NO. 24958-1-III

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

RESPONDENT

V.

JON G. DEVON

APPELLANTS

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

The Defendant and his Co-Defendant were charged by an information alleging First Degree Murder by Extreme Indifference, or in the alternative, Homicide by Abuse, as a principal or accomplice. Clerks Papers for Yolanda Devon, hereinafter "CP-Y", CP 313; Clerks Papers for Jon Devon, hereinafter "CP-D" 668.

The charges stem from the death of Aden Valdovinos, who was approximately 22 months old at the time of his death. Id. The defendants' cases were joined for trial. CP-D 650.

Prior to trial, Judge Allen granted the defendants' motion to dismiss the alternative count of First Degree Murder by Extreme Indifference. Judge Allen also denied the State's motion to amend the information to include a count of First Degree Premeditated Murder. 12/19/05 RP. The case proceeded to trial on one count of Homicide by Abuse.

At a pretrial hearing on December 19, 2005, Yolanda Devon's attorney expressed concern about the level of pre-trial publicity and suggested the need for conducting individual voir dire in chambers.

> *MR. HAMMETT: I don't believe so but I was--would the Court--I guess we could take this up later at the motion*

hearing but I was thinking there was quite a bit of publicity about this case so we may have to voir dire some of the jurors individually in chambers but I'm not sure.

THE COURT:Okay.

MR. HAMMETT: --extend the time.

THE COURT: Well we may. We may. I've certainly had cases where we've done that before and I mean we can do that I guess, yeah, and I guess part of your submission's on the fifth or for the fifth. I would ask that--so those are to come in by the twenty-ninth. If there are some greater number than usual for general questions that the Court would ask, maybe you could have your proposals in that regard because we might be able to then identify folks that need to be questioned individually through some general questions that the Court might ask and I've actually done cases that are higher profile where we do some very limited things at the beginning and then actually do the individual questioning and have sometimes weeded out people that way who know about the case or have opinions about the case and then come back for the rest of the voir dire of the whole group and then we also thereby avoid maybe having those people who have obtained things about the cases, convey those to the other jurors and you know, perhaps bias those other jurors. So we can think about that and talk about that on the fifth.

12/10/05 RP 27.

Defendants' continued to be concerned about the impact of trial publicity, and Jon Devon's attorney filed a motion to sequester the jury. CP-D 509-530. Yolanda Devon's attorney joined that motion. 1/05/06 RP 22.

MR. MAXEY: Again, I think that if we try (inaudible) and set out argument in the memorandum the best we can 'cause I

don't want to labor the point. Clearly, this is a matter that has been in the discretion of the Court. Our concern is that there has been (inaudible) surrounding this case previously and usually once there's some form of hearing that generates some true publicity. Based on the nature of the publicity and the nature of the case, we feel that it's important in order to assure that we have a pool of jurors ultimately that are not tainted, poisoned, influenced in any way by the publicity, I think they should be sequestered. Given the Court on--in the memorandum and download some samples of the nature of the publicity that has been generated surrounding the case and unfortunately, I think in the allegations and the statements made by witnesses previously, exists reports and other things that have been referred to and filed (inaudible), these types of things have been repeated over and over again. They are very explanatory type comments. This is a small community. It may be spread out a bit but there aren't that many individuals in the county compared to many. It's not a big metropolitan area and so forth and you know, I'm not up here on a regular basis but the jury selections I've had, I mean generally we're getting people from small areas--kind of pockets of people who live in small communities that come in to make up these juries. Tonasket, Oroville, Okanogan, and I think this is the kind of case that does generate conversation and that people are going home over this too, and we're going to have witness lists--I think that's going to require probably two to three weeks--and we're going to be here doing this--that the potential for people discussing the case on a regular basis is greater and greater despite the fact that the Court gives instruction and we try to believe that you know, people want to follow the Court's instruction. And so we're asking the Court to sequester the jury based on legal authority and Criminal Rule 6.7A, to exercise its discretion in this particular case--to keep the jury, I guess sanitized away from any other influences in this particular case--we--I (inaudible) refer to it in the briefing, your Honor. Quotes are going out in the newspaper about this is the worst case of child abuse they've ever seen and talking about the nature of the injuries, quoting doctors as saying that, you know, it's repetitive, sadistic, and evil, and things of that nature. You know, it's difficult enough to try

and get a jury pool and then it potentially would be impossible to get one that isn't influenced or subjected to any outside influences, so the briefing is there your Honor. I won't go on and on. Thank you for your time and we'd ask the Court to consider our motion.

THE COURT:Okay. Thank you. Mr. Maxey. Mr. Hammett, did you--

MR. HAMMETT: --Well on behalf of Yolanda Devon, I can join in Mr. Maxey's motion to sequester.

1/05/06 RP 19-22.

Defendants also proposed a supplemental jury questionnaire due to the nature of the charges and publicity surrounding the case. 1/05/06 RP 8, 161, 162.

The court denied the motion to sequester without prejudice and invited defense to raise the issue again during voir dire, depending on the responses from prospective jurors.

Jury selection began on January 10, 2006. 1/10/06 RP 1. In open court, jurors were given the supplemental questionnaire and then general questioning commenced. 1/10 RP 8-15. In response to the question "...is there anyone who has heard of this case?" forty- two jurors indicated they had. After the initial instructions and questions, the jurors were provided time to complete the supplemental questionnaire. They were advised that the

information provided was to be used only by the Court and lawyers, that it would not be further disseminated, and that they should answer fully and openly. 1/10/06 RP 23.

Voir dire reconvened in the afternoon at which point, the Court advised the jurors, in open court, that individual questioning would be conducted by the attorneys and defendants in chambers. 1/10/06 RP 24-25. After individual questioning was completed, general questioning of the jurors resumed in open court on January 11. RP 1.

The evidentiary portion of the trial followed and on January 26, 2006, the jury found Jon Devon guilty of Homicide by Abuse. RP 1959.

B. ARGUMENT

1. Violation of Right to Public Trial

a. Defendants' right to a public trial was unharmed

When a Washington State judge excludes members of the public from court proceedings, or seals records related to a case, the exclusion implicates state and federal constitutional rights of the public and, in criminal cases, of the defendants.

The Sixth Amendment of the U.S. Constitution and Wa. Const. art. I, § 22 contain nearly identical provisions guaranteeing the right of an accused to a public trial.[1] The First Amendment of the U.S. Constitution is generally understood to guarantee open access for the public and press to judicial proceedings.[2] The freedoms enumerated in the First Amendment--of speech, the press, the right of assembly, and the right to petition the government --" share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). Wa. Const. art. I, § 10 also contains a separate guarantee of the open administration of justice: "Justice in all cases shall be administered openly, and without unnecessary delay." Wa. Const. art. I, § 10. This special emphasis on the presumption of open

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[1] U.S. Const. amend. VI "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...."; "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases....".

[2] U.S. Const. amend. I "Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

court proceedings renders the Washington Constitution at least arguably more stringent on this point, and the Washington State Supreme Court's decisions have consistently emphasized the value of open administration of justice. See, e.g., *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113, 1115 (2012); State v. Lormor, 172 Wn.2d 85, 90-91, 257 P.3d 624, 627-28 (2011); In re Det. of D.F.F., 172 Wn.2d 37, 39-40, 256 P.3d 357, 359-60 (2011); State v. Strode, 167 Wn.2d 222, 229-30, 217 P.3d 310, 315-16 (2009); State v. Momah, 167 Wn.2d 140, 147-48, 217 P.3d 321, 324-25 (2009); State v. Easterling, 157 Wn.2d 167, 179, 137 P.3d 825, 830-31 (2006); Rufer v. Abbott Labs., 154 Wn.2d 530, 540, 114 P.3d 1182, 1186-87 (2005); In re Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291, 295-96 (2004), as amended on denial of reconsideration (Jan. 20, 2005), , as amended on denial of reconsideration (Jan. 20, 2005), ; Dreiling v. Jain, 151 Wn.2d 900, 903-04, 93 P.3d 861, 864 (2004); State v. Bone-Club, 128 Wn.2d 254, 258, 906 P.2d 325, 327 (1995); Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 209-10, 848 P.2d 1258, 1260-61 (1993); Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716, 719 (1982); Federated Publications, Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440, 444-45 (1980).

Under both constitutions, "the public's right of access is not absolute, and may be limited to protect other interests." Seattle Times Co., 97 Wn.2d at 36. In several important cases involving challenges brought by the media, the Washington State Supreme Court defined the public's right to open proceedings under Wa. Const. art. I, § 10. In Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982), and Allied Daily Newspapers of Washington, 121 Wn.2d 205, the Court announced the test to be used to balance the public's right to access against other compelling interests. See Allied Daily Newspapers of Washington, 121 Wn.2d at 209-11; Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716, 720-21 (1982).

In the present case, unlike State v. Frawley, the defendant did not waive his right to be present for the individual voir dire. In this case, the defendant was present during *all* jury questioning. Also unlike Frawley, there was no closure of the courtroom during

general questioning. See State v. Frawley, 334 P.3d 1022, 1024 (Wash. 2014). [3]

Frawley, specifically relied upon Wise, 176 Wn.2d at 13; that held a trial court may question potential jurors individually outside of the public's presence—thereby closing the courtroom—but only after considering the five *Bone–Club* factors on the record. Closure of the courtroom without this analysis is a structural error for which a new trial is the only remedy. Wise, 176 Wn.2d at 15.

However, *Wise* specifically differentiated this holding from that of Momah, 167 Wn.2d, 148. While the right to a public trial applies to all judicial proceedings, including jury selection, the right is not absolute. The presumption in favor of openness may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and narrowly tailored to serve that interest. Thus, the court may close a courtroom under certain circumstances. Momah, 167 Wn.2d, 148. The holding in Momah, 167 Wn.2d 140 remains unchanged by Wise, Frawley or other subsequent decisions; and is applicable to the present case.

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[3] Similarly, the defendant was not excluded from any portion of the voire dire or trial, as occurred in Easterling, 157 Wn.2d 167.

On appeal, if the court determines that the defendant's right to a fair public trial has been violated, it devises a remedy appropriate to that violation. If the error is structural in nature, it warrants automatic reversal of conviction and remand for a new trial. An error is structural when it " 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' Momah, 167 Wn.2d, 149-50, (quoting Washington v. Recuenco, 548 U.S. 212, 218, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)(alterations in original) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999))). Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) established that not all courtroom closure errors are fundamentally unfair and thus not all are structural errors; our cases applying *Waller* also support that proposition. Momah, 167 Wn.2d, 149-50.

b. There was no violation of the right to public trial where the court conducted limited individual questioning. Alternatively, the Bone-Club factors were satisfied.

Defendant argues that his right to a public trial was violated under Wa. Const. art. I, § 22. That provision is entitled "Rights of the Accused". In very limited part, it says: "In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury . . . ." Jury selection is part of the public trial. In re Orange, 152 Wn.2d at 804.

Both the Sixth Amendment of the U.S. Constitution and Wa. Const. art. I, § 22 protect a criminal defendant's right to a public trial. Before a court may close a hearing that could implicate a defendant's public trial right, it must engage in a multi-factor analysis, considering the interests justifying the potential closure, the tailoring of means to protect those interests, and alternatives to excluding the public. See Waller, 467 U.S. at 48; Bone-Club, 128 Wn.2d, 258-59.

However, a defendant is free to waive any of the rights guaranteed by the constitutions. For instance, an accused can waive the right to counsel and represent himself. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). "A waiver is the intentional relinquishment of a known right or privilege." State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978), quoting

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Accord, Frawley, 334 P.3d 1022.

In Wise, 176 Wn.2d, 14-15 the Court stated:

> While this court stated in Momah, 167 Wn.2d 140 that not all closures are fundamentally unfair and thus not all closures are structural errors, *Momah* presented a unique set of facts. Momah, 167 Wn.2d at 150. This court distinguished the public trial right violation in Momah, 167 Wn.2d 140 from the public trial right violations in *Easterling, Brightman, Orange,* and *Bone–Club,* which all involved structural error. Id. *Momah* was distinguishable from other public trial violation cases on two principal bases: (1) more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in Momah, 167 Wn.2d 140 effectively considered the *Bone–Club* factors. Id. at 151–52, Momah, 167 Wn.2d 140; Strode, 167 Wn.2d at 234(Fairhurst, J., concurring). At bottom, *Momah* presented a unique confluence of facts: although the court erred in failing to comply with *Bone–Club,* the record made clear—without the need for a post hoc rationalization—that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure.

Wise, 176 Wn.2d, 14-15.

The present case is factually the same as Momah, 167 Wn.2d 140, where the defendant affirmatively assented to the closure, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in the present case, like Momah, not only sought input from the defendants, but closed the courtroom after consultation with the

defense and the prosecution. As in Momah, 167 Wn.2d 140, the trial judge closed the courtroom to safeguard the defendant's constitutional right to a fair trial by an impartial jury, not to protect any other interests. Where a defendant's other constitutional rights are implicated, the trial court is required to give due consideration to those rights in determining whether closure is appropriate. Momah, 167 Wn.2d, 151-52.

In Momah, 167 Wn.2d 140(and as recognized in Wise, 176 Wn.2d 1) the Court indicated in order to facilitate appellate review, the better practice is to apply the five guidelines and enter specific findings before closing the courtroom. But their absence under the facts in Momah, 167 Wn.2d 140 did not turn the supported trial court decision into a structural error. See Momah, 167 Wn.2d, 152.

In Momah, 167 Wn.2d 140 the defendant asserted that his failure to object did not constitute a waiver of his public trial right such that he was prohibited from raising this issue for the first time on appeal and seeking a new trial. The Court noted that while Momah was correct in terms of the ability to raise the issue, if found that in none of the cases cited by Momah as support did

the defendants affirmatively advocate for closure, argue for the expansion of the closure, and benefit from it as he did. Momah, 167 Wn.2d, 154-55, (citing Easterling, 157 Wn.2d 167(defendant denied opportunity to object and was not permitted to participate in closed hearing on codefendant's motion to sever); and Bone-Club, 128 Wn.2d 254 opportunity to object and was not permitted to participate in the closed pretrial suppression hearing)).

The court found Momah' s situation was distinguishable from that of other defendants in closure cases, and concluded that being able to raise an issue on appeal does not automatically mean reversal is required. Momah, 167 Wn.2d, 154-55.

In Momah, 167 Wn.2d 140, as in the present case, the record demonstrated that the trial court recognized the competing Wa. Const. art. I, § 22 interests and in consultation with the defense and the prosecution, carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury. Further, the closure was narrowly tailored to accommodate only those jurors who had indicated that they may have a problem being fair or impartial. The defendant in Momah, 167 Wn.2d 140 affirmatively accepted the closure,

argued for the expansion of it, actively participated in it, and sought benefit from it. The Court held that reversal of Momah' s conviction and remand could not be the remedy under these circumstances, and affirmed Momah' s conviction. Momah, 167 Wn.2d, 156.

In the present case, the defendants proposed a supplemental jury questionnaire based on concerns about pre-trial publicity and the nature of the charges. Defendants also brought a motion to sequester the jury for those same reasons. The defendant was present for the individual questioning of the jurors about their responses to the questionnaires.[4] The individual questioning was suggested by, and for the benefit of, the defendant in order to select a fair, unbiased, and impartial jury to hear the case.

Even if the in chambers questioning is considered "public", there is a sufficient record to justify what amounts to a limited or partial "closure" of the courtroom.

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[4] Juror questionnaires are typically considered private documents. Indeed, GR 31(j) indicates that access to juror information, other than the juror's name, can only be done by petitioning the court upon a showing of good cause.

Courts apply a five factor test, borrowed from Seattle Times Co., 97 Wn.2d 30, and Allied Daily Newspapers of Washington, 121 Wn.2d 205, to determine the propriety of closing a courtroom despite the guarantee of Wa. Const. art. I, § 22. Bone-Club, 128 Wn.2d, 258-259. The five factors to be considered are:

> 1. The proponent of the closure or sealing must make some showing (of a compelling interest), and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
>
> 2. Anyone present when the closure is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.
>
> Id.

Application of these standards in the present case shows the trial court was justified in a partial or limited "closure" of the courtroom for the individual voir dire.

The first factor, the purpose of the closure, was for the defendant's benefit in picking a fair jury. The defendants raised the

issue of individual questioning and moved to sequester jurors out of concern that jurors may be tainted. Due to the defendant's concerns about being able to select a fair jury, the first factor heavily favored closure of the courtroom. Individual questioning was necessitated by defendants' motion and questionnaire, in order to avoid the risk of tainting the entire jury panel in open court.

The second factor, permitting anyone present when the closure is made an opportunity to object, was met. The initial questioning of the jury panel was conducted in open court. There was no closure of the courtroom and it was open to any member of the public. See 1/10/06 RP. The trial judge stated in open court on the record that there would be individual questioning of jurors conducted. 1/10/06 RP 25. Jurors completed their questionnaires in court and the judge reconvened court again before beginning individual questioning. 1/10/06 RP, p. 19, 23-26. There was no objection by anyone to the proposed individual questioning, despite ample opportunity to do so. 1/10/06 RP, p. 25-30; See also RP Individual Jury Questioning, Vol. I and II. At the conclusion of individual questioning, questioning of the entire panel again resumed in open court. See 1/10/06 RP; RP 1.

The Bone-Club court cited to Seattle Times Co., 97 Wn.2d 30, for the proposition that "an *opportunity* to object holds no practical meaning unless the court informs potential objectors of the nature of the asserted interest (emphasis added). Bone-Club, 128 Wn.2d at 261(citing Seattle Times Co., 97 Wn.2d at 39). The cases require an opportunity to object, not an invitation. In Seattle Times Co., 97 Wn.2d 30, the court stated:

> Anyone present when the closure [and/or sealing] motion is made must be given an opportunity to object to the suggested restriction. For this opportunity to have meaning, the proponent must have stated the grounds for the motion with reasonable specificity, consistent with the protection of the right sought to be protected. *At a minimum, potential objectors should have sufficient information to be able to appreciate the damages which would result from free access to the proceeding and/or records.* This knowledge would enable the potential objector to better evaluate whether or not to object and on what grounds to base its opposition. (Emphasis added; internal citations omitted.)

Seattle Times Co., 97 Wn.2d at 38. The record in the present case included repeated warnings to the jury to avoid discussing the case, exposure to media, etc. It also included a discussion with a juror who responded to the judge's question about following the law and the presumption of innocence. 1/10/06 RP, p. 17-18. The juror began to disclose what he read and was stopped by the judge, who advised that some of the questions on the questionnaire would ask

jurors if they had impressions of the case and that they would be able to express those impressions in the questionnaire. 1/10/06 RP, p. 17-18.

The jurors were then advised that individual questioning would be conducted based on the questionnaires. 1/10/06 RP, p. 25. The judge also invited and responded to questions about the individual questioning schedule. 1/10/06 RP, p. 26-29.

During jury selection, the judge also asked if there were any jurors who were told or overheard information from another juror who was excused, as to why they were excused. RP 15. One juror responded in the affirmative, and a second session of individual questioning of that juror followed. RP 15, 56.

The record was sufficient to demonstrate that potential objectors present were provided with the opportunity, and with sufficient information, to object to the limited restriction of individual questioning. There is a sufficient record to support the Respondent's argument regarding the second Bone-Club factor.

The third factor is whether the court uses the least restrictive means of achieving its goals. That was done in the present case. There was no way to question potential jurors with regard to their written answers except for making individual inquiry. Individual

questioning was necessary to avoid tainting the entire panel in light of the change of venue motion. The physical layout of the Okanogan County Superior Court and courthouse does not permit, for example, holding large groups of jurors in another location and bringing jurors who are subject to individual questioning into the open courtroom.[5] Moreover, in this case, general questions were conducted in open court, both before and after the individual questioning.

The fourth factor, the weighing of the interests, clearly favored "closure". The defendants' were the proponents of closure to ensure selection of a fair jury. In this case, the defendant's right to a fair trial substantially outweighed the potential limitation of the right to have the public present for a limited portion of individual questioning. The need of defendants to obtain a fair jury by discerning individual jurors' exposure to publicity and their potential

[5] There is no available nearby physical space hold the large jury panel outside of the courtroom for the number of days necessary to complete jury selection. The record reflects that during the questioning, jurors had to remain in the courtroom despite tight seating. 1/10/06 RP, p. 25-26, 29; RP 11, 14. More importantly, the parties do not have the ability to conduct side bars, make and discuss challenges, etc. in the open court room and at the same time create a sufficient digital recorded record. To do so would require clearing the courtroom each time. See State v. Clinkenbeard, 130 Wn. App. 552, 571, 123 P.3d 872 (2005). The record in the present case contains reference to the limitations of the electronic recording system, and that sidebars and objections could not be recorded with the jury present. See e.g., RP 15, 59, 188, 208, 999-1000.

prejudices related to the nature of the crime, substantially conflicted with the right to have *all* questioning done in open court. The defendants' right to have a fair trial certainly outweighed the minimal public interest in the jurors' individual private responses to questionnaire comments.

The fifth factor was also satisfied, in that the questioning of each juror was brief and limited. The entire panel was subject to questioning in open court before and after the individual questioning. The limited closure was not more broad or extensive than was necessary.

In light of Momah, the five-factor test clearly favored the limited or partial closing of the courtroom in the present case. The court did not err in permitting individual voir dire outside of the public eye.

C. CONCLUSION

Defendant was not denied his right to public trial by conducting individual juror questioning. The claimed partial closure was not a "structural" error supporting a new trial.

Dated this 19 day of November 2014

Respectfully Submitted by:

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PROOF OF SERVICE

I, Karl F. Sloan, do hereby certify under penalty of perjury that on November 19, 2014, I provided email service, a true and correct copy of the Supplemental Brief of Respondent, to:

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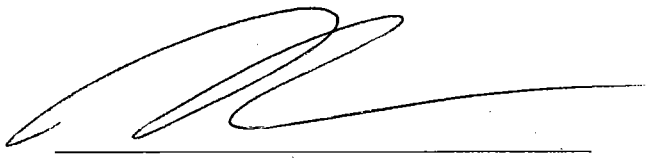

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