aggravated burglaries – the defence will be one of identity, denying that Napier and Jones were the persons who committed the acts.
- ii) That there were three burglars at the first burglary.
- iii) Phone numbers attributed to NAPIER and JONES in witness statements were actually numbers used by them.
- iv) NAPIER and two other men were seen “casing” 12 Legana Court on the afternoon before the second burglary took place.
- v) The discovery of a yellow-handled knife outside Legana Court implicates JONES in the second burglary.
- vi) The similarities between the two burglaries constitute an assertion that the same offenders committed both burglaries.
  - If it can be established that NAPIER or JONES committed one of the burglaries it follows that they also committed the other.
- vii) The credibility of Scott Colquhoun’s admissions to police.
- viii) Whether the goods recovered from Colquhoun’s house match items stolen during the burglaries.

### Issues unlikely to be in dispute

- i) Instructions indicate that the conduct of the police during the arrests of NAPIER (and Colquhoun) and the subsequent taking of fingerprints, body samples and evidence are not in issue.
- ii) That the yellow-handled knife was located directly behind 12 Legana Court. As established by the corroborating evidence of Senior Constable Christie and Detective Jackson who took photos of the knife in this location.
- iii) Items reported stolen by victims were actually stolen. There is no evidence to suggest otherwise.
- iv) That NAPIER owns a red Holden Vectra hatchback with the registration OTS 942.
- v) It is over-established that the NAPIER and JONES knew each other. Witness statements (NAPIER's girlfriend Annie Burton states, 'I know WILLIAM knows HENRY') prove they clearly move in similar friendship circles, they have both lived with Richard Bush at his Mitcham address and JONES' girlfriend Dorothy Edmond states she knows NAPIER through JONES.
- vi) The technical evidence of phone records provided by Telstra, Optus and Vodafone, in relation to IMEI numbers and SIM cards, as the evidence is based on a systematic and mathematical process,<sup>1</sup> leaving no chance of human error. (Note: not the evidence in relation to registered account names.)

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<sup>1</sup> Description of process by Desmond Naylor, Support Liaison Officer with Optus (statement 3).

### **3) PROVING THE KEY FACTUAL PROPOSITIONS.**

(Chart provides construction of arguments).

**Underlying Proposition: NAPIER and JONES committed both of the aggravated burglaries (Chart One).**

#### **i) There was a third burglar waiting outside during the first burglary.**

Warren Rice states that as the second burglar came through the window he shouted “wait outside.” Daisy Bolton states that as the two burglars ran out the front door they called out “Hurry up, we’re leaving.” These two comments suggest there was a third person waiting outside, which corroborates the record of interview provided to the police by Colquhoun, where he admitted burgling the house with NAPIER while JONES waited outside, presumably standing watch.

#### **ii) NAPIER used the SIM card with the phone number 0438 582 271.**

Telstra records show that the SIM card with the mobile phone number 0438 582 271 is registered to WILLIAM NAPIER of 5 Lowing Close, Berwick, connecting NAPIER to the first burglary where Warren Rice’s mobile phone was stolen.

The defence for NAPIER could dispute the registered name, arguing that as it is a pre-paid SIM card, it would not be difficult to put a false name on the account (it seems likely that NAPIER did this with Bob Murdoch’s name). However, this remains a strong piece of circumstantial evidence in building a case against NAPIER.

#### **iii) NAPIER and two other men were seen “casing” 12 Legana Court on the afternoon before the second burglary took place.**

Kevin Porter notices a car acting suspiciously at around 6.30pm on the night of the burglary. His description of a metallic red sporty hatchback closely matches the description of a car registered to



NAPIER. He is also able to provide a close description of the male passenger and, in particular, his prominent left forearm tattoo. (See chart

**iv) The discovery of a yellow-handled knife outside Legana Court implicates JONES in the second burglary.**

As NAPIER and JONES fled the scene from 12 Legana Court, JONES dropped a knife in the park land directly adjacent to number 12. This was later discovered by Senior Constable Christie with the assistance of his sniffer dog Rover. The fresh scent on and around the knife indicated that it had recently been dropped. Jones fingerprints were found on the knife, firmly establishing that he had the opportunity to commit the burglary, as he was in the immediate vicinity around the time, and he was carrying a knife, from which an inference can be drawn that he had prepared himself to burgle.

**v) NAPIER used the SIM card with the phone number 0431 427 329.**

The correlation of witness statements from Dorothy Edmond and Michelle Hinch, and the partial correlation by NAPIER's girlfriend Annie Burton, indicate that NAPIER used the mobile phone number 0431 427 329. This evidence connects him with the second burglary where Sabina Petrescu's mobile phone (#2) was stolen. Additionally, between 19 and 20 February NAPIER used this phone to SMS his ex-girlfriend Evra Frost and his current girlfriend Annie Burton five times each, as well as his room-mate Richard Bush three times.

**vi) JONES used the SIM card with the phone number 0415 409 625.**

Richard Bush and Dorothy Edmond both state that JONES used this phone number connecting him with the first burglary through the stolen phone of Sabina Petrescu (#1). Furthermore, Optus records show that JONES received calls from NAPIER on 20 February and 10 March.

**vii) The similarity of the two burglaries suggests that one "team" of burglars committed both.**

If it can be proven that JONES and NAPIER committed the second burglary – and there is substantial evidence suggesting that it can – then it seems highly likely that they also committed the first burglary.

A comparison of the two burglaries:

Statements from victims of the first burglary establish that the burglars smashed a window to gain entry to the house, that one burglar was about 5'10, fat and carrying a rifle and the other was 5'8, slim and carrying a sawn-off shotgun. Both burglars were dressed in dark clothes and were wearing balaclavas and gloves. The burglary occurred in the early hours of the morning on a weeknight. There were two burglars in the house, but the victims suspect a third was waiting outside. The burglars demanded "cash and drugs" but left with a small amount of cash, a wallet and a mobile phone.

Victims of the second burglary state that the burglars smashed a window leading into the front room in the early hours of the morning, that there were three burglars: two medium around 5'8 with light builds and one taller and fat. They carried a rifle, a sawn-off shotgun and a crossbow. Two were dressed in dark clothes and one in overalls and they all wore balaclavas and gloves. They demanded money and gold but accepted small amounts of cash, mobile phones and jewellery. They were heard to yell "I can't believe we got the wrong place again."

Both burglaries took place in the outer south-eastern suburbs of Melbourne and occurred within a week of each other.

**viii) The goods recovered from Colquhoun's house match items stolen during the burglaries.**

While this evidence supports Colquhoun's admissions, it is likely that the defence for NAPIER and JONES will argue that it damages the credibility of the admissions because Colquhoun has been caught red handed with proceeds from the burglary (assuming they match items stolen during the burglaries). This Colquhoun may have been trying to gain some leniency from the police by giving an interview implicating JONES and NAPIER.

**4) ADMISSIBILITY OF EVIDENCE LIKELY TO BE DISPUTED**

Assume that all evidence discussed below, which is based on the key propositions for the prosecution case, has passed the test for relevance outlined in the UEL and could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.<sup>2</sup>

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<sup>2</sup> Section 55(1) UEL.

Furthermore, unless otherwise stated, it can be assumed that any prejudicial effect is outweighed by probative value.

**Testimony Evidence:**

- i) Admissibility of evidence that the burglars shouted, “wait outside” and “hurry up, we’re leaving” during the first burglary.**

Hearsay: “Wait outside”<sup>3</sup> and “hurry up”<sup>4</sup> are previous representations made out of court by the burglars, and are being made to assert the fact that there was a third burglar outside, which is what is trying to be proven by the representation.

However, section 66 of the UEL provides an exception to the hearsay rule if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person giving evidence. So this evidence would be admissible.

- ii) Admissibility of the evidence provided by Telstra, which asserts that the SIM card with the phone number 0438 582 271 is registered to William Napier.**

Business Exception to the Hearsay Rule: This evidence is provided by Sarah Barnes, acting in her capacity as Court Liaison Officer for Telstra. She has stated that the mobile service mentioned above is registered to Mr WILLIAM NAPIER after “a perusal” of records and documents maintained by Telstra, making this statement hearsay.

The exception to the hearsay rule based on business records, outlined at section 69 of the UEL, would almost certainly deem this evidence admissible as it clearly is in the parameters of sub-section 1(a)(i) in that it is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business.

Prejudicial Effect versus Probative Value: As discussed above, it is plausible that the defense will argue that the registration of this SIM card is unreliable and could have been forged because it is a pre-paid card. Consequently, NAPIER’s defense may try to have it excluded on the grounds that its prejudicial effect outweighs its probative value. Clearly this is a compelling piece of evidence as it directly links

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<sup>3</sup> Statement from Warren Rice immediately after first burglary.

<sup>4</sup> Statement from Daisy Bolton immediately after first burglary.

NAPIER with the phone that was stolen from Warren Rice in the first burglary. If the evidence was inaccurate it would have a severely prejudicial effect, however, it is also a highly probative piece of evidence and therefore the court would probably allow it or may make a discretionary assessment to warn the jury as to its prejudicial effect.

**iii) Admissibility of Kevin Porter's eyewitness testimony.**

Lay Opinion Exception: Porter gives a description of the car and describes the three men inside as "casing" the 12 Legana Court, which is an opinion. Consequently the prosecution will attempt to circumvent the opinion rule through the lay opinion exception.

Although Porter satisfies sub-section (a) of section 78 of the UEL, in that the opinion is based on something he saw, sub-section (b) requires that the opinion is necessary to obtain an adequate account of what happened, which Porter's assertion of "casing" is not. However, Porter's opinion is only a small part of his evidence and if the opinion part was severed from the rest of the statement it would be admissible.

**- Admissibility of Porter's identification of NAPIER's car by picture evidence.**

This piece of evidence has quite poor probative value as Porter failed to exclusively pick NAPIER's car from the booklet of twelve provided by Detective Andrews on 26 May 2004, and it seems likely that the defence would be able to have it excluded based on the argument that its prejudicial effect outweighs its probative value.

**- Admissibility of Porter's identification of NAPIER's forearm tattoo by picture evidence.**

Identification Evidence: When this booklet – containing 12 photographs of tattoos on the left arm of males – was shown to Porter by Detective Andrews on 26 May, NAPIER was in custody, but the picture was taken after his arrest<sup>5</sup> and therefore it would not be excluded under section 115 (3) of the UEL.

The intimate nature of the photographs (which are presumably close ups of the left forearm) support an implied assertion that subjects in the photo are police suspects and that one of the subjects is probably

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<sup>5</sup> Statement by Detective Graeme Wooster of Armed Offenders Squad, dated 3 June 2004.

the defendant. There is no evidence to suggest that Detective Andrews has told Porter that “it might not be any of these guys” or that “none of the guys photographed are in custody.”

Therefore it is quite likely that the defence would raise an argument that under section 115 (2) this evidence should be excluded. The prosecution, in response, would argue that the evidence is highly probative and the nature of the identification (a forearm tattoo) made it difficult to present the pictures to the witness without influencing their opinion of the subjects – which was minimal anyway – and therefore the court should use its discretion to admit the evidence, albeit with a warning to the jury under section 116.

**iv) Admissibility of Senior Constable Christie’s statement of finding a warm scent on and around the yellow-handled knife.**

Section 33: Senior Constable Christie’s statement was made on 23 May, three months after the event, and therefore cannot be included under section 33 for evidence by police officers.

Expert Opinion: Senior Constable Christie’s opinion that there was a recent scent on and near the yellow-handled knife is based on his expertise as a sniffer dog handler, but also on the expertise of the dog Rover. Both have been trained and tested regularly in finding (Rover) and interpreting what is being found (Christie) and have been operating as a team for five years. Christie recognised the behaviour of Rover finding a recent human scent after being cast, having seen Rover track numerous times on an operational basis. This is sufficient evidence to suggest that Christie and Rover have specialised knowledge and that Christie’s opinion, that the knife had a recent human scent on it, is based on his knowledge and expertise in the field. The evidence is admissible under section 79 of the UEL.

**v) Evidence that fingerprints on the knife belong to JONES.**

Expert Opinion: This is an opinion provided by fingerprint expert, Sergeant Philip Warne. Under section 79 opinions are admissible if a person has specialised knowledge, based on training and experience, and the opinion they are giving is wholly or substantially based on that knowledge.

Amongst other accreditations Sergeant Warne has undergone 5 years of extensive training in the science of fingerprinting and has passed exams set by the Victorian Police on the subject of fingerprints.

The evidence clearly indicates that his opinion is based on facts and evidence, which relate to his expertise and therefore this evidence is admissible.

**vi) Admissibility of statements from Dorothy Edmond and Michelle Hinch, which assert that NAPIER used the SIM card with the phone number 0431 427 329.**

Lay Opinion Exception: It is an opinion of Edmond and Hinch that NAPIER uses or has used this phone number. They are drawing an inference that because Napier has called them from that number or because they have him listed in their phones under that number, that the SIM card number belongs to NAPIER.

However, the lay opinion exception to the opinion rule at section 78 may allow this evidence to be admitted. Presumably both girls listed this phone number under Napier's name due to a combination of what they saw (the number coming up on the screen when he called), heard (NAPIER or someone else telling them this was NAPIER's number) or otherwise perceived. Evidence of the opinion they formed is necessary to obtain an adequate account of their perception and therefore the evidence will probably be admissible under the lay opinion exception.

Credibility of the Witnesses: It is possible that defence counsel for NAPIER may try and discredit Edmond and Hinch's statements by adducing evidence that they have a motive to lie and implicate NAPIER because they might believe that in doing so they are assisting their boyfriends (co-accused JONES and Colquhoun).

However, the credibility rule is discretionary and has a high threshold, and it would be difficult to make out an argument that either witness was knowingly or recklessly making a false representation,<sup>6</sup> and unlikely that the court would accept it.

**vii) Admissibility of statements from Dorothy Edmond and Richard Bush asserting that JONES used the SIM card with the phone number 0415 409 625.**

Same reasoning and outcomes for opinion rules apply as for statements from Edmond and Hinch above.

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<sup>6</sup> Section 103(2)(a) UEL.

**viii) Admissibility of Sabina Petrescu’s evidence of one of the burglars saying “I can’t believe we got the wrong fucking place again.”**

Hearsay Rule: Prima facie this evidence is hearsay as the statements allude to previous statements that are intended to prove that the burglars had committed this crime before. However, it is assumed that Sabina Petrescu is testifying at trial and therefore the prosecution will establish that the exception outlined at section 66 (2) applies, as all initial statements were taken from witnesses within a few hours of the burglaries. Therefore the representation of what was said was fresh in the mind of Petrescu and the evidence will be admissible.

**ix) Inclusion of Tendency Reasoning used to implicate JONES in first burglary.**

Defence counsel for JONES will attempt to have tendency reasoning, implicating JONES in the first burglary, excluded under section 97 of the UEL.

In support of an inclusionary exception to the rule the reasoning is strong – that JONES has a tendency to commit aggravated burglaries – and the probative value links JONES with the first burglary, which is a key aspect of the prosecution’s case. The degree of unusualness is high – based on the striking similarities between the two burglaries (established above) and the proof of other misconduct (the second burglary) is also quite strong, with real (knife) and circumstantial (use of stolen phone) evidence establishing other misconduct.

The High Court in *Pfennig v R* permitted tendency reasoning, but under strict circumstances where the only other possible explanation for the disappearance of Black was if somebody with the same tendency as *Pfennig* also spoke to him in the last hour before he went missing. JONES’ tendency to burgle is not as rare as *Pfennig*’s tendency to abduct small boys, but Colquhoun’s admissions, even if the credibility is attacked, would seem sufficient support to allow an argument of tendency reasoning to be made.

**x) Inclusion of Coincidence Reasoning.**

It is likely that the defence would attempt to exclude coincidence reasoning that implicates JONES and NAPIER in both burglaries. Prima facie the use of this type of reasoning as evidence would be inadmissible. However, section 101 permits an inclusionary exception where coincidence evidence

about a defendant can be used, provided the probative value of the evidence substantially outweighs the prejudicial effect it might have on the defendant.

Notice would need to be given to the defence and it would also need to be established that the similarities between the burglaries were so overwhelming that it would be implausible to argue that the first burglary was committed by somebody else. The similarities between the two burglaries strongly suggest that it would be highly unlikely that it was different offenders. However, “substantially outweighs” is an extremely high threshold to prove and it is quite probable that the court would choose to exclude it.

**xi) The credibility of Scott Colquhoun’s confession to police (presuming that Colquhoun’s confessions to police are admissible).**

If Colquhoun appears as a witness: The defence will most likely challenge the credibility of Colquhoun’s confessions, made during a record of interview, which clearly implicate JONES and NAPIER in both burglaries. Evidence relating to credibility is generally inadmissible; however, the cross-examination exception, under section 103 of the UEL, can circumvent the credibility rule, provided the evidence substantially affects the assessment of the credibility of the witness. Under section 165(d) the defence is likely to request that the judge warn the jury of the unreliability of Colquhoun’s evidence as he is criminally involved in the proceedings.

The defence have a compelling argument for getting an exception: self-interest motive to lie in order to carry favour with the police after being caught with incriminating evidence in his house. The fact that he made a full confession suggests he was offered some form clemency by the police in return for implicating NAPIER and JONES as well as himself.

This argument would have to be seriously considered by the court as it has substantial probative value in challenging his credibility as a witness; however this exception has a high threshold and would prove difficult to make out.

If Colquhoun does not appear as a witness and his admission is used, section 108B (3) offers a “previous representations of an accused who is not a witness” exception to the credibility rule where leave from the court is not required if the evidence is about whether the defendant (a) is biased or has a motive to be untruthful or (c) has made a prior inconsistent statement. This exception seems to require a lower



threshold and be analogous with these circumstances and consequently it seems likely that the defence for JONES and NAPIER would be able to successfully challenge the credibility of Colquhoun.

## 5) LIKELIHOOD OF CONVICTION

The likelihood of conviction for both JONES and NAPIER is largely dependent on the credibility Colquoun's admissions hold at trial and what evidence the defence for JONES and NAPIER can adduce to diminish this credibility.

The yellow-handled knife found outside the second burglary – and the evidence from Senior Constable Christie and Rover indicating it was left there recently – is compelling evidence against JONES, particularly when supported with the circumstantial evidence that he used the mobile phone stolen during this burglary in the days afterward. These two key pieces of admissible evidence suggest that it is likely that JONES would be found guilty of the second burglary. However, there is virtually no convincing evidence tying JONES to the first burglary, and the coincidence argument based on the similarities between the two burglaries is probably not, in practice, going to convince a jury of his guilt beyond reasonable doubt.

Similarly, the evidence against NAPIER in the first burglary is frail with only the dubious registered mobile connecting him to the burglary. However, the overall pattern of behaviour and body of evidence against NAPIER, where it is all but proven that he has already stolen and used a mobile phone after the second burglary, would make NAPIER more likely to be convicted of the first burglary than JONES. The evidence against NAPIER in the second burglary, though only circumstantial, is more rounded. The combination of the use of the stolen mobile phone, the eyewitness description of his car and picture evidence of his tattoo, along with the backdrop of Colquhoun's confession, make a conviction for the second burglary more likely than not.

**CHART 1:**

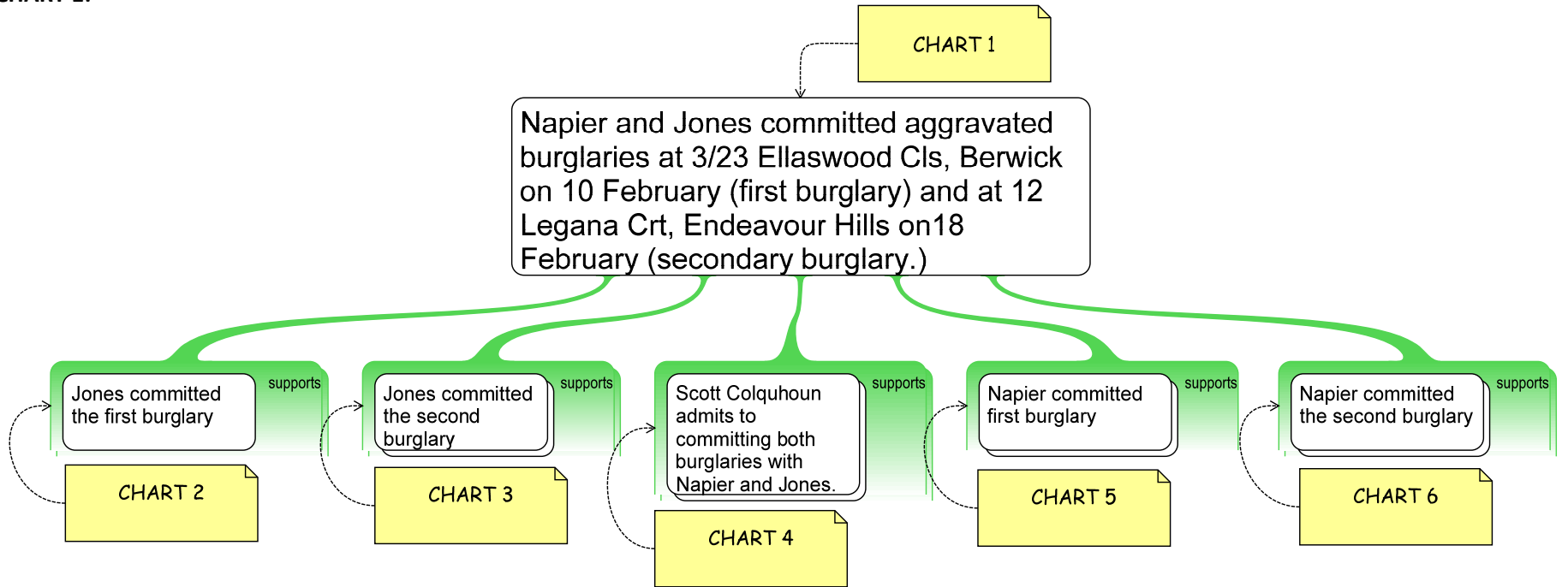


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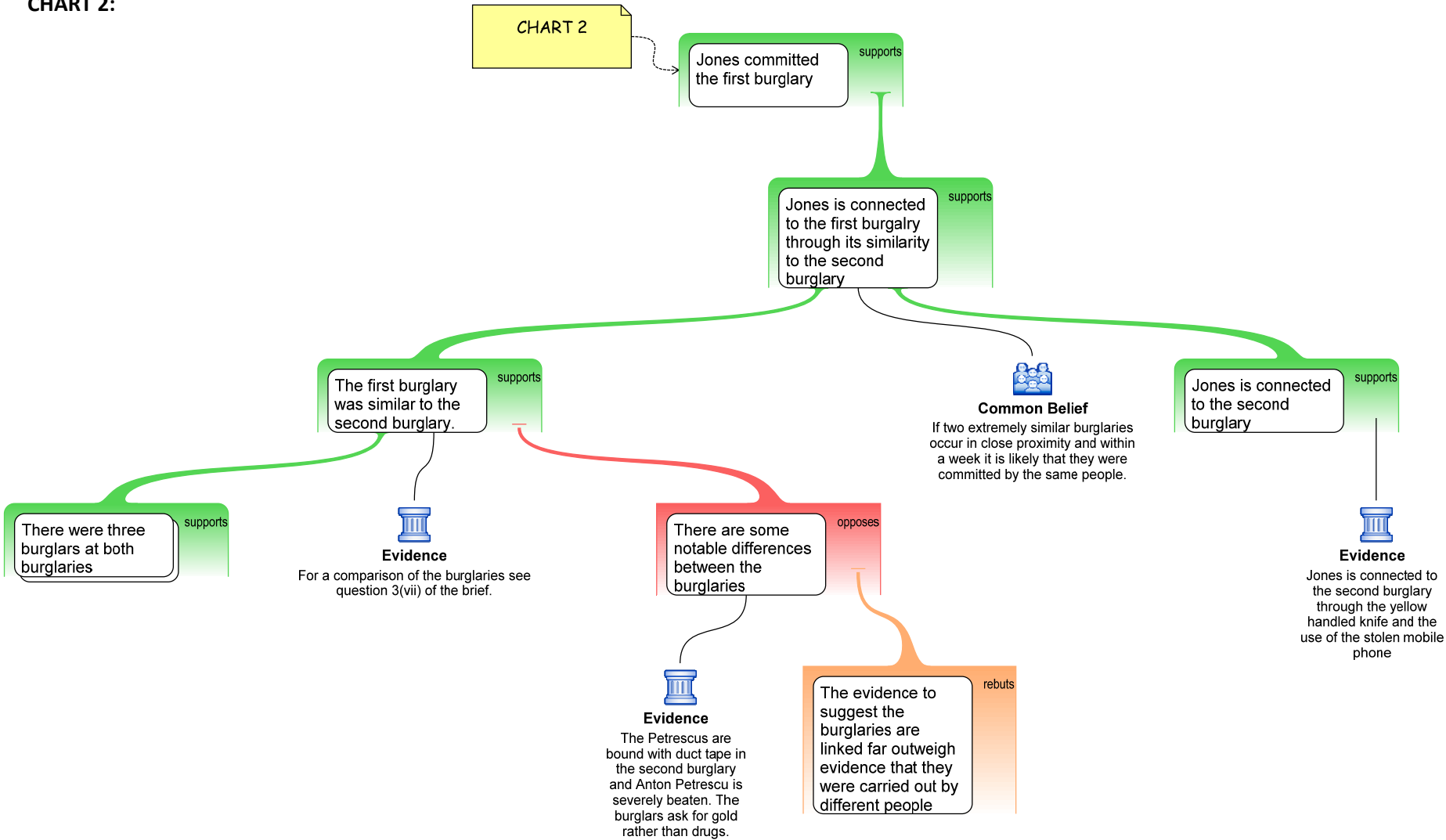




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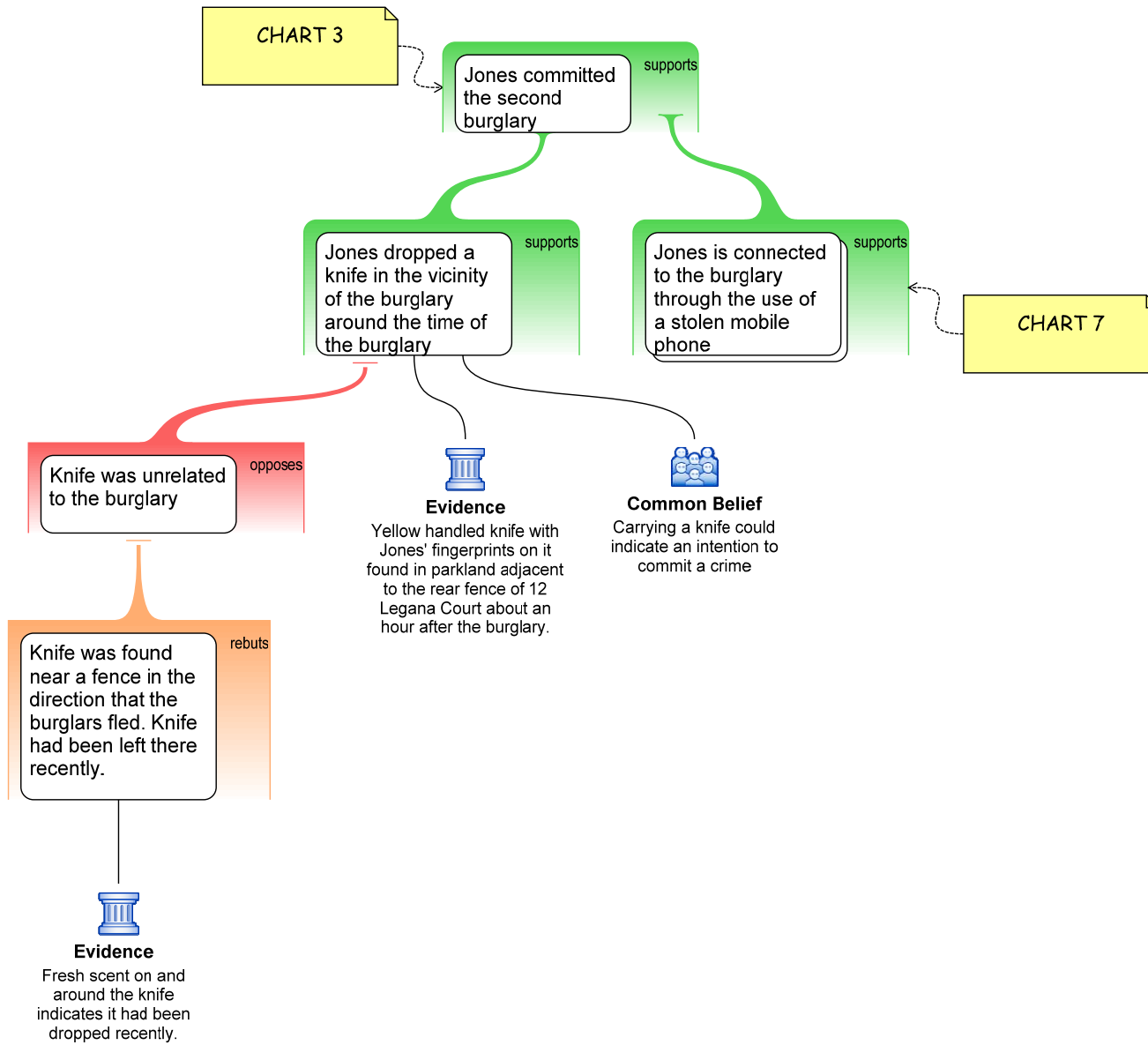


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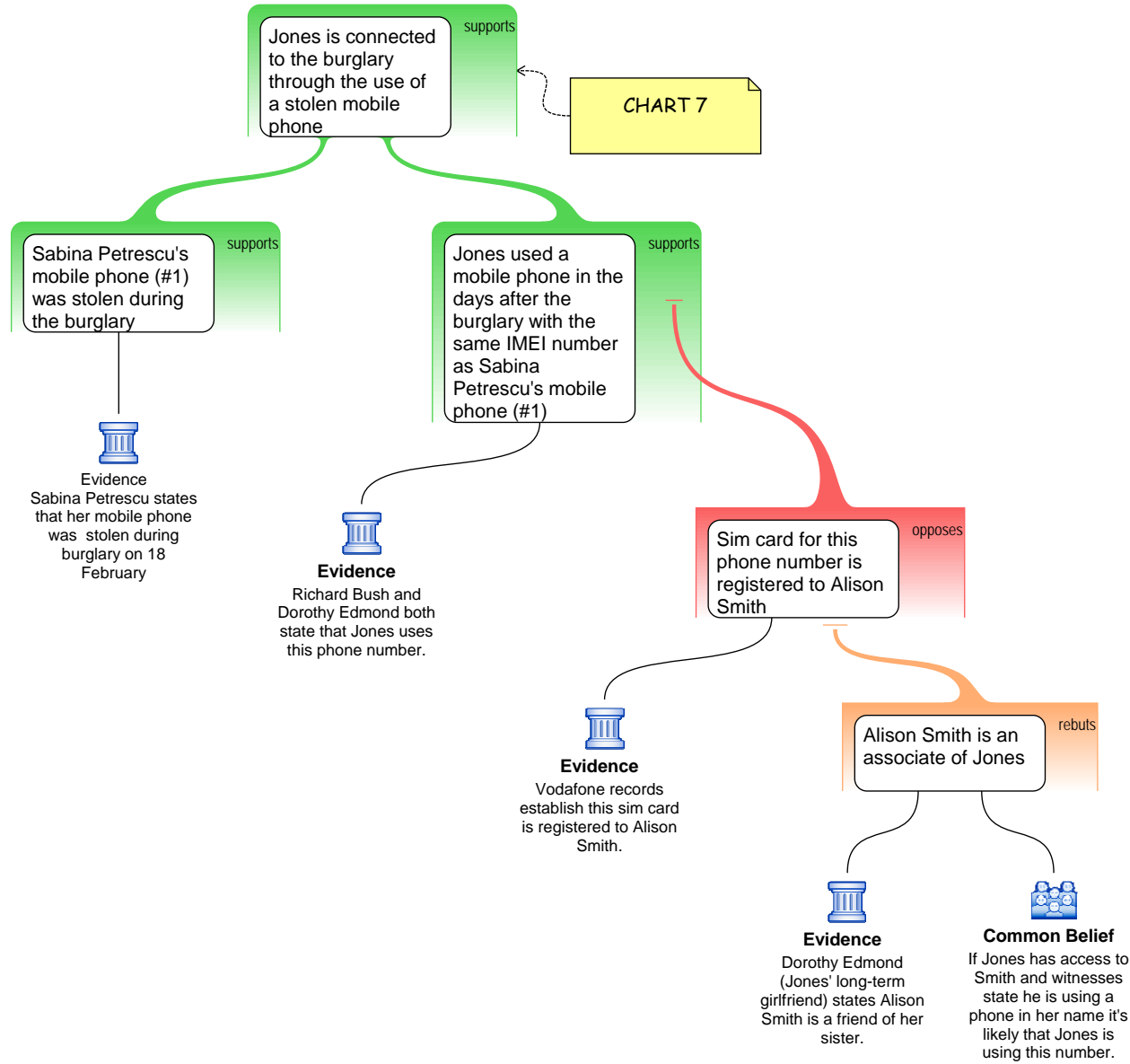


CHART 4

CHART 4:

Scott Colquhoun admits to committing both burglaries with Napier and Jones.

supports



**Evidence**

Full admission by Scott Colquhoun to police implicates Jones and Napier in both of the burglaries

Goods connected to the second burglary and instruments that could be used for burgling were found at Colquhoun's house, corroborating his admissions.

supports

CHART 8





**CHART 8:**

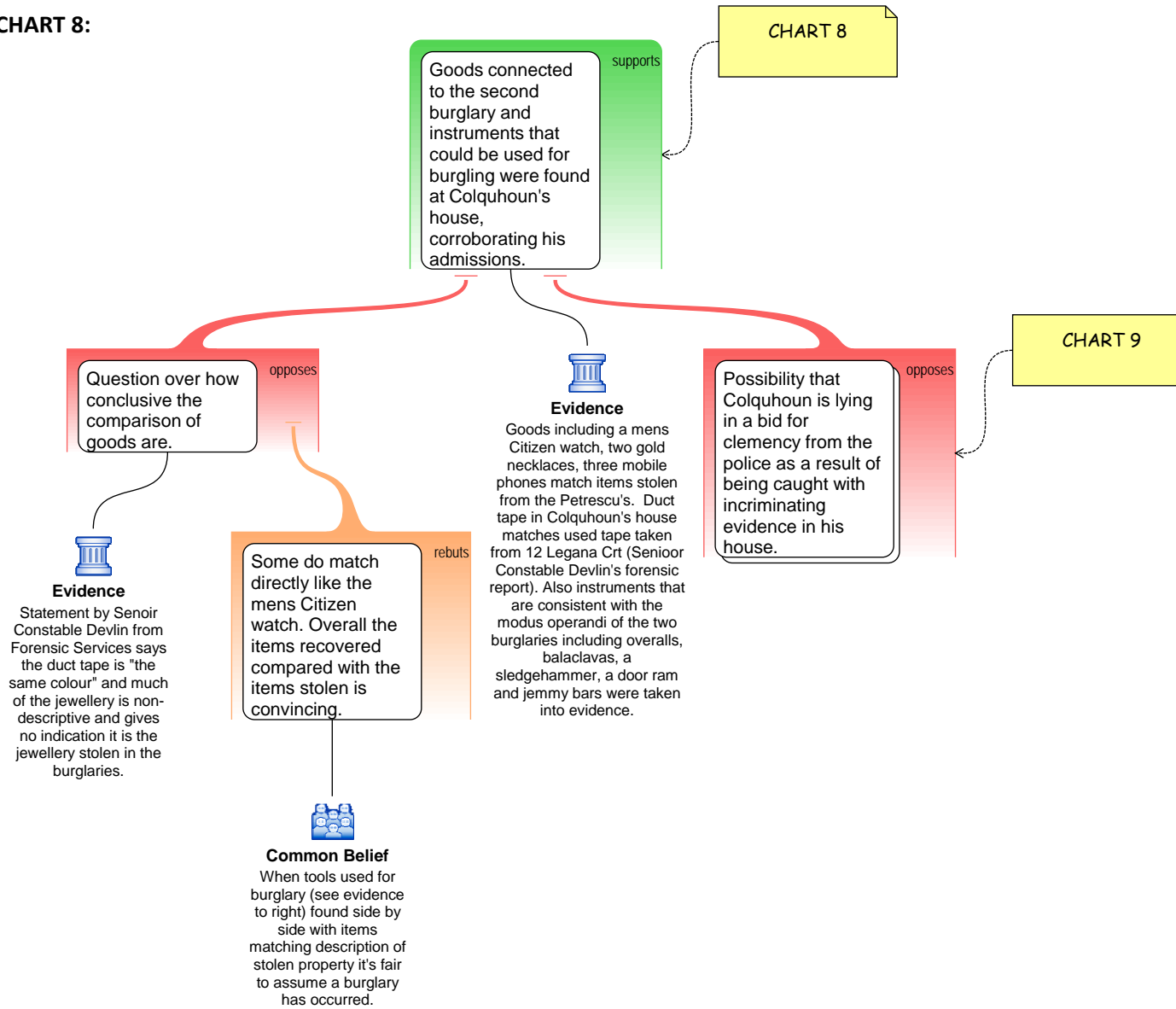


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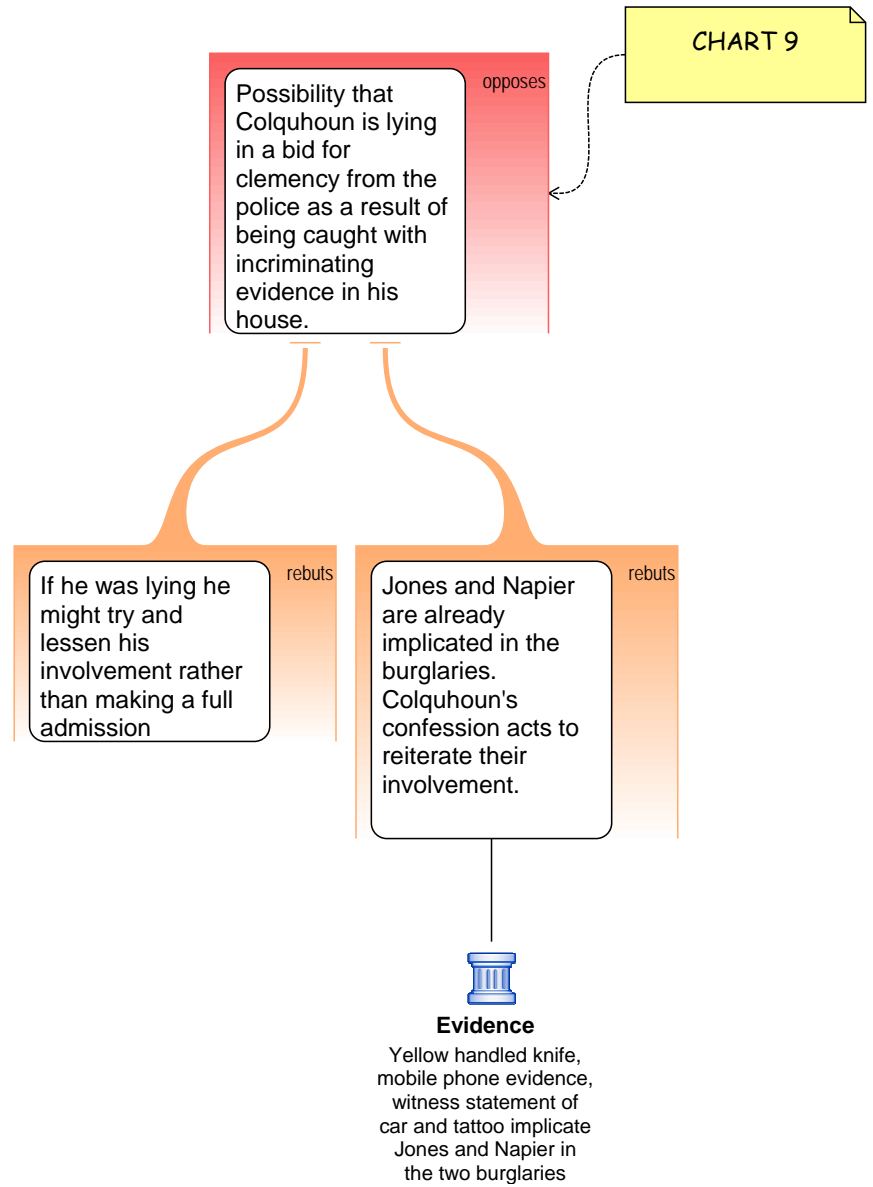
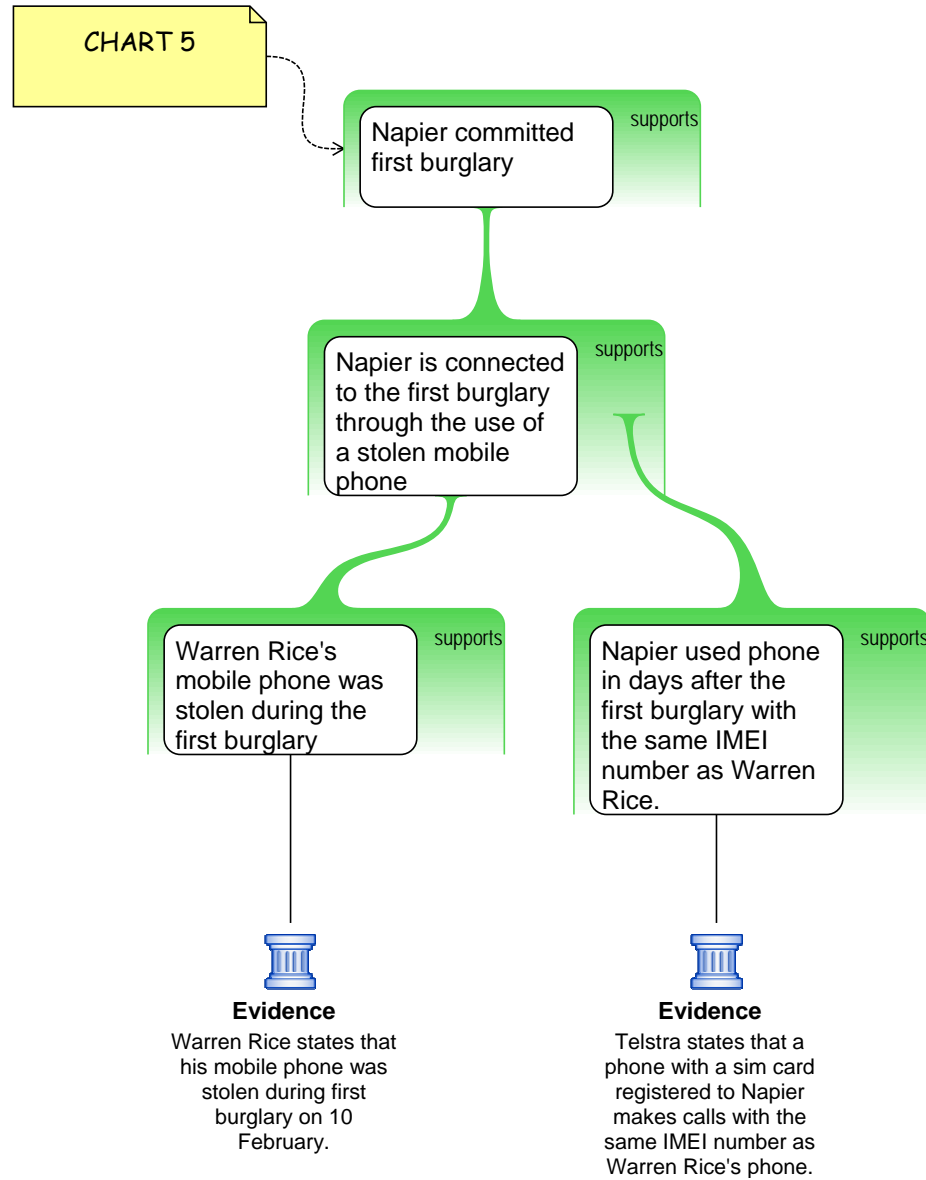
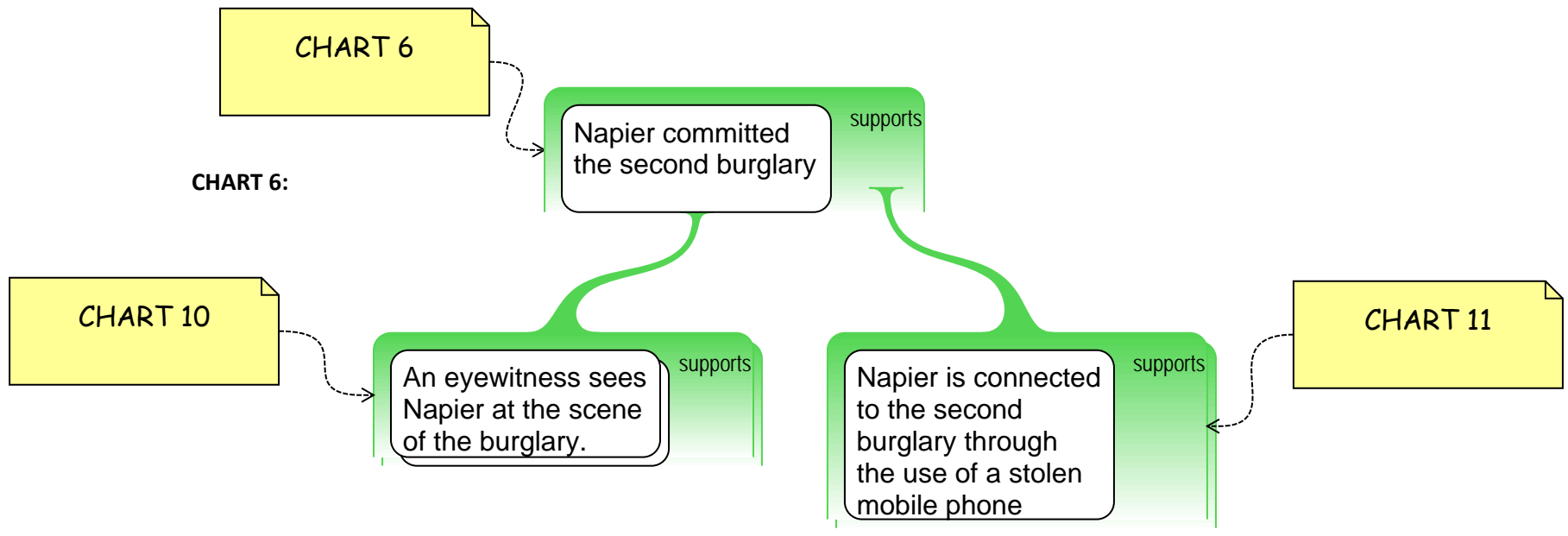


CHART 5:







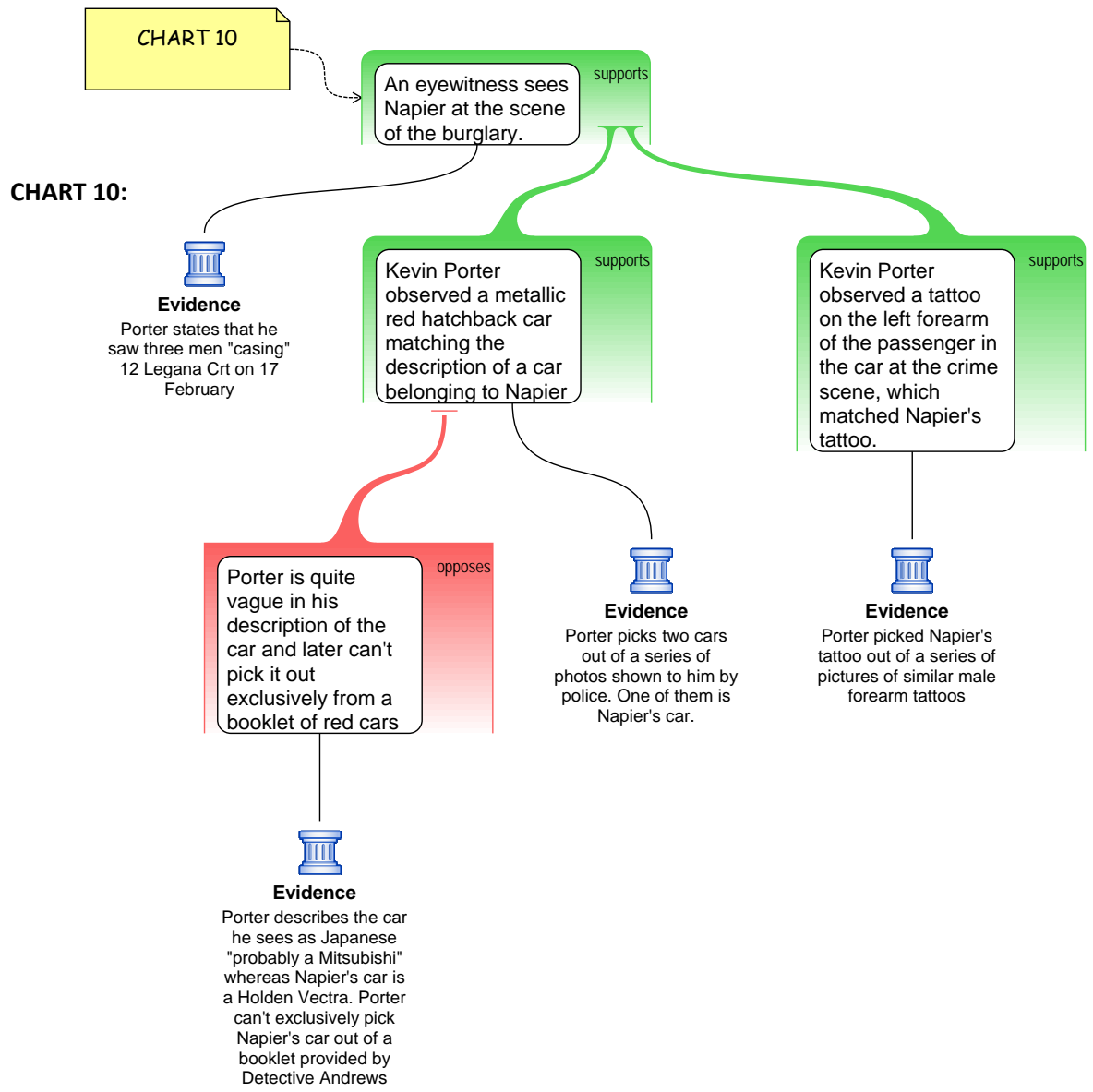


CHART 11:

