

No. 81769-3  
(Court of Appeals No. 59034-1-I)

SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Detention of  
CURTIS N. POUNCY, aka POUNCEY

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STATE OF WASHINGTON  
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STATE'S SUPPLEMENTAL BRIEF

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**I. INTRODUCTION**

In its decision below, the Court of Appeals adopts a seemingly *per se* rule that admission of a judicial *Frye* determination to impeach an expert is reversible error. Through this analysis, the court acts on an alleged error that was not properly preserved and fails to conduct a mandatory harmless error analysis. Although admission of a *Frye* determination for impeachment purposes is question of first impression open to consideration by this court, Pouncy has made no demonstration that a few questions on the *Frye* matter were sufficient to override six weeks of overwhelming evidence against him. Because the ineffective assistance and instructional error issues raised in Pouncy's answer to the petition for review are not well-founded, this court should reverse the Court of Appeals and reinstate the Pouncy's Order of Commitment.

**II. STATEMENT OF THE CASE**

The facts are set forth in the Brief of Respondent at pp. 2-10 (filed 7/2/2007) and the State's Petition for Review at pp. 2-8.

**III. LEGAL ARGUMENT**

**A. Pouncy Failed to Preserve His Claim that Use of the *Frye* Determination for Impeachment Purposes was Error and Counsel Was Not Ineffective**

**1. The Impeachment Questions and the Objection**

The *Frye* determination by the Yakima Superior Court rejecting

certain theories of the defense expert, Dr. Wollert, was discussed in his deposition. 16RP 160. The defense filed no motion in limine.

When the matter first came up during the two day cross-examination of Dr. Wollert, the prosecutor asked five questions before moving on to other impeachment topics. 16RP 160-61. Pouncy offered a "foundation" objection to the second question in a seeming effort to make sure that the State had dotted its "i's" and crossed its "t's" by obtaining a certified copy of the Yakima Judgment. Pouncy offered no further objections. The next day, the prosecutor asked Dr. Wollert a few more questions on the Yakima *Frye* determination that came in without any objection.

## **2. Pouncy Failed To Preserve Any Error**

It is well-established that a party must timely object to the introduction of evidence in order to preserve the alleged evidentiary error for appeal. *State v. Davis*, 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000); *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). One reason that parties are required to lodge objections at appropriate times below is so that parties and trial courts can operate to protect the record and correct any error. *Smith v. Shannon*, 100 Wash.2d 26, 37, 666 P.2d 351 (1983), citing *Estate of Ryder v. Kelly-Springfield Tire, Co.*, 91 Wash.2d 111, 114, 587 P.2d 160 (1978).

Pouncy's objection to "foundation" did not perform this function. When the objection was made, the prosecutor was introducing the impeachment evidence through use of a certified copy of the Yakima *Frye* determination. In this context, a trial judge would always deny a "foundation" objection because the document is self-authenticating.

The Court of Appeals more elaborate explanation that Pouncy was correctly objecting, based on foundation, to the expert qualifications of the Yakima judge simultaneously tries too hard and not hard enough. If Pouncy was indeed concerned with the expert qualifications of the Yakima judge, the correct objection was not "foundation," but "ER 702." An ER 702 objection would have given the judge at least some notice that Pouncy was challenging the expert admissibility of the findings. Other possible objections were to hearsay, relevance, or prejudice, but none of these were made. It is contrary to this court's precedent to allow a six week trial to be reversed based on a vague and improper objection to "foundation." A party is not only obligated to object, but to specify the correct grounds for the objection. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

Moreover, it was not appropriate for the Division I appellate court to search the record for objections that might have been, or could have been made, in order to reverse the trial court. Such action runs afoul of preservation of error principles.

In *United States v. Perry*, 857 F.2d 1346 (9th Cir. 1988), the Ninth Circuit addressed the question of how to review admission of a judicial opinion into evidence without a proper objection. Rather than the searching inquiry undertaken by the Court of Appeals, Pouncy's failure to lodge an objection limits review to the "plain error" standard:

The first assignment relates to the admission of a bankruptcy court's determination that certain transfers of property to Perry's relatives were fraudulent conveyances. As the Tenth Circuit noted in *Johnson v. Colt Industries Operating Corp.*, 797 F.2d 1530, 1534 (10th Cir.1986), admission of a prior judicial opinion as substantive evidence of a fact then in issue presents the danger that a jury may give the judicial opinion undue weight or be confused, believing the earlier court's findings somehow binding on it. *But because Perry made no objection to the admission of this testimony below, we are compelled to review for plain error. We find none.*

857 F.2d at 1351. Even though an admission of a judicial opinion had the potential to impact the jury's determination, it may not be reviewed in the absence of a proper objection; it is not "plain error." *Id.* at 1352. In *Perry*, the court ultimately concluded that it was not plain error to admit a judicial determination. *Id.*

An independent reason for finding that Pouncy failed to preserve his claim of error comes in Pouncy's determination not to request a curative instruction after it was offered by the trial court. The day after Dr. Wollert's testimony, Judge Halpert determined that she would instruct the jury to disregard the Yakima impeachment evidence and strike it from the record. VRP 10/12/2006 at 4-5. The court then gave the parties an

opportunity to consider the court's curative instruction and intent to strike the testimony. *Id.* at 37. At a side bar, the court asked counsel for Pouncy "if she was, in fact, affirmatively requesting that [the court] give such an instruction." *Id.* Counsel for Pouncy "said no, that she didn't object, but she wasn't affirmatively requesting it." *Id.* Because Pouncy was not requesting the curative instruction, the trial court determined that she would not give the instruction.<sup>1</sup> *Id.* She further asked that neither party mention it in closing. *Id.*

A curative instruction to strike the testimony was clearly available to Pouncy and he chose not to ask for it. Under these circumstances Pouncy has failed to preserve the error, if any, in admitting the impeachment evidence. A party must object to any irregularities and request remedial action *before* the case is submitted to the jury. *Spratt v. Davidson*, 1 Wash.App. 523, 526, 463 P.2d 179 (1969); *see Cerjance v. Kehres*, 26 Wash.App. 436, 441, 613 P.2d 192 (1980). A party "may not remain silent when it is time to speak, and then urge [the argument] for the first time on a motion for a new trial." *Agranoff v. Morton*, 54 Wash.2d 341, 346-47, 340 P.2d 811 (1959).

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<sup>1</sup> In his answer to the State's Petition for Review, Pouncy attempts to confuse trial counsel's position. Judge Halpert initially indicated that she was going to *sua sponte* offer a curative instruction. 18RP 4. After defense counsel "didn't object" but "wasn't affirmatively requesting it," the trial court determined to strike the curative instruction. 18RP 37. Even if appellate counsel is correct that Judge Halpert simply forgot to instruct the jury, it remained incumbent on trial counsel to remind the Judge, but for the fact that

Strickland per  
Deputy Clerk's  
4-2-09 ruling.

[REDACTED]

[REDACTED] Because "[a] curative instruction will often cure any prejudice that has resulted from an alleged impropriety," *State v. Pastrana*, 94 Wash.App. 463, 479, 972 P.2d 557 (1999), this court should make it clear a practice of "hedging bets" fails to preserve error. All counsel and the trial judge should be working together to ensure a fair trial without unnecessary error. Pouncy's counsel was hoping to purposely preserve an issue for appeal rather than fix it on the trial level. Review should not be allowed in this circumstance.

### 3. Trial Counsel Was Not Ineffective

On appeal, Pouncy claims that trial counsel was ineffective because she "was trying to keep the evidence out" but "invoked the wrong ground for objection." Answer to Petition at 10. A complaint with counsel's action on a single objection, however, does not establish ineffective assistance of counsel. *See also* Brief of Respondent at 19-28.

The constitutional right to counsel only ensures an attorney who can provide "reasonably effective assistance, not the most astute counsel." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on an ineffective assistance claim

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Pouncy was ambivalent about an instruction.

involving a challenge to admission of evidence, it is the defendant's burden to demonstrate that:

(1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, *State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995); (2) that an objection to the evidence would likely have been sustained, *McFarland*, 127 Wash.2d at 337 n. 4, 899 P.2d 1251; *Hendrickson*, 129 Wash.2d at 80, 917 P.2d 563; and (3) that the result of the trial would have been different had the evidence not been admitted, *Hendrickson*, 129 Wash.2d at 80, 917 P.2d 563.

*State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364, 366 (1998). The court gives deference to counsel's professional decisions and such decisions cannot serve as a basis for an ineffective assistance of counsel claim so long as it can be characterized as legitimate trial strategy or tactic. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Here, Pouncy has failed in this burden to demonstrate ineffective assistance. The question is not whether counsel mishandled a single objection, but whether the overall course of representation was "reasonably effective." *See Geiger v. Cain*, 540 F.3d 303, 309 -310 (5th Cir. 2008) (The singular actions of counsel cannot be ineffective assistance "unless it is so ill chosen that it permeates the entire trial with obvious unfairness.). Pouncy's counsel put on a vigorous defense that occupied nearly six weeks of court time. It seems disingenuous to label her "ineffective" due to her strategic response to a questions in the middle of a lengthy cross-examination.

There is no claim for ineffective assistance of counsel when the challenged action goes to a legitimate trial strategy or tactic. *State v. Kolesnik*, 146 Wash.App. 790, 801, 192 P.3d 937, 943 (2008). In particular, counsel's conduct in objection or not objecting to the admission of testimony will *rarely* form the basis for a successful ineffective assistance claim:

The decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel. *See, e.g., State v. Madison*, 53 Wash.App. 754, 763, 770 P.2d 662 (citing *Strickland*, 466 U.S. 668, 104 S.Ct. 2052; *State v. Ermert*, 94 Wash.2d 839, 621 P.2d 121 (1980)), *review denied*, 113 Wash.2d 1002, 777 P.2d 1050 (1989).

*Id.* Decisions to object "fall firmly within the category of strategic or tactical decisions." *State v. Madison*, 53 Wash.App. 754, 763, 770 P.2d 662 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id. Accord State v. Johnston*, 143 Wash.App. 1, 19, 177 P.3d 1127, 1137 (2007).

Even if the focus of a ineffective assistance claim were on counsel's "foundation" objection and her subsequent failure to object to further discussion of the Yakima determination, counsel for Pouncy had a strong strategic reason not to challenge this testimony. With the Yakima *Frye* determination and other authorities, the State could have sought to exclude

Dr. Wollert outright as a witness. Rather than push the State to take this position, Pouncy was content to have Dr. Wollert take some minor discomfort from the Yakima *Frye* determination in order to remain on the witness stand for the defense. For the prosecution, it was also a more conservative approach to impeach the weight and credibility of Dr. Wollert's testimony with the Yakima findings, rather than risk reversal on appeal by excluding Dr. Wollert altogether through a *Frye* challenge. In precluding the outright exclusion of her main expert witness, defense counsel engaged in a legitimate strategy to that allowed the state to use the Yakima *Frye* determination for weight, rather than admissibility.<sup>2</sup>

**B. The Trial Court Did Not Abuse Its Discretion by Allowing the State to Impeach Pouncy's Expert with a Prior Judicial *Frye* Determination Rejecting A Portion of the Expert's Methodology**

**1. Standard of Review**

In reviewing the trial court's ruling, the Court of Appeals failed to note the applicable standard of review. "Determinations regarding the scope of cross-examination are within the trial court's discretion and will not be overturned on appeal absent an abuse of discretion." *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (citations omitted).

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<sup>2</sup> Similarly, the question of whether to accept a curative instruction rests within the firm strategic judgment of trial counsel. See *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968).

Importantly, abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97 935 p.2d 1353 (1997). To state it more positively, a trial judge does not abuse his or her discretion when the decision falls within the broad range of decisions that any reasonable trial judge might adopt. “[T]he trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did.” *State v. Thomas*, 150 Wash.2d 821, 856, 83 P.3d 970 (2004).

**2. Impeachment of Dr. Wollert with the Prior *Frye* Determination was Not Error**

The Court of Appeals erred in determining that the trial court abused its discretion by allowing the State to impeach Dr. Wollert with a prior *Frye* determination rejecting his theories. The impeachment evidence went to the expert's lack of care in persisting to advance theories that were judicially determined to lack general acceptance in the relevant scientific community. As he admitted in testimony, Dr. Wollert continued to advance his theories on the "Null Hypothesis" and the "Bayes Theorem" even though he was the only expert in his field to hold these opinions. VRP 10/10/2006 at 162-63. The fact that Dr. Wollert has continued to testify to these same theories after the Yakima court determined that they lacked general acceptance spoke to the extremely cavalier nature of Dr. Wollert's approach to expert testimony.

Contrary to the Court of Appeals opinion, the Yakima trial court's decision was not properly construed as the "expert opinion" of the Yakima judge on Dr. Wollert's credibility, but instead constituted a *judicial determination* under the *Frye* standard that Dr. Wollert lacked general acceptance.<sup>3</sup> Rather than a personal comment by the Yakima judge on Dr. Wollert's credibility, the prior court determination "*was* the evidence."<sup>4</sup> *State v. Gentry*, 125 Wn.2d 570, 639, 888 P.2d 1105 (1995). The Yakima findings reached the conclusion that Dr. Wollert lacked acceptance in his field after considering Dr. Wollert's testimony and other testimony addressing his methods. Dr. Wollert was involved in those proceedings and it should not be necessary to re-litigate the Yakima findings when Pouncy makes no objection challenging the procedures surrounding those findings.

Because this case involved the unique situation of impeaching an expert who persists in using disfavored theories with the *Frye* determination of another court, the various lower federal cases cited by the

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<sup>3</sup> The Court of Appeals opinion strays on this point. The Yakima findings were not addressing whether Dr. Wollert "had acted consistent with the standard of his profession in interviewing and evaluating Pouncy." Slip op. at 10. Rather, the court was engaging in the judicial inquiry allowed by *Frye* on whether Dr. Wollert's theories were generally accepted. There is no requirement to somehow "qualify a trial court" under ER 702 before it makes a "general acceptance" determination.

<sup>4</sup> Under *Gentry*, the Court of Appeals claim that judicial findings of fact constitute "hearsay" is plainly incorrect. Although the defense made no hearsay objection, the findings used by the State were a self-authenticating certified public records exempt from hearsay considerations. Moreover, because the findings themselves "are the evidence" under *Gentry*, the hearsay doctrine does not apply.

Court of Appeals have little application. The primary case relied upon by the Court of Appeals -- *Blue Cross and Blue Shield of N.J. v. Phillip Morris*, 141 F.Supp.2d 320, 323 (E.D.N.Y. 2001) -- had nothing to do with impeachment of an expert through use of a prior *Frye* determination. In the *Blue Cross* case, the federal district court granted a motion in limine preventing the use of record comments by a Canadian judge that were not part of a formal decision to impeach an expert witness. Rather than a judicial determination under *Frye*, the comments at issue in *Blue Cross* case were those of a Canadian judge addressing the expert's credibility using strong and personal language in the course of trial. Such comments are easily distinguishable from a judicial *Frye* determination.

The secondary cases cited by the appellate court are even more remote. The decision in *Niper v. Snipes*, 7 F.3d 415 (4<sup>th</sup> Cir. 1993) involved a judicial comment on the credibility of a party in a case, not a prior *Frye* determination by an expert. Similarly, the 1924 Maryland decision in *Newton v. State*, 147 Md. 71, 127 A. 123, 131 (1924), had nothing to do with impeachment of an expert witness through use of a prior *Frye* determination.

The Court of Appeals citation to *Greycas v. Proud*, 826 F.2d 1560 (1987), which involved the use of judicial findings to establish a property right, favors the State's position. Similar to this court's decision in

*Gentry*, the federal circuit court draws the distinction between the use of prior judicial decisions "as evidence of facts underlying the judgment" versus the use of prior judicial decisions with independent judicial operation. In the *Greycas* matter, the judicial decision established a property right and itself constituted evidence of title. *Id.* Judge Posner, in allowing use of the state court judgment, points out that "it is a little hard to understand why [the state court judgment] should not be allowed to have merely evidentiary effect if for some reason not all the requirements of res judicata or collateral estoppel are not met." 826 F.2d at 1567.

The *per se* approach that the Court of Appeals takes to excluding the use of judicial *Frye* determinations is not supported by case law of common-sense. First, the State used the Yakima *Frye* determination to assist the jury in evaluating the weight that should be given to Dr. Wollert's opinions. Ultimately, the State's decision to merely inform the jury of the ruling rather than seeking to exclude Dr. Wollert on this basis is a more conservative approach that minimizes prejudice to Pouncy. Courts generally favor circumstances where challenges to evidence are allowed to go to weight rather than admissibility. Ultimately, it would not make sense to order a new trial because Dr. Wollert should have been excluded under *Frye*, rather than allowing the jury to consider the weight of his testimony in light of the *Frye* determination.

Second, unlike the judicial opinions cited by the Court of Appeals and Pouncy, the current case does not involve the *admission* of a judicial opinion, nor does it involve the use of this opinion for *substantive* purposes. The Yakima *Frye* decision, as noted, above was merely used to impeach Dr. Wollert.<sup>5</sup>

Finally, the Court of Appeals decision greatly underestimates the ability of jurors to properly consider evidence, even when it comes in the form of a judicial opinion. The presumption is that juries decide cases in accord with the court's instructions. There is no basis for surmising that a judicial opinion on a narrow impeachment point would be given overwhelming value.

Rather than the *per se* exclusion approach adopted by the Court of Appeals -- which seems squarely at odds with the *Gentry* decision -- a better analysis was adopted by the Tenth Circuit in *Johnson v. Colt Industries Operating Corporation*, 797 F.2d 1530 (10th Cir. 1986). In *Johnson*, the plaintiff introduced as substantive evidence a prior judicial determination where the famous "Colt Six Shooter" injured another person in a manner similar to the plaintiff's injury. Although the *Johnson* court ultimately determined that admission of the opinion was error and that it

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<sup>5</sup> Another reason that *Gentry* offers the best approach by recognizing that a judicial opinion "is the evidence" is because it avoids the need to call the authorizing judge as a witness. Judicial opinions, once certified, are they type of extremely reliable evidence that does not implicate hearsay concerns.

was harmless error, it nonetheless rejected the contention -- consistent with *Gentry* -- that judicial opinions are per se inadmissible.

The court emphasized that the opinion was relevant, but that its admission as *substantive evidence* "presents obvious dangers." *Id.* at 1534. It holds that "a judicial opinion should be admitted as substantive evidence of a similar accident only in the rarest of cases when no other form of evidence is available and then only with detained limiting instructions." *Id.* The court determined that admission was error, albeit harmless, because the plaintiff could have proven up the other similar accident through other means. *Id.* at 1535.

The primary concern with admission of a judicial opinion is that the jury would use it to *resolve key factual* elements in a case. *See id.* at 1535 (discerning error in the district court's admission of a judicial opinion as substantive evidence in a products liability case litigating the alleged improper discharge or "drop-fire" of firearm, where the opinion involved the drop-fire of a similar firearm and "may have helped the jury to decide that the gun model was likely to drop-fire"); *Herrick v. Garvey*, 298 F.3d 1184, 1192 (10th Cir.2002) (noting the admission of prior judgments or findings of fact under Rule 803(8) is questionable because "[j]uries are likely to give disproportionate weight to such findings of fact because of the imprimatur that has been stamped on them by the judicial system");

*accord Carter v. Burch*, 34 F.3d 257, 265 (4th Cir.1994) (concluding, in a civil rights case against a prosecutor and police officer based on their failure to disclose exculpatory evidence in the plaintiff's criminal trial, that the trial court properly excluded a state court's opinion that "decided the precise issue before the jury [which] thereby ma[de] it likely that the jury would have placed undue weight on such evidence").

These same concerns are not present with a *Frye* determination used for impeachment purposes. Because the evidence is considered for non-substantive purposes any undue impact attributable to admission of a judicial opinion for substantive purposes is absent. Moreover, there are not readily available means of alternative proof for a judicial *Frye* determination. The court's *Frye* determination is the evidence. The ultimate significance is that Dr. Wollert continues to offer his theories even after judicial disapproval. For these reasons, the court did not abuse its discretion in admitting the Yakima *Frye* determination for

C. **The Court of Appeals Erred When It Failed to Conduct a Harmless Error Analysis**Error! Bookmark not defined.

Even if admission of the *Frye* determination for impeachment purposes was error, it was certainly harmless error. The Court of Appeals, with its per se approach, erred by not conducting a harmless error analysis.

An evidentiary error is reversible only if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v.*

*Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). In other words, "[e]rror is harmless unless the improper cross-examination was sufficient to affect the outcome of the trial." *State v. Lopez*, 95 Wash.App. 842, 856, 980 P.2d 224 (1999). When viewed in context, even if error, the impeachment of Dr. Wollert with the Yakima findings was harmless error.

**Impeachment was against an expert, not against Pouncy.** It is unusual to reverse a case for impeachment evidence because of its nonsubstantive nature. Nevertheless, harmless error is all the more unlikely when the impeachment evidence is against a witness, rather than against Pouncy himself. See *United States v. Huddleston*, 811 F.2d 974, 978 (6th Cir.1987) ("Any prejudice to the defendant is normally greater where the defendant's own character is being attacked.").

**The impeachment was cumulative and admitted by the expert.** The impeachment evidence from Yakima went to the question of whether Wollert's theories were generally accepted in the scientific community. As noted in the State's Petition for Review, Dr. Wollert acknowledged that his theories were rejected by the two leading experts in the field -- Drs. Hanson and Doren. He further admitted that he was the only expert using his theories. In this context, admission of the Yakima findings merely confirmed what Wollert had already admitted and was cumulative to the other impeachment evidence. By definition, this is harmless error.

**No reference was made in closing.** In accord with the trial court's direction, the prosecutor made no reference to the Yakima impeachment evidence in closing. The lack of emphasis in closing supports a harmless error conclusion. *U.S. v. Logan*, 998 F.2d 1025, 1032, 302 U.S.App.D.C. 390 (D.C. Cir. 1993)

**The jury was instructed that it was the sole judge of credibility.**

A concern with judicial documents is that the jury will give undue weight to the judges determination of credibility. In this case, however, the jury was specifically instructed that "[y]ou are the *sole judges of the credibility of the witness . . . .*" CP 987. Juries are presumed to follow the court's instructions. *State v. Pastrana*, 94 Wash.App. 463, 480, 972 P.2d 557 (1999). As a result, there is little likelihood that the Yakima findings had any undo influence on the jury.

**The State's case was overwhelming.** Pouncy was not a close civil commitment case. The State's evidence demonstrated a long history of sexually violent predation followed by failed treatment and more predation. It is difficult to believe that a few questions buried in the middle of a long cross-examination of a marginal defense expert made the difference to the jury's verdict.

**Counsel's Actions in Offering only a General Objection and Rejecting a Curative Instruction Demonstrate Harmless Error.** On

appeal, viewing a bare record, it is easy to misjudge the relative importance of issues in a six-week trial. As pointed out in the *Johnson* case, trial counsel's actions demonstrate that any error here was harmless:

Finally, it is significant that appellant's trial counsel made only a general objection to the admission of the [judicial] opinion and later refused the court's offer to give appropriate limiting instructions to the jury. *Counsel, having resorted to understandable "trial strategy", cannot complain of what he now perceives as the pervasive prejudicial effect of the opinion when at trial he was willing to gamble on an all or nothing objection.*

*Johnson*, 797 F.2d at 1535 (emphasis added).

**D. The Trial Court Did Not Abuse It's Discretion by Refusing a Personality Disorder Instruction**

The State relies on its existing briefing -- Brief of Respondent at 28-34.

**IV. CONCLUSION**

For the foregoing reasons, the Court of Appeals decision should be reversed. Even if admission of the Yakima Superior Court *Frye* determination was error that was properly persevered, it was ultimately harmless error. Trial counsel's performance was neither deficient under the *Strickland* test, nor was prejudicial given the overwhelming State's case against Pouncy. There was no error in not offering an instruction on "personality disorder." The Court of Appeals should be reversed and Pouncy's Order of Commitment should be reinstated.

DATED this 30th day of January 2009.

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**Certificate of Service**

The undersigned hereby certifies that he caused the above brief to be served by depositing same in the US Mail, First Class on January 30, 2008 to the following address: Casey Grannis, Nielson, Broman & Koch, PLLC, 1908 East Madison, Seattle, WA 98122. Two copies were filed with the Washington Supreme Court by the same means.

