

COPY

SUPREME COURT NO. 90227-5
COURT OF APPEALS NO. 71057-5-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of Sheldon Martin,

STATE OF WASHINGTON,

Respondent,

v.

SHELDON MARTIN,

Petitioner.

RECEIVED
COURT OF APPEALS
DIVISION I
APR 30 2014

FILED
MAY 14 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Sheldon Martin asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in In re Detention of Martin, COA No. 71057-5-I, filed March 31, 2014, attached as an appendix to this petition.

C. ISSUES PRESENTED FOR REVIEW

Petitioner Sheldon Martin is seeking review of the appellate court's decision affirming his involuntary commitment under Chapter 71.09 RCW. As part of his treatment at the Special Commitment Center at the time of trial, Martin was prescribed testosterone suppressing medication. 1RP 25. As this would have made the results of any plethysmograph (PPG) testing unrevealing, Martin's expert evaluator, psychologist James Manley requested polygraph testing as an alternative. 1RP 25-26. No deception was indicated when Martin was asked during the polygraph if he had masturbatory fantasies about children and he said no. 1RP 25.

Although the state's expert Amy Phenix was allowed to testify to inadmissible hearsay contained in aged department of corrections (DOC) records as a basis for her opinion under ER 703

that Martin met the criteria for commitment (1RP 47-48), the court prohibited Dr. Manley from testifying about the polygraph Martin underwent as a basis for his contrary opinion. 1RP 32. The court reasoned the rule did not give experts “carte blanche” to testify to inadmissible evidence. 1RP 33.

1. Did the court err in excluding evidence of the polygraph as a basis for Dr. Manley’s opinion under ER 703?

2. Did the court’s exclusion of the evidence deprive Martin of his right to present evidence and to a fair trial?

3. Should this Court should accept review, as this case involves a significant question of law under the state and federal constitutions? RAP 13.4(b)(3).

4. Should this Court should accept review, as the appellate court’s decision in this case conflicts with its own decisions in State v. Reay, 61 Wn. App. 141, 810 P.2d 512 (1991), and State v. Halgren, 124 Wn. App. 206, 98 P.3d 1206 (2004)? RAP 13.4(b)(2).

5. Should this Court accept review as a matter of substantial public interest to provide clarity in light of the conflict between the present case and prior cases of Division One? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE¹

At the time of Martin's commitment trial, twenty years had passed since his last sexual offense. 3RP 112. As is typical in commitment trials, the case boiled down to a battle of the experts. The state's psychologist, Amy Phenix, opined Martin met the criteria for commitment; whereas, the defense psychologist, James Manley, did not. 3RP 110; 5RP 95.

The primary dispute centered on whether Martin suffered from a mental disorder of pedophilia, which also qualifies as a mental abnormality – an element the state is required to prove for commitment.² 6RP 40-41. In arriving at her pedophilia diagnosis, Phenix was permitted to testify to inadmissible hearsay contained in department of corrections (DOC) records as a basis for her opinion under ER 703. 1RP 47-50; 2RP 167.

Incongruously, however, the court prohibited Manley from testifying about a polygraph Martin underwent as a basis in forming his opinion Martin did not in fact suffer from pedophilia. Despite the court's ability to give a limiting instruction regarding this evidence –

¹ A more detailed statement of the case with citation to the record can be found in the opening brief of appellant at pages 3-29.

² Specifically, the state was required to prove that Martin suffers from a mental abnormality or personality disorder, which causes him serious difficulty in controlling his sexually violent behavior. 6RP(6/25/12) 9.

as it did for evidence relied upon by Phenix – the court ruled the evidence was more prejudicial than probative and therefore inadmissible under ER 403. 1RP 32-34, 48-50; 2RP 167.

On appeal, Martin argued the court's ruling prevented him from fully defending against the state's allegations by unfairly diminishing the credibility and weight of his expert's opinion and thereby violated his right to a fair trial. Brief of Appellant (BOA) at 29-41.

In deciding against Martin and affirming his commitment, the appellate court first noted that polygraph evidence is generally inadmissible absent stipulation of the parties. Appendix at 4. While the court recognized its opinion in State v. Reay³ holding that polygraph evidence may be relevant and admissible for purposes other than establishing the truth or falsity of a disputed fact, the court held the purpose here was to assert the truth of the matter. The court held this would invade the province of the jury. Appendix at 5. The appellate court therefore concluded the trial court did not err in finding the probative value of the evidence outweighed by its danger of unfair prejudice. Appendix at 5.

³ State v. Reay, 61 Wn. App. 141, 148, 810 P.3d 512 (1991) (admission of polygraph permitted to demonstrate the thoroughness of government officials in determining cause of death).

The court dismissed Martin's argument that he sought to admit the evidence not for its truth, but rather as a basis for his expert's opinion. In doing so, the court disagreed polygraph evidence is analogous to plethysmograph evidence, which it noted is admissible in Washington under ER 703. Appendix at 5-6.

The court also relied on United States v. Scheffer, where the Court ruled that because of the disputed reliability of polygraph evidence, a per se rule against its admission did not violate Scheffer's due process rights. Appendix at 6 (citing United States v. Scheffer, 523 U.S. 303, 309, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)). In Scheffer, however, the polygraph evidence was offered to help the jury resolve a factual dispute, i.e. whether the defendant was telling the truth; it was not offered as a basis for an expert's opinion. Scheffer, 523 U.S. at 306, 317.

Regardless of this distinction, the Court of Appeals concluded that, as in Scheffer, there was no constitutional violation here. Appendix at 6.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

THIS COURT SHOULD ACCEPT REVIEW BECAUSE THIS CASE INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS, BECAUSE THE APPELLATE COURT'S DECISION CONFLICTS WITH PRIOR CASE LAW, AND BECAUSE THIS COURT SHOULD PROVIDE CLARITY AS A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

Whether Martin suffered from pedophilia was the central issue in the case. Manley's opinion Martin did not suffer from the disorder was based in large part on the polygraph Martin took in which no deception was indicated when he responded no to the question of whether he currently entertained sexual fantasies about children.

The polygraph evidence as a basis for Manley's opinion had heightened probative value due to the unavailability of any objective testing as evidence of Martin's current mindset. Because of the testosterone suppressing drug he was taking, a PPG was not considered a viable opinion. Therefore, without admission of the polygraph as a basis for Manley's opinion, his opinion was stripped of any credibility or appearance of objectivity. In short, in a case that boiled down to a battle of the experts, the exclusion of this evidence significantly undermined a fundamental element of the

defense case – the expert's opinion Martin did not suffer from a mental abnormality. As a result, Martin's due process right to defense was violated and this Court should accept review. RAP 13.4(b)(3).

Contrary to the court of appeals decision, the evidence was not offered to prove the truth of the matter asserted. The state acknowledged that its experts routinely rely on polygraphs in conducting their own evaluations. 1RP 26-27. The state confirmed that while the experts may disagree about the reliability of polygraph testing, they universally agree as to its usefulness in fostering honesty in their patients' responses. 1RP 29-30. As the prosecutor asserted, state's experts ask for polygraphs, because they "tend[] to increase the candor of the person. They believe the disclosure is more reliable if the person believes they're going to be caught lying." 1RP 29-30.

Accordingly, the evidence sought to be admitted here had probative value apart from its reliability. The value of the polygraph to the expert is not its results, but the fact that the subject taking it believes in its reliability and therefore tends to be more candid. Regardless of results, the administration of a polygraph is therefore

an important part of the evaluation process. And under ER 703,⁴ its admission is limited to that purpose.

Under ER 702, however, polygraph evidence is offered as “scientific evidence” to help the jury resolve a factual dispute, typically whether a defendant is telling the truth. See e.g. Scheffer, 523 U.S. at 306-307, 316-17 (upholding exclusion of polygraph evidence offered to support defendant’s testimony he did not knowingly use drugs); United States v. Kwong, 69 F.3d 663, 668-69 (2d Cir. 1995) (declining to address whether polygraph evidence admissible “scientific evidence” but excluding it under ER 403, due to the ambiguity of the particular questions). The problem noted by courts with admitting evidence for this purpose is that it invades the province of the jury, and it not very probative because of its questioned reliability. See e.g. Scheffer, 523 U.S. at 312-313.

That is not the case here. The evidence was sought to be admitted as a basis for Dr. Manley’s expert opinion, not to resolve a

⁴ ER 703 provides:

The facts of data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

disputed fact. Accordingly, the appellate court's reliance on Scheffer and Kwong was misplaced. Appendix at 6.

The court's distinction between polygraph and PPG evidence on grounds the reliability of polygraph testing is disputed was also misplaced. Appendix at 5. Ironically, in a different case, the court ruled the questionable reliability of PPGs went to the weight of the evidence not its admissibility under ER 703, specifically because it was not offered as "scientific evidence" but as a basis for the expert's opinion. State v. Halgren, 124 Wn. App. 206, 220, 98 P.3d 1206 (2004). The court's decision here directly conflicts with Halgren. RAP 13.4(b)(2).

The court's opinion in this case also conflicts with State v. Reay, in which a medical examiner was allowed to testify about a polygraph the decedent's husband passed as a basis for the examiner's opinion that the wife's death was a suicide. Reay, 61 Wn. App. at 145. In upholding the admission of the polygraph evidence, Division One noted the main issue was whether the medical examiner had completed a thorough examination of the evidence he relied on in making his decision, including the polygraph. Reay, 61 Wn. App. at 150-51.

Division One held the polygraph was directly relevant to the thoroughness of the examiner's suicide determination. Moreover, the potential for prejudice was negligible in light of the purpose for which the polygraph was admitted, as well as the limiting instruction given to the jury. Id.

As in Reay, the polygraph evidence here was offered for a similar purpose – as a basis for the defense expert's opinion Martin is not a pedophile. It was not offered to show Martin was telling the truth, but to show Manley conducted a competent and objective evaluation. As in Reay, any prejudice to the opposing party was negligible considering the limited purpose of the evidence and availability of a limiting instruction.

The sexually violent predator statute is considered civil in nature. In re Personal Restraint of Young, 122 Wn.2d 1, 23, 857 P.2d 989 (1993). Nevertheless, an individual's liberty interest is fundamental in nature and due process applies. See United States v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095, 2103, 95 L. Ed. 2d 697 (1987); In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003); U.S. Const. amend. XIV, § 1. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Foucha

v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 437 (1992).

The right to present evidence in one's defense is a fundamental element of due process. State v. Ellis, 136 Wash.2d 498, 528, 963 P.2d 843 (1998). This due process right applies in SVP commitment proceedings. In re Detention of West, 171 Wn.2d 383, 417, 256 P.3d 302 (2011) (Madsen, J., concurring) (West has a constitutional right to “a meaningful opportunity to present a complete defense’,” which includes vigorous cross-examination) (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

Generally, the right to present evidence in one's defense is subject only to the following limits: (1) the evidence sought to be admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the state's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. See Washington v. Texas, 388 U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

For the reasons stated above, the polygraph evidence was highly relevant, apart from its reliability. Moreover, the state's interest was negligible as it could have brought out any weaknesses of the evidence on cross examination, and sought a limiting instruction in keeping with the one given during its own expert's testimony when she testified about inadmissible hearsay.

In contrast, the exclusion of the evidence was highly prejudicial to the defense. Without evidence of the polygraph, Manley's opinion was stripped of any appearance of objectivity and credibility. Unlike the state's expert, Manely appeared to require no seemingly objective testing whatsoever to give an opinion.

The court's ruling violated Martin's right to defend against the state's allegations. This Court should accept review of this significant question of law under the state and federal constitutions. RAP 13.4(b)(3). This Court should also accept review because Division One's decision conflicts with its own prior cases. RAP 13.4(b)(2). Because clarity is needed, there is also a substantial public interest in having this case reviewed by this Court. RAP 13.4(b)(4).

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP 13.4(b)(2), (b)(3), (b)(4).

Dated this 30th day of April, 2014.

Respectfully submitted,

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

In the Matter of the Detention of
SHELDON MARTIN,
Appellant.

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No. 71057-5-1
DIVISION ONE
UNPUBLISHED OPINION
FILED: March 31, 2014

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAR 31 AM 10:15

GROSSE, J. — Absent stipulation of both parties, polygraph examinations are generally inadmissible. Here, prior to a trial on whether the defendant should be committed as a sexually violent predator, the defendant moved to admit the results of a polygraph examination that his expert relied on in forming his opinion that the defendant was not a pedophile. The trial court noted the unreliability of polygraph examinations and that the evidence was being introduced to prove the truth of the statements, thereby invading the province of the jury. In finding the evidence inadmissible, the trial court properly balanced the relevancy of the evidence against its potentially prejudicial effect under ER 403. The trial court did not abuse its discretion in denying the defendant's motion.

FACTS

Sheldon Martin suffered abuse as a child. Martin admitted in his deposition that he sexually offended against a 4-year-old girl when he was 10 years old.¹ At that time he was on release from Echo Glen and visiting his mother and sister.

¹ The parties stipulated that the videotaped deposition transcript was played to the jury and was the official record of the testimony.

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Martin testified that in 1976 he again fondled a 4- or 5-year-old boy. This occurred when Martin was 16 years old and after Martin had received treatment at the Morrison Center in Portland, Oregon. Martin coaxed the child into the garage and performed oral sex on him. Martin was arrested and sent to a juvenile facility.

Martin masturbated to thoughts of children during the 1980s when he was in his twenties. In 1991, Martin was arrested and pleaded guilty to indecent exposure for an incident at a Fred Meyer store in Vancouver, Washington where he had followed a woman into the bathroom and began masturbating with one hand while he grabbed the woman on her ankle. While awaiting the charges that he eventually pleaded guilty to, Martin again went to a Fred Meyer store, this time in Portland, intending to commit a sexual offense. Martin searched for approximately 20 minutes until he spotted a girl who was approximately 3 years old. Martin decided to kidnap and molest the child. Martin took the child by the hand, leading her toward the exit near where he had parked. He was stopped by security when the child began screaming and crying. Martin pleaded guilty to second degree kidnapping and first degree attempted sexual abuse. Martin testified that he would "always suffer from pedophilia."

Dr. Amy Phenix, a clinical psychologist, evaluated Martin in 2003. Phenix interviewed Martin and reviewed all the available records. Phenix concluded that Martin suffered from the mental abnormalities of pedophilia; that he was sexually attracted to males and females, nonexclusively; that he also suffered from alcohol and marijuana dependence; and finally, determined that Martin met the criteria for sexually violent predator (SVP) commitment.

Dr. James Manley testified on Martin's behalf. Manley diagnosed Martin with voyeurism, antisocial personality disorder, and marijuana and alcohol dependence. Manley disagreed with Phenix that Martin suffered from pedophilia. Manley based this opinion in part on Martin's denial that he was currently masturbating while thinking about children.

The defense sought permission for Dr. Manley to testify regarding favorable responses that Martin made while he was taking a second polygraph. Martin's first polygraph was inconclusive. The trial court rejected Martin's argument that the evidence was admissible under ER 703.² Although the court acknowledged that under ER 703 an expert's opinion can be based on inadmissible evidence, it also recognized that ER 703 did not give an expert "carte blanche" to relate all the inadmissible evidence in order to explain his or her opinion. The trial court ruled the polygraph results inadmissible. Martin appeals.

ANALYSIS

To uphold a commitment of an individual as an SVP on appeal, the reviewing court must find that the jury had sufficient evidence to find the following elements beyond a reasonable doubt:

- (1) That the respondent had been convicted of or charged with a crime of sexual violence; and
- (2) That the respondent suffers from a mental abnormality or personality disorder; and

² ER 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

- (3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined in a secure facility.^[3]

Here, the evidence establishes that Martin had a prior conviction that qualifies under the statute. And the evidence presented by the State supported a finding that Martin suffered from mental abnormality and that he was likely to engage in predatory acts if not confined.

At issue in the case was whether Martin suffered from pedophilia. The State's expert testified that he did, while Martin's expert disputed the diagnosis. This was an issue of credibility for the jury.

Martin argued that he should be permitted to introduce polygraph evidence that showed that his responses to two questions during a polygraph examination indicated that he did not have fantasies about children while masturbating. The trial court excluded the evidence under ER 403 because the prejudicial effect outweighed its probative value.

ER 403 provides in pertinent part that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." This court reviews a trial court's decision to admit or exclude evidence under an abuse of discretion standard.⁴

Evidence from a polygraph is inadmissible because of the "inherent problems" and unique difficulties posed by polygraph examinations which the courts have consistently recognized as unreliable and, unless stipulated to by all

³ In re Audett, 158 Wn.2d 712, 727, 147 P.3d 982 (2006).

⁴ In re Det. of West, 171 Wn.2d 383, 396-97, 256 P.3d 302 (2011).

parties, inadmissible.⁵ In particular circumstances, the fact that a polygraph was given may be relevant and admissible for purposes other than establishing the truth or falsity of a disputed fact.⁶ Here, as the trial court noted, the purpose of admitting the polygraph was to assert the truth of the matter. This would invade the province of the jury to decide Martin's credibility.⁷ The trial court properly exercised its discretion in finding the probative value of the evidence was outweighed by unfair prejudice:

So my ruling is that if the doctors in this case want to come in and say that they're basing their opinion in part on Mr. Martin's statements or any other witness' statements and that in forming their opinions they assume that those statements were accurate or inaccurate for the purposes of their opinion, then they can do that, but they cannot say: And a machine told me he either was lying or wasn't telling the truth. Because that's not permissible and the jury will take that evidence and do thing [sic] with it other than assess the doctor's opinion. It's under a [ER] 403 analysis, even if he says that the basis for my opinion or she says that's the basis for my opinion, the jury will not use it in this court's opinion exclusively to evaluate the opinion. They'll use it to say, well, the person was telling the truth or lying.

And in this case the defense -- the respondent wants to bring it in to show that he's telling the truth.

Moreover, polygraph examinations have been excluded under ER 702 as well as ER 403.⁸

Martin argues that he was not seeking to admit the evidence for its truth but rather as the basis for Dr. Manley's opinion under ER 703. Martin contends

⁵ In re Det. of Hawkins, 169 Wn.2d 796, 802-03, 238 P.3d 1175 (2010).

⁶ State v. Reay, 61 Wn. App. 141, 148, 810 P.3d 512 (1991) (admission of polygraph permitted to demonstrate the thoroughness of government officials in determining cause of death).

⁷ United States v. Scheffer, 523 U.S. 303, 313, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) ("By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations.").

⁸ Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 606-07 n.4, 260 P.3d 857 (2011).

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that a polygraph is similar to penile plethysmograph results which are admissible in Washington under ER 703 and 705. But as the United States Supreme Court noted in United States v. Scheffer, "there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques."⁹ In Scheffer, the defendant sought to introduce evidence of a favorable polygraph examination to show that he did not knowingly take drugs. The military court ruled that the polygraph evidence was inadmissible under the military rules of evidence. Because of the inherent unreliability of the polygraph evidence, the court held that the per se exclusion of polygraph evidence was not a constitutional violation. Likewise, Martin's argument, that the exclusion of the polygraph evidence here implicated his due process rights, fails. "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions," such as those contained in evidentiary and procedural rules.¹⁰ Federal courts have upheld the exclusion of polygraph results under Federal Rules of Evidence (Fed. R. Evid.) 403.¹¹ In Kwong, the court found that the polygraph evidence would not assist the jury and further that the ambiguity of the questions asked might mislead and confuse the jury.¹² Even if polygraph evidence is found to meet the requirements of Fed. R. Evid. 702, federal courts have held that the results of a polygraph may be withheld under Fed. R. Evid. 403 "if it finds that the probative

⁹ 523 U.S. 303, 309, 118 S. Ct 1261, 140 L. Ed. 2d 413 (1998).

¹⁰ Scheffer, 523 U.S. at 308.

¹¹ United States v. Kwong, 69 F.3d 663, 668 (2d Cir.1995).

¹² 69 F.3d at 668.

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value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."¹³

The trial court properly balanced the relevancy of the evidence against its potentially prejudicial effect under ER 403. There was no abuse of discretion and the trial court's evidentiary ruling did not deny Martin due process.

Affirmed.

Grosse, J.

WE CONCUR:

Denz, J.

Cox, J.

¹³ United States v. Cordoba, 194 F.3d 1053, 1063 (9th Cir. 1999) (internal quotation marks and citations omitted).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Commitment of Sheldon Martin,)
)
STATE OF WASHINGTON,)
)
Respondent,)
)
v.)
)
SHELDON MARTIN,)
)
Appellant.)

SUPREME COURT NO. _____
COA NO. 71057-5-1

DECLARATION OF SERVICE

RECEIVED
COURT OF APPEALS
DIVISION ONE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT: APR 30 2014

THAT ON THE 30TH DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF APRIL 2014.

x Patrick Mayovsky