

NO. 35933-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Respondent

v.

JONATHAN J. JENSEN,

Appellant

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
DEPUTY

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

The Honorable Chris Wickham, Judge  
Cause No. 02-1-00447-8

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BRIEF OF RESPONDENT

---

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## A. STATEMENT OF THE ISSUES

1. Whether substantial evidence supported Judge Chris Wickham's Findings of Fact at an evidentiary hearing conducted June 28, 29 and 30, 2006, pursuant to remand from this court, *State v. Jensen*, 125 Wn. App. 319, 104 P.3d 71 (2005), on the effect of trial counsel's conflict of interest, and whether he drew correct Conclusions of Law.

Appellant's assignment of error No.3. *The trial court erred in denying Jensen's motion for a new trial based on his trial attorney's undisclosed conflict of interest that adversely affected his performance at Jensen's trial.*

Appellant's assignment of error No.4. *The trial court erred in entering Findings of Fact and Conclusions of Law Re: Hearing On Remand From The Court Of Appeals Findings of Fact Nos. 1-8 and Conclusion No.3*

2. Whether substantial evidence supported Judge Daniel Berschauer's Findings of Fact at an evidentiary hearing conducted December 13, 2002 on the subject of alleged juror misconduct and whether he drew correct Conclusions of Law

Appellant's assignment of error No.1. *The trial court erred in denying Jensen's motion for a new trial based on jury misconduct where extrinsic evidence was introduced by Juror 6 - an experiment she conducted in her home.*

Appellant's assignment of error No.2. *The trial court erred in entering Findings Of Fact, Conclusions Of Law, And Order Denying Motion For A New Trial Based Upon Juror Misconduct Conclusions of Law Nos. 1 and 2; and the Order denying Jensen's motion for a new trial based on jury misconduct.*

## B. STATEMENT OF THE CASE

This is an appeal from two post-trial evidentiary hearings. The latter one held on June 28, 29, and 30, 2006 addressed the questions posed by this court on remand after considering Jensen's Personal Restraint Petition. This remand order narrowly focused on the possibility of a nexus

between counsel's conflict and his trial preparation, not on counsel's trial performance which this court did not find lacking. "We hold that the record supports Jensen's assertions sufficiently to warrant a hearing on whether Phelps (trial counsel) was adequately *prepared* and, if not, whether the lack of preparation was *due to* his own pending charges." State v. Jensen, 125 Wn. App. 319, 333, 104 P.3d 717 (Jan. 11, 2005).(emphasis added) Respondent will first discuss the findings from the evidentiary hearing before Judge Christopher Wickham held June 28, 29, and 30, 2006.

The earlier hearing before Judge Daniel Berschauer, the trial judge, on the juror misconduct issue took place over five years ago, on December 13, 2002, and focused on an allegation of juror misconduct. He made oral Findings and Conclusions denying this motion on December 20, 2002, which were reduced to writing the same date. The Findings and Conclusions denying his motion on the conflict of interest issue were entered on January 11, 2007, and signed by Judge Wickham. In retrospect, it appears this issue was simply "put on the back burner" pending resolution of the Personal Restraint Petition based on the counsel conflict issue. (Copies of correspondence between counsel indicate that the filed Findings and Conclusions were originally prepared in 2002 for Judge Berschauer's signature, but never presented to him. Rather, they were presented to Judge Wickham at the same time as the Findings and

Conclusions for his hearing of the juror misconduct claim.) There is no allegation of prejudice resulting from the delay in entering written Findings and Conclusions on the juror misconduct issue, nor is there any contention that the Findings and Conclusions signed by Judge Wickham January 11, 2007 do not reflect the oral Findings and Conclusions of Judge Berschauer December 20, 2002 which appear in the record. Copies of both sets of Findings and Conclusions, quoted in Appellant's Brief pgs. 4-8, are attached. A Thurston County jury convicted Jensen September 18, 2002. He was sentenced on October 24, 2002, prior to the evidentiary hearing on the alleged juror misconduct allegation.

### C. ARGUMENT

1. Counsel's conflict of interest: The trial court's conclusion after a three day hearing that Jensen's trial counsel was adequately prepared for trial is supported by substantial evidence and its findings of fact are in conformity with applicable law. (Appellant's assignments of error No.3 and No.4)

Jensen's argument on appeal is limited by this court's order on remand, i.e. that his attorney was not adequately prepared *and* that the lack of preparation was due to similar charges pending against him. As this Division noted, a violation of RPC 1.7(b) does not automatically translate to ineffective assistance of counsel, citing State v. White, 80 Wn. App. 406, 412-13, 907 P.2d 310 (1995). The quality of representation at trial is simply not an issue. "But he does not identify a specific example of how

Phelps's conflict affected his trial performance; nor can we find one in the record." Jensen, *supra*, at 331.

Whether Jensen's attorney could have or should have been better prepared and whether or not better preparation would have resulted in a different result at trial is, of course, a different question, a question subject to nothing but speculation absent a clear showing of a factual basis in the written record. Mere speculation is not a sufficient basis to require re-trying a child molestation case more than five years later. Judge Christopher Wickham (In the interest of preserving the appearance of fairness, Trial Judge Daniel Berschauer had recused himself from hearing this motion for a new trial. [3-14-03 RP 12]) spent three days listening to testimony from Jensen himself, his wife, a friend of hers, his conflicted attorney and the attorney's investigator in an effort to determine whether there was any factual basis to support Jensen's speculation. [6-28/30-06 RP 5-216]. He concluded as follows:

“...this is not a case where Mr. Phelps failed to prepare, failed to have appropriate witnesses available, failed to discuss with Mr. Jensen a defense, and failed to put together that defense. We could say that perhaps he should have done more in this regard, but there is no evidence that has been shown that indicates his failure to do more was a result of the charges that were pending against him.”[6-28/30-06 RP 212]

The formal Findings of Fact No. 2-7 specifically addressed the accusations of defective preparation set forth in Jensen's brief and concluded that the record did not support them. Finding No. 8 is of

particular importance for this appeal because it addressed the *nexus* portion of this Court's mandate, i.e. whether any lack of preparation was *due to* the charges pending against Jensen's counsel.

“To the extent that there were deficiencies in defense counsel's representation of the defendant, there has been no showing that any such deficiency was caused by the existence of charges pending against defense counsel.” (Finding of Fact No. 8)

Jensen cites to nothing in the record that gives factual support to his speculation that there was some *nexus* between the pending charges against his attorney and his attorney's trial preparation. Were one allowed to speculate, one could just as well speculate that the similarity of the pending charges against his client to those pending against him could have generated empathy in him and consequently enhanced effort on his client's behalf.

This Division recently reiterated the traditional rule for reviewing a trial court's findings and conclusions. “We review findings of fact for substantial evidence and conclusions of law de novo. State v. Schwab, 141 Wn. App. 85, 91, 167 P.3d 1225 (2007). There simply is no factual evidence, much less substantial evidence, in the record to support Jensen's speculation, and Judge Wickham's conclusions of law are in conformity with the authorities cited in this Court's remand.

Applicable law did not change between this Court's remand order of January 11, 2005 citing nineteen authorities and the trial court's ruling

June 30, 2006. Jensen cites no subsequent authorities that suggest reconsideration. An earlier 9<sup>th</sup> Circuit case reversing the Washington Courts and holding that an actual conflict exists when an attorney is accused of crimes similar or related to those of his client might appear on its face to have some application, but it is clearly distinguishable on its facts. In Mannhalt v. Reed, 847 F.2d 576 (9<sup>th</sup> Cir. 1988), counsel knew from police that a witness against his client had accused him (the attorney) of buying stolen property from him (the witness). Although he had told his client about this he had not pointed out the implications of the conflict. At trial, the “worst” happened. The attorney, when accused in open court, lost his composure, did not take the stand to rebut the accusation, was argumentative on cross, did not call his client to rebut the charge and did not explore possible plea bargains. This is an example of a claim of conflict supported by the factual record, far different than Jensen’s unsupported speculation that his attorney’s preparation *could have* been better and if so *would have* meant a different result.

2. Alleged Juror Misconduct: The trial court’s denial of a motion for new trial based on juror misconduct was supported by substantial evidence and in conformity with applicable law.

“A trial court’s ruling on a motion for a new trial will not be reversed on appeal unless there is a showing of abuse of discretion.

State v. Crowell, 92 Wn.2d 143,145, 594 P.2d 905 (1979).

As a general rule, appellate courts are reluctant to inquire into how a jury arrives at its verdict.

State v. Gay, 82 Wash. 423, 439, 144 P. 711 (1914). See also Gardner v. Malone, 60 Wn.2d 836, 841-43, 376 P.2d 651, 379 P.2d 918 (1962).

A strong affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.

Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 271-272, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014, 807 P.2d 883 (1991) State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994)

Jensen argues that because some jurors said they had heard another juror say something about an experiment at her home with a mirror the trial court should have granted a new trial. After trial, Jensen alleged that his attorney's investigator had heard two of the jurors say that another juror had said something about experimenting with a mirror at home. On its face this was clearly insufficient basis for a mistrial and the court proceeded to sentence Jensen. However, out of an abundance of caution, it agreed to provide for an evidentiary hearing. [10-24-02 RP 7]

The hearing commenced at 1:30 P.M. December 13, 2002 and ended that same afternoon. Eight jurors appeared in response to subpoenas. They were not told why they were there and the court declined to answer any questions. [12-13-02 RP 8-9] The juror who made the questioned comments, later identified as juror No. 6 (None of the other jurors remembered her by name) was on extended travel and not subpoenaed by Jensen. Whatever she might have said and might or might

not have done can therefore be only described as speculative hearsay. Judge Daniel Berschauer himself initiated the questioning of each of the eight jurors. The testimony was not extensive. Of the 88 pages of double-spaced transcript, only 35 contain the entire testimony of all eight witnesses.

After listening to argument of counsel a week later, he explained his Findings of Fact.:

“The reenactment did not involve any sophisticated equipment. It did not raise any novel theories. It only involved what could be seen in a mirror, and these are common sense everyday perceptions. The reenactment was not discussed by other jurors. *No questions were asked of juror six. Some jurors did not even hear juror six’s comments. One juror thought that juror six said she could not see images in the mirror.* On this record I’m satisfied *beyond a reasonable doubt* that if one were to characterize this reenactment as misconduct, it was *harmless beyond a reasonable doubt*. Even though jurors’ subjective opinions inhere in the verdict, I do note that there was *not one juror* who said that juror’s six’s information had any effect on their deliberations. In conclusion, from essentially agreed facts, I conclude that what happened is not juror misconduct. Even if it is assumed to be misconduct, for the sake of argument, I conclude that it was *harmless beyond a reasonable doubt*.” (emphasis added) [12-20-02 RP 6-7]

In support of his conclusions of law, Judge Berschauer cited to State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 301 (1994) [12-20-02 RP 3] and State v. Kell, 101 Wn. App. 619, 5 P.3d 47 (2000). [12-20-02 RP 6]. He was also clearly familiar with Richards v. Overlake Hospital, 59 Wn. App. 266, 796 P.2d 737 (1990) cited to him by Jensen’s counsel [12-13-02 RP 7] as well as State v. Briggs, 55 Wn. App. 44, 776 P.2d 1347 (1989)

[12-13-02 RP 8] and Steadman v. Shackelton, 52 Wn.2d 322, P.2d 833 (1958) [12-13-02 RP 10]

Findings of fact are, of course, reviewed for substantial evidence. What Judge Berschauer found was a lack of any substantial factual evidence supporting Jensen's speculation. Even a cursory review of the testimony explains his conclusions. (Page references below are to 12-13-02 RP: all questions quoted are questions of the Court)

Juror Langen:

A. "It was just an expression to the table, but I don't think people picked up on it. Was never discussed, what did you see, that kind of thing"...

Q. "Did she express any opinions about what she had learned from her experiment?"

A. "No" (pgs. 13-15)

Juror Blowers:

Q. "Do you recall anything happening like that?" (comments about an experiment)

A. "No. I heard that for the first time right now. I never heard anybody went home and did an experiment myself. Nobody came and gave a demonstration that I recall." (pgs. 20-21)

Juror Cordero:

A. "I remember her mentioning she had hung a mirror at home, but I don't remember it really being discussed."...

Q. "Did you consider it as any part of your deliberation?"

A. "Absolutely not." (pgs 23-24)

Juror Hall:

Q. "You recall her saying about being at home and looking at a mirror?"

A "Yes sir."

Q. "Did she state an opinion that she could see or could not see something in this mirror that she looked at home?"

A. "I think she did. But I don't recall what.

Q. "Did any other jurors ask her questions?"

A. "I don't recall." (pg. 32)

Q. "Was it the subject of any further deliberations or discussions; that is, what she said she did at home? Was there any discussion deliberations among the other jurors?"

A. "Not that I recall, no." (pgs 31-32)

Juror Langford:

Q. "If I told you that some jurors have heard from a woman juror, not you, a woman juror, about an experiment using a mirror, does it trigger any memory that you have about any discussion that someone would have said they looked in a mirror at home?"

A. "Not offhand, no." (pg. 34)

Juror Laigh:

Q. "Did it play any part in your opinion about your personal decision in this case?" (After she said she didn't recall any jurors asking questions of juror No. 6 or any discussion among the jurors about what juror # 6 may have said)

A. "No" (pg. 38)

Juror Rea:

Q. "Did other jurors ask questions about this experiment?"

A. "Not that...not to my recollection, no."...

Q. "Did what she said have any bearing as far as you were concerned in your deliberations?"

A: "No" (pg. 42)

Juror Whaley:

Q. "To your knowledge, was there any kind of use of this information by any of the other jurors during deliberations?"

A. "Not that I know. I don't believe it was discussed?" (pg. 46)

It is difficult to analogize from a dearth of facts relevant to Jensen's contentions to the facts in cases he cites. It is respectfully submitted they are clearly distinguishable.

In State v. Everson, 166 Wash. 534, 7 P.2d 603 (1932), jurors used a magnifying glass produced by one of them to examine a walking stick in evidence for grain markings and gravel. This was without consent of the court or knowledge of counsel. Our Supreme Court affirmed the conviction.

In Steadman v. Shackelton, *supra*, the jury conducted his own investigation and made its own measurements at the accident scene in the judge's presence, but in the absence of counsel. After realizing witnesses after this experiment gave testimony conflicting with witnesses before it, the trial judge changed his mind and granted a mistrial. This was held not to be an abuse of discretion.

In State v Balisok, *supra*, the jury tried to reenact the struggle and hold, putting the leather jacket with a pistol in its pocket on one of the jurors and trying to pull out the pistol from the pocket and aim it in a way that would result in the pattern of bullet wounds suffered by the victim. Our Supreme Court found no misconduct.

In State v. Rinke, 70 Wn.2d 854, 425 P.2d 658 (1976), an inflammatory editorial highly critical of lenient judges and courts appeared the morning of trial. It was marked as an exhibit for purposes of the motion to change venue or continue, but somehow got to the jury by mistake. Mistrial was granted because it clearly would have been inadmissible as a physical exhibit at trial.

An analogous problem occurred in State v. Smith, 55 Wn.2d 482, 348 P.2d 417 (1960). There the State failed to prove the use of highly prejudicial aliases listed in its Information. They were clearly inadmissible, but by mistake appeared on the court's instructions and verdict forms given to the jury.

In State v. Boggs, 33 Wn.2d 921, 207 P.2d 743 (1949) physical objects specifically rejected as evidence by the court, the gun and bullet allegedly used by the defendant, somehow got into the jury room. In its rationale supporting a mistrial, our Supreme Court emphasized the duty of trial courts to prevent this type of prejudice by exercising control over evidence within control of the court. Court control of the prejudicial evidence is a common denominator of this and the cases cited above, an element missing in Jensen's case.

In Halverson v. Anderson, 82 Wn.2d 746, 513 P.2d 827 (1973), the error predicating a new trial was the erroneous introduction by a juror of information relating to damages which would have been clearly inadmissible even coming from an expert witness, i.e. the salary of airline pilots; the plaintiff had simply expressed a desire to go to flight school some day.

In Gardner v. Malone, *supra*, a juror made a prohibited visit to the scene of the accident and described his findings to other jurors. The

evidence clearly showed that significant changes had been made to the site between the date of the accident and the trial.

#### D. CONCLUSION

Because Jensen was unable at the evidentiary hearing before Judge Wickham to provide factual basis for his claim that his trial counsel's conflict of interest adversely affected trial preparation, and because he was unable to make a strong a strong affirmative showing of prejudicial juror misconduct at the evidentiary hearing before Judge Berschauer, the State respectfully requests this Court to defer to their Findings of Fact, concur in their Conclusions of Law and affirm their discretionary rulings denying Jensen's motions for mistrial.

Respectfully submitted this 10<sup>th</sup> day of January 2008

*for* Carol Ludeme 19229  
George Oscar Darkenwald WSBA # 3342  
Special Deputy Prosecuting Attorney for Thurston County

**COPY RECEIVED**  
THURSTON COUNTY  
PROSECUTING ATTORNEY

JAN 10 2008

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**FILED**

JAN 11 2007

SUPERIOR COURT  
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THURSTON COUNTY CLERK

SUPERIOR COURT OF WASHINGTON  
COUNTY OF THURSTON

STATE OF WASHINGTON, Plaintiff,

v.  
JONATHAN J. JENSEN,  
Defendant.

No. 02-1-00477-8

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
ORDER DENYING MOTION FOR A NEW TRIAL BASED  
UPON JUROR MISCONDUCT**

This matter having come on before the undersigned judge of the above-entitled Court on defendant's motion for a new trial based upon an allegation of juror misconduct; and the Court having reviewed the defendant's motion and the State's response; and having considered the applicable case law; and having heard and considered testimony from eight of the twelve jurors who were seated in this case; and being otherwise fully advised, the Court enters the following:

**I. FINDINGS OF FACT**

1. This court has jurisdiction over the parties and the subject matter of this motion;
2. There was evidence presented at trial indicating that the victim had observed certain conduct in a mirror; such conduct alleged to be the basis for one of the charges. Juror number 6, at home, set up a mirror in her hallway in an attempt to duplicate some of the evidence from trial to see if someone could, in fact, see what was claimed to have been seen in a mirror at a distance of about 30 to 31 feet. There is no evidence that this juror tried to duplicate the evidence more precisely than, perhaps, to utilize the same size mirror.
3. On the second day of jury deliberations, Juror 6 commented that she had set up the mirror in her hallway

and opined that she thought she could see a reflection. One juror believed Juror 6 said that she could not see images in the mirror.

4. Juror 6's comment was heard by some but not all of the other jurors. Juror 6 did not expand upon her opinion and none of the other jurors asked any questions of Juror 6 as to what she did or what she saw. Additionally, Juror 6's opinion was not discussed among the other jurors.

Having so found, the Court enters the following:

II. CONCLUSIONS OF LAW

1. Juror 6 did not commit misconduct. What Juror 6 did in her home was a reenactment of the evidence produced at trial. It was not novel or extrinsic evidence because it involved testimony and exhibits admitted and discussed at trial. This was not information that was "outside all the evidence." This reenactment done by Juror 6 in her home was nothing more than an application of everyday perceptions and common sense to the issues presented at trial

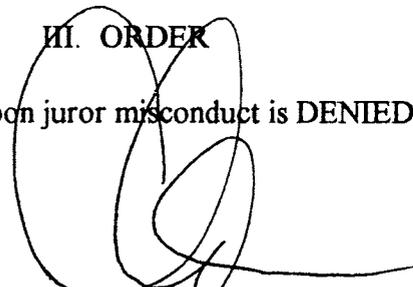
2. Even if Juror 6's actions were misconduct, it was harmless beyond a reasonable doubt. The reenactment did not involve any sophisticated equipment, it did not raise any novel theories, it involved only what could be seen in a mirror, which are common sense everyday perceptions, and it was not discussed by the other jurors.

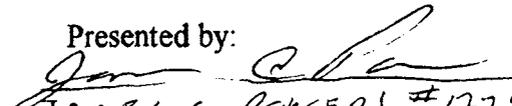
Therefore, the Court enters the following:

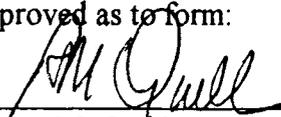
III. ORDER

1. Defendant's Motion for a new trial based upon juror misconduct is DENIED.

Dated: 6/11/07

  
JUDGE

Presented by:  
  
JAMES C. POWERS #12791  
~~FOR~~ Steven C. Sherman, WSBA #20685  
Senior Deputy Prosecuting Attorney  
DEPUTY PROSECUTING ATTY

Approved as to form:  
  
Robert M. Quillian, WSBA #6836  
Attorney for Defendant

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**FILED**  
JAN 11 2007  
SUPERIOR COURT  
BETTY J. GOULD  
THURSTON COUNTY CLERK

**IN THE SUPERIOR COURT OF WASHINGTON  
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,  
  
vs.  
  
JONATHAN J. JENSEN,

Plaintiff,  
  
  
  
Defendant.

NO. 02-1-00447-8

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW RE HEARING ON REMAND FROM  
THE COURT OF APPEALS**

THIS MATTER having come on before the Court on June 28, 29, and 30, 2006, for a hearing on the merits on remand from the Court of Appeals, to determine whether defendant's prior trial counsel had an actual conflict of interest which adversely affected his representation of the defendant; the defendant, JONATHAN J. JENSEN, appearing in person and through his attorney, Robert Quillian; the plaintiff, State of Washington, appearing by its counsel James C. Powers, Deputy Prosecuting Attorney for Thurston County; and the Court having duly considered the matter, now makes the following:

**A. FINDINGS OF FACT**

1. The primary arguments asserted by the defendant in this hearing were: (a) that the defendant had difficulty communicating with defense counsel during the time leading up to trial; (b) that defense counsel did not interview a minor named David as a potential defense witness;

1 and (c) that defense counsel failed to call certain witnesses to testify at trial.

2 2. While the defendant may have had some difficulty contacting defense counsel during  
3 the period of time leading up to the trial of this Cause, resulting in the defendant having feelings of  
4 anxiety and frustration, there has been no showing that this difficulty in communication had a  
5 prejudicial impact on defense counsel's performance.  
6

7 3. Defendant's trial counsel relied significantly upon investigator Susan Watts for the  
8 defense investigation in preparation for trial, including contact with potential witnesses. On  
9 September 10, 2002, Watts became aware for the first time that the State would not divulge the  
10 whereabouts of a minor named David, whom Watts was seeking to interview as a possible defense  
11 witness.  
12

13 4. Watts apparently had no difficulty communicating with defense counsel about this  
14 problem with contacting David, since a motion to continue the trial because of this problem was  
15 filed by defense counsel three days later.  
16

17 5. The defense motion to continue the trial was denied. Thereafter, neither Watts nor  
18 defense counsel was able to contact David prior to the trial of this cause, nor did David testify at the  
19 trial. However, nothing in the record shows that David would have had important evidence to  
20 present to the jury.  
21

22 6. Defendant's counsel did prepare for trial, did discuss with the defendant a defense to  
23 present at trial, did put together that defense, and did have appropriate defense witnesses available at  
24 the trial to testify.  
25  
26

1           7.       During the presentation of the defense case at trial, defendant's counsel became  
2 convinced that the jury was prepared to find in favor of the defendant, and therefore made the  
3 tactical decision not to call a number of potential defense witnesses to testify. While this decision  
4 may have been a mistake, no evidence has been shown indicating that this decision was the result of  
5 the charges pending against defense counsel. Rather, the decision was based on defense counsel's  
6 sense of the jury.  
7

8           8.       To the extent that there were deficiencies in defense counsel's representation of the  
9 defendant, there has been no showing that any such deficiency was caused by the existence of  
10 charges pending against defense counsel.  
11

12           Based on the above Findings of Fact, and the applicable legal principles, the Court makes the  
13 following:  
14

15           II.       CONCLUSIONS OF LAW

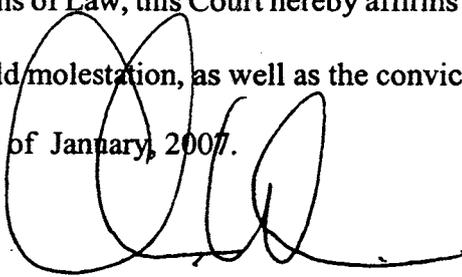
16           1.       As the Court of Appeals has previously found, defendant's trial counsel violated the  
17 Rules of Professional Conduct by failing to disclose to the defendant that there were charges pending  
18 against defense counsel during counsel's representation of the defendant.  
19

20           2.       Defendant has the additional burden of showing that defense counsel's pending  
21 charges constituted an actual conflict of interest that adversely affected counsel's representation of  
22 the defendant. To satisfy this burden, the defendant must show that defense counsel's pending  
23 charges had some prejudicial impact on counsel's performance.  
24

25           3.       The defendant has failed to meet his burden of showing an adverse impact on defense  
26 counsel's performance resulting from the charges pending against defense counsel.

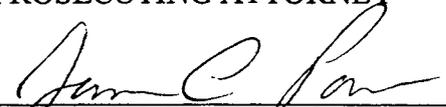
1 The defendant was charged with four counts of first-degree child molestation and one count  
2 of indecent exposure. At trial, he was convicted of three counts of first degree child molestation and  
3 the one count of indecent exposure. On appeal, the Court of Appeals ruled that one of the  
4 convictions for first-degree child molestation must be vacated and dismissed with prejudice due to  
5 insufficient evidence. Upon remand from the Court of Appeals, based upon the above  
6 Findings of Fact and Conclusions of Law, this Court hereby affirms the defendant's remaining two  
7 convictions for first-degree child molestation, as well as the conviction for indecent exposure.

8  
9 DATED this 11 day of January, 2007.

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11  
12   
13 \_\_\_\_\_  
14 HONORABLE JUDGE CHRIS WICKHAM

14 PRESENTED BY:

15 EDWARD G. HOLM  
16 PROSECUTING ATTORNEY

17   
18 \_\_\_\_\_  
19 JAMES C. POWERS/WSBA #12791  
20 DEPUTY PROSECUTING ATTORNEY

APPROVED AS TO FORM AND NOTICE OF  
PRESENTATION WAIVED:

21   
22 \_\_\_\_\_  
23 ROBERT M. QUILLIAN/WSBA #6836  
24 ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, No. 335933-2-II,  
on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

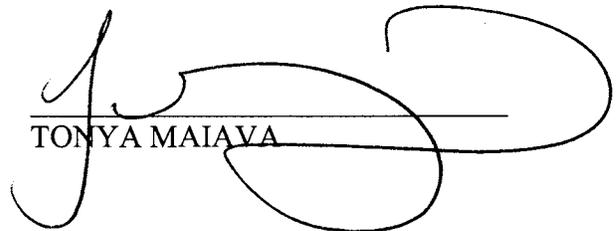
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TO:

PATRICIA ANNE PETHICK  
ATTORNEY AT LAW  
P.O. BOX 7269  
TACOMA, WA 98417  
ATTORNEY FOR JONATHAN J. JENSEN

I certify under penalty of perjury under laws of the State of  
Washington that the foregoing is true and correct.

Dated this 10<sup>th</sup> day of January, 2008, at Olympia, Washington.

  
\_\_\_\_\_  
TONYA MAIAYA