

NO. 81769-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CURTIS POUNCY,

Respondent.

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KING COUNTY PROSECUTING ATTORNEY'S OFFICE
CRIMINAL DIVISION
SVP UNIT

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

The Honorable Helen L. Halpert, Judge

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SUPREME COURT
STATE OF WASHINGTON

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUE STATEMENT

1. Did the trial court commit reversible error by allowing the State to impeach Pouncy's expert witness with judicial findings from an unrelated case?

2. Was defense counsel ineffective in failing to appropriately object to the judicial findings or request a curative instruction?

3. Did the trial court commit reversible error in failing to give Pouncy's proposed instruction on the definition of "personality disorder," thereby allowing the jury to speculate on the meaning of an element of the State's case?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The State sought to involuntarily commit Pouncy as a sexually violent predator (SVP). CP 1-169. In 1983, Pouncy pled guilty to the second degree rape of a teenager and first degree rape of a woman. CP 1, 5; 8RP 67-68. In 1997, Pouncy entered an Alford¹ plea to charges of unlawful imprisonment, fourth degree assault, and felony harassment against another woman. CP 3-6; 8RP 137; 9RP 178. The State also presented evidence of a number of uncharged sex offenses. 4RP 103-152; 5RP 54,

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

62, 146; 6RP 130-148); 8RP 70-77, 80-81, 11RP 52-66,103-128; 12RP 6-30. Pouncy admitted to seven rapes overall. 6RP 115.

The State offered expert testimony from Dr. Richard Packard, who diagnosed Pouncy with "antisocial personality disorder." 9RP 27, 35, 118. Packard also opined Pouncy suffers from a mental abnormality called "paraphilia not otherwise specified (NOS), non-consent." 8RP 162, 164; 9RP 26. Packard concluded Pouncy is likely to engage in future acts of predatory sexual violence if not confined in a secure facility. 9RP 118-19.

Pouncy offered expert testimony from Dr. Richard Wollert that contradicted Packard's evaluation. 15RP 70-178; 16RP 11-198; 17RP 2-132. In Wollert's opinion, Pouncy did not suffer from a mental abnormality or personality disorder. 15RP 93, 114-15, 120, 162, 169; 16RP 71. Wollert rejected Packard's personality disorder diagnosis because Pouncy did not meet the diagnostic criteria. 15RP 119-22, 161-64. Wollert further testified Packard's paraphilia diagnosis was invalid because the diagnosis is not recognized by the Diagnostic and Statistical Manual of Mental Disorders (DSM), the criteria for assigning the diagnosis have never been set forth in the DSM, and the reliability of rape-based diagnoses is unacceptably low. 15RP 106-119; 17RP 108. Wollert also opined Pouncy was not likely to reoffend. 16RP 71-72.

As an element of its case, the State needed to prove Pouncy has a mental abnormality and/or personality disorder that makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(16); CP 991 (Instruction 3). Wollert used the Static 99 actuarial instrument to conclude Pouncy was not likely to reoffend. 16RP 21-24, 71-72.

On cross-examination, Wollert testified he used a formula known as the Bayes theorem to calibrate his risk assessment. 17RP 23-25. Taking into account Pouncy's age and evidence profile, Wollert applied the Bayes theorem to Pouncy's recidivism rate under the Static 99 and concluded Pouncy had a 31 percent risk of reoffense. 17RP 24-25, 27. Wollert also applied the "Null Hypothesis" in Pouncy's case, which was "equivalent to the principle of innocent till proven guilty." 16RP 155-58, 162-67; 17RP 105-06.

Wollert had previously used the Null hypothesis and Bayes theorem in the SVP case of In re Robinson. 16RP 159-61. The Yakima County trial judge in that case found "Dr. Wollert's methods of assessing the impact of age on sexual recidivism are not generally accepted in the community of mental health professionals who evaluate and assess persons in SVP

matters. This includes his use of Bayes theorem and Null hypothesis." 16RP 160-61; 17RP 36, 103.

On two different days, the prosecutor in Pouncy's case used these judicial findings during cross-examination of Wollert to impeach his testimony. 16RP 160-61, 17RP 35-36. On the first day, the trial court overruled defense counsel's objection on the ground of "foundation." 16RP 160-61. The trial court later told the parties "I don't see why we should have in the record evidence that should not be there" and that she would instruct the jury to disregard the findings on her own motion. 18RP 4, 37. Despite this representation, the trial judge did not tell the jury to disregard the improper findings.

Pouncy's counsel proposed a jury instruction defining the term "personality disorder" based on the DSM IV-R. CP 730, 931. Counsel took exception to the court's failure to include this instruction. 18RP 38-46. The jury returned a verdict finding Pouncy to be an SVP. CP 1019.

The Court of Appeals held the State's use of judicial findings from another case constituted reversible error. In re Detention of Pouncy, 144 Wn. App. 609, 612, 184 P.3d 651 (2008). The Court of Appeals rejected Pouncy's argument that the trial court erred in not defining "personality disorder" for the jury. Id. at 620-21.

C. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THE JURY WAS LIKELY INFLUENCED BY JUDICIAL FINDINGS THAT THE METHODOLOGIES USED BY POUNCY'S EXPERT WITNESS WERE UNSOUND.

The State introduced judicial findings entered in an unrelated SVP case to discredit the methodologies upon which Dr. Wollert relied to conclude Pouncy did not meet the definition of an SVP. The findings were inadmissible on grounds of lack of foundation, hearsay, and unfair prejudice. The error was not harmless because jurors are inclined to give judicial findings of fact undue weight and the determination of whether Pouncy was an SVP rested on which expert the jury believed.

- a. The Court Of Appeals Correctly Held The Trial Judge Should Have Sustained Defense Counsel's Foundation Objection.

Expert opinion is admissible under ER 702 only if the witness qualifies as an expert and the testimony would be helpful to the trier of fact. State v. Yates, 161 Wn.2d 714, 762, 168 P.3d 359 (2007). Expert testimony or opinion that lacks a proper foundation is inadmissible. State v. Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006). Proper foundation includes qualifying the witness as an expert. State v. Baity, 140 Wn.2d 1, 18, 991 P.2d 1151 (2000).

Pouncy's counsel objected on grounds of "foundation." 16RP 160-61. Viewed in context, this objection "was premised upon the State's failure to qualify the Yakima judge as an expert witness in the areas of sex offender evaluation and psychology." Pouncy, 144 Wn. App. at 623. The findings represent the Yakima judge's opinion that Dr. Wollert's methodologies were not generally accepted in the scientific community. The Court of Appeals correctly observed this was a matter for expert, not lay, testimony. Pouncy, 144 Wn. App. at 623.

"The rationale of the Frye² standard is that expert testimony may be permitted to reach a trier of fact only when the reliability of the underlying scientific principles has been accepted by the scientific community." State v. Canaday, 90 Wn.2d 808, 813, 585 P.2d 1185 (1978). In making a Frye determination, trial judges are deemed to have the understanding of laypersons when it comes to assessing scientific evidence and must defer to the judgment of scientists. State v. Copeland, 130 Wn.2d 244, 255, 260, 922 P.2d 1304 (1996).

Had the State actually called the Yakima judge to testify as a witness, he would have been testifying as an expert witness in opining Dr. Wollert's methodologies were invalid because this is a matter outside the

² Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

common knowledge of laypersons. Instead, the trial court "allowed the government to shortcut the usual process of proving facts by putting witnesses before a jury" by permitting the introduction of the judge's findings. United States v. Sine, 493 F.3d 1021, 1041 (9th Cir. 2007). The State presented the Yakima's judge's opinion that Dr. Wollert's methods lacked general acceptance, but the State never qualified the Yakima judge as an expert capable of giving that opinion. Defense counsel's foundation objection was therefore proper.

The State nevertheless insists the Yakima judge's findings were admissible because they "constituted a judicial determination under the Frye standard that Dr. Wollert lacked general acceptance." Petition for Review at 12. The State's argument on this point is an exercise in misdirection. The purpose of a Frye determination is to keep the jury from even hearing unsound expert opinion by preventing its admission into evidence. In re Detention of Thorell, 149 Wn.2d 724, 754, 72 P.3d 708 (2003) (addressing use of actuarial instruments in SVP proceedings). The trial court's gatekeeper role under Frye ensures "'pseudoscience' is kept out of the courtroom." Copeland, 130 Wn.2d at 259.

But the State made no effort to keep Dr. Wollert's assessment methods out of the courtroom by means of a Frye determination. On

appeal, the State has not explained why it failed to request a Frye hearing before trial began or outside the presence of the jury. If the State believed Wollert's methodologies were scientifically unsound, this is what it should have done. Instead, the State deliberately chose to discredit Wollert's testimony in front of the jury with the most prejudicial means available.

b. The Judicial Findings Were Also Inadmissible On Grounds Of Hearsay And Unfair Prejudice.

The Court of Appeals declined to reach Pouncy's claim that counsel was ineffective in failing to properly object to the judicial findings because it determined counsel's foundation objection was sufficient. If this Court finds otherwise, then Pouncy's counsel was ineffective in failing to object to the findings on grounds of hearsay and unfair prejudice.

Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Here, counsel's objection on an inappropriate ground was not the product of legitimate strategy. She objected, but invoked the wrong ground for objection.

Counsel was deficient in failing to object to the findings as hearsay. ER 801(c). Where the out-of-court statement of a non-testifying declarant

is used to impeach a trial witness, the impeaching statement constitutes hearsay. State v. Williams, 79 Wn. App. 21, 27, 902 P.2d 1258 (1995). Hearsay may not be incorporated into questions asked for impeachment purposes. Washington Irrigation & Dev. Co. v. Sherman, 106 Wn.2d 685, 687-88, 724 P.2d 997 (1986).

As the Court of Appeals correctly recognized, the judicial findings presented in the prosecutor's cross-examination are inadmissible hearsay because they are written assertions made by the nontestifying judge offered to impeach Wollert's credibility as an expert witness. Pouncy, 144 Wn. App. at 625. The findings were statements, the judge was the declarant, and the judge did not make the statements while testifying at trial. This is rank hearsay. No exception applies. Other jurisdictions have reached the same conclusion. See, e.g., Sine, 493 F.3d 1035-36; Herrick v. Garvey, 298 F.3d 1184, 1191-92 (10th Cir. 2002); United States v. Jones, 29 F.3d 1549, 1553-54 (11th Cir. 1994); Nipper v. Snipes, 7 F.3d 415, 417-18 (4th Cir. 1993); Gonzales v. Surgidev Corp., 120 N.M. 133, 143-44, 899 P.2d 576 (N.M. 1995).

The State claims the judicial findings were admissible under the public records exception to the hearsay rule because they "were a self-authenticating certified public record." Petition for Review at 12 n.3. The

State cites State v. Gentry, 125 Wn.2d 570, 639, 888 P.2d 1105 (1995) in support, but Gentry had nothing to do with hearsay. Judicial findings are not subject to the public records exception. Nipper, 7 F.3d at 417-18 (analyzing federal rule equivalent); accord Herrick, 298 F.3d at 1192; Jones, 29 F.3d at 1554.

Pouncy's counsel was also deficient in failing to object on grounds of unfair prejudice under ER 403. Judicial findings of fact "present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice." Nipper, 7 F.3d at 418 (citation omitted). The State presented the Yakima judge's findings in order to impress upon the jury that judicial authority had already determined Dr. Wollert's methodologies to be unsound. If, as the State claims, the judicial findings were merely cumulative,³ then the findings had little to no probative value under ER 403 but the danger of unfair prejudice was real.

The judicial findings constituted an expert opinion on the validity of Wollert's methodologies cloaked in the mantle judicial authority. Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., 141 F. Supp.2d 320, 323 (E.D.N.Y. 2001) (excluding factual findings of a

³ Petition for Review at 2.

different judge offered to impeach plaintiff's expert). A jury is inclined to "give exaggerated weight to a judge's supposed expertise on such matters." Id. Other jurisdictions accordingly recognize out-of-court statements by judges should not be admitted on grounds of unfair prejudice. See, e.g., Id., Sine, 493 F.3d at 1033-35, 1041; United States Steel, LLC v. Tieceo, Inc., 261 F.3d 1275, 1288 (11th Cir. 2001); State v. Donley, 216 W. Va. 368, 378, 607 S.E.2d 474 (2004).

c. Judicial Findings That Decisively Impeached Pouncy's Expert Witness Were Not Harmless In A Case That Turned On Which Expert The Jury Believed.

Reversal is required under an ineffective assistance claim where there is a reasonable probability that, but for counsel's error, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The standard of prejudice for evidentiary error is the same. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

In SVP proceedings, "psychiatric testimony is central to the ultimate question" of whether a person suffers from a mental abnormality or personality disorder that makes him likely to engage in predatory acts of sexual violence. In re Pers. Restraint of Young, 122 Wn.2d 1, 58, 857 P.2d 989 (1993). Admission of the judicial findings undermined confidence

in the outcome because the verdict hinged on which expert the jury believed. Juries are likely to give disproportionate weight to judicial findings because of the imprimatur that has been stamped upon them by the judicial system. Nipper, 7 F.3d at 418. Dr. Wollert and the State's expert witness held opposite opinions on whether Pouncy met the SVP criteria. The jury's evaluation of Dr. Wollert's testimony could well have been influenced by knowing a judge - who would be presumed to have expertise in judging credibility - had already deemed him unworthy of belief. Sine, 493 F.3d at 1040.

The jury, not a trial judge in an unrelated case, was charged with making factual findings on the State's allegations in this case. By placing the judicial findings into evidence by way of impeachment, jurors were placed in the intolerable position of being forced to disagree with a judge of the State of Washington or succumbing to the influence of that judge's opinion. "[J]urors are likely to defer to findings and determinations relevant to credibility made by an authoritative, professional factfinder rather than determine those issues for themselves." Id. at 1033.

Prejudice is further compounded in that, "[u]nlike the scientific community's process of peer review, there is no practical way for a scientist to defend against a judge's assessments of credibility." Blue Cross, 141

F. Supp.2d at 324. Dr. Wollert's utter inability to meaningfully respond when confronted with the judicial findings illustrates this point. 16RP 160-61; 17RP 35-36.

In assessing the prejudicial effect of judicial comments on the evidence, this Court observed long ago that "it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting State v. Crotts, 22 Wn. 245, 250-51, 60 P. 403 (1900)).

While the judicial findings used to impeach Dr. Wollert may not have technically qualified as judicial comments because the sitting trial judge did not make them, the rationale for prejudice enunciated in Lane applies to this case. See Donley, 216 W. Va. at 378 (acknowledging comments made in family court order were not made by the sitting trial judge in the criminal case and therefore did not qualify as judicial comments; "They were, however, generated by a family court judge who addressed almost identical facts and relationships and were therefore capable of effectuating a similar adverse impact on the jury.").

At the trial level, the State strenuously argued these findings were properly presented to the jury because they were needed to impeach Dr. Wollert's testimony. 18RP 4-5, 37. On appeal, the State reverses course, claiming the findings were insignificant to the jury's determination because the State's case was "overwhelming" and the judicial findings were cumulative to other impeachment evidence. Petition for Review at 2.

The State's evidence can be considered overwhelming only if the jury believed the State's expert witness and disbelieved Dr. Wollert regarding whether Pouncy currently met the definition of an SVP. That is the very reason why the judicial findings were so prejudicial. State appellate counsel's personal determination that the error was harmless because the jury must have disbelieved Wollert based on other evidence is of no moment. "[T]he finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses." State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). The jury, not appellate counsel for the State, was the finder of fact in this case. Reasonable minds could differ on the value of Dr. Wollert's testimony apart from the judicial findings, but those findings, once introduced to the jury, prejudicially tainted juror assessment of Wollert's credibility beyond redemption.

"A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Oswalt, 62 Wn.2d 118, 122, 381 P.2d 617 (1963) (citation omitted). Pouncy was prejudiced because expert opinion was central to the outcome. The judicial findings skewered the heart of Pouncy's defense.

The trial judge did not follow up on its stated intention to strike the improper evidence on her own motion. Assuming this was defense counsel's failing rather than the trial judge's, it is another instance of why counsel was ineffective. Pouncy does not concede instruction to disregard the Yakima finding could have cured the problem. See Nipper, 7 F.3d at 418 (despite limiting instruction, hearsay findings made by judge in different case that were read to jury required reversal); 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.75 (4th ed. 2006) (jurors often regard judgments as conclusive proof despite instructions to the contrary).

But if instruction could have erased the unfair prejudice arising from the challenged evidence, then defense counsel should have pursued the proper curative measure. See Aho, 137 Wn.2d at 745 (review not precluded where invited error results from counsel's ineffectiveness).

"[J]urors are presumed to follow instructions." State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). In light of this presumption, it was not a legitimate tactic to fail to insist on an instruction to disregard the findings.

2. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE DEFINITION OF PERSONALITY DISORDER.

Juries must not be allowed to deliberate in ignorance of the law. The trial court did not give defense counsel's proposed instruction defining "personality disorder," an element of the case that the State needed to prove in order to commit Pouncy as an SVP. In so doing, the trial court committed reversible error because the jury was left to invent its own meaning of this technical term.

A defendant has the right "to have a jury base its decision on an accurate statement of the law applied to the facts in the case." State v. Miller, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997). Because the role of the trial court is to explain the law of the case to the jury through instruction, "[t]he trial court may not delegate to the jury the task of determining the law." State v. Huckins, 66 Wn. App. 213, 217, 836 P.2d 230 (1992). Trial courts must therefore define technical words and expressions used in jury instructions. State v. Brown, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). "The technical term rule attempts to ensure

that criminal defendants are not convicted by a jury that misunderstands the applicable law." State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). The technical term rule likewise ensures individuals are not involuntarily committed by a jury that misunderstands the SVP criteria.

The Court of Appeals dismissed Pouncy's argument simply by noting In re Detention of Twining, 77 Wn. App. 882, 894 P.2d 1331 (1995) had already decided the issue. Pouncy, 144 Wn. App. at 621. Twining conflicts with established law.

Twining held the trial court did not err in refusing to instruct the jury on the meaning of "personality disorder." Twining, 77 Wn. App. 895. The appellant in that case cited State v. Allen, 101 Wn.2d 355, 678 P.2d 798 (1984) for the proposition that undefined terms may lead the jury to supply its own definition rather than an objective legal standard. Id. at 895-96. Twining dismissed Allen as inapplicable because Allen "was talking about statutorily defined terms with specific legal definitions," whereas "the definition of personality disorder is not so defined." Id.

Twining missed the point. The jury, when faced with technical terms that did not comport with common understanding, should not be "forced to find a common denominator among each member's individual understanding of these terms and to determine on its own just what was

their meaning." Allen, 101 Wn.2d at 362. Although the jury may be able to hammer out a definition among themselves, reversal was required because "[t]here is no way to ascertain whether they used the proper, statutory definitions." Id. Pouncy's jury was faced with the dilemma of having to hammer out a definition of personality disorder among themselves and there is no way to determine they agreed upon a proper definition in the absence of sufficient guidance from the trial court.

Whether a term is technical does not turn on whether the term is defined by statute. A term is "technical" when it has a meaning that differs from common usage. Brown, 132 Wn.2d at 611. The term "personality disorder" has no common usage. WAC 388-880-010 provides "'Personality disorder' carries the same definition as found in the DSM-IV-TR and includes psychopathy as assessed using the Hare PCL-R or similar instrument." One could hardly imagine a more technical meaning.

Consistent with WAC 388-880-010, this Court recognizes "personality order" is a term of art found in the DSM and employed by specialists in the psychiatric field. Young, 122 Wn.2d at 49-50. The complicated science of human psychology is beyond the ken of the average juror. In re Detention of Bedker, 134 Wn. App. 775, 779, 146 P.3d 442 (2006). The Court of Appeals did not explain how average jurors could

properly define a term for themselves when that term has a specialized meaning known only to those in the psychological profession.

The Court of Appeals cited the general proposition that instructions are sufficient if they allow each side to argue their theories of the case,⁴ but "[t]he jury should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). Pouncy was "entitled to a correct statement of the law and should not have to convince the jury what the law is." Thomas, 109 Wn.2d at 228.

Moreover, the jury must not be held captive by an expert's definition of personality disorder. See State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002) ("Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards."); State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) (witnesses are not allowed to give legal conclusions under guise of expert testimony or testify a particular law applies to the case).

Court have found the failure to define a technical term to be harmless error where the term did not implicate an element of the charge

⁴ Pouncy, 144 Wn. App. at 620-21.

at issue. See, e.g., State v. Thompson, 47 Wn. App. 1, 10, 733 P.2d 584 (1987); State v. Bledsoe, 33 Wn. App. 720, 727, 658 P.2d 674 (1983). But here, whether the State proved Pouncy suffered from a personality disorder was very much at issue. The error was not harmless because Pouncy's theory of the case was that he had neither a personality disorder nor mental abnormality that makes him likely to commit predatory acts of sexual violence. Because the jury was free to disregard expert testimony that Pouncy had a mental abnormality, there is no way of knowing the jury did not find Pouncy to be an SVP on the sole basis of having an undefined personality disorder. Reversal is required when there is no way to ascertain the jury considered a proper definition of a technical element in reaching its verdict. Allen, 101 Wn.2d at 362.

D. CONCLUSION

For the reasons stated, Pouncy requests that this Court affirm reversal of the commitment order.

DATED this 30th day of January, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Petitioner,)	
)	
v.)	NO. 81769-3
)	
CURTIS POUNCY,)	
)	
Respondent.)	

DECLARATION OF SERVICE

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

THAT ON THE 30TH DAY OF JANUARY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CURTIS POUNCY
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JANUARY, 2009.

x Patrick Mayovsky