

No. 81236-5

THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

A.N.J., A Minor,

Appellant.

CLERK

BY RONALD R. CARPENTER

2008 NOV -5 A 7:48

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

---

SUPPLEMENTAL BRIEF OF PETITIONER, A.N.J., A Minor

---

Garth Dano, WSBA No. 11226  
George M. Ahrend, WSBA No. 25160  
Dano Gilbert & Ahrend PLLC  
P.O. Box 2149  
100 E. Broadway Ave.  
Moses Lake, WA 98837  
(509) 764-8426  
Attorneys for Petitioner

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

IN ADDITION TO PETITIONER’S BRIEF-IN-CHIEF AND REPLY BRIEF FILED WITH THE COURT OF APPEALS, AND PETITION FOR REVIEW FILED WITH THIS COURT, PETITIONER SUBMITS THE FOLLOWING:

I. The newly adopted financial conflict of interest rule for public defense contracts confirms that Douglas Anderson provided ineffective assistance of counsel to A.N.J. ....1

II. Professional standards are not just relevant, they are the only yardstick to measure ineffective assistance of counsel.....3

III. CONCLUSION.....6

APPENDIX

Declaration of Associate Professor John A. Strait ..... A1

Declaration of Dr. Tascha Boychuk-Spears .....A16

## TABLE OF AUTHORITIES

### Cases

<i>Burger v. Kemp</i> , 483 U.S. 776, 785, 107 S. Ct. 3114 (1987).....	5
<i>Lambert v. Blodgett</i> , 248 F. Supp. 2d 988, 1007 (E.D. Wash. 2003); <i>Affirmed</i> 393 F 3d 943, (9 <sup>th</sup> Cir. 2004). .....	5
<i>Schriro v. Landrigan</i> , 127 S. Ct. 1933 (2007).....	4, 5
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052 (1984).....	4

### Court Rules

RPC 1.8(m) .....	1, 2
------------------	------

### Other Authorities

Institute of Judicial Administration & American Bar Ass'n, <i>Juvenile Justice Standards: Standards Relating to Counsel for Private Parties</i> , reprinted in American Bar Ass'n, Criminal Justice Section, <i>Juvenile Justice Standards Annotated: A Balanced Approach</i> (Robert E. Shepherd, Jr., ed., 1996).....	2
National Legal Aid & Defender Ass'n, <i>Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services</i> , (1984) .....	2
Washington State Bar Ass'n, <i>Report of the WSBA Blue Ribbon Panel on Criminal Defense</i> (May 15, 2004) .....	2

IN ADDITION TO PETITIONER'S BRIEF-IN-CHIEF AND REPLY BRIEF FILED WITH THE COURT OF APPEALS, AND PETITION FOR REVIEW FILED WITH THIS COURT, PETITIONER SUBMITS THE FOLLOWING:

**I. The newly adopted financial conflict of interest rule for public defense contracts confirms that Douglas Anderson provided ineffective assistance of counsel to A.N.J.**

Since the parties' briefing was submitted in the Court of Appeals, this Court has adopted RPC 1.8(m):

A lawyer shall not:

- (1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm ....
  - (i) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel; or
- (2) knowingly accept compensation for the delivery of indigent defense services from a lawyer who has entered into a current agreement in violation of paragraph (m)(1).

(Formatting in original; ellipses added.) The official comment to RPC 1.8 states:

Paragraph (m) specifies that it is a conflict of interest for a lawyer to enter into or accept compensation under an indigent defense contract that does not provide for the payment of funds, outside of the contract, to compensate conflict counsel for fees and expenses.

(Comment 26.) This “creates an acute financial disincentive for the lawyer[.]” (Comment 27.) “Similar conflict-of-interest considerations apply when indigent defense contracts require the contracting lawyer or law firm to pay for the costs and expenses of investigation and expert services from the general proceeds of the contract.” (Comment 28.)

This is not a new standard. It codifies and reaffirms what had already been stated by the Washington State Bar Association and other courts cited in the official comment to RPC 1.8, as well as the preexisting professional standards cited in A.N.J.’s brief in chief.<sup>1</sup>

Douglas Anderson’s contract ran afoul of these standards both with respect to investigators and experts. Mr. Anderson acknowledged the financial disincentive to hire investigators and experts.<sup>2</sup> The strength of the disincentive was overwhelming as Mr. Anderson never hired an investigator in any case, let alone in A.N.J.’s case.<sup>3</sup> When asked whether he would have hired an investigator in A.N.J.’s case, given sufficient

---

<sup>1</sup> E.g., National Legal Aid & Defender Ass’n, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, Guideline III-13(a)(1984) (“The contract should avoid creating conflicts of interest between the Contractor or individual defense attorneys and clients. Specifically: expenses for investigations, expert witnesses, transcripts and other necessary services for defense should not decrease the Contractor’s income or compensation to attorneys or other personnel”); accord Washington State Bar Ass’n, *Report of the WSBA Blue Ribbon Panel on Criminal Defense*, at 27 (May 15, 2004); Institute of Judicial Admin. & American Bar Ass’n, *Juvenile Justice Standards: Standards Relating to Counsel for Private Parties*, Standard 2.1, reprinted in American Bar Ass’n, Criminal Justice Section, *Juvenile Justice Standards Annotated: A Balanced Approach* (Robert E. Shepherd, Jr., ed., 1996).

<sup>2</sup> (CP 154 [Transcript, Sept. 2, 2005, at 19:25-27].)

<sup>3</sup> (CP 154-155 [Transcript, Sept. 2, 2005, at 19:28-20:10]; CP 80 [Transcript, Mar. 16, 2006, at 18:17].)

funds, he answered “I’m not sure if I would or not .... I can’t say for certain, unfortunately.”<sup>4</sup> As a result of the failure to investigate, Mr. Anderson never interviewed nor presented testimony from two exculpatory witnesses.<sup>5</sup>

With respect to experts, the same conflicted dynamic was at work. Mr. Anderson did not consult an expert despite his awareness of problems with child sex abuse interviews.<sup>6</sup> When an expert was later retained in connection with the guilty plea withdrawal hearing, she identified numerous problems with the interviews performed in this case. (CP 39.) If the Court does not find ineffective assistance of counsel under these circumstances, then the adoption of RPC 1.8(m) will have been an empty gesture.

**II. Professional standards are not just relevant, they are the only yardstick to measure ineffective assistance of counsel.**

In opposition to the petition for review, the State argues that professional standards do not set the standard for performance of defense counsel under the Sixth Amendment. This argument is essential to the State’s case because it has identified no professional standards that would

---

<sup>4</sup> (CP 173 [Transcript, Sept. 2, 2005, at 38:13-15; ellipses added].)

<sup>5</sup> A.N.J. has also assigned error to the trial court’s refusal to consider these witnesses’ testimony at the withdrawal of guilty plea hearing. (Brief of Appellant, at 3 [assignment of error nos. 10-11].)

<sup>6</sup> (CP 155-156 [Transcript, Sept. 2, 2005, at 20:14-21:3].)

justify the conduct of defense counsel in this case. Yet the State's argument is clearly wrong, as stated in the seminal case on the subject:

The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

*Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064-2065 (1984) (citation omitted). In the absence of professional standards, the State fails to answer the crucial question of how otherwise to determine whether counsel was effective or ineffective?

The State's citations to authority do not support its argument. Initially, the State cites *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007), for the proposition that the U.S. Supreme Court "rejected the application of ABA Criminal Justice Standards 4-4.1(a) and 4-8.1(b)." (Respondent's Objection to the Petition for Discretionary Review, at 12 [hereafter "Resp. Obj."].) These standards are not at issue in this case, but more importantly, they were not at issue in *Schriro* either. The *Schriro* decision does not cite or discuss them. As recognized by Justice Stevens in dissent, "No one, not even the Court, seriously contends that counsel's investigation of possibly mitigating evidence was constitutionally sufficient" and "fell below the

standards of professional representation prevailing at the time[.]” 127 S. Ct. at 1945. The relevance of professional standards was assumed in *Schriro*.

Next, the State cites *Burger v. Kemp*, 483 U.S. 776, 785, 107 S. Ct. 3114 (1987), and *Lambert v. Blodgett*, 248 F. Supp. 2d 988, 1007 (E.D. Wash. 2003), for the proposition that these courts “rejected the application of the imputed disqualification rule.” (Resp. Obj., at 12). The imputed disqualification rule is not at issue in this case. In *Burger*, the U.S. Supreme Court did not reject the rule, but rather affirmed it. 483 U.S. at 783, 107 S. Ct. at 3120 (“There is certainly much substance to petitioner’s argument that the appointment of two partners to represent coindictees in their respective trials creates a possible conflict of interest that could prejudice either or both clients.”) The court decided the case on grounds of prejudice rather than a rejection of professional standards. *See id.* at 783-784, 107 S. Ct. at 3120.

The Eastern District of Washington’s decision in *Lambert* does not reject professional standards either. Instead, the decision reveals how mere “imputation” of a conflict is at odds with the requirement to show prejudice in an ineffective assistance case. 248 F. Supp. 2d at 1005-1006. The district court’s decision was affirmed by the Ninth Circuit in this respect. 393 F.3d 943, 985-986 (9<sup>th</sup> Cir. 2004). In this case, there is no

question of imputing a violation of professional standards to Douglas Anderson. His own violations of professional standards in this case unquestionably prejudiced A.N.J.<sup>7</sup>

**III. Conclusion.**

A.N.J. respectfully asks the Court to permit him to withdraw his guilty plea and grant him a trial with the benefit of effective assistance of counsel.

Submitted this 3<sup>rd</sup> day of November, 2008.

DANO GILBERT & AHREND PLLC



By: George M. Ahrend  
WSBA No. 25160  
Attorneys for A.N.J.

---

<sup>7</sup> (See Brief of Appellant, at 21-24 [failure to establish independent and confidential attorney-client relationship with child apart from parents]; *id.* at 24-27 [failure to investigate]; *id.* at 27-29 [failure to consult expert]; *id.* at 29-30 [affirmative misstatement of consequences of plea].)

## APPENDIX

Declaration of Associate Professor John A. Strait - Pages A1-15

Declaration of Dr. Tascha Boychuk-Spears - Page A16-19

FILED

MAR 09 2006

KENNETH O. KUNEG  
Grant County Clerk

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
FOR GRANT COUNTY

STATE OF WASHINGTON,

Plaintiff,

Vs.

ALEXANDER JONES,

Defendant.

NO. 04-8-00370-7

DECLARATION OF ASSOCIATE  
PROFESSOR JOHN A. STRAIT IN  
SUPPORT OF ALEXANDER  
JONES REGARDING SIXTH  
AMENDMENT EFFECTIVE  
ASSISTANCE OF COUNSEL

15  
16 John A. Strait declares as follows:

17 I have been retained (without fee) by Garth Dano of Dano, Gilbert & Ahrend,  
18 PLLC, to opine about the representation Douglas Anderson, court-appointed counsel,  
19 for Alexander Jones, in the case of State of Washington v. Alexander Jones, Grant  
20 County Superior Court No. 04-8-00370-7 and whether he met the Sixth Amendment  
21 standard for effective assistance of counsel in his representation leading to Mr. Jones'  
22 guilty plea.

23 I. CREDENTIALS

24 1. My professional experience and educational background are partially set  
25 forth in the attached curriculum vitae and resume. I received a law degree from Yale  
26 Law School in 1969. I am admitted to the practice of law in California, Oregon,

1 Washington, the United States District Courts for Northern California, Oregon,  
2 Washington, D.C., Wyoming, Eastern Washington, Western Washington, the Ninth  
3 Circuit Court of Appeals and the United States Supreme Court. I am currently on  
4 inactive status in California and Oregon.

5 2. I am currently an Associate Professor of Law at Seattle University School  
6 of Law with teaching responsibilities in the fields of Professional Responsibility, Criminal  
7 Procedure, Criminal Law, and Trial Advocacy. I have taught the law of the Sixth  
8 Amendment and professional responsibility standards since 1976.

9 3. Outside my teaching duties, I have remained in active practice and  
10 periodically take leaves from teaching in order to practice full time. My practice  
11 experience includes supervising the felony division of the largest contract public  
12 defender office in the State of Washington and developing standards for representation  
13 in child sexual abuse cases for that office; prosecuting sexual abuse cases for the  
14 Alameda County Prosecuting Attorneys Office in Oakland, CA; and defending child  
15 sexual abuse cases as a public defender. I consult on Sixth Amendment and  
16 professional responsibility issues with prosecutor's offices, public defenders, and/or  
17 private defense counsel on a regular basis. I consult on such matters a minimum of  
18 once (1) per month and have done so since the mid-1970s. I consult daily on conflict of  
19 interest and professional responsibility issues.

20 4. I lecture and teach on the law of the Sixth Amendment and its application  
21 in practical settings such as representing child sexual abuse cases both in law school  
22 and for continuing legal education. I've taught the law of the Sixth Amendment and the  
23 standards for conflicts of interest and used child sexual abuse cases as examples since  
24 1976 in law school in at least one course per semester and often at least one course  
25 every semester. I have lectured on the law of the Sixth Amendment and the standards  
26 for conflicts of interest in many of my CLE presentations to both prosecutor

1 ~~organizations (WAPA) and to the Washington Defender Association (WDA), the~~  
2 Washington Association of Criminal Defense Lawyers (WACDL), the Washington State  
3 Bar Association Criminal Law Section, the Hawaii State Public Defender's Office, the  
4 National Legal Aid and Defender's Association, the Alaska Department of Law for  
5 Prosecutors, the Alaska Public Defender's Office, the Hawaii District Attorney's  
6 Association, and the New Mexico Attorney General's Office (prosecutors), among  
7 others. I have presented continuing legal education programs on the defense of child  
8 sexual abuse cases to members of the Washington State Bar Association criminal  
9 defense bar on more than ten (10) occasions since the mid-1970s.

10 5. I have previously been qualified as an expert witness in matters relating to  
11 the Sixth Amendment right to effective assistance of counsel in The Federal District  
12 Courts for the Eastern and Western Districts of Washington, Oregon, Wyoming, Alaska,  
13 and New Mexico. I have been similarly qualified and appeared either by declaration or  
14 by live testimony in more than ten (10) county superior courts in the State of  
15 Washington including Whatcom County. I have served as counsel of record on matters  
16 relating to the Sixth Amendment before the United States Supreme Court, United States  
17 Courts of Appeal for the Ninth and Tenth Circuits Courts of Appeal as well as for the  
18 Federal District Courts of Wyoming, Oregon, the Washington State Supreme Court, and  
19 the Washington State Court of Appeals for Divisions I, II, and III as well as in several  
20 county superior courts. I have been qualified as an expert and appeared by testimony or  
21 declaration on conflict of interest issues in more than fifteen (15) counties and six (6)  
22 states.

23 6. I have served as a consultant to the King County Office of Public Defense  
24 establishing contract standards for public defender appointments on felony cases and  
25 specifically in child sexual abuse defense. I was Chairman of the Board of the  
26 Washington Appellate Defender Association for eight (8) years. I have served on the

1 Washington Supreme Court Task Forces on indigent representation and currently am  
2 appointed as a member of the Supreme Court's Task Force on Funding Indigent  
3 Representation. I currently serve on the Executive Committee of the Washington State  
4 Bar Association Criminal Law Section and have done so for more than twenty (20)  
5 years and am a former Chair of that Section.

6 7. In my law school teaching, CLE presentations, and in-house training for  
7 public defender offices, I have taught eye-witness identification defense techniques for  
8 more than thirty (30) years.

## 9 II. SCOPE OF OPINION

10 1. I have been asked to render an opinion as to whether Mr. Jones received  
11 effective assistance of counsel from Mr. Anderson in investigating, counseling, and  
12 representing Mr. Jones when he undertook to defend Mr. Jones on a child molestation  
13 allegation and advised Mr. Jones and his parents that Mr. Jones should enter into a  
14 guilty plea to this charge. I have been asked to opine whether Mr. Anderson's  
15 representation materially prejudiced Mr. Jones in the entry of his guilty plea and whether  
16 his failure to meet the Sixth Amendment assistance of counsel warrants withdrawal of  
17 that guilty plea.

## 18 III. STANDARD OF REVIEW FOR MY OPINION

19 1. In making my review of Mr. Anderson's performance in this case, I have  
20 relied on the standards for the Sixth Amendment effective assistance of counsel as set  
21 forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 675 (1984)  
22 and under the Washington case law interpreting *Strickland v. Washington* as well as my  
23 own experience training and teaching Sixth Amendment effective assistance of counsel  
24 standards for Washington criminal defense lawyers as described, *supra*. I rely upon  
25 both *Strickland supra* and the minimum competence standards on a state-wide basis for  
26 criminal defense lawyers under Washington law including the Washington Rules of

1 Professional Conduct (RPC) 3.7, RPC 1.1, RPC, 1.2, RPC 1.3, and RPC 1.4, as based  
2 upon my experience as a law professor, practitioner, consultant, and expert witness.

3 **IV. MATERIALS REVIEWED IN ORDER TO RENDER OPINION AND**  
4 **ASSUMPTIONS ON WHICH OPINION IS BASED**

5 1. In order to render these opinions, I have reviewed:

- 6 • The transcript of the September 2, 2005 hearing to withdraw guilty plea;
- 7 • The declaration of JoAnn Jones dated December of 2004;
- 8 • The typed declaration of Douglas Anderson dated December 5, 2004;
- 9 • A second declaration of Douglas Anderson written out by Detective David Matney dated July 14, 2005;
- 10 • A declaration of Ken Jones, dated December 2, 2004.
- 11 • A declaration of Dr. Tascha Boychuk-spears

12 **V. OPINIONS**

13 **A. Generally**

14 1. Mr. Anderson's representation of Mr. Jones does not meet the effective  
15 assistance of counsel standard under the Sixth Amendment for a criminal defense  
16 lawyer representing a 12-year-old child charged with Child Molestation in the 1<sup>st</sup>  
17 Degree.  
18

19 2. Child sexual abuse allegations are difficult cases that require a substantial  
20 level of criminal defense services. The potential for erroneous investigation and charge  
21 is greater in child juvenile cases, child sexual assault cases involving young victims than  
22 in adult cases based upon my experience and training. Minimal competence requires at  
23 least interviewing the victim and the witnesses to whom first report was made.  
24 Reviewing the transcript of the victim interview and, if possible, the audio and/or video  
25  
26

1 tape, if one was made, in order to ascertain the degree of leading questions and/or  
2 suggestion used by the interviewer. Because of the risk for erroneous investigation  
3 and/or erroneous accusation, it is particularly important to establish an attorney-client  
4 relationship with a child defendant to protect confidentiality in that setting. When  
5 advising a juvenile defendant to plead guilty, the attorney must have done adequate  
6 investigation to not only ascertain the likelihood of conviction, but also the desirability of  
7 the plea and its effects upon the defendant. In order for a valid plea to have been  
8 entered, the Sixth Amendment mandates that the attorney advise the defendant of all of  
9 the consequences of the plea, detail the elements of the plea and, of course, ascertain  
10 clearly from the defendant personally his guilt or innocence in the matter. The attorney  
11 must prepare the plea form with the defendant so that the defendant fully understands  
12 the likelihood of his conviction, the charge he is pleading to, and the direct effects of the  
13 sentence possibilities that he will receive. Juvenile defendants obviously present  
14 substantial challenges in the process and require special care to avoid the attorney  
15 imposing the attorney's judgment on the client because of the vulnerability and youth of  
16 the client.

19 3. In my view, Mr. Anderson failed to meet the minimum standards of care  
20 for a reasonably competent lawyer in Washington defending a child sexual abuse, Child  
21 Rape I count, and advising his client to plead guilty. Those deficiencies may be divided  
22 into three categories: (1) his office structure and contractual relationship for  
23 representing indigent juveniles which made it difficult, if not impossible, for him to render  
24 effective assistance of counsel; (2) the specific deficiencies in this particular  
25  
26

1 representation and his advise to enter a guilty plea; and (3) the prejudice which those  
2 deficiencies caused to Mr. Jones warranting the withdrawal of his guilty plea because  
3 he was not provided with effective assistance of counsel in the entry of that plea.

4 **B. Ineffective Office Structure and Contractual Relationship for Juvenile Court**  
5 **Representation**  
6

7 1. Mr. Anderson has a contract with Grant County to provide representation  
8 on criminal juvenile defense for juvenile defendants in Grant County and also defend  
9 truancy contempt hearings, at-risk youths, and child dependency proceedings. In the  
10 contract year 2004 overlapping Mr. Jones' representation, Mr. Anderson represented  
11 approximately 240 child criminal defense cases and approximately 200 or more  
12 dependency cases at the rate of 30-40 per month, plus the other categories enumerated  
13 in the record I have reviewed. Mr. Anderson's office staff consists solely of his wife who  
14 acts as his secretary. He has no investigator and under the terms of his contract with  
15 Grant County, he is not entitled to be reimbursed for investigation but instead must pay  
16 for an investigator out of the lump sum he receives for his representation of these  
17 cases. Should a conflict develop among any of his clients which would prevent him  
18 from representing a case, Mr. Anderson must pay out of his contract for that conflicted  
19 representation. In the contract year of 2004, Mr. Anderson never hired an investigator  
20 on a juvenile case. Mr. Anderson has no victim assistance counselor or other qualified  
21 professional to assist in designing treatment or other alternative disposition for guilty  
22 plea defendants. He has no qualified professional available to him to assist in  
23 evaluating a sexual offender special treatment program such as SSODA and the  
24  
25  
26

7

1 wisdom or appropriateness of such a disposition for a defendant who his investigation  
2 as established has no viable defense. It is likely that the contract also contains a  
3 provision which requires him to pay for expert opinion and/or expert assistance in  
4 representing any client out of his lump sum.  
5

6 In sum, Mr. Anderson's office has too many cases, no investigative or specialized  
7 assistance to represent juveniles adequately in the investigation of their cases, and no  
8 availability of resources to adequately develop testimony and/or alternative sentence  
9 dispositions. Instead, he relies entirely upon the State to voluntarily disclose the  
10 relevant information that he requires. He cannot perform competent investigation in his  
11 cases since the only investigation is done by him which would be likely to bar him from  
12 being able to effectively impeach or establish testimonial knowledge at trial for his  
13 clients because his own testimony would violate Washington Rule of Professional  
14 Conduct 3.7. RCP 3.7 prevents him from being either an impeaching witness or an  
15 affirmative witness for his client in the same case in which he is representing the  
16 defendant. He cannot adequately counsel his clients with regard to the consequences  
17 of plea, particularly on child sexual assault cases because he does not have  
18 professional assistance to evaluate and advise him so that he can counsel his client on  
19 the wisdom or eligibility of a SSODA disposition in child sexual abuse cases. He does  
20 not have available to him and has never used an expert witness on child sexual assault  
21 investigative technique although the likelihood of erroneous investigative techniques  
22 particularly where unchallenged by the criminal defense representation is substantial.

23  
24  
25 Mr. Anderson's office structure, his contract relationship with Grant County and his  
26

1 overload of cases made it unlikely that he could render effective assistance of counsel  
2 in the abstract. That is particularly the case with child sexual abuse allegations because  
3 of their greater demand for investigative and expert services as well as their time-  
4 consuming nature in order to render minimally effective representation.  
5

6 **C. Specific Deficiencies in His Representation of Mr. Jones Leading to the**  
7 **Guilty Plea**

8 1. Mr. Jones' victim was interviewed by the investigating detective on  
9 February 3, 2004. The allegation of child rape was filed on April 7, 2004. Mr. Jones  
10 was arraigned without counsel present on July 19, 2004 and the matter was continued  
11 to August 2, 2004.

12 On August 14, there was a pre-trial conference, and on August 19, a plea was  
13 entered three days prior to the scheduled trial date of August 22<sup>nd</sup>. Mr. Anderson's  
14 actual period of representation, by his testimony, really began on August 2<sup>nd</sup> and ended  
15 with the plea on August 19<sup>th</sup>.

16 In that 17-day period, he did not interview the victim. Although he claims to have  
17 contacted the victim's parents, the victim's parents identify only two meetings, both quite  
18 abbreviated, including meeting the morning of the entry of the plea.  
19

20 In Doug Anderson's first Declaration, he claims that he "made an attempt" to  
21 contact the witnesses but was "never able to speak with them." Although advised of the  
22 existence of two potential witnesses who might explain the victim's behavior which led  
23 to the allegation as the product of another and different child molestation, Mr. Anderson  
24 did not contact either potential witness and claims to have attempted to have done so  
25 only by phoning without any further follow-up. No documentation of these attempts  
26

1 exists. When the witnesses were contacted by Garth Dano's office, they stated that  
2 they never received any phone calls or messages from Doug Anderson asking to speak  
3 with them regarding this incident.

4 Doug Anderson also states in his original Declaration that he never  
5 "independently investigated the claims regarding the alleged victim nor do a background  
6 check on the family." He "simply reviewed the police reports." He used no other  
7 investigator and during the time period, his only staff member, his wife, was at home  
8 with a diabetic son and unable to assist in any investigative efforts. He hired no expert  
9 witness or consultant with regard to child sexual assault and/or investigation techniques  
10 and he had minimal interview contact with his client and the client's parents. Mr.  
11 Anderson had a responsibility to contact the alleged victim's family and investigate the  
12 family for possible other sources of alleged child abuse along with interviewing other  
13 neighbors or friends who knew the family. Mr. Anderson did not do any investigation.

14  
15  
16 Mr. Anderson did not interview David Matney, the detective who took the victim's  
17 statement. He did not request a copy of the audio tape which would have revealed  
18 possible intimidation and the witness's demeanor in responding to the questioning of the  
19 detective as well as revealed the degree of leading and suggestive nature of those  
20 questions. He did not interview any of the victim's family members, including the  
21 victim's parents or siblings. He did not interview the Sheriff's officer involved in the  
22 original report. He did not check descriptions of how the events occurred as alleged  
23 against the actual physical scene at the home where they allegedly occurred. He filed  
24 no written pleadings in the case at all and, consistent with his routine practice,  
25  
26

1 depended entirely on the prosecution to turn over the relevant information rather than  
2 making discovery requests. This, of course, waived any Brady exculpatory issues in the  
3 possession of either the prosecution or the police agencies subject to the prosecutor's  
4 duty to produce such information since the failure to make any request waives all but  
5 knowingly false factual allegations under Brady.  
6

7 Although the parents were aggressive in attempting to contact Mr. Anderson,  
8 they were unable to get detailed information from him as they described in their  
9 declarations, and the wife in her testimony.

10 On the two occasions that can be documented that he met with the defendant  
11 and his parents for more than a nominal appearance, Mr. Anderson apparently did not  
12 distinguish between the parents and the child and met with them jointly. In juvenile  
13 representation this is particularly troubling because of the potential lack of candor of a  
14 child in the attorney-client relationship when third parties, not covered by any privilege,  
15 are present and who are also the parental authority figures of the child. Candor from a  
16 juvenile to the attorney is critical in order to comply with RPC 1.4, Adequate  
17 Communication. Adequate communication is required in order to perform the advisory  
18 functions of a lawyer and to ascertain what investigation and discovery is needed.  
19 Candor cannot be accomplished without waiving the client's rights to confidences and  
20 secrets under RPC 1.6 and the Fifth Amendment when the meeting is held jointly with  
21 the parents. There is a substantial risk that the child will defer to the parents under such  
22 circumstances when advice on the decision to plead guilty or to go to trial is being  
23 provided. Mr. Anderson's practice apparently violated both his duties to protect the  
24  
25  
26

1 confidentiality of his attorney-client communication and his ethical responsibilities to his  
2 client, a juvenile. Based on the descriptions of the limited discussion of the wisdom of  
3 the plea reflected in the transcript I have reviewed and the declarations, it appears likely  
4 that the child was a passive participant and the parents were actually making the  
5 decisions to which the child then agreed.  
6

7 It is particularly troubling that on the critical question of actual guilt or innocence  
8 he relied on an admission of guilt (as Mr. Anderson viewed it) through the parents rather  
9 than in direct discussion with the child. That is a critical and major deficiency when  
10 entering a guilty plea in a juvenile case. No competent criminal defense lawyer would  
11 accept an admission of guilt through a parent rather than by direct and independent,  
12 confidential communication with his client, the child.  
13

14 In Doug Anderson's second Declaration prepared by the prosecutor's office, he  
15 states he did not read " 'word for word' the statement on plea of guilty to Alex Jones or  
16 have Alex do so." Mr. Anderson states that he informed Alex "if he successfully  
17 completed SSODA treatment he could later plea to an amended charge" however, Doug  
18 Anderson does not state the ramifications of pleading guilty and being convicted of the  
19 amended charge. If we assume the description of the critical meeting with the parents  
20 and Mr. Jones is as described in Mr. Anderson's original declaration, the declarations of  
21 the parents of Mr. Jones, and in Mrs. Jones' testimony in the September hearing, Mr.  
22 Anderson's advice to plead guilty and cooperate with a SSODA referral did not meet the  
23 Sixth Amendment effective assistance of counsel standard. He did not explain in plain  
24 English the meaning between child molestation in the first degree and child molestation  
25  
26

1 in the second degree. He did not adequately explain the consequences of a guilty plea.

2 Mr. Anderson had not done adequate investigation nor evaluation of the case  
3 factually to ascertain whether a guilty plea should be properly advised in the first place.  
4 By his own testimony he relied upon what he understood to be an admission of the child  
5 client coming through his parents rather than his own independent discussions with the  
6 child after having established a confidential relationship with the child. He erroneously  
7 advised the parents about the consequences of a SSODA disposition and, by his own  
8 testimony, was at best ambiguous about the critical issue of permanent criminal record  
9 and expungement and, at worst, materially mislead both the parents and his client as to  
10 the consequences. The parents' description of his advice to his client to falsely state  
11 that he'd read the statement on plea of guilty when in fact he had not, is not only below  
12 the standard of care for reasonably competent criminal defense lawyers advising a  
13 client with regard to a guilty plea, it is also, of course, a violation of RPC 3.3(a). It is a  
14 material misrepresentation to the court because the court's function in performing an  
15 independent inquiry into the voluntariness of the plea is a constitutional prerequisite to a  
16 valid plea and false information presented in response to the court's inquiry materially  
17 misleads the tribunal on the voluntariness, adequacy, and fully-informed nature of the  
18 plea as is constitutionally required for a valid plea to be entered.  
19  
20  
21

22 **VI. PREJUDICE ARISING FROM THE INEFFECTIVE REPRESENTATION**

23 Mr. Jones was not fully informed as to the consequences of his potential plea.  
24 He was not fully informed about the critical issue of expungement, the direct effects  
25 under the registration laws for child sexual offenders, nor of the implications of an  
26

1 SSODA treatment and supervision program. Mr. Jones was not counseled and could  
2 not have been as to the merits of his potential defenses since Mr. Anderson only  
3 reviewed the prosecution's evidence as voluntarily provided to him and performed no  
4 independent investigation to confirm the prosecution's allegations or to deny them.

5  
6 Mr. Anderson was not equipped by virtue of his caseload and office structure to  
7 provide minimally effective assistance of counsel in order to competently investigate  
8 and advise Mr. Jones about the wisdom of entering into a guilty plea and potential  
9 SSODA disposition. It appears from the record that Mr. Anderson actually spent more  
10 time plea bargaining the case in communication with the prosecutor's office than he did  
11 investigating, counseling, and advising his client and in preparing his client for the entry  
12 of the guilty plea.

13  
14 Given Mr. Anderson's caseload, his lack of resources and his personal family  
15 situation during the critical period, it is not surprising that Mr. Anderson lacks any  
16 substantive memory of much of the contested facts generated by his conflicting  
17 affidavits. It also appears that Mr. Anderson was expecting the case to be disposed of  
18 by guilty plea although he made no minimally competent investigation to ascertain  
19 whether that was an appropriate disposition for Mr. Jones. When Mr. Jones entered his  
20 plea he could not have been adequately counseled or advised by Mr. Anderson since  
21 Mr. Anderson had done none of the prerequisite steps a minimally-competent criminal  
22 defense lawyer in Washington would have taken in order to counsel such a plea. Even  
23 the most basic step of a separate and independent attorney-client relationship and  
24 consultation after establishing a confidential relationship with Mr. Jones failed to occur.  
25  
26

1 Instead Mr. Jones was advised to plead guilty through his parents based on joint  
2 communication in the presence of the parents. The prejudice to Mr. Jones is even  
3 greater where, as here the parents attempted to be actively involved as Mr. Anderson  
4 describes, (and as many would be in such circumstances) without familiarity of the  
5 criminal justice system and were substantially dependent on Mr. Anderson to advise  
6 and represent their son. Since Mr. Anderson could not and did not competently do so, it  
7 is particularly prejudicial to Mr. Jones that a guilty plea based on this representation  
8 prevented the defense to which he is entitled. The interests of justice certainly warrant  
9 the withdrawal of the plea in light of the ineffective assistance of counsel Mr. Anderson  
10 represented under JuCR 1.4(b), JuCR 7.8(c)(2)(iii), and CrR 4.2(f).  
11  
12  
13

14 I declare under penalty of perjury that the foregoing is true and correct.

15 Executed on March 7, 2006  
16 Seattle, WA.

17   
18 \_\_\_\_\_  
19 JOHN A. STRAIT, WSBA #4776

GARTH DANO  
LAW OFFICES OF GARTH DANO AND ASSOCIATES  
100 E. Broadway  
Moses Lake, WA 98837

FILED  
KENNETH O. KUNES, CLERK  
DEPUTY  
JUL 21 2005  
RECORDED IN \_\_\_\_\_  
VOLUME \_\_\_\_\_ PAGE \_\_\_\_\_

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR GRANT COUNTY

State of Washington

Case No. 04-8-0070-7

v.

RECEIVED

072505

Alex Jones

DANO, GILBERT & AHREND, PLLC

DECLARATION OF DR.  
TASCHA BOYCHUK-SPEARS

I, TASCHA BOYCHUK-SPEARS, M.Sc., Ph.D., RN, SANE-A under the penalty of perjury of the laws of the State of Washington, declare and state:

1. I am over the age of eighteen and I am competent to testify herein. I am making this declaration from my personal knowledge, and further the opinions contained herein are based upon my experience and knowledge of clinical and scientific literature relevant to this matter.
2. I am a forensic nurse consultant licensed to practice as a registered nurse in the State of Arizona. I am currently licensed by the Arizona State Board of Nursing, and have been so licensed since 1984. I hold License #RN052240. I have also been licensed in the State of Arizona as a Professional Counselor, licensed by the Board of Behavioral Health Examiners License #CC-1064.
3. I have extensive experience since 1985 in conducting forensic interviews with children and adolescents. I have evaluated and treated preadolescent as well as adolescent youngsters who are alleged to be victims of crime, perpetrators of crimes and/or witnesses to crimes. I have conducted forensic interviews of over 3,000 children/adolescents reporting child maltreatment and/or presenting as witnesses to violent crimes and am familiar with the investigative issues that exist when allegations of sex abuse are brought forth by preschool children. Attached hereto as exhibit "A" and incorporated by this reference is a true and correct copy of my curriculum vitae, which sets forth my qualifications to render an opinion in this case.

4. I am familiar with the scientific and clinical literature regarding sound forensic interview techniques and have been employed as a consultant by a number of Police Departments and State Agencies to assist in training professionals on scientifically sound forensic interview techniques and sound investigative strategies in crimes involving children and adolescents.
5. I am familiar with the scientific and clinical literature regarding "autobiographical memory" as well as the scientific literature on factors that can affect the reliability of memories for personally experienced events. I am also familiar with the concept of suggestibility as used in the scientific literature.
6. In addition to my private practice, I have conducted research regarding child victims and/or witnesses to violent crimes. I have authored one book, and co-authored several publications regarding child victims and/or witnesses.
7. I have qualified as an expert witness in multiple jurisdictions, providing testimony in the areas of general characteristics regarding sexually abused children as a group, scientifically sound interview strategies, general principles regarding memory, and clinical and scientific literature regarding the long term effects of adverse life events such as sexual abuse, physical abuse and witnessing violent crimes such as domestic violence and homicide.
8. I was requested by the law firm of GARTH DANO AND ASSOCIATES to review documents in the matter of State of Washington v. Alex Jones as set forth in the attached index, Appendix B and that I reviewed those documents.

I intend to offer the following impressions and opinions related to this matter. If additional information becomes available, I may supplement or amend the opinions provided below:

- a) "autobiographical" memories for personally experienced events is a "reconstructive" rather than a reproductive enterprise. That is to mean that memories are not simply passively recorded, then stored in their natural form in a way that maintains their initial quality, nor are memories mechanically accessed in their original state at the time of recall. Rather, because of the reconstructive nature of memory, various factors can affect the accuracy of recollections. Included in these factors would be the nature of the event being remembered, salience (meaningfulness of the recollections), interview strategies used to elicit the recollections and both pre and post event circumstances.
- b) It is important to understand the "triggering circumstances" surrounding the initial disclosure of an allegedly abusive experience. The circumstances leading to the determination by the alleged victim to report has central importance regarding the investigative process and ruling out false alarms. It is critically important to interview the adult or child to whom the original outcry was made in order to

determine the context of the outcry, questions that were asked of the alleged victim and circumstances of the disclosure.

- c) It is important during the investigation, that the investigator enter interviews with an open mind, and explicitly consider multiple possible alternative explanations for the child's allegations or statements (e.g. Alleged victim was abused by the stated perpetrator, alleged victim was abused by someone else, alleged victim was not abused, etc.). Interviewers who attempt only to confirm their initial presumptions are likely biased. The concern with alternative competing hypotheses about the allegations should be evident in both the interview and the broader investigation of which the interview is one important component. It is important to inquire regarding the history of the child reporting the abuse as it may relate to other types of sexually toned experiences.
- d) Interview strategies, including factors such as interview environment, and the design of interview questions (whether questions invite narratives from free recall or require responses from recognition memory) will affect the quality of information provided by the individual recounting the events in question. Interview strategies that are scientifically sound (e.g. NICHD protocol, Sem-Structured Cognitive, Step-wise, and others that attempt to elicit a narrative from children) are to be used during investigative interviews of children alleging abuse.
- e) That whenever possible, the interviewer should first explain the ground rules for the child by illustrating concretely the child's capacity to understand the questions, and ability to correct the interviewer along with instructions regarding not guessing at any answers, source monitoring (only what happened not what anyone wants you to say), and the importance of providing a detailed and truthful account of his/her experiences.
- f) That scientifically sound interview strategies can substantially reduce the risk of obtaining unreliable information from children and adolescents;
- g) That the scientific literature indicates there are factors that increase the risk of obtaining unreliable information from children. Included are factors such as: young age of the child, delayed in social/emotional development, undue influence by significant adults, high status biased interviewers in an investigation, selective re-enforcement of response, negative stereotyping of the accused and or external pressures placed on the reporting child.
- h) That during investigations, it is critical to electronically preserve the interrogation of the accused. Reconstructions of interrogations, like reconstructions of other conversations are often invariable inaccurate and can distort key features of the statement and the manner in which they were elicited.

~~i) It is my opinion that the investigative strategies used by Detective Matney during the investigation of Alex Jones were insufficient due to:~~

1. no interviews of adult to whom the disclosure was made (Tyler's mother),
2. no information regarding the context of how the report was made,
3. no information regarding the questions that were asked of Tyler and Christina during the time they were speaking with their mother
4. interview of Tyler Mullan, age 5 years 11 months was conducted 28 days after initial report,
5. interview of Tyler Mullan was not conducted in a scientifically sound manner and it was insufficient in assisting one in understanding not only what did or did not happen but also the context of the alleged event (Note: It should be noted that the credibility of the alleged victim will not be addressed, being an issue for the "trier of fact.")
6. no assessment of influencing factors pre-allegation nor during the 28 days prior to the interview (e.g. prior sexual abuse, family dynamics, interaction between the family members of the accused and the alleged victim; possible motivations to accuse, possible motivations of alleged victim to misrepresent, possible motivations of alleged victim to not report fully, etc.)
7. no interview of collateral witnesses (e.g. Christina, Michael)
8. no electronic preservation of the interrogation of Alex,
10. evidence of bias during the investigation (no evidence that alternative explanations were considered throughout the investigation).

*Tascha Boychuk Spears*  
 \_\_\_\_\_  
 Dr. Tascha Boychuk-Spears

SUBSCRIBED AND SWORN to before me this 13<sup>th</sup> day of June  
 2005 by Dr. Tascha Boychuk-Spears.

*Karen A. Harvey*  
 \_\_\_\_\_  
 Karen A. Harvey  
 Notary Public

My Commission Expires:  
 January 2007

