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Case No. 61538-6-I

82635-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

Icicle Seafoods, Inc.

Appellant,

v.

Justin Endicott,

Respondent.

BRIEF OF RESPONDENT JUSTIN ENDICOTT

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ORIGINAL

2.	Prejudgment interest is allowed in “mixed” cases	14
3.	Prejudgment interest is allowed on unliquidated damages.....	16
4.	The trial court only awarded prejudgment interest on past damages.....	17
C.	The Trial Court Properly Admitted the Written Statements of Icicle Employee Jason Jenkins.....	17
1.	Standard of review and applicable evidentiary rule.....	18
2.	The Jenkins statement is a classic admission by party-opponent	18
3.	Even if the statement is hearsay, its admission was harmless	22
D.	The Trial Court Did Not Improperly Exclude Evidence of Endicott’s Purported Drug Use and Psychiatric Issues	23
1.	Standard of review and applicable evidentiary rule.....	23
2.	The trial court admitted much of the evidence surrounding Endicott’s purported drug use and psychiatric issues	24
3.	Evidence of collateral issues excluded at trial was cumulative	25
4.	Ironically, Washington law required the trial court to exclude all evidence regarding collateral issues	26
VII.	Conclusion	27

APPENDIX.....	viii
Plaintiff's Motion to Strike Defendant's Jury Demand (CP 29-31)	A-1
Order Granting Plaintiff's Motion to Strike Defendant's Jury Demand (CP 56).....	A-4
Trial Court's Judgment (CP 123-124)	A-5
Findings of Fact and Conclusions of Law (CP 114-121).....	A-7
Trial Exhibit 48	A-15
Dennis J. Sweeney, <i>An Analysis of Harmless Error In Washington: A Principled Process</i> , 31 Gonz. L.Rev. 277 (1995-96).....	A-25
Deposition Transcript of Dawne Moore	A-64

Table of Authorities

CASES

<u>Barrie v. Hosts of America, Inc.</u> , 94 Wn.2d 640, 618 P.2d 96 (1980)	20
<u>Blodgett v. Olympic Sav. & Loan Ass'n</u> , 32 Wn. App. 116, 646 P.2d 139 (Div. II, 1982)	20
<u>Bowman v. American River Transp. Co.</u> , 838 N.E.2d 949 (Ill. 2005)	12
<u>Brown v. Spokane County Fire Protection District 1</u> , 100 Wash. 2d 188, 668 P.2d 571 (1983)	22
<u>Burnside v. Simpson Paper Co.</u> , 123 Wn.2d 93, 864 P.2d 937 (1994)	18
<u>Codd v. Stevens Pass, Inc.</u> , 45 Wn. App. 393, 725 P.2d 1008 (Div. I, 1986)	19-20
<u>Condon Bros., Inc. v. Simpson Timber Co.</u> , 92 Wash.App. 275, 966 P.2d 355 (Div. II, 1998)	21-22
<u>Craig v. Atlantic Richfield Co.</u> , 19 F.3d 472 (9th Cir. 1994)	7, 9
<u>Dice v. Akron, C. & Y. R. Co.</u> , 342 U.S. 359 (1952)	8
<u>Donald B. Murphy Contractors, Inc. v. State</u> , 40 Wn. App. 98, 696 P.2d 1270 (Div. II, 1985)	20
<u>Foster v. State of Washington Dept. of Transp.</u> , 128 Wn.App. 275, 115 P.3d 1029 (2005)	14
<u>Garrett v. Moore-McCormack Co.</u> , 317 U.S. 239 (1942)	6
<u>Hansen v. Rothaus</u> , 107 Wn.2d 468, 730 P.2d 662 (1986)	16
<u>Havens v. C&D Plastics, Inc.</u> , 124 Wash. 2d 158, 876 P.2d 435, (1994)	25-26

<u>Hill v. Dep't of Transp.</u> , 76 Wn.App. 631, 887 P.2d 476 (1995)	7
<u>Hogland v. Meeks</u> , 139 Wash.App. 854, 170 P.3d 37 (Div. II, 2007)	24
<u>Kiewit-Grice v. State</u> , 77 Wash.App. 867, 895 P.2d 6 (1995)	13-14
<u>Kramer v. J.I. Case Mfg. Co.</u> , 62 Wn.App. 544, 815 P.2d 798 (Div. I, 1991).....	26, 27
<u>Linton v. Great Lakes Dredge & Dock Co.</u> , 964 F.2d 1480 (5th Cir. 1991)	11
<u>Magee v. U.S. Lines, Inc.</u> , 976 F.2d 821 (2nd Cir. 1992).....	14, 15
<u>McAfoos v. Canadian Pacific Steamships</u> , 243 F.2d 270 (2nd Cir. 1957)	7
<u>Panama R. Co. v. Johnson</u> , 264 U.S. 375 (1924)	7
<u>Pannell v. Food Services of America</u> , 61 Wash.App. 418, 810 P.2d 952.....	20
<u>Passavoy v. Nordstrom, Inc.</u> , 52 Wn. App. 166, 758 P.2d 524 (Div. I, 1988).....	20
<u>Paul v. All Alaskan Seafoods, Inc.</u> 106 Wash.App. 406, 24 P.3d 447 (2001)	6, 8, 14, 16, 17
<u>Peters v. San Francisco</u> , 1995 A.M.C. 788 (Cal.App. 1994)	8, 9
<u>Prier v. Refrigeration Engineering Co.</u> , 74 Wn.2d 25, 442 P.2d 621 (1968)	16
<u>Pope & Talbot v. Hawn</u> , 346 U.S. 406 (1953).....	6, 10
<u>Rachal v. Ingram Corp.</u> , 795 F.2d 1210 (5th Cir. 1986)	7, 11
<u>Scoccolo Const., Inc. v. City of Renton</u> , 158 Wn2d 506, 145 P.3d 371 (2006)	13

<u>Scudero v. Todd Shipyards Corp.</u> , 63 Wash.2d 46, 385 P.2d 551 (1963).....	7
<u>State ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n</u> , 111 Wash.App. 586, 49 P.3d 894 (2002)	12
<u>State v. Coe</u> , 101 Wash.2d 772, 684 P.2d 668 (1984)	24
<u>State v. Stubsjoen</u> , 48 Wash.App. 139, 738 P.2d 306, <i>review denied</i> , 108 Wash.2d 1033 (1987).	24
<u>Stewart v. Dutra Const. Co.</u> , 543 U.S. 481 (2005).....	13, 15
<u>The Osceola</u> , 189 U.S. 158 (1903).....	13

STATUTES

46 U.S.C.App. § 688	8
---------------------------	---

RULES

ER 403.....	23-24, 25
ER 801(d)(2)	17, 18
ER 801(d)(2)(ii)	22
ER 801(d)(2)(iv).....	18, 19, 21

OTHER AUTHORITIES

David W. Robertson & Michael F. Sturley, <i>The Right to a Jury Trial in Jones Act Cases: Choosing the Forum versus Choosing the Procedure</i> , 30 J. Mar. L. & Com. 649 (Oct. 1999).....	11-12
Dennis J. Sweeney, <i>An Analysis of Harmless Error In Washington: A Principled Process</i> , 31 Gonz. L.Rev. 277 (1995-96)	22

Gilmore & Black, The Law of Admiralty 383 (2d ed. 1975)	14
RESTATEMENT (SECOND) OF AGENCY, § 286	21

I. INTRODUCTION

Plaintiff Justin Endicott ("Endicott") sued Defendant Icicle Seafoods, Inc. ("Icicle") after he sustained a "crush" injury to his right (dominant) arm when he only 19 years old. Endicott grew up in the rural community of Eagle Point, Oregon. RP 51-53. He was active in Future Farmers of America, played sports, and enjoyed hunting and fishing. RP 53. He dropped out of high school during his senior year and, after doing a few odd jobs, applied for work with Icicle. RP 56, 57-58. As part of Icicle's application process, Endicott submitted to, and passed, a drug test. RP 59-60. Icicle hired Endicott and assigned him to the BERING STAR. RP 62. Endicott's job duties included working as a processor (where he would remove crab shells), working on the pressure steam cooker (where he would cook crab), and working on the "slime line" (where he gutted thousands of fish). RP 65, 66, and 68-69. These were manual labor jobs and required him to work 16 hours per day, 7 days per week. RP 64. His base salary was \$7.15 per hour. *Id.* Despite the low pay and hard work, Endicott thought the job was "awesome" and "great work" because it gave him a chance to leave his hometown, explore Alaska, and work with his hands. RP 62, 68, 70. He was a good worker, was never reprimanded, and wanted to continue working at those jobs for the foreseeable future. RP 70-71.

A few days prior to his injury, Icicle assigned Endicott to be a freezer worker. RP 73. Icicle failed to give him any formal training for this new job. RP 73, 94. The new job required Endicott to push 1500 pound carts through the BERING STAR's narrow freezer. RP 74-76, 93-94, 244. The carts had rollers on them and the rollers were attached to an overhead rail system. RP 75. Unfortunately, the overhead rails were warped and the 1500 pound carts would regularly come off the rails. RP 75-76, 91. This happened so frequently that Endicott's supervisor supplied pry bars to the freezer workers so they could put the carts back on the rails. RP 75-76, 79-80, 97. In addition to carts coming off the overhead rails, the freezer's walking surface created a trip hazard because different sections of the floor "butted up in places" and created lips. RP 76, 93-94. Moreover, Endicott's supervisor forced him to work at an unsafe speed. RP 78, 94, 96, 99.

On the day of his accident, Endicott was pulling the cart (walking backwards) while a co-worker (Jason Jenkins) was pushing from the other side. RP 78. Endicott stumbled on the lip created by the uneven flooring. RP 78-79. At the same time, the 1500 pound cart started to come untracked from the overhead rails. RP 78-79. Endicott immediately yelled "stop, stop, stop," but Jenkins kept pushing. RP 79, 81. Endicott instinctively attempted to swing the cart back onto the rails before it could

completely fall off. Id. Endicott's forearm was crushed when "my elbow butted up against a steel pole and the cart compressed my arm this way and it bent my bones. I was looking at it, it was almost like slow motion. My bones bent in the middle, and then my arm just folded together in half. It sounded like a piece of dry wood breaking." Id. Endicott's arm broke in 3 places. RP 82. The break folded Endicott's arm to the point where his hand was next to his elbow. RP 83, 244. After the accident, Icicle performed an investigation and determined that the accident was caused by poor training and supervision, an undermanned freezer, slippery walking surfaces, and an unsafe freezer design. Trial Ex. 48

Endicott immediately informed his supervisor about the injury, but Icicle refused to give Endicott medical attention until he took a drug test. RP 82-83. Endicott passed the drug test and was flown to Alaska where surgery was performed. RP 82-83, 102. The surgery required the doctors to insert two titanium plates, 12 or 13 screws, and several clips into Endicott's arm. RP 104. He also needed more than 150 stitches. RP 105. After a few months, Endicott moved in with his mother when it became clear that he needed help caring for himself. RP 106. Furthermore, the pain in Endicott's arm never went away. RP 106. Instead, his arm developed a deformity. It "was severely bowed. It was bowed really bad. It was almost like a boomerang, in the middle of my arm." RP 108, 111.

This was because the bones never properly healed after the first surgery. As a result, Dr. Thomas Trumble performed a second surgery. RP 323-25. The surgery required Dr. Trumble to remove the original plates and screws, cut Endicott's bones, and insert new plates. Id. Due to the pain, Endicott avoided using his dominant arm to the point where it was still significantly atrophied more than three years after the accident. RP 289, 308, 337-39. Dr. Purtzer, a pain management specialist, diagnosed Endicott with "unremitting, severe, untreatable chronic pain" in his arm, wrist, and hand which will affect him "for the rest of his life." Similarly, Icicle's own IME doctor (Dr. James Green) diagnosed Endicott with chronic pain syndrome. RP 308, 354. Importantly, Dr. Green testified at trial that Endicott is not a malingerer and could not say that Endicott was addicted to marijuana or pain medication. RP 317-18, 359.

Faced with a textbook case of unseaworthiness and Jones Act negligence and a serious injury, Icicle determined to try its case on collateral character issues. Icicle made clear from the start that it would attempt to paint Endicott as a marijuana addict who should not be allowed to recover since he spent a week in a mental health facility. Icicle's litigation strategy was calculated to distract a jury from the clear liability and damages facts. As a result, Endicott, as a seaman and a "ward of the court", chose to exercise his substantive right to a bench trial. This

allowed him to try his case to an experienced trial judge who would be less likely to be swayed by inflammatory character attacks. The trial court properly granted Endicott's motion to strike Icicle's jury demand. CP 29-31, 56. At trial, the lower court admitted most of Icicle's evidence on the irrelevant side issues, but put more stock in the evidence relevant to liability and damages. The trial court awarded Endicott \$143,611 plus prejudgment interest. CP 123-24.

This Court should find that the trial court did not err when it struck Icicle's jury demand. Moreover, the Court should find that the lower court did not err when it awarded prejudgment interest. These rulings would be consistent with governing law and would recognize Jones Act's status as a remedial statute meant to protect seamen and give them full compensation for their injuries. Finally, the Court should rule that the trial court did not err in its evidentiary rulings, or, to the extent there was error, that such error was harmless.

II. STATEMENT OF THE ISSUES

1. Did the trial court err when it upheld Endicott's federal substantive right to a bench trial?
2. Did the trial court err when it awarded prejudgment interest to Endicott?
3. Did the trial court err when it admitted the witness statement of an Icicle employee which was procured as part of Icicle's investigation into Endicott's injury? If so, was

the error harmless since the facts contained in the witness statement simply repeated facts testified to by other witnesses?

4. Did the trial court err when it excluded some inflammatory evidence of drug usage and mental health issues? If so, was the error harmless since the trial court admitted extensive testimony on the exact same issues and Icicle's expert psychiatrist testified that the issues did not impact Endicott's ability to hold down a job?

III. STATEMENT OF THE CASE

Icicle's brief adequately sets forth the procedural background of this case.

IV. ARGUMENT

A. The Trial Court Did Not Err When It Struck Icicle's Jury Demand

(1) Standard of review

Federal preemption questions are reviewed de novo. Paul v. All Alaskan Seafoods, Inc., 106 Wash.App. 406, 427, 24 P.3d 447 (2001).

(2) Endicott has a federal, substantive right to a bench trial

It is axiomatic that state courts must apply federal substantive law in Jones Act and general maritime cases. Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942) (noting that, under the Jones Act, the "source of the governing law applied is in the national, not the state, governments."); Pope & Talbot v. Hawn, 346 U.S. 406, 410 (1953) ("a state may not deprive a person of any substantial admiralty rights as

defined in controlling acts of Congress or by interpretative decisions by this Court.”); Scudero v. Todd Shipyards Corp., 63 Wash.2d 46, 48, 385 P.2d 551, 552 (1963) (“the substantive rules of the maritime law apply to the action whether the proceeding be instituted in an admiralty or in a common law or state court.”); Hill v. Dep’t of Transp., 76 Wn.App. 631, 637, 887 P.2d 476 (1995) (“When deciding admiralty matters, state courts must preserve the substantive rights of the parties under federal law.”).

In 1924, the United States Supreme Court recognized that the (recently enacted) Jones Act’s “election” clause “permits injured seamen to elect . . . between different forms of action.” Panama R. Co. v. Johnson, 264 U.S. 375, 392 (1924) (emphasis added). “The ‘election’ contemplated by the Jones Act is primarily a decision as to the form of trial—whether jury or nonjury.” McAfoos v. Canadian Pacific Steamships, 243 F.2d 270, 273 (2nd Cir. 1957). This is because “[t]he plain language of the Jones Act gives the *plaintiff* the option of maintaining an action at law with the accompanying right to a jury trial. The Act makes no mention of a defendant.” Craig v. Atlantic Richfield Co., 19 F.3d 472, 476 (9th Cir. 1994) (finding that, in a Jones Act case, “only the plaintiff has a right to a demand a jury trial.”) (emphasis in original); Rachal v. Ingram Corp., 795 F.2d 1210, 1215 (5th Cir. 1986) (“As we have noted, the Jones Act gives only the seaman-plaintiff the right to choose a jury

trial.”). As a result, a Jones Act defendant’s “right to a jury trial is an issue of substantive law that turns on federal law alone.” Peters v. San Francisco, 1995 A.M.C. 788, 791 (Cal.App. 1994) (striking the defendant’s jury demand because, as a matter of federal substantive law, “[t]he Jones Act defendant possesses no corresponding right to a jury trial.”) (emphasis added).¹ Since Endicott’s right to a bench trial is a matter of federal substantive law, all state laws purporting to give Icicle a right to a jury trial are preempted.

Moreover, in the FELA context, the United States Supreme Court has long recognized that the right to a jury trial is substantive rather than a procedural right. Dice v. Akron, C. & Y. R. Co., 342 U.S. 359, 363 (1952) (“the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere ‘local rule of procedure.’”). As a result, “[s]tate laws are not controlling in determining what the incidents of this federal [jury] right shall be.” Id. at 361 (emphasis added). Dice is particularly instructive since the Jones Act expressly incorporates FELA by reference. 46 U.S.C.App. § 688 (“in such action all statutes of the United States conferring or extending the common law right or remedy in cases of personal injury to

¹ Cases published in the *American Maritime Cases* may be cited to Washington courts. Paul v. All Alaskan Seafoods, Inc. 106 Wash.App. 406, 414 n.23, 24 P.3d 447, 452 n.23 (2001) (“the U.S. Supreme Court, the Ninth Circuit, and our Supreme Court have cited with approval decisions published only in the A.M.C. reporter.”).

railway employees shall apply.”). Since an injured seaman’s right to a bench trial is a substantive right written into the Jones Act, all Washington laws which give a defendant the right to a jury trial are pre-empted. Consequently, the trial court did not err when it struck Icicle’s jury demand.

(3) Endicott’s substantive right to a bench trial does not disappear in state court

Icicle’s argument that Endicott loses his right to a bench trial when he sues “at law” cannot withstand scrutiny. In Peters, the injured seaman sued his employer “at law” in a state court just like Endicott. Peters, 1995 A.M.C. at 791. There, the California Court of Appeals denied the defendant the right to a jury trial because “[t]he Jones Act grants only the Plaintiff the right to a jury trial. The Jones Act defendant possesses no corresponding right.” Peters, 1995 A.M.C. at 791 (citations omitted). Icicle makes no attempt to explain why Peters is wrong or why Endicott’s case is somehow different. Instead, Icicle looks for support in the Ninth Circuit’s reasoning in Craig v. Atlantic Richfield Co. AB p. 14. Yet, in Craig, the Ninth Circuit found that the defendant could not demand a jury trial even though the injured seaman, like the injured seaman in Peters and like Endicott, brought his claim “at law” instead of “in admiralty.” Craig v. Atlantic Richfield Co., 19 F.3d 472, 476 (9th Cir. 1994).

Moreover, in a case brought by a *Sieracki* seaman, the United States Supreme Court rejected Icicle's distinction between cases brought "at law" and cases brought "in admiralty." Pope & Talbot v. Hawn, 346 U.S. 406, 410-11 (1953). There, the trial court tried to enforce Pennsylvania's contributory negligence bar instead of maritime law's liberal comparative negligence rule. Id. at 407-09. The defendant, like Icicle, argued that seamen lose the protections traditionally provided to them by "admiralty courts" if they choose to sue "at law." The Supreme Court squarely rejected the defendant's argument because it makes no sense that "the substantial rights of parties would depend on which courthouse, or even which 'side' of the same courthouse, a lawyer might guess to be in the best interests of his client." Id. at 411. As a result, the Supreme Court found that **"the substantial rights of an injured person are not to be determined differently whether his case is labeled 'law side' or 'admiralty side' on a district court's docket."** Id. (emphasis added). Similarly, Endicott does not lose his substantive right to a bench trial when he sues "at law" in state court.

The Fifth Circuit cases Icicle relies on do not help Icicle's argument either. While a Jones Act defendant's right to a jury in state court was not at issue in either case, both cases bolster Endicott's position. In Linton, the Fifth Circuit "made it clear that only when a Jones Act

claim is brought in *federal* court, under the ‘saving to suitors’ clause, and based on *diversity* jurisdiction,” does the defendant have a right to demand a jury trial.” Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1489 n. 16 (5th Cir. 1991) (some emphasis in original; some emphasis added). In all other cases, “the Jones Act gives *only* the seaman-plaintiff the right to choose a jury trial.” Id. (emphasis in original). Rachal came to the same conclusion. Rachal v. Ingram Corp., 795 F.2d 1210, 1213, 1215-16, 1216 n. 8 (5th Cir. 1986). Obviously, Endicott did not bring his claim in federal court and diversity of citizenship was irrelevant to the trial court’s subject-matter jurisdiction. Therefore, the Fifth Circuit cases support Endicott’s right to a bench trial. More importantly, Peters and Craig are directly on point and both cases support Endicott’s right to a bench trial. As a result, the Court should find the trial court did not err when it struck Icicle’s jury demand.

(4) The Court should reject the reasoning employed in Icicle’s law review article and the reasoning employed by the Bowman court

Icicle largely relies on a series of law review articles written by Professors Robertson and Sturley. However, the professors were not reviewing the current state of the law. Instead, they advocated a *change* in the law. The professors freely admit that “courts have construed the Jones Act to give plaintiffs the unilateral right” to choose a bench trial. David

W. Robertson & Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum versus Choosing the Procedure*, 30 J. Mar. L. & Com. 649, 650 (Oct. 1999). Accordingly, their goal is to “reveal the mistake [made by the courts], discuss its consequences, and argue for its correction.” *Id.* at 651. This Court should rely on current law, not professors advocating new directions. Unfortunately, the Bowman court relied almost exclusively on Professors Robertson and Sturley and lifted their reasoning almost verbatim in Bowman v. American River Transp. Co., 838 N.E.2d 949 (Ill. 2005). Since Bowman is based on a law review article instead of well-settled case law, this should reject its reasoning and follow better reasoned cases like Peters.

(5) Injured seamen had no right to bring negligence actions against their employers when the Washington Constitution was enacted.

Even if Icicle’s supposed right to a jury is controlled by state law, the Washington Constitution does not help Icicle’s cause. In order to determine whether the Washington Constitution confers a right to a jury trial, “Washington courts examine the nature of the cause of action to see if it is analogous to a common law cause of action entitled to a jury trial when the constitution was adopted in 1889.” State ex rel. Evergreen Freedom Foundation v. Washington Education Ass’n, 111 Wash.App. 586, 609, 49 P.3d 894, 908 (2002). Since the Jones Act was enacted well

after 1889, Icicle is forced to argue that this *type* of claim could be tried to a jury in 1889. In order to do this, Icicle mischaracterizes Jones Act suits as run-of-the-mill “personal injury claim based on negligence.” Icicle Brief at pg. 23.

Icicle ignores the fact that, prior to the Jones Act, injured seamen did not have the right to sue in negligence. The Osceola, 189 U.S. 158, 175 (1903) (“the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew.”).² As a result, “Congress enacted the Jones Act in 1920 to remove this bar to negligence suits by seamen.” Stewart v. Dutra Const. Co., 543 U.S. 481, 487 (2005) (recognizing that, prior to the Jones Act, “[s]uits against shipowners for negligence, however, were barred.”). Since seamen had no right to sue their employers for negligence in 1889, the Washington Constitution does not grant Icicle a right to a jury trial today.

B. The Trial Court Did Not Err In Awarding Prejudgment Interest

(1) Standard of review

“The award of prejudgment interest is reviewed for abuse of discretion.” Scoccolo Const., Inc. v. City of Renton, 158 Wn2d 506, 519, 145 P.3d 371 (2006) (citing Kiewit-Grice v. State, 77 Wash.App. 867,

² The fellow servant doctrine also barred seamen from holding shipowners vicariously liable for the acts of its crew members. Id.

872, 895 P.2d 6 (1995)). However, the trial court's ruling that the federal maritime law preempts Washington's prejudgment interest rule is reviewed de novo. Paul v. All Alaskan Seafoods, Inc., 106 Wash.App. 406, 427, 24 P.3d 447 (2001).

(2) **Prejudgment interest is allowed in "mixed" cases**

Icicle acknowledges that the courts are split on whether an injured seaman can recover prejudgment interest on a "mixed" negligence and unseaworthiness claim.³ This Court should follow the Second Circuit's reasoning in Magee and ensure that injured seamen receive full compensation for their injuries.

In Magee, the Second Circuit recognized that "a Jones Act count and an unseaworthiness count are 'Siamese twins', and that 'since recovery is the same under either count, the question whether [the plaintiff] recovers for negligence or for unseaworthiness is hardly worth asking.'" Magee v. U.S. Lines, Inc., 976 F.2d 821, 823 (2nd Cir. 1992) (quoting Gilmore & Black, The Law of Admiralty 383, 389 (2d ed. 1975)). As a result, "[t]here is little reason, therefore, for denying plaintiff

³ The only Washington case Icicle cites on this issue is Foster. Foster denied prejudgment interest because the State was a defendant and it never "waived sovereign immunity with respect to prejudgment interest in this case." Foster v. State of Washington Dept. of Transp., 128 Wn.App. 275, 280, 115 P.3d 1029 (2005). Accordingly, its discussion of prejudgment interest in "mixed" Jones Act and unseaworthiness cases is mere dicta. Interestingly, Foster was tried to the bench instead of a jury. Id. at 277 ("In September 2003, the court held a bench trial."):

recovery of interest on his maritime claim.” Id. Magee found support for its conclusion by looking at other types of claims where plaintiffs typically assert two theories of liability, yet only one theory allows for prejudgment interest. Id. at 822. After reviewing those claims, Magee determined that “where only a single award of damages, not segregated into separate components, is made, the preferable rule, we think, is that the successful plaintiff be paid under the theory of liability that provides the most complete recovery.” Id.

The Magee rule helps fulfill the Jones Act’s remedial goals. If the Court prohibits injured seamen from recovering prejudgment interest when they sue their employer for negligence, many seamen may choose to forgo their negligence claims and only bring unseaworthiness claims in order to recover under a more liberal damages regime. However, the Jones Act was specifically enacted to broaden the rights of injured seamen and give them a negligence cause of action against their employers. Stewart v. Dutra Const. Co., 543 U.S. 481, 487 (2005) (recognizing that, prior to the Jones Act, “[s]uits against shipowners for negligence, however, were barred,” and “Congress enacted the Jones Act in 1920 to remove this bar to negligence suits by seamen.”). Any rule that provides an incentive for seamen to waive their special Jones Act protections and return to the days of The Osceola should be rejected. Consequently, the

Court should follow Magee and allow injured seamen to recover prejudgment interest on “mixed” negligence and unseaworthiness claims.

(3) Prejudgment interest is allowed on unliquidated damages

Icicle irrelevantly cites Hansen and Prier for the proposition that plaintiffs cannot recover prejudgment interest on unliquidated damages. “Admiralty courts, however, have long disdained the liquidated/non-liquidated distinction.” Paul v. All Alaskan Seafoods, Inc., 106 Wash.App. 406, 427, 24 P.3d 447 (2001). As a result, the Washington rule that prejudgment interest is only awarded on liquidated claims does not apply in maritime cases. Id. (finding that because “[g]eneral maritime law is traditionally hospitable to prejudgment interest,” the “Washington rule [requiring a liquidated claim] . . . conflicts with the maritime rule, and its application is preempted.”).

Hansen and Prier are not maritime cases and neither case deals with prejudgment interest on unliquidated *maritime* claims in state court. See Hansen v. Rothaus, 107 Wn.2d 468, 469 730 P.2d 662, 663 (1986) (action against “insurance brokers for damages allegedly suffered as a result of the brokers’ failure to provide them with insurance as agreed or represented.”); Prier v. Refrigeration Engineering Co., 74 Wn.2d 25, 26 442 P.2d 621, 622 (1968) (“This is an action for damages arising out of

the construction of an ice rink know as the Burien Ice Chalet.”). Certainly, the Paul court was aware of these cases when it held that the “Washington rule governing prejudgment interest thus conflicts with the maritime rule, and its application is preempted.” Paul, 24 P.3d at 459. In fact, Paul cited both cases. Id. at n. 86. Accordingly, the Court should ignore the liquidated/non-liquidated distinction and follow Paul.

(4) The trial court only awarded prejudgment interest on past damages

Icicle argues that Endicott cannot recover prejudgment issue on future damages. However, the trial court did not award any future damages. CP 118, 120. Therefore, there is no need for the Court to address this issue.

C. The Trial Court Properly Admitted the Written Statements of Icicle Employee Jason Jenkins

Icicle next seeks to exclude a written statement made by one of its own employees, Jason Jenkins (who was directly involved in the accident), based on the erroneous assertion that the statement constitutes hearsay. Trial Ex. 48; RP 85-88. The statement, taken a few days after the accident and produced by Icicle as part of its investigation file, is the epitome of an admission by party opponent under ER 801(d)(2) and, therefore, is admissible as non-hearsay. Moreover, and regardless of its purported hearsay status, the trial court’s admission of the statement was

harmless in light of other overwhelming evidence in support of its Finding of Facts and Conclusions of Law.

(1) Standard of review and applicable evidentiary rule

A trial court's decision to admit evidence is reviewed under an abuse of discretion standard. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107, 864 P.2d 937 (1994). Thus, an appellate court "will reverse evidentiary rulings only if they are based on untenable grounds or made in a manifestly unreasonable manner." Id. Under ER 801 (d)(2), a statement is not hearsay, but an admission by party-opponent, if:

The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party.....

Here, the Court carefully considered ER 801(d)(2), the arguments of counsel, and correctly admitted Jenkins' statement as non-hearsay. Trial Ex. 48; RP 85-88.

(2) The Jenkins statement is a classic admission by party-opponent

Under the plain language of ER 801(d)(2)(iv), Jenkins' statement constitutes a textbook admission by party-opponent. There is no question that Icicle authorized Jenkins to make the statement since it was produced as part of Icicle's investigation file and Icicle compelled him to record his

observations in "statement form" as part of its investigation. RP 85-88. In fact, it borders on frivolity to argue that an employee partially responsible for a serious accident is not authorized to make a statement to his employer's investigators. Icicle's counsel admitted as much in a telling analogy during trial, conceding that a "statement of the person who was involved specifically driving a truck on behalf of the company that caused the accident" is admissible under ER 801(d)(2)(iv). RP 88, lines 11-22. When counsel's candid analogy is applied to the case at hand, Jenkins was the "truck driver," Icicle is the "company that caused the accident," and Exhibit 48 is the "statement." Simply put, Icicle authorized Jenkins to recount the accident as part of the investigation, and naturally included Jenkins' eye witness statement in its investigation. Thus, the statement is an admission by party-opponent, and exempt from the hearsay rule.

Icicle cites several cases, as well as the Restatement's rule on admissions by party-opponent, in a misguided attempt to argue that Jenkins was not authorized to make the statement. See Icicle's Brief, pp. 47-48. A closer look at these cases and rules leaves no doubt that the trial court properly admitted the statement. First, each of the cases cited by Icicle involve statements made by company employees to *third parties*, not to the companies themselves. See Codd v. Stevens Pass, Inc., 45 Wn. App. 393, 404, 725 P.2d 1008 (Div. I, 1986) (ski patrolman made

unauthorized statement regarding liability to decedent's son); Passavoy v. Nordstrom, Inc., 52 Wn. App. 166, 169-70, 758 P.2d 524 (Div. I, 1988) (employee of defendant made post-accident statement to plaintiff over the telephone); Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 644, 618 P.2d 96 (1980) (bar manager told plaintiff's attorney on the phone that plaintiff was smashed when he left the bar); Blodgett v. Olympic Sav. & Loan Ass'n, 32 Wn. App. 116, 126, 646 P.2d 139 (Div. II, 1982) (carpenter employed by defendant made a statement regarding liability to a police officer at the scene of the accident); Donald B. Murphy Contractors, Inc. v. State, 40 Wn. App. 98, 110, 696 P.2d 1270 (Div. II, 1985) (employees of the defendant made statements to the plaintiff relevant to liability). In each of these cases, the alleged admission regarding liability was made to a third party (usually the plaintiff) without permission of the defendant employer. Stated differently, the agent made a statement to an adverse third party without authorization to do so from the principal.

In this case, however, Jenkins (the agent and employee of Icicle) made a statement to Icicle (the principal) during the course of its investigation of the accident regarding his first-hand recollection of the accident and the freezer conditions. Trial Ex. 48; RP 85-88; see Pannell v. Food Services of America, 61 Wash.App. 418, 430, 810 P.2d 952, reconsideration denied, opinion amended on other grounds 815 P.2d 812,

review denied 824 P.2d 490, 118 Wash.2d 1008 (citing 5B K. Tegland, Wash.Prac. § 349 (3d ed.1989) (holding that statements from the agent to the principal, like those from an agent to a third party, constitute admissions by party opponent under ER 801(d)(2)(iv)). Thus, there is no valid basis on which to question (1) the authority of Jenkins to make the statement and (2) the discretion of the trial court to admit it.⁴

A review of the language of RESTATEMENT (SECOND) OF AGENCY, § 286, the basis for Washington's party-opponent analysis of agent authority confirms the prudence of the trial court's ruling. Section 286 reads:

statements of an agent to a third person are admissible in evidence against the principal to prove the truth of the facts asserted in them ... if the agent was authorized to make the statement or was authorized to make, on the principal's behalf, any statements concerning the subject matter.

Clearly (and logically), the Washington rule is concerned with ensuring that unauthorized statements made by the defendant's employees to third persons cannot be used in court as non-hearsay admissions. See Condon Bros., Inc. v. Simpson Timber Co., 92 Wash.App. 275, 285, n. 20 & 21,

⁴ Icicle's argument that there is no evidence independent of Jenkins' declarations to establish his authority to make the statements to Icicle is easily contradicted. The statement was obviously procured by Icicle and produced as a natural part of the investigation file along with other admissions by Icicle employees and/or safety personnel. The cumulative results of the investigation, rather than Jenkins' specific declarations, establish his authority (and, in fact, obligation) to make the statement at issue.

966 P.2d 355 (Div. II, 1998). This valid concern is not at issue here because the statement was made directly to Icicle, not to a third party, as the trial court aptly recognized. RP 88, lines 5-10.

Icicle also adopted the Jenkins statement, and/or manifested its belief in the statement, by both its affirmative acts and its failure to dispute it. See ER 801(d)(2)(ii). Icicle affirmatively included the statement in the investigation file it produced to Endicott. RP 87, lines 6-12. In addition, Icicle included absolutely nothing in the investigative report to refute the statement. Instead, it remained silent with regard to its contents. Trial Ex. 48; RP 85-88. Icicle's affirmative act of procuring the statement, compounded by its complete silence refuting the writing, demonstrates adoption under Rule 801 (d)(2)(ii).

(3) Even if the statement is hearsay, its admission was harmless

It is axiomatic under Washington law that the admission of cumulative evidence is harmless. Dennis J. Sweeney, *An Analysis of Harmless Error In Washington: A Principled Process*, 31 Gonz. L.Rev. 277, 319 (1995-96) (citing Brown v. Spokane County Fire Protection District 1, 100 Wash. 2d 188, 196, 668 P.2d 571, 576 (1983)), in which the court held harmless the erroneous admission of tape recordings on the basis that "the admission of the objectionable portion of the tape was not

reversible error because the statements were merely cumulative”). The Jenkins statement is cumulative of the detailed testimony of Justin Endicott regarding the accident and the telling statements in Icicle’s accident reports. RP 73-95; Trial Ex. 48. Consequently, the trial court’s admission of the Jenkins statement, even assuming it constitutes hearsay, was harmless.

D. The Trial Court Did Not Improperly Exclude Evidence of Endicott’s Purported Drug Use and Psychiatric Issues

Icicle’s contention that the trial court improperly excluded all evidence of Endicott’s alleged drug use and psychiatric problems is baffling, and lacks even a hint of validity. In actuality, the trial court permitted Icicle to present extensive testimony on the collateral (and irrelevant) issues of drug use and psychosis despite the fact that Washington law required the court to exclude such evidence under ER 403. Occasionally, when the testimony and evidence reached astounding levels of redundancy and irrelevance, the trial court excluded some of the evidence, which was entirely within its discretion. Thus, Icicle’s final point of error must be rejected and the trial court’s judgment affirmed.

(1) Standard of review and applicable evidentiary rule

Washington Rule of Evidence 403 provides that:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger

of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Washington courts have broad discretion in the admission and exclusion of evidence, such as balancing the prejudicial impact of evidence against its probative value. Hogland v. Meeks, 139 Wash.App. 854, 875, 170 P.3d 37 (Div. II, 2007); State v. Coe, 101 Wash.2d 772, 782, 684 P.2d 668 (1984). An appellate court “will not reverse absent a showing of abuse of trial court discretion, even if [it] might have [admitted] the proffered evidence had [it] been in the trial court’s position.” See State v. Stubsoen, 48 Wash.App. 139, 147, 738 P.2d 306, *review denied*, 108 Wash.2d 1033 (1987).

(2) The trial court admitted much of the evidence surrounding Endicott’s purported drug use and psychiatric issues

Due to the unassailable facts proving Icicle’s negligence, the vessel’s unseaworthiness, and the serious nature of Endicott’s injury, Icicle planned to try the case on collateral issues regarding Endicott’s purported drug use and psychosis.⁵ See RP 11-16. Icicle was permitted to emphasize these highly inflammatory issues in its examination of several witnesses at trial, despite the fact that Endicott passed his pre-employment

⁵ Icicle spent much of its time focusing on marijuana usage. Endicott obtained a prescription for medical marijuana because his prescription pain pills made him sick. RP 124, 259-60, 265.

and post-accident drug tests and there was no evidence that he used any drugs in the several months he worked on Icicle's vessel. For instance, the trial court allowed Icicle's counsel to cross-examine Endicott and his mother extensively on the issues of drug use and mental health, and to offer the testimony of Dr. Berryman Edwards, a psychiatrist, almost exclusively to explore such issues. RP 194, 216, 218, 221, 263-67, 270, 371-426.⁶ The court also admitted records from the Northern Nevada Adult Mental Health Services facility. RP 183; CP 81-82. Thus, Icicle's contention that the court extracted the issues of drug use and psychosis from trial by systematically excluding exhibits and testimony is belied by the record and wholly lacks merit.

(3) Evidence of collateral issues excluded at trial was cumulative.

Washington case law and evidentiary rules are clear: trial courts possess broad discretion to exclude cumulative evidence. ER 403; Havens v. C&D Plastics, Inc., 124 Wash. 2d 158, 169-70, 876 P.2d 435, 441 (1994) (holding that "[t]he exclusion of evidence which is cumulative or has speculative probative value is not reversible error;" and "[t]he evidence need not be identical to that which is admitted; instead, harmless

⁶ The trial court also appears to have admitted the deposition of social worker Dawne Moore, who testified extensively on these collateral issues. RP 773. To the extent that Icicle complains that the deposition was excluded, this point was waived since Icicle failed to secure a ruling from the trial court on this issue. Id. 772-75. A copy of Dawne Moore's deposition is included in the Appendix.

error, if error at all, results where evidence is excluded which is, in substance, the same as other evidence which is admitted.”). As set forth above, the trial court permitted Icicle’s counsel to cross-examine Endicott and his mother at length on these topics, and allowed Icicle to present a psychiatrist whose primary purpose was to testify about the collateral matters. RP 7-16, 194-200, 207, 218, 221, 264-67, 270, 371-425; CP 81-82.⁷ As such, the occasional records and testimony excluded by the trial court were entirely cumulative, and therefore, properly cast aside.

(4) Ironically, Washington law required the trial court to exclude all evidence regarding collateral issues.

Perhaps the most ironic aspect of Icicle’s point of error regarding the collateral evidence issue is that, according to Washington law, the trial court actually erred in admitting it.⁸ In Kramer v. J.I. Case Mfg. Co., 62

⁷ Icicle rests its entire point of error on a statement by the trial judge uttered during the direct examination of Dr. Berryman Edwards, the psychiatrist who examined Endicott for Icicle and reviewed his past medical records. RP 371-426. After Icicle repeatedly bombarded the court with the specific details of Endicott’s one week stay in a mental health facility a year after the accident, the court urged Icicle to focus Dr. Edwards’ examination on how such alleged mental health issues affected Endicott’s ability and desire to work. RP 389, lines 5-11; see also RP 388, lines 5-10, 396-97, 399-401. Warning Icicle’s counsel to move on from the details of Endicott’s stay in the mental health facility, the court stated: “You know, I don’t want to spend time on it because I’m clearly not going to even consider that or give it one thought in reaching a decision on this case. I mean what he did that week in Nevada is of no interest to me....” RP 389. Icicle isolated this statement and mischaracterized it as a sweeping declaration by the trial court that it would not consider Endicott’s “mental health issues” at all. Icicle’s contention is contradicted by a cursory review of the record cited above. The trial court worked diligently with counsel and Dr. Berryman to explore and consider any potentially relevant testimony and evidence of mental health issues and drug abuse.

⁸ Endicott filed a motion to exclude these collateral matters that relied primarily on Kramer. The trial court heard argument on Endicott’s motion and overruled it. RP 7-16.

Wn.App. 544, 556-60, 815 P.2d 798 (Div. I, 1991), the court of appeals held that the trial court committed reversible error by admitting evidence of the plaintiff's substance abuse because its probative value was outweighed by its prejudicial effect. The court emphasized the fact that the defendant failed to present an expert who could opine that the substance abuse affected the plaintiff's ability to earn money, particularly in light of his good standing and attendance record. Id.

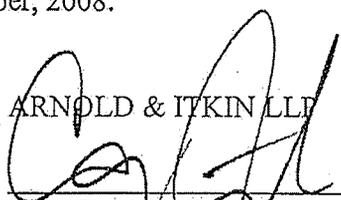
Kramer is squarely on point. In this case, Dr. Berryman conceded (1) that Endicott's purported mental health issues and drug use do not affect his earning capacity, and (2) he cannot opine that, more probably than not, such issues affect Endicott's desire to work. RP 396, lines 13 – 21; RP 399 line 22 – 401 line 3; see also RP 397, lines 13-18. These admissions are fatal to Icicle's supposed purposes in admitting the evidence of drug use and psychosis – i.e., to prove reduced earning capacity and provide an alternative explanation for Endicott's failure to return to work. See Icicle's Brief, p.57. Thus, according to Kramer, the trial court should have excluded (and in some limited instances did so) all evidence of purported drug use and mental health issues.

V. CONCLUSION

The Court should affirm the judgment of the lower court and overrule Icicle's assignments of error.

DATED this 2nd day of October, 2008.

ARNOLD & ITKIN LLP


Cory D. Itkin, Texas State Bar #24050808

Pro hac vice

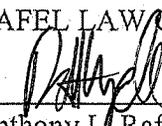
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RAFEL LAW GROUP PLLC

 WSBA # 33593
Anthony L. Rafel, WSBA #13194

Rafel Law Group PLLC

999 Third Ave, Ste. 1600

Seattle, WA 98104

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury of the laws of the State of Washington that on October 2, 2008, a true copy of the foregoing **BRIEF OF RESPONDENT JUSTIN ENDICOTT** was served on counsel of record for Appellant as follows:

VIA MESSENGER TO:

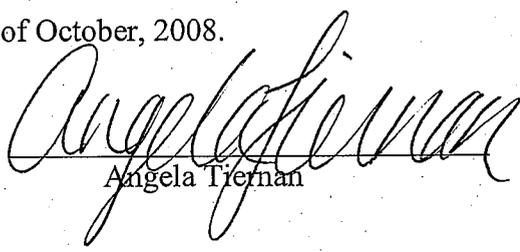
Michael Barcott
Thad O'Sullivan
Holmes Weddle & Barcott
999 Third Avenue, Ste. 2600
Seattle, WA 98104

VIA FAX & U.S. MAIL TO:

Kara Heikkila
Hall, Farley, Oberrecht & Blanton, P.A.
Key Financial Center
702 West Idaho Street, Ste. 700
Boise, ID 83701

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 OCT 2 11 43

Dated this 2nd day of October, 2008.


Angela Trieman

APPENDIX

Plaintiff's Motion to Strike Defendant's Jury Demand (CP 29-31) A-1

Order Granting Plaintiff's Motion to Strike Defendant's Jury
Demand (CP 56)..... A-4

Trial Court's Judgment (CP 123-124) A-5

Findings of Fact and Conclusions of Law (CP 114-121)..... A-7

Trial Exhibit 48 A-15

Dennis J. Sweeney, *An Analysis of Harmless Error In
Washington: A Principled Process*, 31 Gonz. L.Rev. 277, 319
(1995-96)..... A-25

Deposition Transcript of Dawne Moore A-64

FILED

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

The Honorable Douglas McBroom
July 3, 2007
Without Oral Argument

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JUSTIN ENDICOTT, an individual,
Plaintiff,

v.

ICICLE SEAFOODS, INC., an Alaska
corporation,
Defendant.

No. 06-2-03016-8 SEA

PLAINTIFF'S MOTION TO STRIKE
DEFENDANT'S JURY DEMAND

RELIEF REQUESTED

Plaintiff moves this Court for an Order striking Defendant's jury demand because a defendant has no right to a jury trial in a Jones Act case.

STATEMENT OF FACTS

Plaintiff, a seaman employed by Defendant, brought his complaint for personal injuries under the Jones Act and general maritime law. Defendant filed a Jury Demand. As a Jones Act seaman, Plaintiff wishes to exercise his statutory election to proceed to trial without a jury.

STATEMENT OF ISSUES

Should this Court strike defendant's jury demand?

ORIGINAL

FILED
KING COUNTY, WASHINGTON

The Honorable Douglas McBroom
July 3, 2007
Without Oral Argument

JUL 09 2007

SUPERIOR COURT CLERK
BY ANDREW T. HALLS
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JUSTIN ENDICOTT, an individual,

Plaintiff,

v.

ICICLE SEAFOODS, INC., an Alaska
corporation,

Defendant.

No. 06-2-03016-8 SEA

~~[PROPOSED]~~ ORDER GRANTING
PLAINTIFF'S MOTION TO STRIKE
DEFENDANT'S JURY DEMAND

[CLERK'S ACTION REQUIRED]

This matter came on for consideration on Plaintiff's Motion to Strike Defendant's Jury Demand. The Court has considered Plaintiff's Motion, Defendant's Response, if any, and Plaintiff's Reply, if any. Being duly advised in the premises, the Court hereby ORDERS that Plaintiff's Motion to Strike Defendant's Jury Demand is GRANTED.

The Court further ORDERS that Defendant's Jury Demand is STRICKEN.

Dated this 9 day of July, 2007. *Rights of Seamen under the Jones act to chose jurisdiction and form of trial is protected because Seaman were perceived to be required to bring personal injury actions in foreign jurisdictions and, as words of the court, enjoyed the protections of the Jones act.*

Rights of Seamen under the Jones act to chose jurisdiction and form of trial is protected because Seaman were perceived to be required to bring personal injury actions in foreign jurisdictions and, as words of the court, enjoyed the protections of the Jones act.

The Honorable Douglas McBroom

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE
DEFENDANT'S JURY DEMAND - Page 1

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Page 56

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FILED
KING COUNTY, WASHINGTON

The Honorable Douglas McBroom

MAR 24 2008

FILED
KING COUNTY, WASHINGTON

MAR 24 2008

~~SUPERIOR COURT CLERK
BY ANNE M. T. HARRIS
CLERK~~

DEPARTMENT OF
JUDICIAL ADMINISTRATION

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JUSTIN ENDICOTT, an individual,
Plaintiff,

v.

ICICLE SEAFOODS, INC., an Alaska
corporation,
Defendant.

No. 06-2-03016-8 SEA
JUDGMENT

JUDGMENT SUMMARY

Judgment Creditor:	Justin Endicott
Judgment Debtors:	Icicle Seafoods, Inc.
Principal Judgment Amount:	\$143,611.00
Costs, including statutory attorney's fees	\$2108.14
Interest to date of judgment	\$74,646.24
Attorneys for Judgment Creditor	Arnold & Itkin LLP and Rafel Law Group PLLC

THIS MATTER having come on for trial beginning on the 20th day of August, 2007,
and it being made to appear to the satisfaction of the Court the Plaintiff is entitled to relief:

NOW THEREFORE,

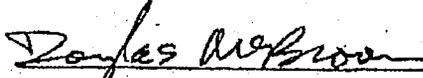
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

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ARNOLD & ITKIN LLP
1401 McKinney St., Ste. 2550
Houston, TX 77010
713-222-3800/713-222-3850
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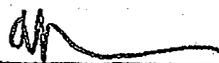
1 Judgment is hereby awarded in favor of Plaintiff Justin Endicott and against
2 Defendant Icicle Seafoods, Inc. in the principal amount of \$143,611.00, plus prejudgment
3 interest in the amount of \$74,646.24, plus taxable costs in the amount of \$2108.14. Interest
4 shall accrue on the foregoing amounts at the rate of 6.35% per annum as provided by RCW
5 4.56.110 until said amounts are paid in full.

6 Dated this 29 day of March, 2008.

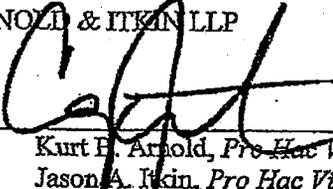
7
8 
9 Honorable Douglas McBroom

10 Submitted by:

11 RAFEL LAW GROUP PLLC

12
13 By 
14 Anthony L. Rafel, WSBA #13194

15 ARNOLD & ITKIN LLP

16
17 By: 
18 Kurt E. Arnold, Pro Hac Vice
19 Jason A. Itkin, Pro Hac Vice
20 Cory D. Itkin, Pro Hac Vice

21 Attorneys for Plaintiff Justin Endicott
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THE HONORABLE DOUGLAS MCBROOM

FILED
KING COUNTY, WASHINGTON

JAN 14 2008

SUPERIOR COURT CLERK
GARY POVICK
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JUSTIN ENDICOTT,	
	Plaintiff,
v.	
ICICLE SEAFOODS, INC.,	
	Defendant.

Case No. 06-2-03016-8 SEA
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on for a non-jury trial on August 20, 2007, the Honorable Douglas McBroom presiding. Plaintiff was represented by Kurt Arnold and Cory Itkin of Arnold & Itkin LLP. Defendant was represented by Kara Heikkila and Thaddeus O'Sullivan of Holmes Weddle & Barcott. At the conclusion of trial, the Court took the matter under advisement. The Court has considered all trial testimony, exhibits admitted into evidence, the transcript or videotaped deposition testimony admitted, and the arguments of counsel.

On the basis of its own careful observations during trial, its credibility assessments of all witnesses appearing live at trial or by depositions, and the detailed consideration of all of the above materials, the Court now enters the following Findings of Facts and Conclusions of Law.

1 **I. Introduction**

2 This case was originally filed on January 20, 2006. Plaintiff asserted a negligence
3 claim pursuant to the Jones Act and a claim for unseaworthiness pursuant to the General
4 Maritime Law of the United States. On August 20, 2007, counsel for both sides proceeded to
5 try the case to conclusion.

6 **II. Findings of Fact**

7 1. This case involves an arm injury sustained by Justin Endicott aboard the
8 BERING STAR.

9 2. At the time of trial, Plaintiff was 23 years old and living in Nevada. Plaintiff
10 grew up in Oregon, but did not graduate from high school. Instead, Plaintiff pursued his
11 dream of traveling to Alaska and worked on a fish processor barge.

12 3. Plaintiff began working for Defendant Icicle Seafoods, Inc. in January 2003.
13 Plaintiff was assigned to the BERING STAR and aided the BERING STAR in accomplishing
14 its mission. The BERING STAR is a processing barge.

15 4. At all relevant times, Defendant owned and operated the BERING STAR.

16 5. At all relevant times, Plaintiff was employed by Defendant as a Jones Act
17 seaman. Plaintiff worked as a seafood processor in the freezer on the BERING STAR. One
18 of Plaintiff's duties was to move a loaded fifteen hundred-pound cart in the freezer tunnels
19 with the assistance of another crewmember.

20 6. The cart was moved via an overhead rail system. The cart system in the
21 freezer where the Plaintiff was working mistracked at times. The Defendant knew or should
22 have known about the hazard, but failed to remedy the defect.

23 7. The preponderance of the evidence showed that there was a trip hazard
24 associated with the grating in the freezer where the Plaintiff was working. Defendant knew or
25 should have known about this hazard, but failed to fix the grating.

1 8. The crew in the freezer at the time of Plaintiff's accident was required to work
2 with undue haste to keep up with production. Defendant knew or should have known about
3 this hazard, but failed to provide more crewmembers.

4 9. Plaintiff received inadequate safety training for his job. Defendant knew or
5 should have known about this hazard, but failed to provide more adequate training.

6 10. On or about May 1, 2003, Plaintiff was using the cart's "pull bar" to pull the
7 cart when it started to come untracked from the overhead rail system. While Plaintiff
8 attempted to keep the cart on track, he stumbled when the heel of his boot caught on a lip
9 created by the freezer's uneven surface. This caused Plaintiff's elbow to jut out and come to
10 rest on a pole of angle support beam. Another Icicle employee, Jason Jenkins, was pushing
11 the cart from the other end. Jenkins should have been aware of Plaintiff's position relative to
12 the cart. Plaintiff yelled for him to stop, but the other worker did not stop because he was
13 either concentrating on keeping the cart from coming untracked or simply not paying
14 attention. Jenkins kept pushing the cart and crushed Plaintiff's arm between the cart and the
15 pole/angle support.

16 11. Immediately following the accident, Plaintiff felt severe pain. He was then
17 flown to Anchorage, Alaska, where he underwent a surgical repair. The surgeons implanted
18 several plates, screws, and clips in Plaintiff's arm to help it heal. Plaintiff needed a second
19 surgery to correct the malunion created by the improper healing from his first surgery which
20 caused his arm to "bow". Plaintiff underwent that second surgery in Seattle, Washington, in
21 April 2005.

22 12. Although the second surgery was a success, Plaintiff developed Chronic
23 Regional Pain Syndrome ("CRPS"). Plaintiff's pain is real. The surgeries and his CRPS
24 should not have prohibited the Plaintiff from gainful employment altogether, but inhibited his
25 ability to work during those recovery periods. The Plaintiff has no earning capacity or loss
26 after December 2005.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW -3

ARNOLD & ITKIN LLP
1401 McKinney St., Ste. 2550
Houston, TX 77010
713-222-3800/713-222-3850

1 13. Plaintiff has experienced pain and discomfort as a result of the May 1, 2003
2 incident.

3 14. Plaintiff's injuries were caused by the cart incident in the freezer aboard the
4 BERING STAR on May 1, 2003.

5 15. Plaintiff's injuries would have been prevented if Icycle had used ordinary care.
6 Icycle should have: (1) fixed the overhead rail system; (2) fixed the uneven grating; and (3)
7 provided more adequate training.

8 16. The Court finds that Plaintiff would have earned \$5,767.00 from the time of
9 his injury until November 2003, but did not earn these wages due to his injuries.

10 17. The Court finds that the Plaintiff's pre-injury earning capacity was \$20,000 per
11 year. The Court also finds that Plaintiff suffered a 50% reduction in his earning capacity from
12 November 2003 to April 2005. This resulted in lost wages of \$13,328.00.

13 18. The Court finds that Plaintiff was completely disabled from gainful
14 employment from April 2005 (when he had his second surgery) until December 2005 (when
15 he fully recovered from the second surgery). Accordingly, he lost \$15,000 in wages.

16 19. The Court finds that Plaintiff lost \$34,095.00 in lost wages and diminished
17 earning capacity during the period May 2003 until December 2005.

18 20. The Court finds that Icycle, through The Alaska's Workman's Compensation
19 system, paid Plaintiff \$3,484.00 and is entitled to an offset or credit on the amount it owes
20 Plaintiff in lost wages and/or diminished earning capacity. Accordingly, Plaintiff sustained a
21 net \$30,611.00 in lost wages and/or diminished earning capacity during the period May 2003
22 to December 2005.

23 21. The Court finds that Plaintiff incurred reasonable and necessary medical
24 expenses for pain treatment from Dr. Thomas Purtzer in the amount of \$3,000.00. While
25 Dr. Purtzer's methods of treatment were questionable, \$3,000 of the total medical charges will
26 be paid by the Defendant.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 4

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Houston, TX 77010
713-222-3800/713-222-3850

1 433, 13 P.3d 642 (2000) (under the Jones Act, "legal cause is established when the
2 employer's negligence was a cause, however slight, of his injuries.") (citations omitted).

3 4. A vessel is unseaworthy if there is "an insufficient number of men assigned to
4 perform a shipboard task" and "actual or constructive knowledge of an unseaworthy condition
5 is not essential to [a vessel's] liability." *Ribitski v. Canmar Reading & Bates, Ltd.
6 Partnership*, 111 F.3d 658, 662 (9th Cir. 1997); see also *Havens v. F/T Polar Mist*, 996 F.2d
7 215, 217-18 (9th Cir. 1993) ("The failure of a piece of vessel equipment under proper and
8 expected use is sufficient to establish unseaworthiness."). "This warranty of seaworthiness is
9 a species of liability without fault. The shipowner warrants that the vessel, together with its
10 gear and personnel, are reasonably fit" for the vessel's purpose. *Miller v. Arctic Alaska
11 Fisheries Corp.*, 133 Wn.2d 250, 264 n.7, 944 P.2d 1005 (1997).

12 5. On an unseaworthiness claim, "[c]ausation is established by showing that the
13 unseaworthy condition was a substantial factor in causing the injury." *Ribitski v. Canmar
14 Reading & Bates, Ltd. Partnership*, 111 F.3d 658, 662 (9th Cir. 1997).

15 6. Successful General Maritime plaintiffs are entitled to 12% prejudgment interest.
16 See *Paul v. All Alaskan Seafoods, Inc.*, 106 Wn. App. 406, 427, 24 P.3d 447 (2001).

17 7. The Court, taking all of these factors into consideration, has determined that
18 the Defendant is liable under the Jones Act and for unseaworthiness.

19 8. The Court also finds that the Defendant was negligent under the Jones Act in
20 failing to maintain the blast freezer, in allowing crew to work with undue haste, and by failing
21 to provide adequate training to the Plaintiff and Mr. Jenkins, his fellow crewmember.

22 9. The Court finds that the BERING STAR was unseaworthy based on (a) a
23 tripping hazard on the flooring of the blast freezer; (b) a faulty overhead rail system; and (c) a
24 fellow crewman who was insufficiently trained or focused on the cart. Consequently, the
25 Court finds that Plaintiff has met his burden to establish an unseaworthy condition aboard the
26

1 vessel, by a preponderance of the evidence. The Court also finds that the vessel's
2 unseaworthiness was a substantial factor in causing Plaintiff's injuries.

3 10. A seaman is comparatively negligent if he fails to act with ordinary prudence
4 under the circumstances. *Peterson v. Great Hawaiian Cruise Line, Inc.*, 33 F. Supp. 2d 879,
5 885-86 (D. Hawaii 1998). The evidence showed no contributing negligence on the part of the
6 Plaintiff and, as such, the Court assesses one hundred percent (100%) negligence to
7 Defendant.

8 11. The Court finds that Defendant has not unreasonably withheld maintenance or
9 cure in the past and that any such past or future claim is subsumed by Plaintiff's offer of
10 uncontroverted past losses, and his future damages. Thus, the Court declines to award any
11 further maintenance or cure, beyond the medical losses assessed.

12 12. At the time of his injury, the Court concludes Plaintiff was a "seaman" as that
13 term is legally defined under the Jones Act, and was employed by Defendant Icicle Seafoods,
14 Inc.

15 13. The Court concludes that the injuries and consequent damages sustained by
16 Plaintiff were 100% proximately caused by Defendant in negligently failing to act as a
17 reasonable maritime employer under like circumstances.

18 14. The Court concludes that the barge (BERING STAR) was unseaworthy, and
19 that such unseaworthiness was a substantial factor and proximate cause of Plaintiff's injuries.

20 15. The Court concludes that Plaintiff has proximately sustained net Special
21 Damages of \$33,611.00. The Court further concludes that Plaintiff has sustained General
22 Damages in the amount of \$110,000.00. In addition, Plaintiff is awarded pre-judgment
23 interest at the rate of twelve percent (12%) per annum from May 1, 2003 to August 29, 2007.
24 Plaintiff is also entitled to six and thirty-five one hundredths percent (6.35%) future interest
25 until time of payment in full of this Judgment, together with all properly taxable costs of
26 court.

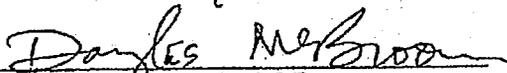
FINDINGS OF FACT
AND CONCLUSIONS OF LAW -7

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Houston, TX 77010
713-222-3800/713-222-3850

1 16. To the extent that any foregoing Findings of Facts constitutes a Conclusion of
2 Law, it is adopted as such. To the extent that any foregoing Conclusions of Law constitutes a
3 Finding of Fact, it is adopted as such.

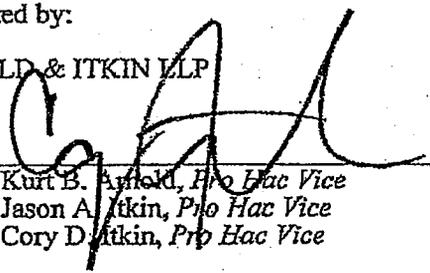
4 IT IS SO ORDERED.

5 DONE at Seattle, Washington, this the 11 day of Jan, 2008

6 
7 The Honorable Douglas McBroom

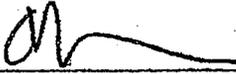
8 Presented by:

9 ARNOLD & ITKIN LLP

10 
11 By: _____

12 Kurt B. Ayfild, *Pro Hac Vice*
13 Jason A. Itkin, *Pro Hac Vice*
14 Cory D. Itkin, *Pro Hac Vice*

15 RAFEL LAW GROUP PLLC

16 By: 

17 Anthony L. Rafel, WSBA #13194

18 Attorneys for Plaintiff Justin Endicott

19 Approved as to form:

20 HOLMES WEDDLE & BARCOTT, P.C.

21 By: _____

22 Kara Heikkila, WSBA #27966
23 Thaddeus J. O'Sullivan, WSBA #37204

24 Attorneys for Defendant Icicle Seafoods, Inc.
25
26

FINDINGS OF FACT
AND CONCLUSIONS OF LAW -8

ARNOLD & ITKIN LLP
1401 McKinney St., Ste. 2550
Houston, TX 77010
713-222-3800/713-222-3850

Alaska Department of Labor and Workforce Development
Alaska Workers' Compensation Board
P.O. Box 25512, Juneau, Alaska 99802-5512

REPORT OF OCCUPATIONAL INJURY OR ILLNESS

AN 206360
AWCB Case Number
5115 5113

EMPLOYEE: Answer questions 1-16. Carefully follow instructions on GREEN and YELLOW pages.

1. Last Name ENDICOTT JUSTIN	2. Telephone Number (541) 831-4099	3. Date of Birth 6/23/84	4. Sex M	5. Social Security Number 548-81-0835
E. Mailing Address 2001. TABLEROCK RD #2		7. Residence Address		
City MEDFORD	State OR	Zip Code 97521	City	State
8. City, Town, Village where injury occurred TOGLAK		9. Date & Hour of Last Exposure to Injury or Disease Date 05/01/03 Hour 2:30 PM		10. On Employer's Premises? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
11. Full Name and Address of Attending Physician		12. Hospitalized as In-Patient? <input type="checkbox"/> Yes <input type="checkbox"/> No	13. Name and Address of Hospital	
City	State	Zip Code	City	State
14. Type of Injury or Illness and Part of Body Injured ARM FX <input type="checkbox"/> Left <input type="checkbox"/> Right		15. Describe How the Injury or Illness Happened		
16. Employee's Signature (If not available, explain)				17. Date Signed 5/1/03

EMPLOYER: Answer questions 16-49. Carefully follow instructions on PINK page.

18. Employer's Name ICICLE SEAFOODS, INC		19. Employer's Alaska Address (If different from mailing)		
20. Employer's Mailing Address (street and number) PO BOX 79003		21. Name of Insurer		
City SEATTLE	State WA	Zip Code 98119	Telephone (206) 282-0988	22. Full Name and Address of Adjusting Company EAGLE INSURANCE CO. 4300 B STREET #304
23. Date Employer First Knew Injury or Illness was Work Related 5/1/03	24. Time Employee Left Work Date 5/1/03 Hour <input type="checkbox"/> AM <input type="checkbox"/> PM	Mailing Address (street and number) ANCHORAGE AK 99503		
25. Time Last Beyond Date of Injury or Illness? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	26. Date Returned to Work Date 5/1/03	27. Death <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	28. Location Where Injury or Illness Took Place BERING STAR - HERRING	29. Employee's Occupation PROCESSOR
30. Date Hired by Employer 01/12/03		31. Earnings Calculated By: <input checked="" type="checkbox"/> Day <input type="checkbox"/> Output <input type="checkbox"/> Wk. <input type="checkbox"/> Mo. <input type="checkbox"/> Year		
32. Rate of Pay \$ 7.5 per HR		33. Days Employee Works Per Week <input type="checkbox"/> 3 or Less <input checked="" type="checkbox"/> VARIES		34. Name Scheduled Days Of VARIES
35. Workday Begins <input type="checkbox"/> AM <input type="checkbox"/> PM		36. Was Employee Paid for Day of Injury or Illness? <input type="checkbox"/> Yes <input type="checkbox"/> No		
37. Federal EIN Number		38. UI Account Number		39. Give Details of How Injury or Illness Happened BE PUSHING CART OF
40. Boxed HERRING INTO FREELER. SLIPPED & FELL. ARM CAUGHT BETWEEN CART & FREELER COIL.				
41. Name and Address of Witnesses		42. If Mechanical, Specifically What Part?		
43. Name and Address of Witnesses		44. If the Injury or Illness Was Caused by Anyone Besides Employee, Give Name and Address		
45. Dependents (name and address in case of death)				
46. If You Doubt Validity of Injury or Illness, State Reason				
47. Signature of Authorized Employer Representative Deanna Lopez		48. Title SAFETY DIR.		49. Date Signed 05/01/03

WARNING TO EMPLOYEES AND EMPLOYERS: Penalties for fraud or misleading statements. A person who knowingly makes a false or misleading statement that adversely affects another person, is guilty of deception as defined in AS 11.46.180, and may be punished as provided in AS 11.46.120-150.

See Instructions on Back of Pink and Yellow Pages

Distribution: Blue—Workers' Comp Board White—Adjusting Co. Pink—Employer's File Green & Yellow—Employee

Form 07-6101 (Rev. 5/00)

ICI 0005

REPORT OF OCCUPATIONAL INJURY OR ILLNESS

AWCB Case Number: _____

EMPLOYEE: Answer questions 1-20, immediately mail report. Further instructions on GREEN AND YELLOW page.

1. Last Name: Gregory First Name: Justin

5. Mailing Address: 380 W. Gregory
 City: Medford, OR State: OR Zip Code: 97521

7. Residential Address: _____
 City: _____ State: _____ Zip Code: _____

8. City, Town, Village where injury occurred: Anchorage, Alaska

9. Date & Hour of Last Exposure to Injury or Disease: Date 5/17/03 Time 1:30 PM

10. On Employer's Premises? Yes No

11. Full Name and Address of Attending Physician: _____
 City: _____ State: _____ Zip Code: _____

12. Hospitalized as in-Patient? Yes No

13. Name and Address of Hospital: _____
 City: _____ State: _____ Zip Code: _____

14. Type of Injury or Illness and Part of Body Injured: Arm Pain
 Left Right

15. Describe How the Injury or Illness Happened: Backing out of freezer putting cart, slipped, arm got caught between coils as he fell.

EMPLOYER: Answer questions 18-49, Carefully follow instructions on PINK page.

PRESS HARD 4 COPIES

16. Employer's Name: Cardinal G. Inc.

18. Employer's Mailing Address: P.O. Box 14003
 City: Seattle, WA State: WA Zip Code: 98148

20. Full Name and Address of Assigning Company: Eagle TMS Co
4800 B. St. Suite 304
 Anchorage, AK 99503

21. Name of Injury: Back Injury

22. Date of Injury: 5/17/03

23. Date Returned to Work: 5/21/03

24. Date of Last Injury or Illness Took Place: 5/17/03

25. Employee's Occupation: HR

26. Details of Injury or Illness: finger, slipped & caught his arm in coils

27. Was Injury or Illness Caused by Failure of a Machine or Product? Yes No

28. Was Injury or Illness Caused by a Hazardous Substance? Yes No

29. Was Injury or Illness Caused by a Hazardous Condition? Yes No

30. Was Injury or Illness Caused by a Hazardous Activity? Yes No

31. Was Injury or Illness Caused by a Hazardous Environment? Yes No

32. Was Injury or Illness Caused by a Hazardous Person? Yes No

33. Was Injury or Illness Caused by a Hazardous Vehicle? Yes No

34. Was Injury or Illness Caused by a Hazardous Object? Yes No

35. Was Injury or Illness Caused by a Hazardous Animal? Yes No

36. Was Injury or Illness Caused by a Hazardous Plant? Yes No

37. Was Injury or Illness Caused by a Hazardous Weather? Yes No

38. Was Injury or Illness Caused by a Hazardous Other? Yes No

39. Was Injury or Illness Caused by a Hazardous Unknown? Yes No

40. Was Injury or Illness Caused by a Hazardous Other? Yes No

41. Was Injury or Illness Caused by a Hazardous Unknown? Yes No

42. Was Injury or Illness Caused by a Hazardous Other? Yes No

43. Was Injury or Illness Caused by a Hazardous Unknown? Yes No

44. Was Injury or Illness Caused by a Hazardous Other? Yes No

45. Dependents (name and address): _____

46. Valid Date of Injury or Illness, State Reason: 5/17/03 (008) and 5/21/03 (008)

47. Signature of Authorized Employer Representative: _____

48. Title: HR

49. Date Signed: 5/17/03

WARNING TO EMPLOYEES AND EMPLOYERS: Penalties for fraud or misleading statements. A person who knowingly makes a false or misleading statement that adversely affects another person is guilty of deception as defined in AS 11.46.180 and may be punished as provided in AS 11.46.120, 160, and 165.

See instructions on Back of Pink and Yellow Pages
 Distribution: Blue - Workers' Comp Board, White - Assigning Co., Pink - Employer's File, Green & Yellow - Empl.

ICI 0006



ICICLE SEAFOODS, INC.
ACCIDENT INVESTIGATION REPORT

VESSEL NAME: Bering Star LOCATION: Tagiak

1. EMPLOYEE'S NAME <u>Justin Endicott</u>	2. SOCIAL SECURITY NUMBER <u>391-80-0973</u>	3. BIRTH DATE <u>6-23-84</u>	4. SEX <input checked="" type="checkbox"/> M <input type="checkbox"/> F
5. EMPLOYEE'S JOB TITLE <u>Processor</u>	6. LENGTH OF TIME IN THIS POSITION <input type="checkbox"/> Less than 1 month <input checked="" type="checkbox"/> 1-5 months <input type="checkbox"/> 6 mo - 1 year <input type="checkbox"/> 1 year +	7. ACCIDENT REPORTED TO: <u>Lead-Joe Ramp</u>	8. DATE REPORTED <u>5/1/03</u>

9. ACCIDENT DATE <u>5-1-03</u>	10. TIME OF ACCIDENT A. <u>2:30</u> ^(A.M.) P.M. B. Time shift started: <u>10:00 pm</u>
11. NATURE OF INJURY AND AFFECTED BODY PART(S) <u>Broken R. Forearm</u>	12. SEVERITY OF INJURY (check all that apply) <input type="checkbox"/> First aid only <input checked="" type="checkbox"/> Medical treatment <input type="checkbox"/> Restricted work <input checked="" type="checkbox"/> Lost work days <input checked="" type="checkbox"/> Medical Leave of Absence <input type="checkbox"/> Fatality
13. NAME OF MEDICAL FACILITY AND PHYSICIAN <u>D'ham/Anchorage</u>	14. OSHA RECORDABLE? <input checked="" type="checkbox"/> Yes If yes: <input checked="" type="checkbox"/> injury <input type="checkbox"/> illness <input type="checkbox"/> No If no: <input type="checkbox"/> not work related <input type="checkbox"/> first aid (injury)
15. PHYSICIAN'S RECOMMENDATIONS	16. POST-ACCIDENT DRUG TEST A. Collected by: B. Collection date: C. Date mailed to lab:

17. Has the employee had similar conditions or injuries in the past?

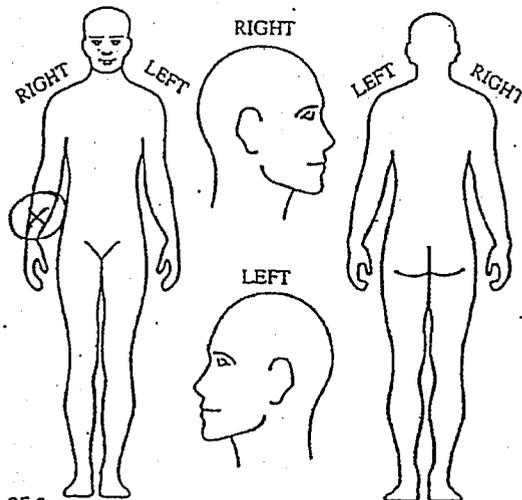
Yes No

If yes, list the conditions / injuries and approximate dates.

18. Was the information listed in #17 included on the employee's health questionnaire?

Yes No

MARK AFFECTED AREAS ON FIGURES BELOW:



OSHA 301: INJURY AND ILLNESS INCIDENT REPORT

Information About The Employee

Full name: Justin Endicott
Address: 380 W. Gregory
Medford, OR 97521

Date of birth: 6/23/84
Date of hire: 11/21/03
 Male Female

Information About The Physician Or Other Health Care Professional

Name of physician or health care professional: Attending in D'Ham/Anchorage
If treatment was given away from the worksite, where was it given?

Facility: Dillingham/Anchorage

Address: _____

YES NO

Treated in emergency room?
In-patient hospitalization overnight?

Information About The Case

Case number from the OSHA 300 log: 13
Time employee began work: 10:00 AM (PM)
Date of death (if applicable): 1 1

Date of injury or illness: 5/1/03
Time of event: 2:30 AM (PM)
 Check if time cannot be determined

What was employee doing just before the incident occurred? Describe activity, as well as the tools, equipment, or material the employee was using. Be specific. Examples: "climbing a ladder while carrying roofing materials," "spraying chlorine from hand sprayer," "daily computer key-entry."

Pulling loaded cart (approx. 1300 lbs) into freezer with another crew member pushing.

What happened? Tell us how the injury occurred. Examples: "When ladder slipped on wet floor, worker fell 20 feet," "Worker was sprayed with chlorine when gasket broke during replacement," "Worker developed soreness in wrist over time."

Justin's heel caught on lip at doorway + caused him to slip, bent his arm out sideways while holding on to "pull" bar, elbow jammed on freezer coil (between cart + coil)

What was the injury or illness? Tell us the part of the body that was affected and how it was affected; be more specific than "hurt," "pain," or "sore." Examples: "strained back," "chemical burn, hand," "carpal tunnel syndrome."

Broken R forearm.

What object or substance directly harmed the employee? Examples: "concrete floor," "chlorine," "radial arm saw." If this question does not apply to the incident, leave it blank.

Freezer coil + freezer cart.

Completed by: Sydney Redfield
Phone number: (206) 282-0988

Title: Safety Mgr.
Date: 5/1/03

ICI 0009

DRUG PROOF

flexible service | rigid procedures
JENKINS, JASON

17 Madison | Suite 500 | Seattle, WA 98104
 206.386.2661 • 800.898.0180 | Fax 206.386.2436
 DrugProof is a service of
 Dynacare Laboratories, Inc.

PAGE: 1
 Final Report Printed: 05-13-03 07:01
 Printed: 05-13-03 07:01

NEW RESULT	TEST NAME	ABN	RESULTS	UNITS	REFERENCE RANGE/COMMENTS
	T1475291		Collected: 05/01/03 2:15 PM		
	SPECIMEN INFO:				
	Reason for Test		POST ACCIDENT		
	Collection Site		BERING STAR		
	EMPLOYMENT PARK				
	Alcohol Urn, Ur		Neg		
	Amphetamines		Neg		
	Cannabinoids		Neg		
	Cocaine Metab.		Neg		
	Opiates		Neg		
	Phencyclidine		Neg		
	Creatinine		126.4	ug/dL	20-500
	Dilution Check		Acceptable		
	Adulterant Check		Acceptable		
	THRESHOLDS (CUTOFFS)				
			SCREENING	CONFIRMATION	
	Alcohol		0.03	0.03	g/dL
	Amphetamines		1000	500	ng/mL
	Cannabinoids		50	15	ng/mL
	Cocaine Metab.		50	150	ng/mL
	Opiates		2000	2000	ng/mL
	Phencyclidine		25	25	ng/mL
	(Results below the threshold are reported as NEG).				
	Aspects of testing differ from HHS/SAMHSA guidelines: e.g. frms, specimen volumes, thresholds, drugs tested.				

PL500 1001

JENKINS, JASON
 391800973
 Requisition: A1875966

Iceberg Floating Processors
 Attn: Human Resources
 4019 21st Ave W
 Seattle WA 98109

Call: 05/01/03 Rec: 05/12/03

** FINAL **

900

Dynacare Laboratories, Inc. is an equal opportunity employer.

ICI 0010

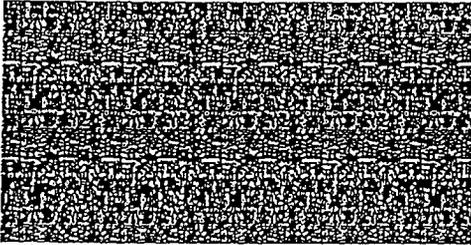
DRUG|PROOF Drug Proof is a service of Dynacare Labs.
Available services & legal procedures

A1870296

1229 Madison | Suite 500 | Seattle, WA 98104 | Tel 206.386.2661 | 800.896.0180

DONOR SOCIAL SECURITY NUMBER		COLLECTION DATE / TIME	
113		11/2 2:15 PM	
DONOR LAST NAME		FIRST	MI.
Endicott		Justin	
STREET ADDRESS			
1111 1st Ave			
CITY		STATE	ZIP
Seattle		WA	98101
PHONE	SEX	BIRTHDATE	
	M	8-10-61	
REASON FOR TEST:			
<input type="checkbox"/> For cause/Reason susp		<input type="checkbox"/> Pre-employment	
<input type="checkbox"/> Random		<input type="checkbox"/> Post-accident	
<input type="checkbox"/> Followup		<input type="checkbox"/> Return to duty	
		<input type="checkbox"/> Other	
<input type="checkbox"/> Treatment			
COLLECTION SITE: <u>Seattle, WA</u>			
PHONE NUMBER: <u>206.386.2661</u>			
COLLECTOR'S NAME: <u>Justin Endicott</u>			
<input type="checkbox"/> OBSERVED <u>Not observed</u>			
COMMENTS:			

DONOR IDENTIFIED BY: <u>Justin Endicott</u>	
REFERRED BY / COMPANY INFORMATION	ACCT. #
<u>Justin Endicott</u>	
<p>Drug test is for Justin Endicott's co-worker at time of accident.</p> <p style="text-align: right;">JR</p>	



SPECIMEN TEMPERATURE WITHIN RANGE
 YES, 90°-100°F / 32°-38° C NO RECORD SPECIMEN TEMPERATURE

CHAIN OF CUSTODY		
ACTIVITY	NAME	DATE
Specimen labeled, collected, sealed, secured by:	<u>Justin Endicott</u>	<u>11/2/05</u>
Specimen transported to lab via: (company or courier):	<u>Lab Courier</u>	<u>11/2/05</u>
Specimen received, accessioned, and placed in temp. storage	SEALS	DATE
	<input type="checkbox"/> INTACT <input type="checkbox"/> BROKEN <input type="checkbox"/> N/A	

CONSENT / RELEASE STATEMENT

I, the undersigned, hereby consent to the collection, analysis, and reporting of the specimen for the purpose of the test described above. I understand that the results of the test may be used for legal and/or employment purposes. I understand that I have the right to refuse this test and that my refusal will not result in any adverse action against me. I understand that I have the right to stop the test at any time. I understand that I have the right to see the results of the test. I understand that I have the right to request a copy of the results of the test. I understand that I have the right to request a copy of the test report. I understand that I have the right to request a copy of the test results. I understand that I have the right to request a copy of the test results. I understand that I have the right to request a copy of the test results.

Justin Endicott

ICI 0011

Icicle Seafoods, Inc. – PV Bering Star – Dutch Harbor
Incident Report and Investigation

Date: May 3, 2003

Re: Justin Endicott

1. **Incident Summary:** Justin was pulling a loaded cart into the blast freezer. He caught his heel on the lip of the doorway and started to slip causing his elbow to jut out past the side of the cart. His arm got jammed between the coil and the cart. His co-worker continued to push and Justin's arm was broken.
2. **Initial Conditions:** Normal freezer flat conditions (slippery and loud with poor visibility).
3. **Initiating Event:** Broken arm.
4. **Incident Description:** Justin had his hands placed on the outside of the cart as he was pulling it into the blast freezer, rather than on the pull bar. He caught his heel on the lip of the doorway and started to slip, causing his elbow to swing out and into the coil area. The entrance to the blast freezer is narrow with barely enough room for the cart to fit through. By using the pull bar with his body centered in front of the cart, he would be protected from getting caught in the coils on either side when he slipped. (He may have sustained other injuries, but certainly not as severe.) His arm was jammed between the coils and the cart and was broken by the weight and pressure of the cart still being pushed by the co-worker. (A loaded cart weighs between 1300 and 1400 pounds.) The cart is pushed up a ramp and into the blast freezer at such a rate of speed that there is no opportunity to stop it, in such an event, in time to prevent a serious injury.
5. **Immediate Corrective Actions:** Reminded freezer leads to make sure their crew do not to put their hands on the outside of the cart when pulling/pushing carts.
6. **Causes & Corrective Actions:** Management System is the Root Cause. Specifically, "enforcement not implemented" and "no way to implement."

ICI 0012

Enforcement Not Implemented: Supervisors sometimes reward behavior they would at other times reprimand workers for. Enforcement of the freezer SOP has been inconsistent and deviation from the SOP is common practice. Workers are told to keep their hands on the inside handle of the carts to prevent injury, and yet are allowed to grasp the outside rail at times for better control at a faster pace. They are not told specifically when it is okay and not okay, but are allowed to make that call on their own. The same with going too fast through the doorways.

No Way To Implement: The SOP was not followed or followed incorrectly because there is no practical way to implement it given the level of staffing and the amount of work that is expected.

After meeting with the Vessel and Production Managers, it was concluded that virtually all serious injuries in the freezer flat were a result of workers having their hands on the outside rail of the cart where they are unprotected. It was agreed that there are times when they have to use the outside rail to maneuver the cart, but that going through the doorway to the blast freezer is not one of them. I will put this procedure into writing and the Production Manager will ensure that the leads implement it.

7. Lessons Learned: We must continue to try to design a safer freezer flat.
8. Investigator: Sydnee K. Redfield, Safety Manager.
9. Distribution: Leaurie Lopes, Safety Director
Chris Kline, Safety Specialist

ICI 0013

TO WHOM IT MAY CONCERN:

THE DAY OF JR'S ACCIDENT, WE WERE EXITING I BELIEVE FREEZER #3 OF THE EAST RAIL. WE HAD BEEN PLAGUED WITH THE FREEZER CART MISTRACKING ALL THE TIME.

(THE ACCIDENT)

AS WE WERE ABOUT (13-20 FT) FROM THE FREEZER ENTRANCE COMING OUT, IN A MATTER OF A SPILT SECONDS, JR'S ARM WAS CAUGHT IN BETWEEN THE FREEZER COIL AND CART. I HAD BEEN PUSHING THE CART, AND WAS CONCENTRATING ON KEEPING IT ON TRACK. JR WAS PULLING THE CART AT A REAL GOOD (FAST) CLIP UNDERSTAND DLY.

I LATER HEARD HIS ACCOUNT OF THE ACCIDENT, AND HE SAID, "I TRIPPED ON THE METAL PLATE AT THE ENTRANCE AND MY ELBOW CAUGHT THE COIL AS I FELL BACK CAUSING THE CART."

JASON JENKINS

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*277 AN ANALYSIS OF HARMLESS ERROR IN WASHINGTON: A PRINCIPLED PROCESS
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TABLE OF CONTENTS

- I. INTRODUCTION 278
- II. THEORY OF HARMLESS ERROR 278
- III. CURRENT APPLICATIONS OF THE DOCTRINE OF HARMLESS ERROR 282
 - A. Definition of Harmless Error 283
 - B. Standards of Review 286
 - 1. The Contribution Test 287
 - 2. The Overwhelming Untainted Evidence Test 287
 - 3. Some Comparisons 291
 - 4. Other Standards 293
 - C. Presumptions 296
- IV. FACTORS INFLUENCING THE DETERMINATION OF HARMLESS ERROR 297
 - A. Factors Relating to Both Instructional and Evidentiary Error 298
 - 1. Error Relating to an Issue Not in Controversy 298
 - 2. Error Cured by the Jury's Verdict 304
 - 3. Case Based on Circumstantial Evidence 310
 - 4. Whether Erroneous Instruction or Evidence at Issue Was Argued . 312
 - B. Factors Limited to Erroneous Instructions 314
 - 1. Evidence to Justify the Instruction 314
 - 2. Instruction Under Review Is Erroneous but Instructions as a

Whole Are Adequate	317
C. Factors Limited to Erroneous Admission or Exclusion of Evidence ..	319
V. CONCLUSION	323

*278 I. INTRODUCTION

There is probably no more cited judicial reason for affirming the result of a trial court following an erroneous ruling than that of harmless error. [FN1] Harmless error is a doctrine of accommodation based upon practical considerations, one of which is that, as a matter of judicial economy, every case in which error occurs cannot be retried. The harmless error rule is, however, viewed by some trial lawyers and at least one appellate judge as a somewhat unprincipled expedient for ignoring clear error. [FN2] One purpose of the rule is clearly expediency: "We should avoid multiple trials and attendant uneconomic use of judicial resources when the new trial will inevitably arrive at the same result." [FN3]

This article first examines the theoretical concepts which underlie the doctrine of harmless error. Part III discusses and criticizes the current applications of the doctrine. Part IV discusses a series of factors distilled from Washington case law which appear to influence the conclusion that error is or is not harmless.

II. THEORY OF HARMLESS ERROR

Washington courts have traditionally applied the harmless error analysis through either of two standards of review--the contribution test or the overwhelming evidence test. [FN4] The judicial assumption is that application of one or the other dictates the conclusion--harmless error in a given case. [FN5] But a review of this state's cases decided on the basis of harmless error casts doubt on the validity of that assumption. In the parlance of the social scientist, these announced standards do not predict the conclusion that error is harmless. [FN6]

The announced standards provide little guidance to lawyers evaluating the prospects of affirmance on the basis of the harmless error rule despite clear *279 error. Indeed, some have suggested that any such prediction may be impossible. As one commentator notes, "What continues to defy articulation is the process which leads a judge to say there is a doubt and that the doubt is or is not a reasonable one. The circumstances are too infinite and the appellate judgment too laden with discretion to admit a formulary aid." [FN7]

In his book, *The Riddle of Harmless Error*, Justice Roger Traynor posits that "if the court is convinced upon review of the evidence that the error did not influence the jury, and hence sustains the verdict, a fortiori there is no invasion of the province of the jury." [FN8] The problem with this approach is that it assumes a reviewing court can determine what evidence or instruction influenced the jury's decision; it cannot. The assumption is nonetheless at the heart of modern standards for review of harmless error. It is, more importantly, a tacit admission that an appellate court is necessarily engaging in fact-finding and thereby invading the province of the jury. [FN9] As the Washington Supreme Court noted in *State v. Robinson*:

Jurors and courts are made up of human beings, whose condition of mind cannot be ascertained by other human beings. Therefore, it is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors. The state attempts to safeguard the life and liberty of its citizens by securing to them certain legal rights. These rights should be impartially preserved. They cannot be impartially preserved if the appellate courts make of themselves a second jury and then pass upon the facts. [FN10]

The right to have a jury resolve factual issues is guaranteed in both state and federal constitutions. [FN11]

In Washington, the theoretical basis for the determination of harmless error presently involves a committee of three judges in the case of the court *280 of appeals, or nine in the case of the supreme court, deciding what did or did not influence the decision-making process of 12 jurors. Those jurors not only heard, but watched, over a period of days, weeks or months, witnesses, lawyers, and a trial judge. The jurors observed the courtroom cast going and coming from the courtroom and watched the frowns, the smiles, the assured and the not-so-assured expressions of lawyers, witnesses, litigants and the judge, as the drama that is a jury trial unfolded. The jurors heard not only the comments made on the record (an appellate court's only source of information), but also saw and heard the laughter, the groans, the whispers in the courtroom, the facial expressions and inflection of voice of the parties, witnesses, and lawyers, and the intonations of the trial judge as he or she ruled on various motions and objections. In short, the jurors formed impressions--impressions based on many factors to which no appellate court can ever be privy. [FN12]

Whether and to what extent an error influenced a given jury verdict is therefore necessarily an exercise in judicial speculation--perhaps principled or reasoned speculation, but nonetheless speculation, about what a jury would or would not have done with or without the offending evidence, instruction, or comment. While much has been written about what does or does not influence juries, what influences a particular jury in a particular case can simply never be discovered. [FN13] And, as will be suggested, this should not therefore be the undertaking of a reviewing court.

Equally important to any discussion of harmless error is the recognition that a lawsuit, like any other human enterprise, is not perfect. No litigant is therefore entitled to a perfect trial. As Justice Hale so eloquently observed in *State v. Green*:

No matter how devotedly the courts strive for perfection, it is bound in some degree to elude them. The perfect trial probably is yet to be held. Therefore, an appeal by an inevitable process of intellectual distillation reduces the points under review to a question of whether the flaws in the record are of sufficient moment to mark the trial as unfair. In the last analysis, the final measure of error in a criminal case should be: Was the *281 defendant afforded, not a perfect but, rather, a fair trial?--for the constitution guarantees no one a perfect trial. [FN14]

The focus of our judicial system has always been on the process. Fairness of process, it is assumed, assures a fair result--not a perfect result. It should not be the business of a reviewing court, therefore, to conclude that a verdict--the end result--is or is not correct. What that court can say is that the process of arriving at the result, even if flawed, was fair and not flawed to the extent the trial must be repeated. Or, in other words, that the error was harmless. Any harmless error analysis should then focus on the process, not the result.

The conclusion that a defendant received a fair trial, however, is necessarily more subjective than a decision that he or she received a perfect trial. The assurance of a perfect trial is ruined by any error. Assurance of a fair trial survives error, through the use of certain assumptions as to why the error did or did not affect the verdict. A defense for this more subjective approach is the generally accepted notion that a "jury reaches its verdict, not by reason of any one circumstance appearing during the trial, but by reason of the general impression which the testimony as a whole had upon their minds." [FN15]

The harmless error analysis need not be an exercise in judicial second-guessing of a jury's verdict. A more certain and principled approach, indeed maybe the only rational approach to a harmless error analysis, is to view those factors of which it can be said should have influenced the process by which a given jury arrived at a given verdict.

Implicit in any harmless error analysis is the normative (but perhaps unrealistic) assumption that juries operate in a logical and rational fashion. This assumption permits an appellate tribunal to review objectionable evidence or instructions and arrive at the equally logical, rational conclusion that the assigned error was harmless. Most trial lawyers and many trial judges would disagree with this assumption, and it may well fly in the face of a traditional and appropriate role for

juries in criminal cases, i.e., to ignore both evidence and instructions and acquit.

Because the trial of a lawsuit is a human enterprise, any judicial suggestion that there is a standard of review by which error can be determined to be harmless is fanciful. But the assumption of the logical, rational jury, while perhaps also fanciful, is nonetheless essential to any harmless error analysis. If we assume that juries act irrationally, then any possible theoretical foundation for the doctrine of harmless error breaks down. Every *282 error is then grounds for reversal because there is no logical, rational premise by which to evaluate the effect of error on a verdict. [FN16]

The harmless error analysis should be an exercise in determining what should have (as opposed to what did) or should not have (as opposed to what did not) influenced a jury in any given case. When so viewed, the analysis becomes less an exercise in judicial intuition, or second-guessing, and more of a reasoned application of a set of rules to a given fact pattern which ultimately results in the decision that the case will or will not be reversed. This approach is appropriate because there are a number of identifiable factors arising from the very factual context in which the error occurred, factors which influence the determination of harmless error. These factors, at least in many harmless error determinations, provide for a more fixed and clearer prediction of affirmance or reversal. They provide more concrete, more tangible guidelines for the harmless error determination than do the traditional analytical standards-- "beyond a reasonable doubt" or "overwhelming evidence."

This article adopts an empirical approach to the application of the harmless error rule, focusing on discrete factors actually leading to the conclusion error was harmless, rather than on the announced harmless error standard. It concludes by identifying a number of factors many of which are unique to the type of error under consideration.

III. CURRENT APPLICATIONS OF THE DOCTRINE OF HARMLESS ERROR

The traditional announced analytical approach to the doctrine of harmless error is flawed in several fundamental respects. First, it focuses on the bottom line (Did the error contribute to the verdict? Does the untainted evidence overwhelmingly support the verdict?) rather than the process. Second, the traditional approach necessarily requires the weighing and balancing of factual matters by an appellate court. And, even at that, the weighing and balancing is once removed because the question is not just guilty or not guilty, or in the civil setting, liability or no liability; the inquiry is rather what did or did not influence a jury. Third, because of the weighing and balancing required of an appellate court, the conclusion of harmless error is not predictable. What might have contributed to a verdict, or at what level evidence is overwhelming, may well vary between decision makers. The current approach is a combination of a definition, standards of review, burdens of proof, and presumptions. This collection of analytical tools *283 contributes to what one judicial writer has called the "chameleonic quality of harmless error methodology." [FN17]

A. Definition of Harmless Error

The definition of harmless error suggests an analytical approach to the harmless error question, an approach long since abandoned. *State v. Britton* defined harmless error as "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." [FN18] Prejudicial error is presumably that error which affected the final result of the case and was prejudicial to the substantial rights of the party assigning it. The definition set out in *Britton* is based on Remington's Revised Statutes section 307. [FN19] That statute provided that "[t]he court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." [FN20]

The successor to Remington's Revised Statutes section 307, Revised Code of Washington section 4.36.240, retains this definition. [FN21] The statutory definition of harmless error was developed at a time when even the most innocuous of

errors would result in reversal. [FN22] The statute and cases which followed were calculated to avoid the formalistic type of pleading and procedural errors which characterized early trial practice and resulted in the reversal of jury verdicts in otherwise flawless trials. [FN23] Despite substantial analysis, reanalysis, and evolution of the application of the doctrine of harmless error, the definition has remained unchanged. [FN24]

The second part of the Britton definition--that the error was not "prejudicial to the substantial rights of the party assigning it"--simply begs *284 the question of the last part of the definition: error is harmless only if it "in no way affected the final outcome of the case." [FN25] This latter statement has, however, served as the starting point for the development of modern case law of the doctrine of harmless error. [FN26] Unlike the first part of the Britton definition--"trivial, or formal, or merely academic"--it suggests no fixed analytical approach to determining if the error under consideration was harmless.

Despite the ambiguity, the definition of harmless error is frequently referenced as if it somehow dictates the conclusion that an error is harmless. [FN27] The question left unanswered by this definition is under what factual pattern does error not affect the outcome of a trial.

Confirming the problems with the Britton definition is the common test set out in Britton:

It is a fundamental rule of modern appellate procedure that in order to warrant a reversal, the error complained of must have been prejudicial to the substantial rights of the appellant or plaintiff in error.

A common test to determine whether an error was harmless or prejudicial is found in 3 Am. Jur. 562, § 1007:

One very common test which is applied in a variety of situations is whether or not the error affected the result. If it did not, then it is not reversible error. [FN28]

Definitions of the words used to define harmless error suggest a very different approach to the analysis, one closer to the original purpose underlying the harmless error doctrine. Trivial means "of very little importance or value; trifling; insignificant." [FN29] Formal means "being in *285 accordance with the usual requirements, customs, ...; conventional; ... being a matter of form only; perfunctory." [FN30] And academic is "learned or scholarly but lacking in worldliness, common sense, or practicality ... conforming to set rules, standards, or traditions; conventional...." [FN31] These definitions suggest an analytical approach to the harmless error question far different than the approach which has evolved. The approach now requires the weighing and balancing of evidence rather than simply ignoring technicalities. [FN32]

The current application of the harmless error doctrine has suffered from somewhat the same difficulty as the analysis of obscenity. The court is left with an impression, difficult to articulate, but definite, that error is (or is not) harmless--the "I know it when I see it" test. [FN33] Like the definition of art or beauty, harmless error depends on the observer. [FN34] Some of this subjectivity can be removed by the application of a number of factors distilled from cases resolved on the basis of harmless error.

The difficulty in expressing any "mechanistic formulae" has also been ascribed to "the actualities in each case." [FN35] These actualities play more of a *286 role in the determination of harmless error than has previously been acknowledged. From these actualities, which are nothing more than the context in which the error arises, a number of factors can be distilled which influence, if not dictate, the conclusion that error is harmless. Before discussing these factors, however, a brief review of the current approach to the harmless error analysis will expose a number of problems in the application of the current standard.

B. Standards of Review

The standard of review for harmless error, as an analytical tool, remains unclear despite judicial pronouncements to the contrary. [FN36] The analysis of constitutional harmless error in Washington has been characterized by two standards of

review. [FN37] The first, the contribution test, focuses on whether the error contributed to the verdict, [FN38] that is, whether the evidence was likely to have been considered by the jury in arriving at its decision or whether the court's instruction in some way contributed to the jury's verdict. The second standard focuses on the remainder of the pie and permits a judicial finding of harmless error if the untainted evidence (untainted applying only where the assigned error is evidentiary) is so overwhelming that in the judgment of the reviewing court conviction was inevitable. [FN39]

As in other jurisdictions, [FN40] Washington went through a period of analysis *287 and reanalysis before finally adopting, in *State v. Guloy*, the standard that constitutional evidentiary error was harmless if the overwhelming untainted evidence supported the verdict. [FN41] The adoption of the overwhelming evidence standard did little, however, to provide the analytical framework necessary to apply the doctrine of harmless error. It may in fact have hurt the process by declaring the problem solved, thereby foreclosing further judicial (but obviously not academic) discussion of the application of the harmless error doctrine.

1. The Contribution Test

The contribution test is generally viewed as the stricter of the two harmless error tests. [FN42] Under this test, harmless error is limited to error which could not have "contributed" to the verdict. [FN43] The contribution test is conceptually more consistent with the definition of harmless error. Moreover, because erroneous instructions and constitutional errors give rise to a judicial presumption of prejudice, [FN44] the ends served by that presumption--requiring the court to start with the assumption the case should be reversed--are better served by this standard. It is most deferential to the party asserting the error. But the argument that this analytical approach is preferable because it is more consistent with the definition of harmless error has been made and lost. [FN45]

2. The Overwhelming Untainted Evidence Test

The court's rejection of the contribution standard in *State v. Guloy* was indirect: "The 'overwhelming untainted evidence' test allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict." [FN46] The unstated assumption is that even error which can be *288 said to have "contributed" to the verdict (a requirement for reversal under the contribution test) amounts to reversal based on technical or academic grounds.

Washington recognized the overwhelming untainted evidence standard as early as 1909 in *Grant v. Armstrong*. [FN47] In *Morgan v. Bankers Trust Co.*, the court held that errors are to be disregarded when "the verdict is so plainly in accordance with the evidence that it follows as a mere conclusion of law thereon." [FN48] The *Morgan* court's conclusion that the verdict follows as a "mere conclusion of law" was a significant limitation on the overwhelming untainted evidence standard as applied in civil cases. This limitation is, in essence, the summary judgment "as a matter of law" standard. [FN49] If engrafted onto the overwhelming untainted evidence standard, it would serve to avoid the balancing and weighing of evidence required by the current application of the rule, and thus avoid proscribed fact-finding by the reviewing court.

In *State v. Nist*, the court stepped away from the "conclusion of law" requirement, holding simply that there must be "overwhelming untainted evidence to support the conviction." [FN50] In *State v. McHenry*, however, the court refused to affirm a conviction despite evidence which it found to be "so unequivocal that a reversal will merely delay the inevitability of an errorless conviction" because the omitted instructions were "on such fundamental *289 ingredient [sic] to a fair trial as the burden of proof beyond a reasonable doubt and the presumption of innocence" [FN51] Similarly, in *State v. Setzer*, the court of appeals set aside a second-degree burglary conviction notwithstanding overwhelming evidence because the trial court admitted a confession induced by police promises. [FN52] But a year earlier in *State v. Markovich*,

the court had refused to set aside a conviction for burglary based on an illegally obtained confession because overwhelming evidence supported the conviction. [FN53]

In *State v. Fowler*, the court distinguished *State v. McHenry* and also rejected the categorical per se rule announced in *McHenry*. [FN54] It opted instead for a rule that "evaluated the instructions as a whole," so that when "the jury is instructed at least once on the State's burden of proof in a criminal case, the omission of further instruction where required shall be analyzed by looking at whether the error was harmless beyond a reasonable doubt." [FN55]

Despite overwhelming untainted evidence in all four cases, the court affirmed in only *Nist* and *Markovich*. [FN56] Three cases -- *Nist*, *Setzer* and *Markovich* -- relied on *Chapman v. California*. [FN57] In none of these cases, however, did the overwhelming untainted evidence standard provide a useful analytical framework for determining whether error was harmless. In *Nist*, the un-Mirandized statement was merely cumulative to properly admitted evidence on the same factual question. [FN58] In *McHenry*, the instruction at issue was fundamental (burden of proof) and apparently not covered by other instructions. [FN59] In *Setzer*, the confession was the result of false promises by police and therefore involuntary. [FN60] In *Markovich*, the objectionable evidence did not relate to an issue in controversy. [FN61]

And finally in *Fowler*, the jury's finding of guilt on a count of second-degree assault, for which an appropriate burden of proof instruction had been *290 given, necessarily implied application of the appropriate burden of proof to the deadly weapon special verdict, because the only evidence of assault was with the deadly weapon. [FN62] The jury's verdict then ruled out the possibility of prejudice.

Whether the overwhelming untainted evidence test truly requires reversal if there is any "reasonable possibility" that inadmissible evidence or an improper jury instruction resulted in a guilty verdict--as *Guloy* posits--is questionable. Focusing, as it does, on the overall evidence in the case rather than the error under consideration, the test provides no consideration of the reasonable possibility that error effected the outcome. As this article suggests, the context in which the error occurs may be more determinative of the conclusion that error is harmless than the weight of the untainted evidence.

The problem which inheres in determining if untainted evidence is so overwhelming as to warrant affirmance despite error is illustrated by the dissent in *State v. Whelchel*:

The record shows that the untainted evidence is not so overwhelming that it necessarily leads to a finding of guilt. Indeed, the jury which convicted *Whelchel* failed to reach a verdict during its first three votes even though it considered the tainted evidence. Clerk's Papers, at 309 ("As a jury we have voted 3 times, looked at all the evidence and cannot reach a unanimous verdict.") Because all of the evidence taken together did not appear overwhelming to the jury which convicted *Whelchel*, we cannot conclude that the untainted evidence alone is overwhelming. [FN63]

The comments by the *Whelchel* dissent highlight the uncertainty inherent in requiring an appellate court to weigh evidence. Both the contribution and the overwhelming untainted evidence standards require factual findings that error either did or did not contribute to a verdict or, alternatively, the untainted evidence is overwhelming. The undertaking most certainly requires a de novo factual determination that the evidence is sufficient to sustain the verdict. In the case of the contribution test, the required factual determination is that the tainted evidence contributed to the verdict. And in the overwhelming untainted evidence test, the court must determine the relative weight of all the evidence. Either determination necessarily invades a process which our justice system reserves for the jury. [FN64]

*291 3. Some Comparisons

Although conceptually distinct, the contribution and the overwhelming untainted evidence tests are not entirely at opposite poles. [FN65] In neither case is the error evaluated in a vacuum. Both require that error be weighed in the context of the overall evidence for and against a defendant in a criminal case. To determine if erroneously admitted evidence or an

improper jury instruction may have "contributed" to a verdict requires that the error be viewed in context with other evidence and/or instructions. The same exercise is also required under the overwhelming untainted evidence test. Other evidence-- the untainted evidence--must be overwhelming compared to the offending evidence. Accordingly, although the tests are conceptually different, both standards are related in application. The reviewing court is always weighing the error in the context of the overall evidence in a case. *292 Under either approach, however, it is impossible to generalize to any principle which is predictive of the conclusion that error is harmless.

Application of the harmless error analysis under either the contribution test or the overwhelming untainted evidence test requires a reviewing court to conclude that 12 jurors in a given case would have arrived at the same collective decision regardless of the error. To state this undertaking is also to state its impossibility. [FN66] Neither standard provides a fixed analytical framework for arriving at the conclusion that error was harmless. Rather, they provide for a process of judicial second-guessing. Thus, the overwhelming untainted evidence test as currently applied does not predict the judicial conclusion that error is harmless.

The theoretical distinctions represented by the two standards were often ignored anyway. [FN67] And at times, the standards have been referred to collectively as if they were the same. [FN68] Moreover, in many cases decided prior to the adoption of the overwhelming untainted evidence test in *State v. Guloy*, [FN69] courts concluded that error was harmless under either standard. [FN70] *293 The analysis required no distinction between tests, and perhaps none was possible.

4. Other Standards

Although there are two acknowledged and frequently discussed standards of review for constitutional harmless error, a review of cases decided on the basis of harmless error suggests at least confusion and perhaps the operation of other, less discussed standards, which also purport to influence the determination of harmless error. As pointed out by Judge Roe in *State v. Vargas*, "The test of what constitutes harmless error has not always been clearly elucidated" [FN71]

A case can also be made that the two primary standards discussed are not exclusive. For example, procedurally, any error subject to a claim of harmless error might be the subject of a motion for a mistrial or new trial and, *294 therefore, subject to review under the deferential abuse of discretion standard. [FN72] Other tacitly acknowledged standards of review include "reasonable probability of a different result," which is applied to the review of error that is not of constitutional magnitude. [FN73] In criminal cases addressing constitutional error, the threshold level for harmless error has been described as that which "in no way affected the final outcome of the case" [FN74] or which is "harmless beyond a reasonable doubt." [FN75] And in reviewing a claim of evidentiary error, a court described the standard of review as follows: "[o]nly if the outcome of the trial would have been different had the errors not occurred" [FN76]

*295 Constitutional error requires reversal "whenever 'there is a "reasonable possibility" that the error materially affected the verdict.'" [FN77] Another formulation is "whether the 'minds of the average jury' would have found the State's case significantly less persuasive ..." without the constitutionally defective evidence. [FN78]

A harmless error analysis can also obviate the necessity for resolution of an assignment of error. This approach is illustrated by those cases in which the court analyzes the assignment of error and then suggests (but does not decide) that the underlying assignment of error is not error at all. The court concludes that even if there is error (a decision it has not made), it is harmless. The analysis then shifts to a discussion of harmless error. [FN79]

*296 From this review of standards for determining harmless error, several observations can be made. First, the standard for determining harmless error remains uncertain. Second, the standards discussed do not predict the conclusion that error is harmless in any given fact pattern. Finally, the current standards require appellate courts to weigh and balance evidence and evaluate the probable effect of that error on a jury verdict.

C. Presumptions

The next step in the traditional harmless error analysis is to consider various presumptions which attach to specific types of error. An erroneous instruction given on behalf of a party in whose favor a verdict was returned is presumed to be prejudicial. [FN80] This presumption has been applied when instructions are contradictory. [FN81] Constitutional error likewise gives rise to a presumption of prejudice. [FN82] The use of presumptions--essentially a legal device for finding a fact--may be the least useful and most innocuous step in the harmless error analysis.

Traditional presumptions allow a jury to presume facts based on other established facts. [FN83] The presumed fact comes into existence only with acceptance that a presumed fact follows from an established fact. [FN84] However, there is nothing--certainly no empirical information--upon which to predicate a judicial presumption of prejudice from error at the trial court. These judicial presumptions are thus normative constructs which allow the court to say that in the absence of a showing to the contrary, a verdict should be reversed if there has been error. But these presumptions rarely, if ever, result in reversal because error in a trial record never occurs as an isolated event. It is only in the absence of other evidence or instructions that a presumption becomes important.

In the harmless error analysis, error does or does not contribute to a verdict only when compared to the always present "other evidence." *297 Likewise, there is always evidence which militates in favor of or against a verdict, depending on whether the evidence is overwhelming. Unlike the typical factual presumption, there is no reason, logic, or experience which would support the proposition that an erroneous instruction or constitutional error necessarily prejudices a jury. This judicial presumption of error truly "may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts," [FN85] actual facts which are present in every harmless error analysis. [FN86]

IV. FACTORS INFLUENCING THE DETERMINATION OF HARMLESS ERROR

The traditional approach to the question of harmless error would benefit from recognizing other important factors which clearly influence, and indeed may dictate, the determination that error is harmless. Adding these factors to the harmless error analysis improves application of the harmless error rule in three ways. First, they focus the reviewing court's inquiry on the process by which a jury arrived at its verdict rather than the ultimate result and, in that way, avoid the kind of balancing and weighing necessarily associated with fact-finding. Second, the conclusion that error was harmless becomes more predictable. Evidence which might impress one appellate panel as "overwhelming" may not so impress a second panel, whereas fixed identifiable factors which should dictate the harmless error result can be applied more uniformly. Finally, these factors are premised on the assumption that jurors and appellate decision-makers both share the same logical, rational approach to decision-making. The application of these factors makes no pretext of determining what actually did or did not influence a given verdict. Rather, they are based on the necessary assumption that because jurors share the same rational thought process as reviewing judges, the assigned error should or should not have influenced the result.

A review of Washington cases decided on the basis of harmless error suggests that a number of these factors are already at work--factors which better predict a finding of harmless error and are less subjective than the traditional focus of the harmless error analysis. They do not, however, weave a seamless web which would include every conceivable claim of harmless *298 error. When they do apply, they provide another important tool for harmless error analysis.

As applied, these factors appear unrelated to either the two most accepted standards of review for harmless error--the contribution test and the overwhelming untainted evidence test--or the other harmless error considerations discussed thus far. But they are directed toward the same goal--determining whether an instruction or some evidence materially affected the jury's verdict. These factors, like the very error under consideration, arise from the context of the case under consideration rather than from an abstract principle of law.

A. Factors Relating to Both Instructional and Evidentiary Error

This section discusses those factors which influence the determination of harmless error when the error relates to an instruction or evidence. Later sections discuss factors which are unique to each type of error.

1. Error Relating to an Issue Not in Controversy

Disregarding error as harmless if it does not relate to an issue in controversy has a certain analytical appeal. First, most lawyers and judges would agree on whether the issue in question was in controversy. The standard is therefore predictive of harmless error. Second, it focuses on the process (the trial), not the ultimate result (the verdict). Third, it is predicated on the logical assumption that the offending instruction, evidence, or comment would not have influenced the jury's deliberations because it is unrelated to the issue the jury is being asked to resolve, and should not therefore play a role, or at least a significant role, in the deliberations. [FN87] Finally, and perhaps most significantly, this approach avoids the weighing and balancing of facts by the reviewing court. It requires only the judicial assumption that if the error had nothing to do with the issues in controversy, the jury did not consider it or, if it did, its taint was confined to an issue not in controversy.

Disposing of error as harmless based on the absence of a relationship to any issue in controversy has a long history in Washington. In *Gallagher v. Buckley*, the assignment of error was based on a jury instruction which defined the Town of Buckley's obligation to maintain safe roads. [FN88] The *299 instruction given charged the jury that the plaintiff had a right to presume that a street was "reasonably safe for ordinary travel throughout its entire width" [FN89] On appeal, the Town assigned error to the instruction, arguing that the obligation to maintain the roadway extended only to the traveled portions, not the untraveled outer edges. [FN90] The court concluded that although the instruction was erroneous, it was also harmless. [FN91] "[W]hatever may be said of the abstract proposition of law included in the instruction criticised [sic], we think it could not have misled or confused the jury in this case, for the reason, as we have seen, that no evidence showed the team to have been driven away from the traveled part of the street...." [FN92] The offending portion of the instruction did not relate to an issue in controversy. [FN93]

Gallagher was the first in a series of civil and criminal cases to hold that error unrelated to the factual issues before the jury was harmless. More than 40 years later in *State v. Britton*, a prosecution for first-degree murder, the jury was instructed that killing a human being is presumed to be without excuse or justification, and that the State is required to prove there was no excuse or justification. [FN94] The instruction, while erroneous, was nonetheless ruled harmless because "[t]here was not one word of testimony in the record concerning excuse or justification for the killing" [FN95] The only question before the jury was whether the defendant was the person who committed the murder during the course of the holdup. [FN96] Again, the instruction related to an issue not before the jury and was therefore harmless. [FN97]

Despite the traditional statement of the standard of review, Washington courts have used the absence of any issue related to the erroneous instruction to find harmless error. [FN98] The error is harmless not because of overwhelming untainted evidence, or because it did not contribute to the verdict, but rather because it is unrelated to the issue which the jury was being asked to resolve. [FN99]

*300 In *State v. Hall*, the defendant was convicted of second-degree assault while armed with a deadly weapon. [FN100] She had fired into a house occupied by three people. [FN101] The court instructed the jury in the disjunctive, thus permitting a finding of guilt without requiring unanimous agreement on which of the three potential victims had been assaulted. [FN102] The defendant objected, arguing that the instruction permitted a non-unanimous verdict. [FN103] The court declined to address the constitutional issue, concluding that the issue was harmless beyond a reasonable doubt. [FN104] There was no dispute that one of the three victims was the subject of the assault; all three were fired upon.

[FN105] The only issue before the jury was the identity of the defendant and her intent to kill. [FN106] Because neither issue involved the challenged instruction, any error was held to be harmless. [FN107]

In *State v. Fernandez*, an instruction that the presumption of death or great bodily harm followed from a violent assault with a dangerous weapon was ruled harmless despite a United States Supreme Court case which held a similar instruction erroneous. [FN108] The court noted that the instruction did not relate to any specific act which was at issue, noting that while "intent was an element of the crime on which the State offered evidence, it was not a contested issue." [FN109]

Likewise, the failure to specify and define an underlying crime (a predicate crime) required to prove burglary has been held to be harmless error *301 when the defendant's intention once inside the building was not an issue before the jury. [FN110]

In *State v. Hagen*, the court, in response to questions from the jury, improperly instructed on the definition of "dominion and control" in a prosecution for possession of marijuana with intent to deliver. [FN111] In concluding the error was harmless, the court of appeals noted that "[t]he evidence showed Hagen to be the owner of the house. His oral and written statements admitted that he grew the marijuana, at least for his own use. Dominion and control were not at issue in his case." [FN112] Because dominion and control was not an issue, the error was harmless as to one defendant. [FN113]

State v. Garcia represents a different twist in the application of the same principle. [FN114] Officer Trebesh saw Garcia give drugs to Rutherford. [FN115] The amended information charging Garcia with delivery of a controlled substance erroneously named Officer Trebesh as the recipient of the drugs. [FN116] The elements instruction to the jury did not name the recipient of the drugs. [FN117] The jury further highlighted the problem by asking during deliberations: "Does intent to deliver a controlled substance pertain to the alleged delivery of a controlled substance to Mr. Rutherford?" [FN118] The court concluded the error was harmless. [FN119] The only issue in controversy was whether Garcia had made the delivery at all; the recipient of the drugs was not in dispute. [FN120]

A more problematic application of harmless error when error does not relate to an issue in controversy is presented in those cases in which the assignment of error is based on the failure to give a unanimity instruction. To *302 convict a defendant of a criminal charge, the jury must be unanimous that the accused committed the criminal act. [FN121] When there is evidence of more than one act, the instruction requires a jury to unanimously agree on the specific criminal act supporting conviction. [FN122]

State v. Camarillo is illustrative. [FN123] The victim there testified to several acts of molestation, any one of which would have been sufficient to support the charge of molestation. [FN124] The only defense was a general denial. [FN125] Evidence was presented which would have permitted the jury to differentiate among three acts. [FN126] The factual issue presented to the jury was whether the defendant committed the acts. [FN127] If the jury accepted the victim's version of events, the defendant committed all three; if they accepted the defendant's version, he was guilty of none. [FN128] Segregation among the three acts was therefore not an issue. As the concurring opinion noted: "This record, however, forces me to agree with the majority that the jury could not have reached the verdict it did without concluding that the victim was telling the truth about all three incidents and that the defendant was lying about all of them." [FN129]

In those cases in which the defense to charges based on multiple acts is a general denial, differentiation among a number of events is not required of the jury and therefore is not an issue in controversy. The jury either accepts the victim's testimony as to all and convicts, or it accepts the defendant's denial and acquits on all charges. The failure to give a unanimity instruction in those instances is harmless error; it does not relate to an issue in controversy.

While the cases discussed thus far involve instructional error, the fact that error does not relate to an issue in controversy

has also been applied to the erroneous admission or exclusion of evidence as early as 1927. In *State v. Bozovich*, the King County coroner was permitted to testify from a report prepared by another physician. [FN130] He could not, however, identify the handwriting, had no knowledge of the report and, therefore, according to the court, "under no circumstances disclosed by the record was the evidence *303 competent." [FN131] The court concluded, however, that the error was harmless because the defendant had admitted shooting the decedent, noting that "[i]f it had been an issuable point, the evidence would have been prejudicial." [FN132]

In *State v. Taylor*, the State presented expert testimony which tied the defendant to a crime scene by evidence of a palm print. [FN133] Following the trial, a second expert advised the prosecutor that the first expert opinion was based on a specimen which was insufficient in both quality and quantity for valid comparison. [FN134] The court of appeals nonetheless affirmed the denial of a motion for a new trial, noting that the evidence did not relate to an issue in controversy: "Taylor's defense was culpability, not his absence from the scene of the crime." [FN135]

In *State v. Smislaert*, the assigned error related to the propriety of admission of a prior conviction. [FN136] While noting that the conviction was of questionable probative value with respect to the defendant's credibility, the court again concluded it was harmless, or in the court's words, "de minimis since the defense was diminished capacity." [FN137] In *State v. Hancock*, the assignment of error related to the admission of testimony of the defendant's gun ownership. [FN138] Distinguishing *State v. Rupe*, [FN139] the court noted, "in the case sub judice the reference to Hancock's gun ownership was merely an unsuccessful attempt to account for L's [[[the victim's] delay in reporting the abuse. There was no argument, express or implied, that gun ownership was related to the ultimate issue of guilt." [FN140] Similarly, in *State v. Markovich*, the court ruled harmless the admission of a statement and evidence of a gun, concluding that "possession of a weapon is not an element of the underlying burglary charge" [FN141]

From a review of these cases, a conclusion can be drawn. Regardless of the type of case (civil or criminal), the standard of review (overwhelming untainted evidence or contribution), or the categorization of the error *304 (constitutional or nonconstitutional), if the disputed evidence or instruction does not relate to a disputed issue, it is likely to be harmless. This factor is based on the rational assumption that such instructions should not have influenced jury deliberations. Arguably, the trial judge--a neutral authority figure--has injected an extraneous issue before the jury, which might just as easily serve to confuse the jury by focusing its attention and deliberations on the extraneous issue. Or, as in the case of *Hancock*, one could argue that even though evidence of possession of a gun has nothing to do with the issues before the jury, possession of the gun makes the defendant appear more sinister, more generally culpable, and therefore implies guilt. [FN142] Nevertheless, if one accepts the assumption that juries act rationally, then refusing to overturn a verdict based on the introduction of improper evidence, instructions, or comments should not result in reversal if they relate to issues over which there is no controversy.

2. Error Cured by the Jury's Verdict

The next factor influencing the determination of harmless error is distilled from those cases in which a jury arrives at a verdict which is necessarily inconsistent with the erroneous instruction or evidentiary ruling. The conclusion of harmless error in those circumstances is based on the assumption that the offending instruction or evidence was necessarily rejected because it is logically inconsistent with the verdict. Again, the court concludes that the error is harmless regardless of the traditional harmless error analysis it employs.

In the early case of *Miller v. Great Northern Railway*, the appellant brought suit on behalf of herself and her minor son for damages following the wrongful death of her husband in a train accident. [FN143] The court erroneously instructed the jury that contributory negligence was a complete bar to liability. [FN144] The jury returned a verdict for the railroad. [FN145] The complaint, however, had alleged liability based on the Federal Employer's Liability Act ("FELA"), which

provided for comparative negligence. [FN146] The decedent's negligence would not, therefore, have been a complete bar to recovery if the railroad were also negligent. The court concluded the error was harmless based on the jury's special verdict which ruled out a finding of any negligence by the railroad: "The special findings of the jury upon the question of the burning of the headlight and the ringing of the bell eliminate all grounds of *305 negligence charged ... the instruction, though erroneous, was harmless error." [FN147]

Similarly, in *Faust v. Benton County Public Utility District 1*, the defendant utility district appealed from an adverse verdict based upon an erroneous instruction on the doctrine of *res ipsa loquitur*. [FN148] The instruction had failed to require a finding that "the injury-causing accident or occurrence is not due to voluntary action or contribution on the part of the plaintiff." [FN149] The trial court gave other instructions on contributory negligence. [FN150] On appeal, the court concluded that if the jury had found the plaintiff to be contributorily negligent based on the other instructions, it would have denied recovery. [FN151] The *res ipsa loquitur* instruction was, therefore, harmless error because the jury had not found Faust contributorily negligent. [FN152] Similarly, in *Okkerse v. Westgate Mobile Homes, Inc.*, the court's failure to instruct the jury on the theory of negligent misrepresentation was ruled harmless because the jury's defense verdict necessarily implied a finding of no misrepresentation. [FN153]

Harmless error in criminal cases may also be premised on this factor. In *State v. Saraceno*, the court gave a jury instruction defining the word "resistance" during the course of deliberations without consulting counsel. [FN154] The reviewing court concluded that although the failure to consult counsel was error, the error was nonetheless harmless--in fact, "innocuous at best." [FN155] The "[d]efendant was acquitted of rape in the second degree, which contains the element of resistance. He was convicted of rape in the third degree, which does not contain the element of resistance.... Therefore, we find that the error is harmless beyond a reasonable doubt." [FN156]

The conclusion of harmless error has similarly been reached when the court's instructions omit a required element which is subsumed in other instructions. In *State v. Ticeson*, the instruction defining "knowledge" was based on a "reasonable man" standard. [FN157] Although the court concluded that *306 the definition was ambiguous and had probably been rejected by the Washington Supreme Court in *State v. Shipp*, [FN158] it concluded the error was also harmless:

Since Ticeson was convicted, the jury must have found that he assaulted his victim, as assault is defined in instruction No. 11. The instruction allowed the jury to find an assault on either of two theories, each of which required an intentional act on the part of Ticeson. The jury must have found that Ticeson acted intentionally. He therefore acted knowingly. Inclusion of the statutory definition of knowledge in the jury instructions was therefore harmless error insofar as the assault charge was concerned.

We also hold that the inclusion of the statutory definition of knowledge was harmless error with regard to the indecent liberties charge. To convict under the assault instructions the jury must have found that Ticeson had the intent to commit the crime of indecent liberties. By law, he also acted knowingly with regard to the crime of indecent liberties.

As the jury in the subject case necessarily found an intentional act on the part of defendant, it must have found he acted knowingly, and the erroneous instruction on "knowledge" was harmless error, and both the charges of "assault" and "indecent liberties" can be sustained under the assignment of error as set forth in issue 1. [FN159]

In *State v. Riggins*, a delivery of controlled substance prosecution, the error again lay in the court's failure to instruct on an essential element-- guilty knowledge. [FN160] In affirming the guilty verdict, the court concluded that "[t]he jury could have acquitted Riggins only by disbelieving the testimony of the police officers and the criminalist." [FN161] A police officer testified that Riggins had agreed to sell heroin and told the undercover officer that the substance being delivered was heroin when he delivered the package. [FN162] Error was therefore harmless based upon a verdict consistent only with a finding of knowledge.

In re Haverty involved a challenge to a Sandstrom instruction which had *307 improperly permitted a presumption of intent to commit burglary. [FN163] The error was ruled harmless on the basis of the jury's verdict:

Thus, instruction 7 made it clear that the jury could not convict petitioner of burglary if it believed petitioner's evidence to the effect that he was too intoxicated to form the requisite intent. The fact that petitioner was convicted indicates that the jury did not believe his intoxication theory. It is unlikely, then, that the challenged instruction prejudiced petitioner." [FN164]

This factor has also played a role in the court's conclusion that the failure to instruct on the burden of proof can be harmless: "From the evidence and testimony presented at trial, the jury could only find Fowler guilty of assault if it also found he was armed at the time of the incident.... Fowler either committed an assault with a weapon or he did not commit an assault at all." [FN165]

In State v. Wheeler, the assignment of error was based on a violation of the Bruton rule, which precludes admission of a non-testifying co-defendant's confession. [FN166] The Wheeler court concluded the violation was harmless because the challenged testimony was evidence of prior intent or motive, neither of which were elements of second-degree assault, the crime for which the jury ultimately convicted the defendant. [FN167] Similarly, in State v. Dault, a prosecution for first-degree murder, an instruction on the lesser included offense of second-degree murder stated erroneously, "[w]hen the killing of a human being by another is proven beyond a reasonable doubt, the law presumes that such killing constitutes murder in the second degree.... The *308 defendant bears the burden of justifying his act or of reducing the charge to manslaughter." [FN168] The instruction, although erroneous, was harmless because the defendant was ultimately convicted of first-degree murder. [FN169]

This factor has also been applied to assignments of error based on the trial court's failure to instruct on a lesser included offense when there is evidence supporting the inference that the lesser crime was committed. [FN170] In State v. Hansen, the defendant was convicted of first-degree kidnapping and rape. [FN171] The issue presented was whether the trial court's failure to give the lesser included instruction on third-degree kidnapping required reversal. [FN172] The court concluded, based on the jury's verdict, that "[a]n error in failing to instruct on a lesser included offense does not require reversal if the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." [FN173] The jury had been instructed on the lesser crime of second-degree kidnapping. [FN174] It returned a verdict of guilty of first-degree kidnapping. [FN175] The court concluded that "the jury's verdict on the highest offense was an implicit rejection of all lesser included offenses that could have been based upon Hansen's diminished capacity defense." [FN176] The jury's verdict had cured any error in the instructions and any error was therefore harmless. [FN177] Significantly, the Hansen court did not even mention the usual criteria for harmless error.

*309 If a verdict is consistent with one version of the facts but inconsistent with another, the jury's ability to sort out evidence of varying factual accounts also results in the conclusion that error is harmless. In State v. McNallie, the defendant was convicted of two counts of communication with a minor for immoral purposes and indecent exposure. [FN178] During the course of the trial, the defendant proposed an instruction limiting the definition of the term "communication for immoral purposes," which would have required that the communication convey a desire to "have the minor engage in sexual conduct for a fee." [FN179] The court rejected the proposed instruction although it was a correct statement of the law. [FN180] The appellate court concluded the error was harmless. [FN181] The court conceded that normally the risk that the jury might convict on the basis of conduct not constituting a crime would require reversal. [FN182] But here, the court noted, the jury had convicted on two of the three counts based on the testimony of two of the three victims and acquitted on the third. [FN183] The third victim testified that there was no offer of money to perform the sexual acts giving rise to the charge. [FN184] The error was accordingly harmless. [FN185]

In *State v. Sharp*, the defendant assigned error to the admission of self-serving hearsay statements of a co-defendant tending to implicate him and exculpate the co-defendant on a drug possession charge. [FN186] Each defendant had taken the position at trial that the drugs found in the car they both occupied belonged to the other. [FN187] The inadmissible hearsay was to the effect that the drugs belonged to defendant Sharp and had been proffered by Sharp's co-defendant, Dauenhauer, in an attempt to exonerate himself. [FN188] But Dauenhauer's conviction of possession led the court to conclude that "[i]mplicit in this jury finding is the fact that they did not believe the hearsay *310 statement." [FN189] On that basis, the court concluded the admission of the evidence against Sharp was not prejudicial. [FN190]

In sum, if the jury's verdict can be viewed to have necessarily disregarded or rejected the offending instruction or evidence, the error is harmless.

3. Case Based on Circumstantial Evidence

Whether the "overwhelming untainted evidence" under consideration was circumstantial or direct is a significant and appropriate factor for consideration in any harmless error analysis. If the error under consideration is one involving the erroneous admission or exclusion of evidence, consideration of other evidence untainted by the error seems a logical approach. But largely circumstantial cases are frequently more tenuous, and the likelihood of erroneously admitted evidence influencing the result is accordingly higher. [FN191] Whether a case is based largely on circumstantial evidence therefore becomes an important factor in the harmless error analysis. If the case is circumstantial, error is less likely to be ruled harmless.

In *State v. Coles*, the defendant was convicted of second-degree murder based in part on the admission into evidence of inculpatory statements made in response to police questioning after invocation of his Miranda rights. [FN192] The court reversed the conviction, concluding that the custodial statements were not harmless "[i]n view of the fact that the State's case consisted solely of circumstantial evidence" [FN193]

The "circumstantial evidence factor" has also been used in the harmless error analysis when the assignment of error is based on improper jury instructions. In *State v. Golladay*, a prosecution for first-degree murder, the court reversed and remanded for a new trial based on the failure of jury instructions to require a unanimous verdict on one of two predicate crimes, noting that "[t]he evidence is entirely circumstantial" [FN194] The court also remarked that "[i]t is not our purpose in discussing these facts to act as a 'superjury,' or to make the prosecutor's burden in circumstantial evidence cases more onerous." [FN195] The court noted simply that when taken in its totality, *311 the circumstantial evidence was not enough to overcome a presumption that the erroneous instructions were prejudicial. [FN196]

But in *State v. Fernandez*, the evidence, although circumstantial, was sufficient. Accordingly, the instructional error was found harmless. [FN197] The instruction at issue included language that "the law presumes that every man intends the natural and probable consequences of his own acts." [FN198] The court found the error harmless, noting that:

The State's evidence relating to intent, although circumstantial, as is most evidence relating to the defendant's mental state, was substantial and was closely tied to the evidence of motive: Fernandez was the beneficiary of life insurance policies on his wife's life; he forged her signature to one of the policies, making himself the beneficiary, without her knowledge; he was having an affair and the marriage was unhappy; he attempted to secure a false affidavit from a witness to the effect that the witness saw the motor home in which the accident allegedly happened and had observed that the wheels were "wobbly;" and twice in the past Fernandez had attempted similar schemes involving mishaps in remote areas and forged documents. [FN199]

It is safe to say that if the case is circumstantial, evidence must indeed be overwhelming before error should be considered harmless. If the error permitted the prevailing party to introduce the only direct evidence into an otherwise cir-

cumstantial case, a reviewing court should be reluctant to conclude that the error was harmless. For example, it would be difficult to construct a scenario in which a confession obtained in violation of a defendant's constitutional rights was harmless error if the only other evidence of culpability was truly circumstantial.

***312 4. Whether Erroneous Instruction or Evidence at Issue Was Argued**

Another factor influencing the determination of harmless error is based on the apparent weight the trial attorneys placed on the erroneous instruction or erroneously admitted into or excluded from evidence. At least one assumption underlying this consideration is that if the point at issue was of sufficient moment to influence a jury, the lawyers would have argued it. Their failure to do so amounts to a tacit admission that the erroneous instruction or evidence is not significant. Arguably, if the point has been made sufficiently during the course of the trial, there is either no need to argue or argument may actually detract from the impact of the evidence on the jury. Again, laying aside the validity of that assumption, a second rationale for this factor is that the instruction or evidence has not been emphasized and therefore is unlikely to have influenced the jury. This too would militate in favor of finding the error harmless.

In *State v. Jones*, the court rejected a hearsay challenge to a statement which arguably implicated the defendant. [FN200] The court concluded that the error would have been harmless in any event, noting that "[i]ndicative of the statement's lack of prejudicial effect is the fact that the prosecution did not mention it in closing argument." [FN201] The dissent argued that "[t]he fact that the prosecution did not dwell on [the declarant's] excited reaction in closing argument reveals nothing about the impact the testimony had on the jury." [FN202]

In *State v. Thomas*, where the defendant had been convicted of third-degree rape, the court reached the same result. [FN203] While conceding that the defendant was entitled to an instruction regarding character evidence, the court nonetheless concluded that "[i]f there were any error in not giving any instruction about character evidence, we conclude, after reviewing the entire record including the defendant's lengthy jury argument, that there is not a reasonable probability that the outcome of the trial would have been materially affected." [FN204] The court noted that defense counsel extensively argued the character evidence presented by three witnesses without an instruction. [FN205] The court also noted that counsel was not interrupted by the *313 prosecutor nor in any manner precluded from presenting the defense theory to the jury. [FN206]

With instructions, any practical justification for the application of this factor breaks down. If the court refuses to give a requested instruction, a lawyer's argument or lack of argument does not militate for or against the significance of an issue. This is particularly so where one considers other cautionary instructions which tend to minimize the weight jurors may place on the lawyers' arguments. [FN207] The dissent in *Thomas* noted as much: "[t]he jury was told in no uncertain terms that it was not to consider matters not sanctioned by the court." [FN208] Standard instructions caution the jury to "disregard any remark, statement or argument which is not supported by the evidence or the law given to you by the court." [FN209] The dissent reflects the reaction of most trial lawyers--an instruction from the trial judge carries much more weight with a jury than do the arguments of the partisans. A well-crafted jury instruction is then a valuable and important way in which to urge an argument upon a jury. [FN210]

In *Zwink v. Burlington Northern, Inc.*, the argument of defense counsel based on an erroneous jury instruction was considered in ruling that an erroneous instruction was prejudicial. [FN211] In this railroad crossing case, the jury had been instructed that:

If the jury should find that the railroad's signal devices were not operating at the time of the accident, defendant railroad would not be negligent in this respect unless it knew or in the exercise of ordinary care should have known thereof for a sufficient time to repair the devices or furnish additional warning. [FN212]

In *Zwink*, it was clear that the railroad had knowledge that a signal device was not operating. [FN213] The only issue for the jury should have been whether the flagman was flagging at the time of the accident. In concluding that the erroneous instruction was not affirmatively harmless, the court relied on the *314 fact that "[i]n closing argument defendant's counsel argued to the jury that a malfunction was not negligence unless the railroad had an opportunity to somehow be on notice of it." [FN214]

This factor has also played a role in the harmless error analysis in cases in which the court failed to give the unanimity instruction required by *State v. Petrich*. [FN215] For example, in *State v. King*, the trial court declined a defense request for a written unanimity instruction based on "the State's avowed intention to make an election in argument." [FN216] In this prosecution for possession of cocaine, the State had offered evidence of two separate instances of possession. [FN217] However, during final summation, the State argued evidence of both acts of possession as a basis for conviction. [FN218] The argument converted what might otherwise have been harmless error into reversible error. The court noted that "as a result of the State's comment and the court's inaction, we cannot say that the jury acted with unanimity as to one act of possession." [FN219]

Arguments by the State provided a basis for affirmance despite the court's failure to give a unanimity instruction in *State v. Bland*. [FN220] "[D]uring closing argument the State made it clear, once more, that Bland's threatening of Jefferson with the gun was the act the State was relying on for count 1 and Bland's near shooting of Carrington with the gun was the act relied upon for count 2." [FN221]

Of the factors influencing the determination that error is harmless, argument by counsel seems the least tenable. Yet, as these cases demonstrate, it remains a consideration in applying the harmless error doctrine.

B. Factors Limited to Erroneous Instructions

1. Evidence to Justify the Instruction

When the assignment of error relates to an erroneous jury instruction, a frequent consideration is whether there was evidence to justify giving the *315 instruction. This factor comes into consideration in the harmless error analysis in two instances: when there is evidence to justify an instruction but the instruction is refused, and when there is no evidence to justify an instruction but one is nonetheless given. The objection in the latter case is that although there is no evidence supporting the instruction, the effect of the court's instruction in the absence of evidence is to suggest to the jury that the matter should be given consideration or that there may be supporting evidence. [FN222]

One typical example is the early case of *Auerbach v. Webb*. [FN223] In this personal injury case, the trial court instructed the jury to award future loss of earnings and medical expenses despite the lack of any evidence to support such damages. [FN224] In ruling the instruction harmless, the court considered the modest verdict of \$500 and essentially concluded that the jury could not have awarded damages for future medical expenses or lost wages. [FN225] But in *Shay v. Parkhurst*, the court reversed a \$10,000 general verdict based on the same assignment of error. [FN226] There, the court instructed the jury to include in its verdict an award for past and future medical expenses in the absence of any evidence of the value of past or future medical expenses. [FN227] The supreme court reversed, refusing to "speculate as to what amounts the jury included in its verdict of \$10,000 for these unproven items." [FN228] In *O'Donoghue v. Riggs*, the court again refused to affirm as harmless an instruction on past and future *316 earnings in the face of testimony that the plaintiff "was both unemployed and unemployable" at the time of the accident. [FN229]

The same consideration has also resulted in reversal when the error related to the issue of liability. In *Johnson v. Seattle*, another early negligence case, the trial court instructed on the doctrine of last clear chance despite the absence of any

evidence to justify the instruction. [FN230] In fact, "[n]o witness testified to a state of facts which tended in the remotest degree to show that the motorman of the street car observed the respondent negligently running into danger in time, by the exercise of ordinary care on his part, to avoid the collision." [FN231] Giving the instruction in the absence of any evidence to support the notion of last clear chance was held to be "misleading and dangerous." [FN232] But in *Christansen v. Puget Sound Naval Co.*, the court found harmless an erroneous instruction that an employer could not delegate to an employee the duty to maintain a safe workplace. [FN233] The instruction was given despite the absence of any evidence of an attempt on the part of the employer to delegate the duty. [FN234] The court found the error harmless, noting that "[t]he last part of [the instruction] was probably simply an unnecessary statement of the law. However, it could not have misled the jury, could not have been prejudicial to appellant, and was harmless error." [FN235]

In *State v. Bruton*, the defendant was convicted of grand larceny following a shoplifting incident. [FN236] At trial, the court instructed the jury that it could consider evidence of the defendant's flight as a circumstance bearing on guilt. [FN237] After reviewing the record and finding insufficient evidence to support flight, the court concluded that the instruction was prejudicial. The court referred to the State's evidence as a "slender showing" and concluded that it permitted the jury to speculate as to whether the defendant escaped or "simply and freely walked away from a disagreeable scene" [FN238] In *State v. Thompson*, the court rejected the State's argument that no prejudice had been shown and reversed the conviction, concluding that "[t]he jury could not but be misled and confused by this instruction, which calls attention to matters upon which there is no evidence." [FN239]

*317 The requirement of jury unanimity in cases in which there is evidence of multiple predicate crimes is conceptually parallel to a rule requiring sufficient evidence to instruct a jury on the elements of a crime. The verdict in *State v. Crane* turned on proof of assault as a predicate crime for second-degree murder. [FN240] Crane assigned error to the court's failure to require a unanimous jury verdict on the count of second-degree murder--the predicate crime being assault. [FN241] Other instructions permitted the jury to consider a number of events occurring on or between May 9 and 15, any one of which could have served as the predicate crime for the charge of second-degree murder. [FN242] The error was ruled harmless, however, because "the only evidence pointing to the fatal assault was for a 2-hour period the afternoon of May 15. Thus, the fact the jury was instructed to consider events occurring 'on or between' May 9 and 15 is harmless error." [FN243]

The application of this factor has been anything but uniform. However, if the assumption is that juries deliberate in a logical and rational fashion, then the assumption should also be that juries do not consider evidence which is not there, even in the face of an instruction suggesting the contrary.

2. Instruction Under Review Is Erroneous but Instructions as a Whole Are

Adequate

Standard jury instructions inform jurors to consider the instructions as a whole and not to single out any one instruction. "You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof." [FN244] In passing on an assignment of error based on an erroneous instruction, an appellate court assumes that the jury does just that. This assumption, in turn, has implications for the harmless error analysis.

The doctrine which requires that instructions be considered as a whole has *318 a long history in this state. In *State v. Hartley*, the court set out the proposition and the doctrine's history: "This court has often stated that instructions must be considered as a whole, and if, when so considered, they properly state the law and include all the elements which constitute the crime charged, they are sufficient, even though some of them may omit some essential part." [FN245]

This factor is applied in both civil and criminal cases. In *Ward v. Ticknor*, the court erroneously instructed that "[i]f

either party is guilty of contributory negligence, such party cannot recover from the other, even though the other is guilty of negligence." [FN246] Even a cursory reading of the instruction reveals the error. The trial court granted the plaintiff a new trial. [FN247] The appellate court reversed, concluding that "[o]ther instructions given by the trial court, mentioned hereinbefore, clearly and adequately instructed the jury on contributory negligence." [FN248]

Inconsistent instructions are not enough for reversible error. [FN249] The inconsistency must mislead the jury as to its functions or responsibilities under the law. [FN250] Although a single instruction may have been an inaccurate statement of the law, if others, or the instructions as a whole, correctly informed the jury of the applicable law, the error is harmless. Again, *State v. Fernandez* is illustrative. [FN251] The court there wrestled with an instruction which told the jury to presume that every man intended the natural and probable consequences of his own acts. [FN252] The instruction violated the United States Supreme Court decision in *Sandstrom v. Montana* in that it relieved the State of the burden of proving an element of the crime. [FN253] The court affirmed on the basis of harmless error, concluding among other things that "[i]n the instant case, the instructions when considered as a whole told the jury that the State had the burden of proving each of the elements of a crime beyond a reasonable doubt." [FN254]

In *State v. Bailey*, the trial court had failed to give a specific burden of proof instruction requiring the State to prove possession. [FN255] While noting that *319 a specific instruction should have been given, the court went on to conclude that "[t]he instructions told the jury that the State had the burden of proving unlawful possession and that possession was not unlawful if the defendant did not know the drug was in his or her possession. Read as a whole, the instructions informed the jury that the State had the burden of proving the absence of unwitting possession." [FN256]

State v. Holt involved a challenge to an elements instruction which failed to define an essential element of the crime—lewd conduct. [FN257] The court concluded that the instruction was erroneous but went on to hold the error harmless in light of other instructions which properly defined the key element. [FN258] Other unchallenged instructions adequately defined the missing element. [FN259] This principle has been reaffirmed in several recent cases, both civil and criminal. [FN260]

In sum, erroneous instructions will not be considered in isolation. If other individual instructions or the instructions as a whole can be read to accurately inform the jury of the law, the error is harmless.

C. Factors Limited to Erroneous Admission or Exclusion of Evidence

Regardless of the announced standard of review for harmless error, Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative. [FN261] This test for harmless error, like others discussed in this article, has been applied in both criminal and civil cases. The theory underlying this principle is that a verdict should not be reversed based on the erroneous admission or exclusion of evidence if the fact sought to be established has been established by other competent evidence. This test differs from the overwhelming untainted evidence test in that it focuses on particular evidence bearing upon an issue rather than the totality *320 of the evidence in the whole case. The cumulative evidence test has previously been advanced by at least one other commentator as a third test for harmless error. [FN262]

The cumulative evidence test has been applied to a variety of assignments of error relating to evidentiary issues in criminal cases. For example, in *State v. Wilson*, the defendant attempted to introduce evidence justifying his apparent flight from prosecution. [FN263] Following an offer of proof, the court erroneously refused to admit the testimony. [FN264] The reviewing court concluded that the error was harmless because the evidence was cumulative: "An explanation of appellants' flight and suspicious conduct in connection therewith was before the jury...." [FN265]

The cumulative evidence test has been consistently applied in criminal cases despite changes in the traditional standards

of harmless error. In *State v. Griff*, for example, two erroneously admitted eyewitness identifications were ruled harmless in the face of other evidence, including the corroborated identification of a third prosecuting witness, on grounds they were merely cumulative. [FN266] In *State v. Nist*, the defendant assigned error to the admission of statements he made prior to being advised of his Miranda rights. [FN267] At issue was the identification and ownership of the automobile used in an abduction and rape. [FN268] Prior to receiving Miranda warnings, the defendant admitted that the vehicle was his and that, as far as he knew, no one else had driven it. [FN269] In addition to his testimony, other witnesses identified Nist, his car by license number, and placed him in the car at times relevant to the assault. [FN270] The admission of the un-Mirandized confession was therefore held to be "merely cumulative evidence constituting harmless error." [FN271]

State v. Slack also involved the admission of an admissible, albeit un-Mirandized, statement followed by the admission of a legally inadmissible statement. [FN272] The court held admission of the second statement harmless because "it is clear that the second statement was repetitive of the first and added nothing to the information which appellant had previously given to the *321 police." [FN273] In *State v. Craig*, the defendant assigned error to the trial court's refusal to grant separate trials on the ground that Bruton required it. [FN274] A co-defendant's confession had been used to implicate Craig. [FN275] Finding the error harmless, the court based its decision in part on the fact that "the story which [the co-defendant] told on the witness stand was substantially the same as that told by the appellant" and noted that the erroneously admitted evidence was therefore cumulative. [FN276]

The defendant in *State v. Hartnell* was prosecuted for delivery of a controlled substance. [FN277] The court admitted several incriminating statements under the excited utterances exception to the hearsay rule. [FN278] However, the statements were not spontaneous, did not fall within the exception, and were therefore improperly admitted. [FN279] Their admission was held to be harmless based on other evidence documenting the same information: "From their own surveillance of Asencio's car and Hartnell's house, the police knew, and the jury was told, quite independently where Asencio had gone on each occasion immediately after Vincent gave him money. Also, the prerecorded money was found on Hartnell's person." [FN280]

In *State v. Johnson*, the defendant assigned error to the trial court's refusal to permit cross-examination on a witness' prior felony convictions. [FN281] The refusal, although error, was harmless because the witness had already been impeached by cross-examination regarding a conviction for a second-degree burglary for which he had served time in the penitentiary. [FN282] Likewise, in *State v. Rice*, the defendant claimed a denial of his right to confrontation based on the admission of a statement he gave to a police detective. [FN283] However, the statement contained the same information included in a *322 properly admitted letter. Thus the information was largely cumulative. [FN284] On that basis, the court concluded that the error in admission was harmless. [FN285]

The cumulative evidence rule has also been applied in civil cases. In *Allman Hubble Tugboat Co. v. Reliance Development Corp.*, the court ruled that the erroneous admission of a letter was harmless. [FN286] "It appears from the record that the letter was to the same general effect as Hunt's statement, and, even though improperly admitted, it would not be so harmful as to call for granting of a new trial." [FN287]

Recently in *Havens v. C&D Plastics, Inc.*, the court reaffirmed that "[t]he exclusion of evidence which is cumulative or has speculative probative value is not reversible error." [FN288] The court in *Havens* went on to note that "[t]he evidence need not be identical to that which is admitted; instead, harmless error, if error at all, results where evidence is excluded which is, in substance, the same as other evidence which is admitted." [FN289] In *Feldmiller v. Olson*, the court assumed that testimony regarding the identification of the plaintiff's vehicle was inadmissible hearsay. [FN290] It concluded the error was nonetheless harmless, citing the principle that "[e]rror in the admission of evidence is without prejudice when the same facts are established by other evidence." [FN291] In *Brown v. Spokane County Fire Protection*

District 1, the court held harmless the erroneous admission of tape recordings on the basis that "the admission of the objectionable portion of the tape was not reversible error because the statements were merely cumulative" [FN292]

As with the other factors discussed in this article, the cumulative evidence factor applies regardless of the standard of review applied (contribution or *323 overwhelming untainted evidence) or the type of error committed (constitutional or nonconstitutional).

V. CONCLUSION

The doctrine of harmless error has been regularly criticized by both commentators and practicing lawyers on the grounds that it represents an arbitrary exercise of judicial authority. The purpose of this article has been to identify additional underlying factors which apparently (and appropriately) constrain and guide the appellate decision-maker's analysis in arriving at the conclusion that error is or is not harmless.

It is hoped that this article will generate both discussion and a more articulate and thoughtful development of the harmless error doctrine. If we can recognize other factors that influence the conclusion that error is harmless, lawyers and judges should be able to predict with more certainty when error should be considered truly harmless.

[FNa1]. Chief Judge, Washington State Court of Appeals, Division III; J.D., Gonzaga University School of Law; LL.M., University of Virginia; Fellow of the American College of Trial Lawyers; Associate of the American Board of Trial Advocates.

[FN1]. See *State v. Vargus*, 25 Wash. App. 809, 817, 610 P.2d 1, 5 (1980) (Munson, J. concurring).

[FN2]. See *State v. Pam*, 30 Wash. App. 471, 477, 635 P.2d 766, 770 (1981) (Ringold, J., dissenting) ("Too often, with unreflecting alacrity, courts are inclined to dispose of difficult issues as 'harmless error.'"), *aff'd*, 98 Wash. 2d 748, 659 P.2d 454 (1983).

[FN3]. *State v. Tharp*, 96 Wash. 2d 591, 600, 637 P.2d 961, 965 (1981).

[FN4]. *State v. Reid*, 38 Wash. App. 203, 217, 687 P.2d 861, 870 (1984) (Ringold, J., dissenting).

[FN5]. *Id.* ("In the case sub judice, however, the choice of methodology determines the outcome.").

[FN6]. See generally MONAHAN & WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 34 (1994) (explaining different theories of causation between events and outcomes).

[FN7]. *State v. Finnegan*, 6 Wash. App. 612, 622, 495 P.2d 674, 680 (1972) (quoting *State v. Macon*, 273 A.2d 1, 9 (N.J. 1971)), *cert. denied*, 410 U.S. 967 (1973).

[FN8]. ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 13 (1970).

[FN9]. See *State v. Robinson*, 38 Wash. App. 871, 877, 691 P.2d 213, 218 (1984). Typical of the fact finding process engaged in by an appellate court is the statement:

Applying those principles here, we do not believe that the jury would have found the State's case significantly less persuasive had the motel registration not been introduced into evidence; and it cannot be said that, within reasonable probabilities, the result of the trial would have been materially more favorable to Tharp had his objection been sustained. We therefore conclude that the error was harmless.

State v. Tharp, 27 Wash. App. 198, 211, 616 P.2d 693, 700 (1980), *aff'd*, 96 Wash. 2d 591, 637 P.2d 961 (1981).

[FN10]. 24 Wash. 2d 909, 917, 167 P.2d 986, 990 (1946).

[FN11]. *Coppo v. Van Wieringen*, 36 Wash. 2d 120, 121, 217 P.2d 294, 296 (1950) (citing Wash. Const. art. I, § 21); U.S. Const. amend. VI.

[FN12]. See *State v. Tyler*, 77 Wash. 2d 726, 762, 466 P.2d 120, 140 (1970) (Rosellini, J., dissenting) ("It is not this court which must be convinced of the appellant's guilt. It is the jury."), vacated in part, 408 U.S. 937 (1972). See also TRAYNOR, *supra* note 8, at 23 ("Ordinarily an appellate court would have reasons for doubt, for there are no scientific answers to the ultimate question whether the trier of fact was influenced by an error. How can anyone determine what went on in the minds of another or of twelve others who served as triers of fact?"); Jonathan D. Casper et al., *Juror Decision Making, Attitudes, and the Hindsight Bias*, 13 LAW & HUM. BEHAV. 291 (1989).

[FN13]. See *State v. Ng*, 110 Wash. 2d 32, 43, 750 P.2d 632, 638 (1988) ("The individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict.") (citations omitted).

[FN14]. 71 Wash. 2d 372, 373, 428 P.2d 540, 542 (1967).

[FN15]. *State v. Hazzard*, 75 Wash. 5, 22, 134 P. 514, 520 (1913).

[FN16]. See *Robinson*, 24 Wash. 2d at 929, 167 P.2d at 995 (Steinert, J., dissenting) ("The jury must be credited with at least a minimum amount of common sense.").

[FN17]. *State v. Evans*, 96 Wash. 2d 1, 9, 633 P.2d 83, 88 (1981) (Brachtenbach, J., concurring).

[FN18]. 27 Wash. 2d 336, 341, 178 P.2d 341, 344 (1947).

[FN19]. *Id.*

[FN20]. *Id.* (citing Rem. Rev. Stat. § 307).

[FN21]. Wash. Rev. Code § 4.36.240 (1994) provides: "The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

[FN22]. *State v. Robinson*, 24 Wash. 2d 909, 917, 167 P.2d 986, 990 (1946) (rejecting the harmless error rule). "A fair trial implies among other things that the court exclude all evidence that has no material bearing on the case." *Id.* See also Pat Delfino, Comment, *The Harmless Constitutional Error Rule in Washington: What It Was, What It Is, and What It Should Be*, 20 GONZ. L. REV. 429, 431-32 (1984).

[FN23]. See TRAYNOR, *supra* note 8, at 4; Delfino, *supra* note 22, at 432.

[FN24]. See, e.g., *Mackay v. Acorn*, 127 Wash. 2d 302, 311, 898 P.2d 284, 288 (1995).

[FN25]. *Britton*, 27 Wash. 2d at 341, 178 P.2d at 344.

[FN26]. See, e.g., *State v. Oswald*, 62 Wash. 2d 118, 122, 381 P.2d 617, 619 (1963); *State v. Fowler*, 114 Wash. 2d 59, 63, 785 P.2d 808, 811 (1990); *State v. Pam*, 98 Wash. 2d 748, 754, 659 P.2d 454, 457 (1983); *State v. Wanrow*, 88 Wash. 2d 221, 237, 559 P.2d 548, 557 (1977).

[FN27]. See *State v. MacMaster*, 113 Wash. 2d 226, 234, 778 P.2d 1037, 1042 (1989) (finding reversible error and remanding for a new trial). The court defined harmless error as follows:

When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless....

A harmless error is an error which ... in no way affected the final outcome of the case.
Id. (citation omitted).

[FN28]. *Britton*, 27 Wash. 2d at 342, 178 P.2d at 344 (citations omitted).

[FN29]. WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1517 (1989).

[FN30]. Id. at 557.

[FN31]. Id. at 7.

[FN32]. See discussion *infra* part III.B.

[FN33]. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stevens, J., concurring).

[FN34]. 1 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 21, at 929 (1983).

The preliminary hurdle to discussion of this topic is the question of whether it is possible to say anything meaningful about the difference between harmless and prejudicial error. There are some who say that the difference is impossible to define and that it is therefore largely pointless to try to articulate a test that describes the difference. However, the latter view exaggerates the problem and misconceives what is entailed by a demand for an adequate description of the difference. A description of the difference between harmless and prejudicial error may supply useful and significant information even if that description does not operate in all respects in the fashion of a self-executing formula and indubitably and clearly prescribes specific results in specific situations.

Id. (citing 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, Jr., FEDERAL PRACTICE AND PROCEDURE § 5035, at 172 (1977) ("The distinction between harmless error and reversible error is all but impossible to define.")).

[FN35]. *Love v. Alaska*, 457 P.2d 622, 629 (Alaska 1969).

A formal statement of legal rules is of little value unless we know the methods by which those rules operate in practice. What matters pragmatically is only the portion of the former rule that survives after the judicial apparatus has done its work.

The application of the harmless error rule in a given case is a broad act of judgment, with all that the term implies. It is not easy to express in mechanistic verbal formulae a rule comprehending the many factors which motivate that act of judgment. The interplay of impression and analysis, the experience and legal philosophy of the judge, the necessity to balance between competing interests, and a detailed consideration of the actualities in each case, all contribute inevitably to the result.

Id.

[FN36]. See, e.g., *State v. Riggins*, 34 Wash. App. 463, 662 P.2d 395 (1983). In *Riggins*, the court cited the *Britton* definition: "[H]armless 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...." Id. at 466, 662 P.2d at 397 (quoting *Britton*, 27 Wash. 2d at 341, 178 P.2d at 343). The court then asserted the presumption that "[w]hen the re-

cord discloses an error in an instruction given on behalf of the party in whose favor the verdict is returned, the error is presumed to have been prejudicial and to furnish ground for reversal 'unless it affirmatively appears that it was harmless.'" *Id.* (citation omitted). After a discussion of both the contribution test and the overwhelming untainted evidence test, the court concluded the error under consideration was harmless beyond a reasonable doubt under either test and did not affect the outcome of the case, in any event. *Id.* at 467, 662 P.2d at 397-98. Which principle of law from this smorgasbord dictated the conclusion that error was harmless?

[FN37]. See *State v. Evans*, 96 Wash. 2d 1, 6-10, 633 P.2d 83, 86-88 (1981) (Brachtenbach, J., concurring).

[FN38]. *State v. Johnson*, 100 Wash. 2d 607, 621, 674 P.2d 145, 154 (1983), overruled by *State v. Bergeson*, 105 Wash. 2d 1, 711 P.2d 1000 (1985).

[FN39]. *Id.* at 620-22, 674 P.2d at 153-55.

[FN40]. Perhaps the majority of cases suggest the overwhelming evidence test is proper. See, e.g., *Milton v. Wainwright*, 407 U.S. 371, 372-73 (1972); *Schneble v. Florida*, 405 U.S. 427, 430 (1972). Others suggest the contribution test. See, e.g., *Price v. Georgia*, 398 U.S. 323 (1968).

[FN41]. 104 Wash. 2d 412, 426, 705 P.2d 1182, 1191 (1985), cert. denied, 475 U.S. 1020 (1986).

[FN42]. See *State v. Jones*, 101 Wash. 2d 113, 125, 677 P.2d 131, 139 (1984), overruled sub nom. *State v. Brown*, 113 Wash. 2d 520, 782 P.2d 1013 (1989), opinion corrected by 787 P.2d 906 (Wash. 1990).

[FN43]. *Guloy*, 104 Wash. 2d at 426, 705 P.2d at 1191.

[FN44]. See discussion *infra* part III.C.

[FN45]. *Guloy*, 104 Wash. 2d at 426, 705 P.2d at 1191.

[FN46]. *Id.* Before and after *Guloy*, verdicts in both civil and criminal cases have been affirmed on the basis that overwhelming untainted evidence supported the verdict. See, e.g., *State v. Fowler*, 114 Wash. 2d 59, 64, 785 P.2d 808, 812 (1990) ("Based on the overwhelming evidence from both sides regarding the gun, Fowler would have been found armed with a deadly weapon beyond a reasonable doubt even if the jury had been properly instructed. The error was harmless beyond a reasonable doubt."); *State v. Hall*, 95 Wash. 2d 536, 541, 627 P.2d 101, 104 (1981) (holding that, despite instructional error, there was simply no reasonable inference contrary to the facts establishing guilt); *State v. Rogers*, 83 Wash. 2d 553, 556, 520 P.2d 159, 156 (holding the conviction must stand because of uncontroverted testimony despite an error in instructing the jury), cert. denied, 419 U.S. 1053 (1974); *State v. Nist*, 77 Wash. 2d 227, 235, 461 P.2d 322, 327 (1969) (finding overwhelming untainted evidence to support the defendant's conviction); *State v. Bockman*, 37 Wash. App. 474, 484, 682 P.2d 925, 933 (1984) (holding trial court's error in not giving a limiting instruction on weight of evidence was harmless given the abundant corroborating evidence); *State v. Jones*, 22 Wash. App. 506, 512, 591 P.2d 816, 819-20 (1979) (finding overwhelming documentary evidence as well as defendant's own incriminating admissions leave no doubt of guilt); *State v. Burnham*, 19 Wash. App. 442, 446, 576 P.2d 917, 919 (1978) (holding a jury instruction harmless error because the jury could arrive at no other result).

[FN47]. 55 Wash. 365, 368-69, 104 P. 632, 634 (1909) (Even if the instructions given by the trial judge were erroneous, it was harmless error "for the overwhelming weight of the testimony presented by the plaintiff....").

[FN48]. 63 Wash. 476, 480, 115 P.2d 1047, 1049 (1911), *aff'd*, 66 Wash. 617, 119 P. 1116 (1912) (citation omitted).

[FN49]. WASH. SUP. CT. R. 56(c) (setting forth the standard "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.") (emphasis added).

[FN50]. *State v. Nist*, 77 Wash. 2d 227, 234, 461 P.2d 322, 326 (1969) (citing *Harrington v. California*, 395 U.S. 250 (1969)).

[FN51]. 13 Wash. App. 421, 425-26, 535 P.2d 843, 846 (1975), *aff'd*, 88 Wash. 2d 211, 558 P.2d 188 (1977).

[FN52]. 20 Wash. App. 46, 52, 579 P.2d 957, 960 (1978).

[FN53]. 17 Wash. App. 809, 815, 565 P.2d 440, 443 (1977), *rev. denied*, 89 Wash. 2d 1015 (1978).

[FN54]. 114 Wash. 2d 59, 63-64, 785 P.2d 808, 811-12 (1990) (citing *State v. McHenry*, 88 Wash. 2d 211, 558 P.2d 188 (1977)).

[FN55]. *Id.* at 64, 785 P.2d at 812.

[FN56]. *Nist*, 77 Wash. 2d 227, 461 P.2d 322 (affirming conviction); *Markovich*, 17 Wash. App. 809, 565 P.2d 440 (affirming conviction).

[FN57]. 386 U.S. 18 (1967) (holding that in order for error to be held harmless in a state criminal case, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to conviction).

[FN58]. *Nist*, 77 Wash. 2d at 235, 461 P.2d at 327.

[FN59]. *McHenry*, 13 Wash. App. at 425-26, 535 P.2d at 846.

[FN60]. *Setzer*, 20 Wash. App. at 51-52, 579 P.2d at 960.

[FN61]. *Markovich*, 17 Wash. App. at 815, 565 P.2d at 443.

[FN62]. *Fowler*, 114 Wash. 2d at 65, 785 P.2d at 812.

[FN63]. 115 Wash. 2d 708, 731, 801 P.2d 948, 960 (1990) (*Utter, J., dissenting*).

[FN64]. Criticism of the overwhelming untainted evidence test has been summarized as follows:

1. An appellate court using the overwhelming evidence test usurps the jury's function far more significantly than an appellate court limiting its inquiry to an examination of the error.

2. The overwhelming evidence test disparages the notion that constitutional protection is due all citizens, the guilty as well as the innocent.

3. Findings of harmlessness under the overwhelming evidence test are much less subject to judicial review than findings of harmlessness under the first approach.

Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error--A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 33 (1976).

An additional problem with the overwhelming untainted evidence rule, indeed a problem with the harmless error rule generally, is that it provides no incentive for litigants (particularly the state in criminal cases) to avoid introducing error with questionable evidence, erroneous instructions, or prosecutorial misconduct.

Still another conceptual flaw with the overwhelming untainted evidence test is that, as applied, it contradicts the basic jury charge that a jury must acquit the defendant if there is a reasonable doubt of the defendant's guilt. See WASH. PAT-

TERN JURY INSTR. CRIM. § 4.01, at 65 (2d ed. 1994). Tainted evidence can be disregarded as harmless error instead of being considered as a basis for finding reasonable doubt.

[FN65]. This state, like most other federal and state jurisdictions, has usually approached the two generally accepted tests for harmless error-- contribution and overwhelming untainted evidence--as an either/or analysis. See, e.g., *State v. Guloy*, 104 Wash. 2d 412, 426, 705 P.2d 1182, 1191 (1985), cert. denied, 475 U.S. 1020 (1986). The court in *State v. Johnson*, however, viewed them as alternatives dependent upon the facts presented to the court:

In determining whether the defendant would or would not have been convicted, but for the error committed, two distinctly different situations can exist.

The evidence of guilt can be so conclusively proven by competent evidence that no other rational conclusion can be reached except the defendant is guilty as charged....

Alternatively, due to the particular situation in which the claimed error arose, the court may be able to say there is no reasonable possibility the evidence complained of might have contributed to the conviction. *State v. Jefferson*, 74 Wash. 2d 787, 793, 446 P.2d 971 (1968). This case fits within the rule stated in *Jefferson*. 1 Wash. App. 553, 555-56, 463 P.2d 205, 206 (1969), rev. denied, 78 Wash. 2d 992 (1970).

[FN66]. See *State v. Robinson*, 24 Wash. 2d 909, 917, 167 P.2d 986, 990 (1946).

[FN67]. See *State v. Evans*, 96 Wash. 2d 1, 10, 633 P.2d 83, 88 (1981) (Brachtenbach, J., concurring).

Our cases have been flawed by similarly confusing inconsistency. Shortly after *Harrington* was decided we characterized that case as holding that a constitutional error "may be held harmless if there is 'overwhelming' untainted evidence to support the conviction." *State v. Nist*, 77 Wash. 2d 227, 234, 461 P.2d 322 (1969). Two years later we cited none of the applicable Supreme Court cases and arguably employed a probability test in a case involving comment on defendant's silence. *State v. Gibson*, 79 Wash. 2d 856, 861, 490 P.2d 874 (1971). In a later case involving comment on silence we appeared to intermingle in an unclear fashion the overwhelming untainted evidence test and *Gibson's* probability test. *State v. Fricks*, 91 Wash. 2d 391, 396-97, 588 P.2d 1328 (1979). In a recent case we cited *Chapman's* rule that a constitutional error must be harmless beyond a reasonable doubt, and refused to hold the error harmless because the court was unable to conclude that the error "in no way affected the final outcome of the case." *State v. Stephens*, 93 Wash. 2d 186, 191, 607 P.2d 304 (1980). This quotation is arguably consistent with the contribution test. *Id.*; see also *State v. Robinson*, 38 Wash. App. 871, 877, 691 P.2d 213, 218 (1984), rev. denied, 103 Wash. 2d 1015 (1985).

[FN68]. *State v. Handran*, 113 Wash. 2d 11, 16-17, 775 P.2d 453, 456 (1989) (explaining that courts have developed two alternative approaches in determining whether constitutional error is harmless: the contribution test and the overwhelming evidence test).

[FN69]. 104 Wash. 2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986); see also discussion *supra* part III.B.2.

[FN70]. See *State v. Jones*, 101 Wash. 2d 113, 125, 677 P.2d 131, 139 (1984) ("We need not decide in this case which of these tests is most appropriate as we find, under either test, the evidence of prior convictions is harmless error in *Jones* and not harmless error in *Young*."); *State v. Belmarez*, 101 Wash. 2d 212, 218, 676 P.2d 492, 495 (1984) (finding error not harmless under either test); *State v. Johnson*, 100 Wash. 2d 607, 621, 674 P.2d 145, 154 (1983) (finding error harmless under either test).

[FN71]. 25 Wash. App. 809, 812-15, 610 P.2d 1, 3-4 (1980) (discussing the following cases: *State v. Redwine*, 23 Wash. 2d 467, 471, 161 P.2d 205, 207 (1945) (stating a jury would probably not have rendered a different verdict); *Chapman v.*

California, 386 U.S. 18, 24 (1967) (holding that the court's comment was harmless beyond a reasonable doubt); *State v. Martin*, 73 Wash. 2d 616, 627, 440 P.2d 429, 437 (1968) (finding where defendant's guilt is conclusively proven by competent evidence, and no other rational conclusion can be reached, conviction should not be set aside because of unsubstantial errors); *Harrington v. California*, 395 U.S. 250, 251, 254 (1969) (stating a year after *Chapman*, court referred specifically to the *Chapman* rule and affirmed it, but referred to overwhelming evidence of guilt); *State v. Finnegan*, 6 Wash. App. 612, 621, 495 P.2d 674, 679-80, rev. denied, 81 Wash. 2d 1001 (1972), cert. denied, 410 U.S. 967 (1973) (quoting *Chapman* and stating the test of constitutional error would be the same, but then quoting from *State v. Mack*, 80 Wash. 2d 19, 490 P.2d 1303 (1971), which referred to *Martin*, which omitted any mention of the *Chapman* rule; the court was also unable to find a distinction in the rule expressed in *Martin* and *Chapman*); *State v. Spencer*, 9 Wash. App. 95, 97, 510 P.2d 833, 834-35 (1973) (stating the court reverted specifically to the rule as stated in *Chapman*, but cited *Martin* as authority); *State v. Haynes*, 16 Wash. App. 778, 786, 559 P.2d 583, 589, rev. denied, 88 Wash. 2d 1017 (1977) (stating the error was harmless beyond a reasonable doubt when viewed in the light of other "overwhelming" evidence to convict) (citing *Chapman*, 386 U.S. 18); *Nist*, 77 Wash. 2d at 235, 461 P.2d at 327 (stating there is overwhelming untainted evidence; there is no reasonable doubt that absence of certain evidence would not have affected the outcome of the trial) (citing *Martin*, 73 Wash. 2d 616, 440 P.2d 429 (a post-*Chapman* case)); *Seattle v. Wakenight*, 24 Wash. App. 48, 52, 599 P.2d 5, 7 (1979) (holding evidence properly admitted established beyond a reasonable doubt the defendant was guilty of the offense); *State v. Burri*, 87 Wash. 2d 175, 182, 550 P.2d 507, 512 (1976) (finding an error of constitutional proportions will not be held harmless unless the appellate court is "able to declare a belief that it was harmless beyond a reasonable doubt."); *State v. Fricks*, 91 Wash. 2d 391, 396, 588 P.2d 1328, 1332 (1979) (stating the court appears to revert to the pre-*Chapman* and pre-*Martin* rule and cannot say if evidence was excluded, "the jury would probably not have rendered a different verdict").

[FN72]. See *Franks v. Department of Labor & Indus.*, 35 Wash. 2d 763, 772, 215 P.2d 416, 423 (1950) (reviewing an appeal from an order granting a new trial based on an erroneous instruction, the court concluded that "[t]he trial court was in a better position than are we to determine the effect which the erroneous instructions may have had upon the jury"); *Zwink v. Burlington Northern, Inc.*, 13 Wash. App. 560, 568, 536 P.2d 13, 19 (1975) (affirming the trial court's denial of a motion for a new trial based upon an erroneous instruction). In the criminal context, see *State v. Bartholomew*, 56 Wash. App. 617, 624-25, 784 P.2d 1276, 1280 (1990) (remanding to the trial court for consideration whether admission of certain evidence was proper and, if not, whether the error should be classified as harmless); *State v. Taylor*, 22 Wash. App. 308, 319, 589 P.2d 1250, 1256, rev. denied, 92 Wash. 2d 1013 (1979) (affirming the trial court's denial of a new trial motion by stating: "It necessarily follows that the judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless-error standard ... [T]he trial judge was fully cognizant of the appropriate standard to be applied. He reviewed the relevant evidence").

[FN73]. See, e.g., *State v. Thomas*, 110 Wash. 2d 859, 863, 757 P.2d 512, 514 (1988) ("It is not a question of some possibility and not a question of a remote probability. Rather it must involve a reasonable probability. Connected to that must be a determination whether the omitted instruction materially affected the outcome.") (emphasis added); *State v. Rogers*, 83 Wash. 2d 553, 557, 520 P.2d 159, 161, cert. denied, 419 U.S. 1053 (1974) ("Error cannot be regarded as harmful so as to require reversal unless, within reasonable probabilities, had the error not occurred, the result might have been materially more favorable to the one complaining of it.") (emphasis added) (citation omitted); *State v. Webb*, 64 Wash. App. 480, 488, 824 P.2d 1257, 1262 (1992) ("Error that is not of constitutional magnitude is harmless unless there is a reasonable probability, in light of the entire record, that the error materially affected the outcome of the trial.") (emphasis added) (citation omitted).

[FN74]. See, e.g., *State v. Wanrow*, 88 Wash. 2d 221, 237, 559 P.2d 548, 557 (1977) (reversing the conviction and rejecting the State's argument that the error was harmless, the court relied on the presumption that erroneous instructions

are prejudicial, and harmless error is limited to that which is "trivial, or formal, or merely academic ... and in no way affected the final outcome of the case." (quoting *State v. Golladay*, 78 Wash. 2d 121, 139, 470 P.2d 191, 202 (1970)) (emphasis added); *State v. Caldwell*, 94 Wash. 2d 614, 618, 618 P.2d 508, 510-11 (1980) (holding error is harmless only if it in no way affected the final outcome of the case).

[FN75]. *Caldwell*, 94 Wash. 2d at 618, 618 P.2d at 511 (citation omitted).

[FN76]. *State v. Bythrow*, 114 Wash. 2d 713, 722 n.4, 790 P.2d 154, 158 n.4 (1990) ("Only if the outcome of the trial would have been different had the errors not occurred is the error deemed reversible error. In making such a determination, the court obviously looks to the strength of the State's evidence.") (citation omitted).

[FN77]. *State v. Boyd*, 29 Wash. App. 584, 588, 629 P.2d 930, 933 (1981) (quoting *United States v. Goldberg*, 582 F.2d 483, 489 (9th Cir. 1978), cert. denied, 440 U.S. 973 (1979)). See also *State v. Johnson*, 1 Wash. App. 553, 556, 463 P.2d 205, 206 (1969) (citing *State v. Jefferson*, 74 Wash. 2d 787, 793, 446 P.2d 971, 974 (1968)) ("[T]here was no reasonable possibility that the evidence complained of might have contributed to the conviction.").

[FN78]. *State v. White Eagle*, 12 Wash. App. 97, 100, 527 P.2d 1390, 1392 (1974) (quoting *Schneble v. Florida*, 405 U.S. 427 (1972)). See also *State v. Rogers*, 83 Wash. 2d 553, 557, 520 P.2d 159, 161, cert. denied, 419 U.S. 1053 (1974) (concluding, despite the error, that the average juror would not have "found the prosecutor's case significantly less persuasive had the jury not been instructed on the statutory presumption of the defendant's specific intent to kill."); *State v. Gollaway*, 14 Wash. App. 200, 203, 540 P.2d 444, 447 (1975) ("The evidence of the possession of amphetamines on Gollaway's person was overwhelming and not significantly less persuasive without the evidence of the additional amphetamines found in his car."); *State v. Odom*, 8 Wash. App. 180, 188, 504 P.2d 1186, 1190 (1973) (holding that despite the error in instructions, "the minds of an average juror would not have found the prosecution's case significantly less persuasive had the instruction been presented to the jury in a more restrictive form and had the jury been admonished not to utilize the statutory presumption as a basis to find in the defendant a specific intent to kill the alleged victims"), aff'd in part, rev'd in part, 83 Wash. 2d 541, 520 P.2d 152, cert. denied, 419 U.S. 1013 (1974).

[FN79]. See *State v. Nist*, 77 Wash. 2d 227, 235, 461 P.2d 322, 327 (1969) ("[I]f there was error in allowing the defendant's admission of ownership of the car before the constitutional warnings were given, it was merely cumulative evidence constituting harmless error."); *State v. Johnson*, 12 Wash. App. 548, 551, 530 P.2d 662, 665 (1975) ("Even if error exists because discretion has been abused, the error will not be reversible unless 'within reasonable probabilities, had the error not occurred, the result might have been materially more favorable to the one complaining of it.'") (citation omitted); *State v. Smith*, 3 Wash. 2d 543, 551, 101 P.2d 298, 301 (1940) ("Assuming that the statements made to Officers Sweeney and Brower could not be considered as part of the *res gestae*, and that therefore it was error to allow these witnesses to testify that the complaining witness told them the name of the man who assaulted her was 'Ed,' still we think it was harmless error....").

Other cases, regardless of the announced standard of review, adopt the same approach. See, e.g., *State v. Rice*, 120 Wash. 2d 549, 569, 844 P.2d 416, 426 (1993); *State v. Webb*, 64 Wash. App. 480, 489, 824 P.2d 1257, 1262 (1992); *State v. Koepke*, 47 Wash. App. 897, 908, 738 P.2d 295, 301 (1987); *State v. Carlin*, 40 Wash. App. 698, 703, 700 P.2d 323, 326 (1985); *State v. Vargus*, 25 Wash. App. 809, 812-13, 610 P.2d 1, 3 (1980); *State v. Miner*, 22 Wash. App. 480, 486, 591 P.2d 812, 816 (1979).

[FN80]. See *State v. Wanrow*, 88 Wash. 2d 221, 237, 559 P.2d 548, 557 (1977); *Franks v. Department of Labor & Indus.*, 35 Wash. 2d 763, 773, 215 P.2d 416, 423 (1950).

[FN81]. See *Gray v. Washington Water Power Co.*, 30 Wash. 665, 670-71, 71 P. 206, 208 (1903).

[FN82]. See *State v. Robinson*, 38 Wash. App. 871, 876, 691 P.2d 213, 217 (1984); *State v. Stephens*, 93 Wash. 2d 186, 190-91, 607 P.2d 304, 306 (1980); *State v. Burri*, 87 Wash. 2d 175, 181, 550 P.2d 507, 512 (1976).

[FN83]. *Bradley v. S. L. Savidge, Inc.*, 13 Wash. 2d 28, 39, 123 P.2d 780, 785 (1942).

[FN84]. *Id.*

[FN85]. *Id.* at 38, 123 P.2d at 785 (quoting *Beeman v. Puget Sound Traction Light & Power Co.*, 79 Wash. 137, 139, 139 P. 1087, 1088 (1914)).

[FN86]. It has been suggested that presumptions in capital cases are stronger because they should be weighted heavily in favor of the defendant. *State v. Tyler*, 77 Wash. 2d 726, 762, 466 P.2d 120, 140 (1970) ("This is a capital case and the presumption should not be indulged that any error which occurred was harmless error.") (Rosellini, J., dissenting), vacated in part, 408 U.S. 937 (1972).

[FN87]. See *State v. Swan*, 114 Wash. 2d 613, 657, 790 P.2d 610, 633 (1990), cert. denied, 498 U.S. 1046 (1991).

[FN88]. 31 Wash. 380, 384, 72 P. 79, 80 (1903).

[FN89]. *Id.* at 382, 72 P. at 80 (emphasis added).

[FN90]. *Id.* at 382-83, 72 P. at 80.

[FN91]. *Id.* at 384, 72 P. at 80.

[FN92]. *Id.*

[FN93]. *Gallagher*, 31 Wash. at 383-84, 72 P. at 80.

[FN94]. 27 Wash. 2d 336, 178 P.2d 341 (1947).

[FN95]. *Id.* at 341, 178 P.2d at 344.

[FN96]. *Id.* at 342, 178 P.2d at 344.

[FN97]. *Id.*

[FN98]. See *State v. Sykes*, 2 Wash. App. 929, 932, 471 P.2d 138, 140 (1970) (holding the instruction on the presumption of intent is harmless error because the entire defense was based upon an alibi; the intent to commit a crime was not disputed).

[FN99]. See, e.g., *State v. Savage*, 22 Wash. App. 659, 591 P.2d 851 (1979), rev'd, 94 Wash. 2d 569, 618 P.2d 82 (1980). In a second-degree murder trial, the jury was instructed that "[i]f and when the evidence shows that one person assaulted another violently with a dangerous weapon likely to kill, and which in fact did kill the person attacked, such evidence gives rise to a presumption that the assailant intended death or great bodily harm." *Id.* at 664, 591 P.2d at 854. While not clearly ruling on the propriety of the instruction, the court concluded that any error was harmless because the issue addressed by the instruction was not in controversy. "Indeed, the whole defense was pointed at establishing not that the defendant did not intend to kill her husband, but that she did so in self-defense." *Id.* at 663, 591 P.2d at 854.

[FN100]. 95 Wash. 2d 536, 627 P.2d 101 (1981).

[FN101]. Id. at 537, 627 P.2d at 102.

[FN102]. Id. at 538, 627 P.2d at 102.

[FN103]. Id.

[FN104]. Id. at 539, 627 P.2d at 103.

[FN105]. Hall, 95 Wash. 2d at 539, 627 P.2d at 103.

[FN106]. Id. at 540, 627 P.2d at 103.

[FN107]. Id.

[FN108]. 29 Wash. App. 278, 628 P.2d 827, rev. denied, 96 Wash. 2d 1003, modified, 640 P.2d 731 (Wash. App. 1981). But see *Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding the instruction denied the defendant due process of law and was unconstitutional regardless of whether the jury interpreted it as a burden-shifting presumption or a conclusive presumption).

[FN109]. *Fernandez*, 29 Wash. App. at 281, 628 P.2d at 828. See also *In re Haverty*, 101 Wash. 2d 498, 505, 681 P.2d 835, 840 (1984) (finding harmless error despite an erroneous instruction that required a finding of intent from breaking and entering). "The record shows that the issue of intent was not contested at trial; the defense focused on the issue of identification." Id.

[FN110]. *State v. Rivas*, 49 Wash. App. 677, 682, 746 P.2d 312, 315 (1987) (holding it was harmless error not to specify and define the crimes intended because the crimes intended by the defendant were not at issue). See also *In re Haverty*, 101 Wash. 2d at 505, 681 P.2d at 840.

[FN111]. 55 Wash. App. 494, 499, 781 P.2d 892, 895 (1989).

[FN112]. Id.

[FN113]. Id. See also *State v. Smith*, 56 Wash. App. 909, 914, 786 P.2d 320, 323 (1990) ("Failure to instruct the jury as to the intent element of a crime may be harmless error, but only if the defense theory of the case does not involve the element of intent (for example, misidentification).") (citation omitted); *State v. Jackson*, 62 Wash. App. 53, 60, 813 P.2d 156, 160 (1991) ("[T]he rule is that failure to instruct the jury as to the intent element of a crime can be harmless error only if the defense theory of the case does not involve the element of intent.").

[FN114]. 65 Wash. App. 681, 829 P.2d 241, rev. denied, 120 Wash. 2d 1003, 838 P.2d 1143 (1992).

[FN115]. Id. at 683, 829 P.2d at 242.

[FN116]. Id. at 684, 829 P.2d at 243.

[FN117]. Id. at 685, 829 P.2d at 243.

[FN118]. Id.

[FN119]. Garcia, 65 Wash. App. at 686, 829 P.2d at 244.

[FN120]. Id. at 688, 829 P.2d at 244-45.

[FN121]. See State v. Stephens, 93 Wash. 2d 186, 190, 607 P.2d 304, 306 (1980) (stating Washington requires jury verdicts in criminal cases to be unanimous).

[FN122]. State v. King, 75 Wash. App. 899, 902, 878 P.2d 466, 468 (1994), rev. denied, 125 Wash. 2d 1021, 890 P.2d 463 (1995).

[FN123]. 115 Wash. 2d 60, 794 P.2d 850 (1990).

[FN124]. Id. at 63, 794 P.2d at 852.

[FN125]. Id. at 68, 794 P.2d at 854.

[FN126]. Id. at 66-68, 794 P.2d at 853-54.

[FN127]. Id. at 69, 794 P.2d at 854.

[FN128]. Camarillo, 115 Wash. 2d at 70, 794 P.2d at 855.

[FN129]. Id. at 73, 794 P.2d at 857 (Utter, J., concurring).

[FN130]. 145 Wash. 227, 259 P. 395 (1927).

[FN131]. Id. at 229, 259 P. at 396.

[FN132]. Id.

[FN133]. 22 Wash. App. 308, 319, 589 P.2d 1250, 1256 (1979).

[FN134]. Id. at 317-18, 589 P.2d at 1255.

[FN135]. Id. at 319, 589 P.2d at 1256.

[FN136]. 41 Wash. App. 813, 706 P.2d 647 (1985).

[FN137]. Id. at 818, 706 P.2d at 651.

[FN138]. 46 Wash. App. 672, 673, 731 P.2d 1133, 1134 (1987), aff'd, 109 Wash. 2d 760, 748 P.2d 611 (1988).

[FN139]. 101 Wash. 2d 664, 706, 683 P.2d 571, 596 (1984) (presenting evidence to the jury that the defendant possessed a legal weapon, which allowed the jury to draw adverse inferences and was therefore irrelevant and highly prejudicial), cert. denied, 486 U.S. 1061 (1988).

[FN140]. Hancock, 46 Wash. App. at 682 n.11, 731 P.2d at 1139 n.11.

[FN141]. 17 Wash. App. 809, 815, 565 P.2d 440, 443 (1977).

[FN142]. Hancock, 46 Wash. App. at 681-82, 731 P.2d at 1138-39.

[FN143]. 105 Wash. 349, 177 P. 799 (1919).

[FN144]. Id. at 354, 177 P. at 801.

[FN145]. Id. at 350, 177 P. at 799.

[FN146]. Id. at 354, 177 P. at 801.

[FN147]. Id.

[FN148]. 13 Wash. App. 473, 535 P.2d 854 (1975).

[FN149]. Id. at 476, 535 P.2d at 856 (emphasis added).

[FN150]. Id. at 477-78, 535 P.2d at 857.

[FN151]. Id. at 478, 535 P.2d at 857.

[FN152]. Id.

[FN153]. 18 Wash. App. 45, 47, 566 P.2d 944, 945 (1977).

[FN154]. 23 Wash. App. 473, 474, 596 P.2d 297, 298 (1979).

[FN155]. Id. at 475-76, 596 P.2d at 299.

[FN156]. Id. at 476, 596 P.2d at 299 (footnotes omitted).

[FN157]. 26 Wash. App. 876, 878, 614 P.2d 245, 247 (1980) (defining knowledge: "[H]e has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.") (quoting Wash. Rev. Code § 9A.08.010(1)(b)).

[FN158]. 93 Wash. 2d 510, 610 P.2d 1322 (1980) (holding that having two possible interpretations of the statutory definition of knowledge was unconstitutional and inconsistent with the statutory scheme).

[FN159]. Ticeson, 26 Wash. App. at 879, 614 P.2d at 247-48 (citations omitted).

[FN160]. 34 Wash. App. 463, 662 P.2d 395 (1983).

[FN161]. Id. at 467, 662 P.2d at 397.

[FN162]. Id., 662 P.2d at 398. See also Connor v. Skagit Corp., 99 Wash. 2d 709, 717-18, 664 P.2d 1208, 1213 (1983) (holding that an instruction which required only that a reasonable person know of a danger in order to invoke the assumption of risk doctrine is harmless error because the jury returned a general verdict for the defendants and therefore did not reach the issue of damages).

[FN163]. 101 Wash. 2d 498, 498, 681 P.2d 835, 836 (1984) (citing Sandstrom v. Montana, 442 U.S. 510 (1979)). The burden of proof for establishing harmless error is the same in federal courts for both direct and collateral review. Rose v. Clark, 478 U.S. 570 (1986). That is not, however, the case in this state. On collateral review the burden is shifted to the petitioner to establish that the error was not harmless or prejudicial. In re Hagler, 97 Wash. 2d 818, 826, 650 P.2d 1103

(1982). In *Haverty*, the court required that the petitioner show "the constitutional errors worked to his 'actual and substantial prejudice.'" 101 Wash. 2d at 504, 681 P.2d at 839. Because personal restraint petitions involve state procedure or state law, the less onerous federal burden does not apply. In *re Mercer*, 108 Wash. 2d 714, 719, 741 P.2d 559, 561 (1987).

[FN164]. 101 Wash. 2d at 506, 681 P.2d at 840. Instruction 7 provided in part: "If a person is intoxicated to such a degree that he is not capable of forming a specific intent to commit a crime, he cannot be guilty of any crime of which a specific intent is a necessary element." *Id.*

[FN165]. *State v. Fowler*, 114 Wash. 2d 59, 65, 785 P.2d 808, 812 (1990).

[FN166]. 95 Wash. 2d 799, 805-06, 631 P.2d 376, 380 (1981) (citing *Bruton v. United States*, 391 U.S. 123 (1968), where the Supreme Court held that the appellant was denied his constitutional right of confrontation because a co-defendant who had confessed and implicated the appellant and whose confession was introduced in evidence did not take the stand and could not be cross-examined).

[FN167]. *Id.* at 808, 631 P.2d at 381.

[FN168]. 19 Wash. App. 709, 712 n.3, 578 P.2d 43, 45 n.3 (1978) (quoting instruction 9).

[FN169]. *Id.* at 713, 578 P.2d at 46.

[FN170]. A defendant is entitled to a lesser included offense instruction if each element of the lesser offense is a necessary element of the offense charged and the evidence supports an inference that the lesser crime was committed. See *State v. Speece*, 115 Wash. 2d 360, 362, 798 P.2d 294, 295 (1990); *State v. Hurchalla*, 75 Wash. App. 417, 421-22, 877 P.2d 1293, 1295-96 (1994) (citing *State v. Davis*, 121 Wash. 2d 1, 846 P.2d 527 (1993), for the proposition that the lesser crime must be committed in all instances in which the greater crime is committed).

[FN171]. 46 Wash. App. 292, 730 P.2d 706 (1986), modified, 737 P.2d 670 (Wash. App. 1987).

[FN172]. *Id.* at 296, 730 P.2d at 709.

[FN173]. *Id.* at 297, 730 P.2d at 710 (citing *People v. Ramkeesoon*, 702 P.2d 613, 616, (Cal. 1985)).

[FN174]. *Id.* at 295-96, 730 P.2d at 709.

[FN175]. *Id.* at 296, 730 P.2d at 709.

[FN176]. *Hansen*, 46 Wash. App. at 298, 730 P.2d at 710.

[FN177]. *Id.* But see *State v. Parker*, 102 Wash. 2d 161, 683 P.2d 189 (1984) (finding prejudicial error in the trial court's failure to instruct on a lesser included offense). The court concluded:

The court of appeals here presumes from the jury's verdict of guilty on felony flight that the intoxication defense was rejected and a retrial would produce no different result. This ignores the fact that the jury had no way of using the intoxication evidence short of outright acquitting Parker, because they were never told that the option of the lesser included offense existed.

Id.

[FN178]. 64 Wash. App. 101, 104, 823 P.2d 1122, 1124 (1992), *aff'd*, 120 Wash. 2d 925, 846 P.2d 1358 (1993).

[FN179]. *Id.* at 106-07, 823 P.2d at 1125.

[FN180]. *Id.* at 107-08, 823 P.2d at 1125-26.

[FN181]. *Id.* at 109-10, 823 P.2d at 1126-27.

[FN182]. *Id.* at 110, 823 P.2d at 1127.

[FN183]. *McNallie*, 64 Wash. App. at 110, 823 P.2d at 1127.

[FN184]. *Id.*

[FN185]. *Id.* See also *State v. Curry*, 14 Wash. App. 775, 780-81, 545 P.2d 1214, 1217-18 (1976) (holding it was harmless error to charge the defendant with possession of two controlled substances (one of which was not a controlled substance at the time of trial) because the jury was instructed to, and did, convict the defendant if he possessed both).

[FN186]. 15 Wash. App. 585, 588-89, 550 P.2d 705, 708 (1976).

[FN187]. *Id.* at 589, 550 P.2d at 708.

[FN188]. *Id.*

[FN189]. *Id.*

[FN190]. *Id.*

[FN191]. This reaction would also militate in favor of the contribution test rather than the overwhelming untainted evidence test for evaluating harmless error. *State v. Reid*, 38 Wash. App. 203, 218-19, 687 P.2d 861, 870-71 (1984) (Ringold, J., dissenting).

[FN192]. 28 Wash. App. 563, 564, 625 P.2d 713, 714 (1981).

[FN193]. *Id.* at 569, 625 P.2d at 717.

[FN194]. 78 Wash. 2d 121, 139, 470 P.2d 191, 202 (1970), overruled, *State v. Arndt*, 87 Wash. 2d 374, 553 P.2d 1328 (1976).

[FN195]. *Id.* at 140, 470 P.2d at 203.

[FN196]. *Id.* Although the court references the presumption, it is probably more accurate to say the evidence simply was not overwhelming. See also *State v. Savage*, 94 Wash. 2d 569, 578-79, 618 P.2d 82, 88-89 (1980) (finding prosecution's evidence of intent to kill was entirely circumstantial and would not, by itself, have led to the conclusion that Dorothy Savage intended to kill her husband when she fired the fatal shot); *State v. Parker*, 79 Wash. 2d 326, 336, 485 P.2d 60, 66 (1971) ("In this case, the evidence against the appellant was all circumstantial evidence. His defense was not entirely implausible. There is good reason to assume that the jury was beset by honest doubt when the additional instruction was given.") (Rossellini, J., dissenting).

[FN197]. 29 Wash. App. 278, 280-81, 628 P.2d 827, 828, modified, 640 P.2d 731 (Wash. App. 1981).

[FN198]. *Id.* at 280, 628 P.2d at 827. (citation omitted).

[FN199]. *Id.* at 280-81, 628 P.2d at 828.

[FN200]. 26 Wash. App. 1, 8, 612 P.2d 404, 408 (1980).

[FN201]. *Id.* at 9, 612 P.2d at 409.

[FN202]. *Id.* at 16, 612 P.2d at 412 (Ringold, J., dissenting). Cf. *State v. Young*, 62 Wash. App. 895, 895, 817 P.2d 412, 413 (1991) (finding no reason to believe the jury's evaluation of testimony was affected by improper admission of other evidence).

[FN203]. 110 Wash. 2d 859, 860, 757 P.2d 512, 513 (1988).

[FN204]. *Id.* at 864, 757 P.2d at 515 (emphasis added).

[FN205]. *Id.* at 863-64, 757 P.2d at 514-15.

[FN206]. *Id.* at 864, 757 P.2d at 514-15.

[FN207]. WASH. PATTERN JURY INSTR. CRIM. § 1.02, at 9 (2d ed. 1994).

[FN208]. *Thomas*, 110 Wash. 2d at 871, 757 P.2d at 518 (Dore, J., dissenting).

[FN209]. *Id.* (emphasis omitted).

[FN210]. See *State v. Scott*, 110 Wash. 2d 682, 690-91, 757 P.2d 492, 497 (1988) ("If a defendant feels the prosecution's case is weak on one of the elements, he may so argue to the jury. He also may advance his argument in a well crafted instruction, which the trial court may accept or reject, taking into account the relevant law and the defendant's right to present his theory of the case.") (citation omitted) (emphasis added).

[FN211]. 13 Wash. App. 560, 562, 536 P.2d 13, 15 (1975).

[FN212]. *Id.* at 564, 536 P.2d at 16.

[FN213]. *Id.* at 566-67, 536 P.2d at 18.

[FN214]. *Id.* at 569, 536 P.2d at 19.

[FN215]. 101 Wash. 2d 566, 572, 683 P.2d 173, 178 (1984). The unanimity instruction dictates that when the State presents evidence of several acts which could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations, or the court must instruct the jury to agree on a specific criminal act. *Id.*

[FN216]. 75 Wash. App. 899, 903, 878 P.2d 466, 469 (1994), rev. denied, 125 Wash. 2d 1021, 890 P.2d 463 (1995).

[FN217]. *Id.*

[FN218]. *Id.*

[FN219]. *Id.*

[FN220]. 71 Wash. App. 345, 351-52, 860 P.2d 1046, 1050 (1993).

[FN221]. Id.

[FN222]. See *Albin v. National Bank of Commerce*, 60 Wash. 2d 745, 754, 375 P.2d 487, 492 (1962); *Zwink v. Burlington Northern, Inc.*, 13 Wash. App. 560, 569, 536 P.2d 13, 19 (1975).

[FN223]. 170 Wash. 567, 17 P.2d 1 (1932).

[FN224]. Id. at 568-69, 17 P.2d at 2.

[FN225]. Id. at 570, 17 P.2d at 2 (relying on a number of cases all of which turned on the size of the verdict in light of the special damages proved). See, e.g., *Reed v. Jamieson Inv. Co.*, 168 Wash. 111, 118, 10 P.2d 977, 979, aff'd, 168 Wash. 111, 15 P.2d 119 (1932) (affirming the judgment despite the fact that the instruction referred to "expenses, 'if any'" and no evidence supporting expenses was presented because it was clear that no expenses were awarded for special damages other than those to be recovered in the future); *Cole v. Schaub*, 164 Wash. 162, 164, 2 P.2d 669, 670 (1931), aff'd, 164 Wash. 162, 7 P.2d 119 (1932) (reversing a \$7,500 judgment because of an instruction which permitted the consideration of impaired earning capacity in the absence of any allegation or proof of impaired earning capacity); *Helland v. Bridenstine*, 55 Wash. 470, 477, 104 P. 626, 629 (1909) (finding harmless error because it will "not be presumed that the jury went out of its way to find on an issue on which the evidence was silent").

[FN226]. 38 Wash. 2d 341, 352, 229 P.2d 510, 518 (1951).

[FN227]. Id. at 351, 229 P.2d at 517.

[FN228]. Id. (relying on *Carr v. Martin*, 35 Wash. 2d 753, 215 P.2d 411 (1950) (holding that it was error for the court to submit claims for special damages to the jury based on medical expenses in the absence of evidence of the reasonable value)).

[FN229]. 73 Wash. 2d 814, 817, 440 P.2d 823, 826 (1968).

[FN230]. 113 Wash. 487, 492-93, 194 P. 417, 419 (1920).

[FN231]. Id. at 492, 194 P.2d at 419.

[FN232]. Id. at 493, 194 P.2d at 419 (quoting *Drown v. Northern Ohio Traction Co.*, 81 N.E. 326, 328 (Ohio 1907)).

[FN233]. 138 Wash. 239, 244, 244 P. 569, 571 (1926).

[FN234]. Id. at 244-45, 244 P. at 571.

[FN235]. Id. at 245, 244 P. at 571.

[FN236]. 66 Wash. 2d 111, 112, 401 P.2d 340, 341 (1965).

[FN237]. Id.

[FN238]. Id. at 113, 401 P.2d at 342.

[FN239]. 68 Wash. 2d 536, 541, 413 P.2d 951, 954 (1966). See also *State v. Mitchell*, 29 Wash. 2d 468, 484, 188 P.2d 88, 96 (1947) (holding that reversal is required when there is no evidence to support one of the alternate means of com-

mitting first-degree murder). But see *State v. Jones*, 22 Wash. App. 506, 511, 591 P.2d 816, 819 (1979) (ruling that the erroneous instruction was harmless in view of the overwhelming documentary evidence and the defendant's incriminating admissions, both of which supported the finding of guilt on two other modes charged).

[FN240]. 116 Wash. 2d 315, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991).

[FN241]. *Id.* at 324, 804 P.2d at 15.

[FN242]. *Id.*

[FN243]. *Id.* at 331, 804 P.2d at 19. The dissent noted that the State had presented evidence of several incidents occurring between May 9 and May 15 which could have been the cause of the death, and the dissent would, therefore, have reversed based on the lack of a unanimity instruction. *Id.* at 336, 804 P.2d at 21 (Dore, J., dissenting).

[FN244]. WASH. PATTERN JURY INSTR. CRIM. § 1.02, at 9 (2d ed. 1994).

[FN245]. 25 Wash. 2d 211, 224, 170 P.2d 333, 340-41 (1946) (citations omitted).

[FN246]. 49 Wash. 2d 493, 494, 303 P.2d 998, 999 (1956) (emphasis omitted).

[FN247]. *Id.*, 303 P.2d at 998-99.

[FN248]. *Id.* at 495, 303 P.2d at 999.

[FN249]. *State v. Wanrow*, 88 Wash. 2d 221, 239, 559 P.2d 548, 558 (1977) (citations omitted).

[FN250]. *Id.*

[FN251]. 28 Wash. App. 944, 628 P.2d 818 (1980), modified, 640 P.2d 731 (Wash. App. 1981).

[FN252]. *Id.* at 955, 628 P.2d at 824.

[FN253]. *Id.* at 958, 628 P.2d at 826 (citing *Sandstrom v. Montana*, 442 U.S. 510 (1979)).

[FN254]. *Id.* at 957-58, 628 P.2d at 825-26. See also *In re Haverty*, 101 Wash. 2d 498, 505-06, 681 P.2d 835, 840 (1984).

[FN255]. 41 Wash. App. 724, 706 P.2d 229 (1985).

[FN256]. *Id.* at 728, 706 P.2d at 231-32.

[FN257]. 56 Wash. App. 99, 783 P.2d 87 (1989).

[FN258]. *Id.* at 105-06, 783 P.2d at 91.

[FN259]. *Id.* at 106, 783 P.2d at 91-92. See also *State v. Fowler*, 114 Wash. 2d 59, 65, 785 P.2d 808, 812 (1990) (holding that the court's omission of further instruction when required shall be analyzed by looking at the instructions as a whole).

[FN260]. See, e.g., *Goodman v. Boeing Co.*, 75 Wash. App. 60, 73, 877 P.2d 703, 711 (1994) (holding the trial court acted within its discretion in determining one instruction was not misleading when the instructions are read together as a whole); *State v. Miller*, 60 Wash. App. 767, 775, 807 P.2d 893, 897 (1991) (holding that the effect of a particular phrase

in an instruction must be determined by considering the instruction as a whole and reading it in the context of all the instructions given).

[FN261]. See, e.g., *Hansen v. Lindell*, 14 Wash. 2d 643, 129 P.2d 234 (1942); *Allman Hubble Tugboat Co. v. Reliance Dev. Corp.*, 193 Wash. 234, 74 P.2d 985 (1938); *Stofferan v. Okanogan County*, 76 Wash. 265, 136 P. 484 (1913).

[FN262]. See *Field*, supra note 64, at 37.

[FN263]. 38 Wash. 2d 593, 602, 231 P.2d 288, 292-93 (1951), cert. denied, 343 U.S. 950 (1952).

[FN264]. *Id.* at 607, 231 P.2d at 295.

[FN265]. *Id.*

[FN266]. 75 Wash. 2d 267, 270, 450 P.2d 486, 488 (1969).

[FN267]. 77 Wash. 2d 227, 461 P.2d 322 (1969).

[FN268]. *Id.* at 232-33, 461 P.2d at 325.

[FN269]. *Id.* at 232, 461 P.2d at 325.

[FN270]. *Id.* at 235, 461 P.2d at 326-27.

[FN271]. *Id.*, 461 P.2d at 327.

[FN272]. 3 Wash. App. 116, 472 P.2d 541 (1970).

[FN273]. *Id.* at 118, 472 P.2d at 543.

[FN274]. 82 Wash. 2d 777, 788, 514 P.2d 151, 158 (1973) (relying on *Bruton v. United States*, 391 U.S. 123, 136 (1968), which held that despite instructions to the jury to disregard the co-defendant's confession, admission of inadmissible hearsay evidence inculcating the defendant in the context of a joint trial violated the defendant's right to a fair trial).

[FN275]. *Id.* at 784, 514 P.2d at 156.

[FN276]. *Id.* at 788, 514 P.2d at 158.

[FN277]. 15 Wash. App. 410, 550 P.2d 63 (1976).

[FN278]. *Id.* at 418, 550 P.2d at 69.

[FN279]. *Id.*

[FN280]. *Id.* at 419, 550 P.2d at 69. See also *State v. Miner*, 22 Wash. App. 480, 486, 591 P.2d 812, 816 (1979) ("The statements made to the call receiver were merely cumulative of the statements made to Officers Margeson and Nolan. No prejudice results when rebuttal evidence is merely cumulative.") (citation omitted); *Doyle v. Langdon*, 80 Wash. 175, 180, 141 P. 352, 354 (1914).

[FN281]. 12 Wash. App. 548, 530 P.2d 662 (1975).

[FN282]. Id. at 556-57, 530 P.2d at 668.

[FN283]. 120 Wash. 2d 549, 569, 844 P.2d 416, 426 (1993).

[FN284]. Id.

[FN285]. Id. See also *State v. Hancock*, 46 Wash. App. 672, 678-79, 731 P.2d 1133, 1137 (1987) (holding erroneously admitted hearsay in a child molestation case was harmless because "[t]he testimony of B's mother on this issue is essentially repetition of B's own testimony, and adds little or nothing"), *aff'd*, 109 Wash. 2d 760, 748 P.2d 611 (1988).

[FN286]. 193 Wash. 234, 239-40, 74 P.2d 985, 987 (1938).

[FN287]. Id. at 240, 74 P.2d at 987.

[FN288]. 124 Wash. 2d 158, 169-70, 876 P.2d 435, 441 (1994) (citing *Henry v. Leonardo Truck Lines, Inc.*, 24 Wash. App. 643, 602 P.2d 1203 (1979)).

[FN289]. Id. at 170, 876 P.2d at 441-42. See, e.g., *Moore v. Smith*, 89 Wash. 2d 932, 941-42, 578 P.2d 26, 31 (1978) (no reversible error where "the substance" of the excluded evidence, an exhibit, came out at trial in testimony); *Mason v. Bon Marche Corp.*, 64 Wash. 2d 177, 179, 390 P.2d 997, 998 (1964) (no reversible error where no offer of proof and no showing that the excluded evidence differed "in any material respect" from that which was admitted); *Gaffney v. Scott Publishing Co.*, 41 Wash. 2d 191, 194, 248 P.2d 390, 391 (1952) (no reversible error where there is other testimony "in substance, the same as" the excluded evidence), *cert. denied*, 345 U.S. 992 (1953).

[FN290]. 75 Wash. 2d 322, 324, 450 P.2d 816, 818 (1969).

[FN291]. *Feldmiller*, 75 Wash. 2d at 324, 450 P.2d at 818 (citing *Bond v. Wiegardt*, 36 Wash. 2d 41, 55, 216 P.2d 196 (1950)).

[FN292]. 100 Wash. 2d 188, 196, 668 P.2d 571, 576 (1983).

END OF DOCUMENT

1 APPEARANCES

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INDEX

EXAMINATION:

PAGE:

By Ms. Heikkila

5

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

ATTORNEYS NOTES/CORRECTIONS

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

PAGE LINE

1 PURSUANT TO NOTICE, and on Friday, May 18,
2 2007, at the hour of 1:00 p.m., of said day, at 480 Galletti
3 Way, Reno, Nevada, before me, Karen Bryson, a notary public,
4 personally appeared DAWNE MOORE.

5 --oOo--

6
7 DAWNE MOORE,
8 having been duly sworn by the notary public,
9 was examined and testified as follows:

10
11 EXAMINATION

12 BY MS. HEIKKILA:

13 Q Ms. Moore, would you state your full name for the
14 record.

15 A Dawne Moore, M-o-o-r-e.

16 Q Where are you employed?

17 A I work for the State of Nevada at Northern Nevada
18 Adult Mental Health Services.

19 Q What is your position there?

20 A I'm a licensed clinical social worker, and I work
21 on both the inpatient unit and our emergency unit.

22 Q How long have you been employed there?

23 A Approximately seven years.

24 Q Were you working continuously in June of 2004?

25 A Yes, I was.

1 Q Were you working inpatient or outpatient at that
2 time, if you recall?

3 A I was working on the inpatient unit.

4 Q Is that where you're presently working?

5 A Presently my office is on the inpatient unit, but
6 I've been working -- which is just a hallway up on our
7 observation unit, which is also the emergency unit.

8 Q In the fall of 2004 were you working inpatient or
9 outpatient?

10 A I was working on the inpatient unit.

11 Q Okay. The purpose of today's deposition is to
12 review treatment that Justin Endicott received at Northern
13 Nevada Adult Mental Health in June of 2004.

14 Have you had an opportunity to review his record
15 from that time frame?

16 A I have.

17 Q And that record has been provided to our law firm
18 from you under release; is that correct?

19 A That's correct.

20 Q I also understand there was a specific release done
21 for you to participate in this deposition today; is that
22 correct?

23 A That's correct.

24 Q Do you have an independent recollection of
25 Mr. Endicott outside of your review of his medical record?

1 A Could you clarify that for me when you say
2 independent?

3 Q Sure. Do you recall him? Could you describe what
4 he looked like?

5 A Well, as a matter of fact, I -- with the chart, the
6 medical record, there is an identification photo, so I was
7 able to revisit that photo, and I do have recollection of
8 him.

9 Q Okay. I'd like to ask you just a few preliminary
10 questions about your medical record system itself.

11 A Okay.

12 Q All of the documents that we received under release
13 have manual handwritten type notes. I take it that you don't
14 have any kind of electronic charting system, at least you
15 didn't in 2004?

16 A In 2004 we did not, but we are on electronic at
17 this point in time.

18 Q In 2004 what was your procedure for documenting a
19 case? For example, if you met with a patient what would your
20 procedure be then at that point?

21 A Once a patient is admitted to the inpatient unit, I
22 do an introduction or a meeting note explaining my role
23 within 24 hours. I'm required to do a psychosocial
24 assessment and a treatment plan within five days, and then I
25 am required to do a minimum of a progress note weekly.

1 Then I partake in treatment team on a weekly basis,
2 which we have a treatment team note with all members signing
3 that. Sometimes that parameter varies, it can be -- it's
4 usually weekly, and then I am -- so I maintain at least
5 weekly progress notes throughout the course of care.

6 At discharge I complete what they call a
7 comprehensive after-care plan summary. And then just like I
8 say at the end of the progress notes, support throughout the
9 course of care.

10 Q And is your documentation system fairly consistent
11 across the various disciplines?

12 A To some degree. I mean, we all have our
13 requirements, absolutely. Some of the time frames may be
14 different, and, of course, you know, RNs do a different
15 assessment than what we do, but it is very -- we are all
16 assigned routine and regular documentation mandates by
17 medical records.

18 Q And these records are made for purposes of
19 diagnosis or treatment; is that correct?

20 A They all pertain to the patient's treatment.

21 Q All right. You keep these records also in the
22 ordinary course of your business; is that correct?

23 A As far as -- do I main -- well, I keep the -- of
24 course, we have the charts so everything goes in the charts
25 in the nursing station. So we all go and we work -- when it

1 was paper chart we all work out of that chart, you bet.

2 Q There are some what I would call medical -- or MR
3 record numbers on the bottom left-hand side. Are those form
4 numbers, or what do those refer to?

5 A That is a form number.

6 Q Okay. And I'll try as we proceed today, if there
7 is a form number, to direct you to one of those.

8 To your knowledge, were there any notes or
9 documents not released under the release?

10 A Let's see, it's my understanding -- let's see here.
11 Looked like you -- the release covered -- let me confirm
12 that. I have -- let's see here. So I have all psychiatric
13 and mental health, drug and alcohol, any type of -- some
14 medical.

15 And basically the consent says here that all health
16 care information in my medical record. So at this point in
17 time I would presume you have what medical records gave you
18 which I imagine was a copy of the chart.

19 Q Okay. I don't see any reference to the MMPI. As a
20 general proposition, are those administered in your
21 institution?

22 A It's individual.

23 Q Okay. Do you know if one was done in this
24 particular case?

25 A I did not come across one. Those are usually -- if

1 we are confused or still not able to clarify diagnostics, we
2 will order that individually.

3 Q Okay. Thank you.

4 My first series of questions will have to do with
5 your actual admission form which I think would be
6 MR 100; is that correct?

7 A That's correct.

8 Q And I'm reading this that he was admitted --
9 Mr. Endicott was admitted on June, 24, 2004.

10 A That's correct.

11 Q The admit code is OL. What does that mean?

12 A Okay. Let's see where we're -- let's see. Where
13 are you seeing that as far as when you say admitted -- you're
14 on the MR 100?

15 Q Correct. Oh, you know what, sorry, this is a data
16 sheet.

17 A Okay. As far as -- oh, I see what you're saying.
18 Okay. Let's see here. OL. Yes, so at this point that he
19 was brought in -- the police kind of were the mediator that
20 brought him to the hospital.

21 Q Were you there when he was actually admitted?

22 A No. He was admitted to -- everybody comes through
23 the observation unit or the emergency unit, so I was not
24 present on that unit when he was admitted there and then
25 deemed needing transfer to the inpatient unit.

1 Q And that would have been your first contact with
2 him?

3 A Right, when he -- once he came to the inpatient
4 unit.

5 Q Do you know where he came from, what the actual
6 referral source was?

7 A Yes, he came from -- my understanding was that the
8 family -- let's see here. He was taken to South Lyon Medical
9 Center, which is in Yerington, Nevada, and there he was
10 placed on a legal 2000. And South Lyon Medical Center in
11 Yerington completed what they call the medical clearance
12 portion of the legal 2000.

13 Q And what is the legal 2000?

14 A That is a -- the form was revised in the year 2000
15 which is an involuntary commitment to a psychiatric facility.

16 Q I'm sorry. Go ahead.

17 A Yes. And that was -- yeah, just as far as it's a
18 form created, updated in the year 2000, and it's an
19 involuntary commitment to a psychiatric hospital.

20 Q All right. And back at the beginning of this, was
21 there some family involvement, to your understanding, with
22 respect to this involuntary commitment?

23 A Yes, there was, there was family involvement.
24 Basically he was deemed an imminent threat to others, which
25 was a family member, which was his mother.

1 Q Do you know any more details about that?

2 A As far as I reference the legal 2000 he had an --
3 he was considered to be a threat to himself. There were some
4 -- there was some threats to harm himself and also to kill
5 others. It was more clarified that he had threatened to pull
6 a knife on his mother due to the fact, in my records, is that
7 he was pissed off at his mother. And then he made some
8 ongoing general threats to kill others at random if the
9 opportunity arose.

10 Q On admit, then, and I'm looking at this point I
11 think both psychiatric and physical examination done on
12 admit, he was diagnosed with a couple things I wanted to ask
13 you about. The first was impulse control disorder.

14 A Now, what I -- as far as the psychiatrist, what I
15 see here the admission diagnosis back on the inpatient unit
16 was marijuana dependence on axis one -- let me see where
17 you're finding impulse control. That may have been the
18 admitting order from the observation unit.

19 Q I'm still looking at that data sheet.

20 A Okay. Yes.

21 Q And then the next one, the discharge data does have
22 the marijuana.

23 A Correct. So what usually the procedure, they're
24 first assessed in the observation unit. That diagnosis came
25 from the doctor. That was a transferring diagnosis to

1 inpatient.

2 Q Okay. All right. What generally is impulse
3 control disorder?

4 A You know, basically impulse -- poor impulse control
5 is when somebody -- when they act without thinking. And
6 usually the behaviors can be quite self-defeating or
7 self-destructive as there is no what I call stop and think or
8 weighing out decisions, so they're very hasty.

9 Q Okay. On both the data sheet and the discharge
10 then data, the axis two diagnosis is anti-social personality
11 disorder.

12 A That's correct.

13 Q What is that generally?

14 A Anti-social personality disorder, it's an adult
15 diagnosis, and basically what that is, is that you're not
16 able to diagnose that unless a person is of age 18. They
17 must have had a conduct disorder or meet a conduct diagnosis
18 prior to the age 15. And, you know, the criteria for
19 anti-social personality disorder, you have to have three
20 criteria.

21 Where we found that he fully met that, we talk
22 about failure to conform to social norms, being dishonest,
23 manipulative, usually for their own personal pleasure or
24 profit, again, impulsivity where they tend to operate on
25 immediate gratification needs rather than looking ahead, can

1 be also aggressive in that sense where -- and it also ties
2 into a lack of remorse, lack of regard, where they will use
3 other people as a vehicle to get their needs met and not
4 really consider or have any regard for their emotion, or, you
5 know, what they have done to them if they did some sort of
6 mistreatment or harm.

7 And then irresponsibility is usually a symptom of
8 this disorder as well, and criminal behavior, and a lot of
9 times drug and alcohol can be evident as well.

10 Q Okay. And if I understood your description here,
11 to get the diagnosis as an adult over the age of -- I am just
12 clarifying your explanation here, for an adult diagnosis over
13 the age of 18, he was exhibiting -- Mr. Endicott was
14 exhibiting these behaviors prior to age 15, some of these
15 criteria; is that correct?

16 A That's correct.

17 Q Okay. The third diagnosis at least on the -- as I
18 understood the initial intake was right eye blindness. Is
19 that consistent with your understanding of Mr. Endicott, his
20 description of his right eye?

21 A Well, you know, there was -- that was noted in our
22 health and physical. And he also reported that. In my --
23 and I -- he had told me that was secondary to a
24 self-inflicted explosive, he was making bombs and it had gone
25 off accidentally.

1 In my understanding and reviewing my notes, I don't
2 -- despite this medical condition, I don't remember it
3 causing any impairment as he was able to, you know, partake
4 in all the activities. But he did report this diagnosis.

5 Q Did he ever report that this was a degenerative
6 problem with his eye?

7 A Not to my understanding. He had indicated that
8 again he had manufactured some explosive material and it had
9 accidentally gone off and it blinded him in the right eye.

10 Q All right. There was a diagnosis under axis four,
11 and the DSM code is 301.7, it's listed -- the description is
12 unemployed. I wondered if you could explain that to me.

13 A Yes. When he came into the hospital he did report
14 unemployment. And he had said that he suffered an on-the-job
15 injury, and I -- if I'm not mistaken, that was approximately
16 one and a half years prior to this admission. He was working
17 on a fishing boat and he had suffered an injury to his right
18 arm.

19 He gave -- on -- in the psychiatric eval he said it
20 had ripped his right arm off and then he had to have that
21 reattached and there was a metal plate. He had told me his
22 right arm was mangled, he had surgery and had a plate. And
23 then the medical doctor had indicated he had had a compound
24 fracture of the right arm.

25 Q And that was the medical doctor who assessed him at

1 your facility?

2 A Right. All patients are required to have a health
3 and physical. And he said secondary to that injury he was no
4 longer able to work.

5 Q Okay. You testified just a bit ago that
6 Mr. Endicott participated in activities. Was that activities
7 while he was an inpatient there?

8 A That's correct.

9 Q Did you personally observe him participating in
10 those activities?

11 A Well, as far as I got -- on the unit activities I
12 saw him -- well, that was more like playing cards. They
13 would do -- they do like bingo, things like that. But the
14 other activities are facilitated through recreational
15 therapy, which we have a member who represents that that
16 comes into the treatment team and was present when
17 Mr. Endicott was here who gave us his level of activity in
18 those groups. They're in the gym or in the courtyard, and
19 then there's also documentation that supports his level of
20 activity and what he had participated in.

21 Q I'll ask you about that as we get to that record.

22 A Okay.

23 Q So in terms of your role in his case, other than
24 what we've talked about already, I take it you were also the
25 discharge planner?

1 A That's correct.

2 Q And were you the primary person responsible for
3 interfacing with the family?

4 A That's correct.

5 Q Do you recall his family, Mr. Endicott's family?

6 A I remember having contact with his mother.

7 Q What role did she play in his care at your
8 facility, if any?

9 A Well, it -- I was able to get a consent from
10 Mr. Endicott, and I made contact with mother to basically
11 explore a history, answer any questions, discuss the course
12 of care. And there was also concerns expressed due to a lot
13 of his aggressive and volatile statements.

14 And then, of course, during that time we also
15 discussed treatment recommendations and discharge planning.
16 And I also invited her to one of our treatment team meetings
17 to have her be physically on-site, and, you know, just
18 include him -- excuse me, include her in his care and --
19 because we were highly concerned about the nature of a lot of
20 his comments and potentiality.

21 Q Okay. And I'll --

22 MR. ITKIN: Kara? I don't mean to interrupt you,
23 Kara, but I was just thinking about this deposition, if we
24 want to finish in an hour, can you just try to leave me 15 or
25 20 minutes at the end?

1 MS. HEIKKILA: I'm not going to be able to leave
2 you 15 to 20 minutes at the end.

3 MR. ITKIN: You're going to give me a chance --

4 MS. HEIKKILA: Well, we don't have time to argue
5 that right now, so let me continue.

6 MR. ITKIN: Well, then, we're not going to end this
7 deposition until I've had an opportunity to cross-examine the
8 witness.

9 MS. HEIKKILA: And you're welcome to do that. You
10 can certainly do what you need to do.

11 MR. ITKIN: Okay. I just wanted to make sure you
12 weren't going to hang up again.

13 MS. HEIKKILA: I don't appreciate that comment,
14 Mr. Itkin.

15 MR. ITKIN: Well, you may not appreciate it all you
16 want --

17 MS. HEIKKILA: Let's pursue this deposition. Thank
18 you.

19 MR. ITKIN: And I'm going to object to the hearsay
20 that the witness has said. But go on with your deposition.

21 BY MS. HEIKKILA:

22 Q Ms. Moore, what history did you learn from
23 Mr. Endicott's mother?

24 A We had learned that the mother allowed marijuana
25 use, she did say that it calmed his mood. And we did express

1 concerns about that. We thought it would be best that he
2 abstain from illicit substance use, as we felt that that was
3 not therapeutic for him.

4 We also felt there was a duty to warn due to the
5 fact he had come in with intent to harm her, and we made sure
6 that that was resolved and she felt that she was not in
7 danger and wanted her son home.

8 And then we confirmed some history as far as his
9 past, some of the legalities, and, you know, relocating to --
10 let's see here, get my story straight here -- relocating to
11 Fernley and just, you know, historical aspects.

12 Q When you say some of the legalities, what were you
13 able to confirm there?

14 A Well, we had talked about -- we talked about his
15 arrest as far as explosiveness. He was charged apparently
16 for arrest for manufacturing and possession of explosives and
17 endangering a minor.

18 Q I'm sorry, and you confirmed that with his mother?

19 A Yeah, we talked to mom about that.

20 Q Sorry. Go ahead.

21 A And let's see here, I'm going to refer to my
22 progress note so I'm -- I don't -- want to make sure that I'm
23 addressing -- and I think what mom had confirmed that there
24 -- he was not -- there was no present legalities, there was
25 no -- because the patient had referenced possibly having a

1 warrant in Oregon but we were not able to confirm that. And
2 mom did tell us that she didn't feel that he was in any
3 present legal trouble.

4 Q Were you able to find out any other detail about
5 the manufacture and danger to minor charge?

6 A You know, I obtained a consent from Mr. Endicott
7 and I called several places. He had indicated that he was
8 on, I believe it was like an informal probation or an
9 unsupervised probation.

10 And let me see here, when I -- let's see. My
11 understanding was in my notes that there was no record of it.
12 And let's see here, I need to -- let's see, I contacted --
13 looks like I spoke to the supervisor who -- of his reported
14 bench warrant status. Let's see, was defined by -- let's see
15 here.

16 Yeah, I'm trying to make sure because I don't want
17 to do hearsay here. I'm trying to recall the actual
18 conversation here. Of course, that's kind of hard. I did
19 document that there was no record of patient found by the
20 court clerk. And I believe that's when I contacted Jackson
21 County District Court. And so there was no record.

22 And then when I spoke with the -- Mr. Endicott, he
23 had clarified that it was a federal offense. When I spoke to
24 the district court they said that they were unable to
25 transfer or locate the federal department, so I believe at

1 that point in time I didn't have any further contacts and so
2 we left it at that.

3 Q And I'll move now to the physical exam. My only
4 question on the physical exam was on page three. It was
5 noted that Mr. Endicott had full range of motion throughout
6 all extremities.

7 A Let's see -- extremities, yes, it does state that.

8 Q And that there were no deformities of the limbs?

9 A That's correct.

10 Q Do you have any reason to disagree with that
11 assessment based on your own observation of Mr. Endicott?

12 A No, I don't.

13 Q There's a reference in the records to Marinal. Are
14 you familiar with Marinal?

15 A Yes, I am.

16 Q Do you recall Mr. Endicott either discussing
17 Marinal or whether he had a prescription for it? Do you know
18 anything about that?

19 A He did discuss it and he did state that he had what
20 they call a license to use medicinal Marinal in Oregon. And
21 my understanding and per my notes, as I reviewed them, my
22 understanding was that he actually had brought with him, that
23 there was a prescription for Marinal that was not honored
24 here in Nevada, but it was from Oregon.

25 Q All right. Next I wanted to ask you about the

1 patient self-assessment form.

2 A Okay.

3 Q I take it that was completed by Mr. Endicott?

4 A Yes, I do recall that. And that's a general form
5 that all clients complete. Let's see here. Back to -- okay.
6 That's MR 195.

7 Q That's correct.

8 Under the problem section, he lists problems as he
9 sees them as none.

10 A That's correct.

11 Q Is that consistent with the diagnoses in this case?

12 A No. We felt that there were several problems
13 identified as far as -- and obviously the treatment team we
14 found many issues that we thought the patient should address.

15 Q And under the end of that section it says whenever
16 personal problem, it says he hurts people and his-self. Is
17 that consistent with what you learned during your assessment?

18 A Well, and, that's correct, he did report a history
19 of self-mutilation, including burning and stabbing himself.
20 And then he had given extensive history of torturing animals
21 and then hurting people.

22 He had also spoke about one example where he
23 describes his peer relationships as very physically violent
24 where he actually shot one of his friends with a pellet gun
25 and it was aimed towards the head. He shot him in the head.

1 And they also stabbed each other.

2 Q Under the second page of that self-assessment
3 there's a section for leisure and social where it appears he
4 listed hunting and fishing.

5 A Let's see here. That's correct, hunting and
6 fishing.

7 Q Do you know any more detail about that, or would
8 that be something that the recreational therapist generally
9 would be covering?

10 A Well, he had -- that was asked by several of us.
11 And I know in my -- I believe that was my psychosocial
12 assessment to where he had listed that he had -- he enjoyed
13 -- those were his leisure interests. Let's see here, if I
14 can refer back to that. I believe he had told me he enjoyed
15 ranching, fishing, hunting, and camping, if I'm not mistaken.

16 Q Do you know when he was presently engaged in those
17 types of activities?

18 A I don't recall.

19 Q Other than that do you recall any other types of
20 leisure activities that he described?

21 A Well, I know -- let's see here. I know that he
22 participated in leisure interests while here in the program.
23 He also -- and he was in the gym, he also played volleyball.
24 Let's see here, let's see if I can refer to the RT's notes
25 here.

1 MR. ITKIN: Whose notes?

2 MS. HEIKKILA: The RT's.

3 THE WITNESS: I'm sorry, yeah, recreational
4 therapy. Yeah, it was -- it's basically what we have -- they
5 do a lot of our groups, they do anywhere from
6 psychoeducational groups to the physical, the gym, they do
7 arts and crafts, and so they do a lot of our milieu
8 activities.

9 He also had engaged -- you know, he said another
10 leisure interest was, if I'm not mistaken, one of my
11 assessments was drinking alcohol. And, let's see, I don't
12 want to do -- let me see if I can find where that was.
13 Drinking alcohol, let's see, that was -- as a matter of fact,
14 RT -- just to clarify, RT and AT are the same thing.

15 You've got recreational therapist or ally therapy.
16 And on 6/29 he had reported that he enjoyed -- patient stated
17 fishing, hunting, and camping are leisure interests. And
18 then the patient reports drinking alcohol on the weekends.
19 BY MS. HEIKKILA:

20 Q And I actually am looking at that entry right now
21 on form 173, and it's -- as I'm reading it, it says can't buy
22 a gun here. I'm reading from an entry on form 173 for June
23 29th, states, enjoys hunting and fishing but can't buy gun
24 here due to being a felon.

25 A Yes. And I recall -- could you tell me, does it

1 have the name of that form on --

2 Q Activity participation.

3 A Okay. I know which one you're looking at. Let's
4 see if I can find that. That's the recreational therapist
5 documentation notes. Let me get to where that is.

6 He also reported that -- it says, patient states
7 living in Nevada is a home to leisure involvement. So he
8 enjoyed it sounds like, you know. Of course, being in Nevada
9 we had a lot to offer here. Okay. For some reason -- I'm
10 sorry about this, the form -- oh, for heaven's sake.

11 Q That's all right. We can move back.

12 A I've got it here. There we go. 173. Let's see,
13 it states here -- that was on 6/29, states, he enjoys hunting
14 and fishing but can't buy gun here related to being a felon.
15 And then he went on further about animals and all. Yes,
16 that's stated here.

17 Q All right. I have some questions about the
18 multi-disciplinary eval admission assessment, the 14-page
19 document.

20 A Yes.

21 Q Under the past history, it made reference to
22 some psychological treatment when he was 16 or 17.

23 Do you know anything more about that?

24 A Okay.

25 Q That's on the first page.

1 A Yes. He had talked about being diagnosed with
2 ADHD, but his mother refused the medication. And then also
3 discussed being treated or diagnosed for major depressive
4 disorder, and was started on medication, but apparently he
5 was non-compliant resorting to marijuana.

6 That was in a psychiatric eval. When I refer to my
7 -- also 193 psychosocial assessment, let's see here, I
8 think -- let's see. To my understanding, I think that was --
9 let's see here. Yeah, I didn't see any other formalized
10 care, but apparently that's what he had reported he had been
11 diagnosed as.

12 Q Okay. There's some reference in this admission
13 form to him being abused by his stepdad. Do you know any
14 details about that?

15 A Let's see here, I know his mother -- his mother,
16 they had described the relationship as quite dysfunctional,
17 mother had divorced him after 17 years. Let's see here. You
18 know, I don't recall anything further on that. As far as --
19 are you seeing that under the psychiatric eval? Are you --
20 or the MR 193?

21 Q It's the MR 193, page five of 14.

22 A Okay. Okay. Yeah, you know, that's -- I don't
23 have -- obviously it's in -- noted here, it was emotional and
24 physical abuse. And, yeah, we did not go into that as far as
25 anything in depth as far as for any individual therapy. We

1 stayed away from that.

2 Q Okay. Then your social service assessment is pages
3 11 through 13 -- or 12 of that multi-disciplinary assessment;
4 is that correct?

5 A Let's see here, I believe that's accurate. Yes, it
6 begins at page 11 and ends there with page 13, uh-huh.

7 Q I believe we have covered a number of the topics
8 already contained in your notes here. I did want to ask you
9 under the arrest history?

10 A Okay.

11 Q There's some reference to him being monitored by
12 the FBI and treatment at the airport. Do you know anything
13 about that?

14 A Well, and that was -- I mean, some of my statements
15 note there was some boastfulness about this issue with --
16 issue with this arrest of possessing explosives and
17 endangering a minor. And my understanding was that he
18 reported that he gets a lot of attention when he goes to the
19 airport.

20 Of course, when we hear that people are concerned
21 about the FBI monitoring, we want to make sure that somebody
22 is not delusional and all. And so we kind of -- I mean, it
23 was more of a -- let's see here. Of course, I wasn't able to
24 confirm this, but we had felt that he probably -- if he did
25 -- in fact was arrested and charged, it'd probably be the --

1 probably the airport, you know, they have them -- I'm sorry,
2 I'm mumbling here. Sorry.

3 Did they have him on a red flag to where if he went
4 in, he had to be screened, but that was -- you know, again,
5 we did not confirm that. Was the FBI monitoring, I don't
6 know. I was not able to get further information or a contact
7 number for the federal court to confirm this arrest or other
8 proceedings.

9 Q Okay. Under the work history, on page 12?

10 A Yes.

11 Q You make note that he plans to proceed with his
12 lawsuit and then apply for disability?

13 A That's correct.

14 Q Did he ever express an interest in returning to
15 work?

16 A No, he had stated that he was unable to work.

17 Q Did he talk in any more detail about his lawsuit?

18 A Just what I had here. He had stated he had told me
19 that he received a small settlement which helped him finance
20 his move to Fernley. I also have in my notes that he had
21 paid the first and last at the home, you know, a deposit on
22 the rental home, and that he was planning on getting more
23 settlements in the future as he was still in litigation.

24 Q And under your areas of strengths it looks like he
25 denied depression; is that correct?

1 A That's correct.

2 Q And your final opinion was that he seemed to be in
3 relatively good health; is that correct?

4 A That's correct.

5 Q Just referring to your progress note, generally how
6 often did you see him as he continued in the inpatient
7 program?

8 A You know, my office is centered right on the unit,
9 so when I go in and out the door, I see the patients, you
10 know, all day long. And by -- formally I'm supposed to at
11 least meet with them on a weekly basis, but it's often daily
12 because I see them on a unit so there is some engagement
13 daily.

14 And then either I'll do several notes per week,
15 which looks like I documented on almost daily here, so
16 usually I would see the patients daily unless for some reason
17 if somebody is sick and in their room most of the day, but
18 otherwise I see them daily.

19 Q It looks like based on the June 30, 2004 progress
20 note that that might have been the care plan meeting that the
21 mother participated; is that correct?

22 A That is correct.

23 Q Did Mr. Endicott also participate in that meeting?

24 A You know, I don't recall, but standard of practice
25 is that what we typically do is we have mom -- or the

1 collateral contacts, whether it's the husband, parent,
2 friend, sometimes we will have them come in first for a few
3 minutes and then bring the patient in. But I can -- I have
4 -- it's not documented here, but our standard of practice is
5 that the patient is always in these treatment team meetings.

6 Q I'm looking at an MR 187 that you signed on June
7 25, 2004.

8 A Okay. Do you have the name of that form real
9 quick? That's the --

10 Q Patient treatment plan face sheet.

11 A Yes, okay. Uh-huh.

12 Q Do you have that form?

13 A I do. Dated 6/20 -- looks like 6/24 or is that
14 6/26? My writing's terrible.

15 Q Hard to tell.

16 A Yeah.

17 Q Doctor's writing. It looks like Mr. Endicott was
18 present for that meeting because it appears that he signed
19 this particular form.

20 A That's correct. And that's required. Yeah, we saw
21 -- looks like he did -- he did not date and time that, but
22 that was 6/25. His date of admission was 6/24.

23 Q All right. And on the top of that form it lists
24 under axis one, mood disorder non-specific and cannabis
25 dependence. Were those diagnoses discussed with

1 Mr. Endicott?

2 A You know, I -- that's typically -- because we
3 review this -- this is written prior to the patient signing
4 it, and so we go over and explain everything. Of course, I
5 don't have the documentation to support that I did in fact
6 review it.

7 But the standard of practice is that's what this
8 form is about. And the patient, it does not have to agree,
9 but all they're showing is that they reviewed it, but this
10 top part is written out before the patient signs it.

11 Q Did Mr. Endicott acknowledge that he had a
12 dependence on cannabis?

13 A Oh, yes, he did. Yes. He felt that it helped him
14 very much.

15 Q Did he say how long he had used marijuana?

16 A He had informed us that he had been using for
17 approximately six to seven years.

18 Q Was he using other illegal drugs?

19 A He had a history of illegal drug use. Let's see
20 here, he described intermittent use of cocaine,
21 methamphetamines, mushrooms, LSD, ecstasy, opium and peyotes.

22 Q What is polysubstance abuse?

23 A Where they use at least three substances, abuse.

24 Q And was Mr. Endicott diagnosed with polysubstance
25 abuse during this inpatient stay?

1 A You know, at this point in time we had no clinical
2 evidence of other drugs other than marijuana, which he
3 endorsed. And so my understanding was, I believe it was,
4 let's see, was marijuana dependence. So we did not -- he had
5 stated he had not used these other substances and sometime --
6 and the drug screen did not represent or detect any of these.
7 So we went ahead with marijuana dependence.

8 Q All right. And if you could just then briefly --
9 we'll get to your comprehensive after-care plan.

10 A Okay.

11 Q Have you had an opportunity to review that prior to
12 today's deposition?

13 A Yes, I have.

14 Q Could you just briefly summarize that for us?

15 A Okay. Yes. The comprehensive after-care plan is
16 done just prior to discharge which summarizes, of course,
17 their after-care needs. It also provides another assessment
18 to document information that may have been not evident upon
19 admission.

20 So basically with physical and psychiatric needs,
21 he reported chronic pain, again, confirming on-the-job
22 injury, he discussed his marijuana prescription, he talked
23 about activities that he participated in such as volleyball,
24 discussed his extensive substance use history, discussed his
25 legal, discussed his diagnoses.

1 And then I discussed as far as he was being
2 discharged on medication to help with the aggressive impulses
3 and sleep problems. We didn't feel that he was consistent
4 with psychosis, but that those did re-emerge because he had
5 endorsed auditory hallucinations in the past and medication
6 would assist with that.

7 And then we talked about his, you know, personal
8 and family history, going back with mom, going back to
9 Fernley. He talked about wanting to go back to Oregon in the
10 near future. He --

11 Q If I could stop you.

12 A Sure.

13 Q Do you know which medications he was discharged
14 with?

15 A Yes. He was given -- go ahead and go to the
16 discharge order. I believe it was Risperdal, two milligrams,
17 and Valproic Acid. Let me just confirm that. He was
18 discharged on Valproic Acid, five milligrams, twice a day,
19 and Risperdal, two milligrams at bedtime.

20 Q Okay. Thank you.

21 If I could just ask a couple more questions from
22 the after-care plan, and maybe we can speed this up. Were
23 you able to learn some information about Mr. Endicott's
24 father during the course of your treatment?

25 A Yes, I did.

1 Q And what did you learn?

2 A I --

3 MR. ITKIN: Objection. You can go ahead and
4 answer.

5 THE WITNESS: Okay. He had not had contact with
6 him in a long time but apparently had just -- contact had
7 just surfaced, and there was a scheduled meeting but he
8 didn't think he was going to make it. It was also reported
9 that he was -- had been in prison for murdering four people.

10 Q And that was reported by Mr. Endicott to you?

11 A Yes, that was reported by Mr. Endicott.

12 Q Under the educational needs, you make reference to
13 him pursuing his GED. Was that something you discussed with
14 him?

15 A Yes. We felt that obviously that would be -- you
16 know, of course, a GED or diploma is recommended to everyone
17 if -- you know, further a goal orientation, yes.

18 Q In your opinion, did he have a successful inpatient
19 stay?

20 A Well, I mean, most significantly the issue of
21 wanting to harm his mother and random thoughts of hurting
22 other people and the thoughts wanting to hurt himself, those
23 were resolved. So I would say that that was significant.

24 As far as the personality issues, you know, and his
25 possible for potential criminal behavior in the future, I

1 mean, we definitely recommended intensive psychotherapy and
2 felt that the medicine may benefit. But the acute issues
3 were resolved. So, yes, I would say that.

4 Q Is there effective treatment for anti-social
5 personality disorder?

6 A You know, it's -- basically what research shows is
7 it's really the fourth decade, age 40 is the -- some of the
8 criminal behavior will dissipate, but usually the prognosis
9 is quite poor.

10 And so, I mean, the volatility of the behavior may
11 diminish as one ages, but the -- like I say, the prevalence
12 of it, it's hard to redirect or resolve usually because
13 when they get involved in treatment they tend to leave
14 treatment for various reasons and so treatment is usually
15 inconsistent or not at all.

16 Q Do you know if there's a genetic component to
17 anti-social personality disorder?

18 A You know, I mean, that's been -- they really focus
19 on the parenting issues, they focus on socioeconomic learned
20 behavior, you know, real inconsistent parenting. You know,
21 again, where it's arguing with the nature versus nurture. I
22 -- that's a different one for me to say.

23 Q Sure.

24 A Yeah.

25 Q And I take it based on what you described earlier

1 in terms of the MMPI, that you were confident with the
2 diagnosis of anti-social personality disorder in this
3 particular case?

4 A That's correct.

5 Q So you did not do an MMPI?

6 A That's correct.

7 Q Okay. My last question for you, we have some
8 additional records from Northern Nevada Adult Mental Health
9 that refers to an admit date of October '04 and a discharge
10 date of December '04.

11 A That's correct.

12 Q I take it you were not involved in any care during
13 this period of time?

14 A He was admitted to the observations unit only, was
15 admitted and released from there, and so I was not involved
16 in his care.

17 Q And are you able to describe anything in terms of
18 that particular course of treatment?

19 A My understanding was his chief complaint at that
20 time was he was having anxiety attack and hallucinating, so
21 he took himself to the Northern Nevada Medical Center which
22 is a hospital here in Sparks. He was reporting auditory
23 hallucinations, and he admitted that he had been
24 non-compliant with his medications.

25 Q And, to your knowledge, have there been any other

1 either inpatient or outpatient contact with Mr. Endicott
2 since December of 2004?

3 A No, there's been no further contact. He was open
4 -- looks like at that time he was open to our outpatient
5 services noting an address that was here in Reno, but it
6 looks as though he never showed up for the outpatient
7 program. He was a no show on his follow-up.

8 MS. HEIKKILA: All right. Ms. Moore, those are all
9 the questions I have. It looks like it's about seven minutes
10 till, and I believe Mr. Itkin has asked to have some
11 additional time with you.

12 Unfortunately we're scheduled for another
13 deposition at this time, so I believe the proper thing to do
14 at this point will be to put on the record that this
15 deposition will be continued to a time that would be
16 convenient for you so that we can allow Mr. Itkin to ask some
17 questions.

18 THE WITNESS: Okay.

19 MR. ITKIN: Before we do that, Kara, number one,
20 Ms. Moore, when do you think a convenient time for you to be
21 -- to retake the second half of this deposition?

22 THE WITNESS: Let's see here. You know, I would
23 say -- I mean, afternoons are best. I'm off on Wednesdays
24 and so -- I mean, we could look at next week, so if you --
25 you know, I'm here Monday.

1 MR. ITKIN: In the afternoon?

2 THE WITNESS: Well, I'm off on Wednesday, so the
3 afternoon of either Monday, Tuesday, Thursday, Friday.

4 MR. ITKIN: Do you have any objection to taking it
5 during next week, Kara?

6 MS. HEIKKILA: Oh, none other than I need to check
7 my schedule real fast.

8 MR. ITKIN: I understand. Your schedule
9 permitting, and we'll work around my schedule.

10 MS. HEIKKILA: My Monday looks fine, Tuesday looks
11 fine, Wednesday is not workable for her. Actually any day
12 next week would be fine.

13 MR. ITKIN: Okay. I anticipate that is going to be
14 fine. If we -- my schedule should be free, too, so I don't
15 think it will be a problem.

16 I do also want to note for the record though, just
17 in case there is a problem, that there was -- this deposition
18 was originally scheduled for a previous date, we rescheduled
19 it at defense counsel's request, and it was rescheduled for
20 an hour before a deposition of Mr. Endicott's -- one of
21 Mr. Endicott's treating physicians.

22 To the extent we don't get an opportunity to
23 re-examine -- to cross-examine Ms. Moore, I'm going to, you
24 know, object to her testimony and move to strike all the
25 testimony that has been given so far and exclude her as a

1 witness at trial.

2 It's something I'm sure, Kara, probably won't end
3 up having to come up, sounds like the schedule should work
4 out fine, but I just want that noted for the record.

5 MS. HEIKKILA: And I would only clarify for the
6 record that this was rescheduled at Ms. Moore's request so
7 that she could have an opportunity to fully review her
8 record.

9 MR. ITKIN: Noted. A good point.

10 Then, Ms. Moore, thank you for your time, and me
11 and Kara I'm sure will get in touch with you in the next day
12 or so to figure out a convenient time for the three of us.

13 THE WITNESS: Okay.

14 MS. HEIKKILA: All right. Thank you so much.

15 THE WITNESS: Thank you.

16 MS. HEIKKILA: We will end the record at this point
17 for now. Thank you so much.

18 THE WITNESS: Okay. Thank you. Bye-bye.

19
20 (2:00 p.m. deposition adjourned.)
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23

24 DAWNE MOORE
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I, DAWNE MOORE, hereby declare under penalty of perjury that I have read the foregoing pages 1 through 41; that any changes made herein were made and initialed by me; that I have hereunto affixed my signature.

DATED:

DAWNE MOORE

(If signed before a notary public, have notary public fill out page 44.)

1 STATE OF NEVADA,)
 2 COUNTY OF WASHOE.) SS.

3
 4
 5 I, Karen Bryson, a Certified Court Reporter
 6 and Notary Public in and for the County of Washoe, State of
 7 Nevada, do hereby certify:

8 That on May 18, 2007, I reported the
 9 deposition of DAWNE MOORE in the matter entitled herein; that
 10 said witness was duly sworn by me; that before the
 11 proceedings' completion, the reading and signing of the
 12 deposition has not been requested by the deponent or party;

13 That the foregoing transcript is a true and
 14 correct transcript of the stenographic notes of testimony
 15 taken by me in the above-captioned matter to the best of my
 16 knowledge, skill, and ability.

17 I further certify that I am not an attorney or
 18 counsel for any of the parties, nor a relative or employee of
 19 any attorney or counsel connected with the action, nor
 20 financially interested in the action.

21
 22
 23 Karen Bryson, CCR #120
 24
 25

1 STATE OF NEVADA)
 2 COUNTY OF WASHOE) ss.

3
 4 I, , a notary public
 5 in and for the County of , do hereby
 6 certify:

7 That on the of
 8 2007, before me personally appeared the witness whose
 9 deposition appeared herein;

10 That the deposition was read to or by the
 11 witness;

12 That any changes in form or in substance
 13 desired by the witness were entered upon the deposition by
 14 the witness;

15 That the witness thereupon signed the
 16 deposition under penalty of perjury.

17
 18 DATED: At , this
 19 day of , 2007.

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1 OFFICER'S ACTIONS RE SIGNING OF DEPOSITION
2 PURSUANT TO NEVADA RULES OF CIVIL PROCEDURE

3
4
5 LETTER SENT TO WITNESS

6
7 AT DIRECTION OF COUNSEL, ORIGINAL
8 WAS SENT TO:

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10 WITNESS SIGNED DEPOSTION

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12 5/26/07 ORIGINAL SENT TO KARA HEIKKILA

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15 OTHER ACTIONS
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SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

--oOo--

JUSTIN ENDICOTT,)
)
 Plaintiff,)
)
 vs.)
)
 ICICLE SEAFOODS, INC.,)
)
 Defendant.)

Case No. 06 2 03016 B

DEPOSITION OF DAWNE MOORE

Volume II

July 19th, 2007

Reno, Nevada

REPORTED BY: STEPHANIE KOETTING, CCR #207, RPR
 Computer-Aided Transcription

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Seattle, Washington

I N D E X

EXHIBITS:

Page

1	Northern Nevada Adult Mental Heal	51
	Physical Examination	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
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19
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1 continuation of that deposition.

2 THE WITNESS: Okay.

3 MR. ITKIN: That's correct.

4 BY MR. ITKIN:

5 Q. Ms. Moore, I'm Cory Itkin. I'm Justin Endicott's
6 lawyer. If you can't hear me, or you don't understand my
7 questions, please ask me to speak up.

8 A. I will.

9 Q. Great. Have you had a chance to review the transcript
10 from the first half of your deposition?

11 A. No, I have not.

12 Q. Do you remember being questioned and giving answers in
13 that?

14 A. I do. I do.

15 Q. I had a few questions about that deposition. You had
16 stated in there that, it doesn't help you to be on the
17 transcript, but page 15 and page 16, you noted that the medical
18 doctor at your facility had indicated that Justin had a compound
19 fracture of the right arm. Do you remember seeing records to
20 that affect?

21 A. I do. That's in the health and physical. It's stated
22 on MR 115.

23 Q. Is it standard for you all to take a medical physical of
24 the patients when they're admitted?

25 A. Always.

1 Q. And do you have medical doctors do those physicals?

2 A. We do, uh-huh.

3 Q. And does the doctor diagnose Justin with a compound
4 fracture at that time?

5 A. At this point, it states: Medical diagnosis, compound
6 fracture, right arm, one and a half years ago with chronic pain,
7 partially blind right eye.

8 Q. Do you know if the diagnosis is he had a compound
9 fracture a year and a half ago or that it healed or he had a
10 compound fracture a year and a half ago that was still
11 persisting?

12 A. I'm just reading it as the doctor put it. What it
13 states to me, as I would understand it, is that the patient
14 suffered a right arm fracture one and a half years ago with
15 chronic pain, which, of course, chronic referencing continued
16 pain.

17 Q. Okay. So you don't know if his arm was healed up at
18 that point, do you?

19 A. Well, no. And I wouldn't make that, because I'm not the
20 medical doctor, so as far as completely healed, that would be
21 very presumptuous of me.

22 Q. Right. You also notice that the medical records state
23 that he had chronic pain, correct?

24 A. That's correct.

25 Q. Do you know what chronic pain is?

1 A. Chronic pain, yes, is a persistent pain following some
2 sort of a traumatic incident or any type of an injury, it can be
3 post surgical, but it persists long after the event such as a
4 surgery and an injury occurs. I mean, sometimes people can also
5 have chronic pain just that arises from joint pain, maybe the
6 diagnosis isn't even clear, it's just a persisting pain.

7 Q. All right. But your medical doctor noted that he was
8 suffering from chronic pain at that time, right?

9 A. That's correct.

10 Q. Do you have a copy of that record with you?

11 A. It's right in front of me.

12 Q. I'd like you to ask the court reporter to mark it as
13 Exhibit Number 1 of the continuation of the deposition.

14 A. Okay. She's doing that now.

15 (Exhibit 1 marked at this time.)

16 BY MR. ITKIN:

17 Q. Thank you. And just like if we can get a copy of that
18 in the record. We also asked if you diagnosed Justin with
19 anti-social personality disorder, correct?

20 A. That's correct. The team diagnosed that and it was
21 reiterated again in my psychosocial assessment and comprehensive
22 after-care plan.

23 Q. You noted there are three factors required to make that
24 diagnosis, correct?

25 A. That's correct.

1 Q. Can you review with me what those three factors are?

2 A. If you refer to the DSM, you're aware of the diagnostic
3 manual?

4 Q. Yes.

5 A. As far as it states, yes, it has many criteria that can
6 support the diagnosis, but it takes three of these criteria, it
7 can be any of the three, to underscore or support the diagnosis
8 of anti-social personality disorder. And so as you're looking --
9 I'm sorry. Go ahead.

10 Q. I don't mean to interrupt you. Let me stop you right
11 there, because I just want to make sure I'm following along. Are
12 you saying that any one of those three can support a diagnosis,
13 you don't need to have all three criteria?

14 A. As I'm looking at the DSM, the diagnostic manual,
15 basically, what it states here there's -- you have to have three
16 or more of the following. And as I look here, there's -- there's
17 category A that has seven criteria; there's B, which is you have
18 to be at least 18 years of age, which obviously Justin was 20
19 when I saw him; C, there's evidence of conduct disorder; and D,
20 that the anti-social behavior is not better explained by another
21 disorder.

22 Now, of course, Justin meets B, C and D to what we
23 assessed. He's 18 years of age. We felt there was substantial
24 criteria to agree that he suffered from an early conduct
25 disorder, which has to be diagnosed or seen evident by or on age

1 15. And that we did not feel that this anti-social behavior that
2 we were assessing was not better explained by another disorder.

3 Now, three or more of the following occur in category A
4 and there's seven criteria. Any of those three would support
5 that diagnosis as long as B, C and D were met.

6 And so the three that we were looking at, and as a
7 matter of fact, we felt there was more than three we felt that he
8 fully supported. It was looking at his inability or failure to
9 conform to social norms, which means unlawful behavior. His, you
10 know, also looking at his -- what do I want to say here? His
11 societal behavior where he was, you know, very amoral in doing
12 things. You know, again, threatening to kill people. He spoke
13 about shooting his friend in the head, stabbing him. That would
14 underscore number one, just failure to conform to social norms.

15 Two, looking at repeated lying or using others for
16 personal profit or pleasure. And, you know, as far as, you know,
17 lying, I mean, we did catch him in several lies, deceitfulness.
18 And even if we didn't -- that's if we didn't have a full history
19 of him not being honest, we drop down to 3, impulsivity or
20 failure to plan ahead.

21 We definitely felt that so far he met 1 and 3. He was
22 impulsive and his plans for the future were just very dismal. He
23 just -- we felt he was very irresponsible and not being
24 age-appropriate.

25 We go down to four, which was irritability and

1 aggressiveness. That talks about repeated physical fights,
2 assaults, aggression. We clearly felt he met that. And his mood
3 was often irritable, let alone the aggressiveness.

4 Five, reckless disregard for safety of self and others.
5 Well, you know, absolutely. We spoke about his manufacturing
6 bombs and let alone his, you know, wanting to see people suffer,
7 wanting to kill people.

8 And then his consistent irresponsibility, and that kind
9 of falls a little bit with 3, but, you know, he wasn't working,
10 even though at his age he should be. At this point in time he
11 was dependent on his mother for financial and just felt he was
12 not very responsible.

13 And then also the biggy -- so the three we felt were the
14 most pronounced would be number 1, the failure to conform to
15 social norms. We felt his number 4, irritability and
16 aggressiveness with the fights and assaults, his lack of remorse,
17 which that was documented time and time again where he just -- he
18 wanted to see people suffer. And he didn't have any regard for
19 what he did to animals.

20 And then, again, his thoughts of, you know, wanting to
21 hurt people and it really didn't matter to him.

22 Q. Okay. I'm going to object to the responsiveness. That
23 was a mouthful there.

24 A. Well, it was. I mean, absolutely. I just want to
25 explain to you, you know.

1. Q. And I appreciate that, and --

2. MS. HEIKKILA: What was the objection?

3. MR. ITKIN: To the responsiveness, nonresponsive.

4. MS. HEIKKILA: She answered your question adequately.

5. MR. ITKIN: I'm glad you feel that way. And, you know,
6. it was a full answer with a lot of information, some of it
7. responsive to the question and some not.

8. BY MR. ITKIN:

9. Q. I want to follow-up on some of the things that you
10. mentioned, Ms. Moore. Your three main, I guess, bases for that
11. opinion -- let me scratch that. Who else participated in making
12. this diagnosis with you?

13. A. Dr. Okakey, who was the primary psychiatrist. Dr. Lee,
14. who was the observation unit psychiatrist.

15. Q. Okay.

16. A. And then LCSW, who was also on the observation unit.
17. Excuse me. It was Sheila Bunch. I'm sorry.

18. Q. Who is Sheila Bunch?

19. A. Sheila Bunch when a person comes into the hospital, they
20. go first to the observation unit, and they get assessed and
21. evaluated by a psychiatrist and LCSW. And he was transferred to
22. inpatient where he was reassigned to a psychiatrist and myself,
23. LCSW.

24. Q. Who was Sheila Bunch?

25. A. She was the LCSW on the observation unit when he first

1 came into the hospital.

2 Q. What is an LCSW?

3 A. A Licensed Clinical Social Worker.

4 Q. Is that what you are also?

5 A. I am.

6 Q. You mentioned failure to conform to social norms,
7 correct?

8 A. That's correct.

9 Q. And that was a major factor in your diagnosis, right?

10 A. That's correct.

11 Q. And that's things, for instance, conduct that would
12 subject him to criminal sanctions, right?

13 A. Yes. Uh-huh. That's -- you know, absolutely. And
14 nonage-appropriate behavior, absolutely. More so the
15 unlawfulness, yes.

16 Q. Things like smoking marijuana, for instance?

17 A. That would be one. We were more --

18 Q. Homemade fireworks, for instance?

19 A. Explosives, correct.

20 Q. You also mentioned irritability, that was a major
21 factor, correct?

22 A. That's correct.

23 Q. Okay. And lack of remorse for others or caring for
24 others, that was the third major factor supporting your
25 diagnosis, right?

1 A. Absolutely.

2 Q. Thanks. What's the difference between polysubstance
3 abuse and polysubstance dependence?

4 A. Really, with the DSM criteria, there really is no such
5 diagnosis as polysubstance abuse, because when you have
6 polysubstance abuse, if they're using three or more substances,
7 it then is diagnosed as polysubstance dependence.

8 Q. I'm sorry. If you're using three or more substances, is
9 that use of the three or more substances, does it have to be
10 ongoing or is it one-time use?

11 A. Well, I mean, you have to show abuse. More often, I
12 mean, you can have polysubstance abuse, so that is 1 or 2
13 substances. But what we do here at the hospital is we specify
14 those. We don't say polysubstance abuse. We'll say cannabis and
15 alcohol dependence. And then we'll say polysubstance dependence,
16 alcohol, cocaine and marijuana.

17 Q. Sure. So you specify what the substances are that are
18 being abused?

19 A. That's correct. We try and be a little bit more
20 clarified. Uh-huh.

21 Q. But you all didn't diagnose him with polysubstance
22 abuse, is that what I understand?

23 A. No. His discharge diagnosis was cannabis dependence.

24 Q. That's dependence on marijuana?

25 A. That's correct.

1 Q. And, in fact, you guys drug tested Justin and he came up
2 clean for every drug but marijuana, correct?

3 A. That's correct.

4 Q. Did he show a positive for marijuana use?

5 A. He did coming in on 6/23, there was a test taken at the
6 Lyon County Hospital emergency room. But when he came back on
7 10/5, that test was negative.

8 Q. So how long does the marijuana stay in your system?

9 A. It varies on how much you've ingested. We see anywhere
10 from two weeks to 30 days.

11 Q. So when he came back, he hadn't used marijuana in at
12 least two weeks, correct?

13 A. That's what he had stated. As a matter of fact, I'm
14 incorrect about that, he had stated it had been two months.

15 Q. It had been two months, and your tests screens for at
16 least two weeks, correct?

17 A. I think any standard cannabis test that's done, it
18 registers a certain level of THC in the body and what we have
19 found that it's usually two to -- two weeks to a month and Lyon
20 County said he was positive for it.

21 Q. And when did they test him for being -- when they say he
22 was positive?

23 A. They tested him on -- let me just reference the records
24 here real quick. Let me look at their referral. Bear with me
25 here.

1 Q. Take your time.

2 A. Sure. Okay. Okay. He was seen on 6/23. Let me just
3 confirm that the test was done on 6/23. I can't find the actual
4 test for you.

5 Q. Is this '05?

6 A. '04.

7 Q. The 6/23 is that the test you did or the other facility?

8 A. The referring hospitals typically do the tests and
9 that's what occurred in this case. He was seen at South Lyon
10 Medical Center. Let me see. I just had that. A lot of paper
11 work here.

12 Q. Well, do you know approximately how long it was before
13 he came to your facility?

14 A. He was tested on 6/23 by the Lyon County South Medical
15 Center. And he arrived to our facility on 6/23. So it was early
16 that morning.

17 Q. And you all tested him and he tested negative for
18 marijuana?

19 A. No. We did not test him again. We accepted those
20 records from the hospital. But when he came -- see, he's had two
21 admissions here. He came back in October, that was the second
22 admission. He came back on October 4th to October 5th, and that
23 test was negative.

24 Q. Oh, I see. That's where my confusion was.

25 A. Okay.

1 Q. So let me -- for the October 4th admission date, he
2 hadn't used marijuana for at least a few weeks, correct?

3 A. I mean, he was -- yes, that's correct. I mean, whether
4 unless he sometimes you can take one small little hit like five
5 days ago and it won't be in the system. Yes, it obviously wasn't
6 recent and it wasn't heavy use because it was negative.

7 Q. Is that consistent with marijuana dependence?

8 A. Well, absolutely it's consistent. I mean, he may --
9 marijuana dependence can be diagnosed for up to one year. So, I
10 mean, possibly during that time on the -- so he was positive when
11 we saw him. So the second time, he was negative. So if he was
12 clean for two weeks to a month, he would still, as the way he
13 gave us a history, he would still qualify for cannabis
14 dependence, but could have what we call qualifiers, where he had
15 early partial remission where he showed no use for month.

16 Q. So he wouldn't use it for a month and then start using
17 it again, possibly, and that's consistent with marijuana
18 dependence?

19 A. Right. I mean, you can have sustained full remission if
20 there's no criteria for 12 months. So you can still give
21 somebody that cannabis dependence, but in sustained full
22 remission, once they achieved sobriety for a year.

23 Q. Does it affect your diagnosis of marijuana dependence if
24 a patient has a license to use marijuana for a medical condition?

25 A. Well, it would if he was living in California or Oregon,

1 but here it's unlawful.

2 Q. Well, if you were practicing in Oregon and he had a
3 license there --

4 A. Yeah.

5 Q. -- you would not have diagnosed him with marijuana
6 dependence?

7 A. I guess it would -- the question is he using Marinol
8 only, which is prescribed, or is he also smoking marijuana. Mom
9 had referenced the first time, and it's in the note here, that he
10 would smoke a joint and be all mellow, he informed Lyon County
11 Medical Center that and so Marinol doesn't come in joint form.

12 Q. Miss Moore, I appreciated that. I'm going to object to
13 the response. That wasn't my question. My question is if he was
14 given -- if you -- let me rephrase the question. If you were in
15 Oregon where he had a license for medicinal marijuana, would you
16 not have diagnosed him with medical dependence then?

17 MS. HEIKKILA: I object to this. I don't think she can
18 answer a question as to what she would do in Oregon. She doesn't
19 practice in Oregon.

20 BY MR. ITKIN:

21 Q. You can go ahead and answer to the extent you know the
22 answer.

23 A. Again, it would depend on the history. Is he taking the
24 marijuana solely as prescribed or is he abusing the prescription
25 and using illicit marijuana? So it would depend on his usage

1 while living in Oregon.

2 Q. Let's go through it. That's a good point. Let's assume
3 he was using marijuana as prescribed and you were in a state
4 where it was legal, would that affect your medical -- or not your
5 medical -- would that affect your marijuana dependence diagnosis?

6 A. Well, no, he would still be dependent on marijuana. But
7 it would be -- maybe the name of it would differ rather than
8 marijuana, you would use the prescribed Marinol. If somebody has
9 chronic pain and is on opiates for years, they have opiate
10 dependence.

11 Q. Okay. What's the difference between Marinol and
12 marijuana?

13 A. You know, I don't know. I don't want to give you a
14 guess on that. I know it's prescribed. I know it's a different
15 type. I'm not sure what the THC level is. I know it is derived
16 from THC, but I don't know the medical explanation of that, so I
17 want to be careful there.

18 Q. Do you know a Dr. Oksenholt?

19 A. Oksenholt. She's our medical doctor and she's the one
20 who completed his H and P.

21 Q. Do you know why Dr. Oksenholt would prescribe -- would
22 recommend Marinol to Justin if he was -- let me rephrase the
23 question. Do you know why Dr. Oksenholt would recommend Marinol
24 pills to Justin if he were dependent on marijuana?

25 A. That's a good question. Absolutely. And that's

1 something that would have to be deferred to her.

2 Q. You don't have an explanation for that, do you?

3 A. I don't have, no, absolutely not.

4 Q. Do you trust -- I mean, Dr. Oksenholt, she's a doctor,
5 correct?

6 A. That's correct.

7 Q. A medical doctor?

8 A. She is. Well, she's a DO, and I know that's -- I don't
9 know the education, but she's obviously licensed, went to medical
10 school. It's just a different type of doctor.

11 Q. Okay. I mean, does she have more experience with this
12 sort of thing and a higher level of expertise than you?

13 A. She does. I mean, she's gone through --

14 Q. Would you defer to her judgment on that type of an
15 issue?

16 A. Well, absolutely. I can't prescribe.

17 Q. Okay.

18 A. The other -- the psychiatrist can, but they didn't
19 prescribe that either but she put that in her note and I see that
20 here.

21 Q. Sure. Is it important for patients in your facility to
22 participate in activities?

23 A. That's something we always encourage.

24 Q. Activities like bingo, cards, checkers and things?

25 A. Right. We have some psychotherapy groups,

1 psych-educational, we have gym, we have recreational therapy.

2 They do a big core of our program, absolutely.

3 Q. Does the patient's willingness to participate in those
4 activities affect when that patient will be discharged?

5 A. No. Unless -- let's say they -- unless we felt that it
6 was going to generalize in the community. For instance, if
7 somebody refused to shower, stayed in their room consistently,
8 was very withdrawn, refused to go to all groups, we would
9 consider that problematic. We would see that as a symptom of why
10 they were here, and, you know, address that. We can gauge
11 people's progress sometimes by their level of participation.

12 Q. Sure.

13 A. But if somebody just refused to go all groups but was
14 not a danger to themselves or others, no, it would not keep them
15 here.

16 Q. Is participation in groups a sign of progress for you?

17 A. It depends on the clients. I mean, of course, if
18 somebody refuses, I want to find out why they're refusing, and
19 you know, go from there. If somebody just, you know, is just not
20 interested, you know, it's very individual. But, yes, it can
21 often --

22 Q. And you personally witnessed Justin participating, I
23 think you testified, in bingo and playing cards?

24 A. The bingo, I don't remember, but I know the playing
25 cards was on the unit. And I don't have that documented that I

1 witnessed him, but I know that he was playing cards on the unit
2 and I had walked through. I remember this case better than I
3 thought, despite it being years ago. So I'll say, that's not
4 documented here, so you'll get me on hearsay on that.

5 Q. Has your memory gotten a lot better after reviewing your
6 records in preparation for these depositions?

7 A. Well, and my -- when I was first told about this, I
8 remembered the name, but when I got the chart, I remember,
9 because it was -- it was quite alarming, I remember, when he came
10 in to due to his reports and his history, and I remember almost
11 like it was yesterday.

12 Q. A bell kind of rung inside your head and things kind of
13 started coming back to you, is that correct?

14 A. That's correct.

15 Q. You never witnessed Justin playing volley ball yourself,
16 did you?

17 A. I did not.

18 Q. And all you know is there's a chart notation that he
19 participated in volley ball on two separate occasions, correct?

20 A. That's correct.

21 Q. And do you know who witnessed that?

22 A. Well, in the morning, in the treatment team, we do that
23 five days a week. The recreational therapist that's assigned to
24 our team is there and would tell us about, you know, what they
25 did, what their level was, and what kind of activities they would

1 be involved in. And then we would document and put that in the
2 chart.

3 Q. Do you have any idea if Justin would sit around on the
4 court but never hit the ball?

5 A. Well, what I saw here, let me reference these records
6 here, because I think the level of participation was documented
7 here. Let's see here. Okay. So it looks like it starts the day
8 that he was transferred to the inpatient unit on 6/24, so I see
9 here that he played 45 minutes cards with staff. Card playing is
10 usually on the unit. And so, let's see, and then we go through
11 and let me find the --

12 Q. What do you mean by on the unit?

13 A. Usually, we have tables on each of our units and usually
14 they'll sit and play cards on the unit with the staff.

15 Q. Is the unit just an area of the facility?

16 A. My office is in a hallway, and each door -- there's two
17 doors in the hallway, and one door goes to our acute unit and one
18 door goes to the intermediate unit. So, you know, either way I
19 go, I'm on a unit. And on each different unit, we have tables
20 and then the nursing stations out there. It's a big day room, if
21 you will.

22 Q. Okay. Just unclear with what you meant by on the unit.

23 A. I see here on 6/25, it says here: Volley ball times two
24 games. And then 6/26: Played volley ball. 6/27: Played volley
25 ball, good input. And so I would imagine -- I mean, that's what

1 it is. I guess, if he was standing around or walking around they
2 may have qualified that, but it says here that he played.

3 Q. You don't know if he actually hit the ball, do you?

4 A. That I don't know.

5 Q. You don't know if he hit the ball with his left arm or
6 his right arm, if he did hit the ball, do you?

7 A. I don't know.

8 Q. You don't know, for instance, if he hit the ball with
9 right arm if he experienced significant pain and complained to
10 someone about that afterwards, do you?

11 A. I don't know. I know there was a complaint of shoulder
12 pain, but I don't know if that was related to volley ball.

13 Q. When was there a complaint of shoulder pain?

14 A. He was given Tylenol 650 milligrams at 14:45 on 6/27,
15 and, like I say, I don't know if this is circumstantial or -- but
16 I believe, I just lost my page here. I believe we just stated
17 that he had played volley ball on 6/27. Again, I don't know
18 whether or not that was related. He was describing, it says here
19 in the nurse's note, complaints of right shoulder pain seven out
20 of the ten, which is the level of pain. And it says here without
21 relief of pain. So I'm -- so you have a little bit of pain that
22 day.

23 Q. We're not interested in shoulders in this case.

24 A. Right.

25 Q. Chronic pain, does that keep people up at night?

1 A. It can.

2 Q. Can it exasperate depression?

3 A. It can.

4 Q. Can it make them impatient?

5 A. It can make them irritable and anxious, uh-huh.

6 Q. Is smoking marijuana, is that -- let me rephrase this.

7 Is smoking marijuana recreationally, is that unusual behavior for
8 people between the ages of 15 and 25?

9 A. I mean, it's unlawful behavior. Is it recreational?
10 That is kind of a tough question for me. I'd have to do a survey
11 to see how many people smoke marijuana. I mean, obviously, some
12 people do, but it's an unlawful behavior.

13 Q. I understand it's unlawful, but I asked you if it's
14 unusual.

15 A. I don't know the status of the population.

16 MS. HEIKKILA: Calls for speculation.

17 MR. ITKIN: What's the objection, speculation?

18 MS. HEIKKILA: Yes.

19 BY MR. ITKIN:

20 Q. Well, Ms. Moore, how old are you?

21 A. I am 43.

22 Q. When you were growing up --

23 MS. HEIKKILA: I'll object.

24 THE WITNESS: I wouldn't answer that.

25 MS. HEIKKILA: That is completely irrelevant.

1 MR. ITKIN: I think it's definitely relevant if we're
2 saying he has an abnormal use of marijuana.

3 MS. HEIKKILA: You can ask her about her experience with
4 him and treating with him, but you're way outside of the bound of
5 her testimony as a provider of care. You're asking her about her
6 personal background and experiences.

7 BY MR. ITKIN:

8 Q. Miss Moore, I'm not asking you if you smoked marijuana.
9 I'm not really interested in that. What I'm asking about, I
10 mean, your experience in modern-day America, whether or not it's
11 unusual for people in Justin's age range to smoke marijuana.

12 MS. HEIKKILA: Same objection.

13 BY MR. ITKIN:

14 Q. You can go ahead and answer the question.

15 A. I mean, there's people that do and there's people that
16 don't. That's all I can tell you. I don't know what the stats
17 are, if it's usual or unusual. I have a -- again, I'm
18 speculating. There's people that do and there's people that
19 don't.

20 Q. You're really saying you don't know whether marijuana
21 use among teenagers is common?

22 MS. HEIKKILA: Objection, asked and answered.

23 BY MR. ITKIN:

24 Q. Is that your testimony, Ms. Moore?

25 MS. HEIKKILA: Objection. Same objection.

1 BY MR. ITKIN:

2 Q. You can go ahead and answer the question. Is it your
3 testimony that you do not know whether recreational marijuana use
4 among people in Justin's age range is common?

5 A. I don't know the statistics on that. I'm not willing to
6 answer that.

7 Q. Okay. Do you -- is it -- you're a social worker,
8 correct?

9 A. I'm a licensed clinical social worker.

10 Q. Is selfish behavior typical for people in Justin's age
11 range?

12 A. I just find this all speculation. I mean --

13 Q. Not the kind of thing you're qualified to talk about?

14 A. Well, I mean, I haven't been -- I don't think I've been
15 to testify as an expert so I don't think my opinion would matter.

16 Q. Are you saying that your opinion about -- for the
17 diagnosis of Justin has an anti-social personality disorder, that
18 you can't testify as an expert on that?

19 A. I don't think I've been sworn in as an expert.

20 Q. I mean, that's how I'm asking. I'm asking if you have a
21 level of expertise based upon your training and education level
22 where you can make an accurate diagnosis of whether Justin has
23 anti-social personality disorder, number one. And number two,
24 the basis for that and whether it's well-founded.

25 A. Well, I think --

1 MS. HEIKKILA: I object to that as a vague and ambiguous
2 and compound question. I agree with the witness, she is not an
3 expert. Her testimony is limited to her care and treatment of
4 Mr. Endicott. And your line of questioning should remain in that
5 arena and not into broader speculation as to societal statistics.

6 MR. ITKIN: Well, the Kara, let me ask you this: Are
7 you planning to offer her opinion as to any personality disorders
8 Justin has or may not have?

9 MS. HEIKKILA: Her testimony will be offered to
10 demonstrate the care and treatment and diagnosis that came from
11 this stay at this facility.

12 MR. ITKIN: All right. Then I'm entitled to is ask her
13 about the basis for her opinion.

14 MS. HEIKKILA: She has explained to you that that
15 opinion was derived from a multi-disciplinary team approach,
16 including psychiatrists, therapists, social workers. So she's
17 simply here in part to explain the records that are before us.

18 But she has not been qualified as an expert to talk
19 about the statistical number of people who use marijuana in
20 certain age groups in society. Those are two entirely different
21 things.

22 MR. ITKIN: Not when that's the basis for her opinion.

23 MS. HEIKKILA: How is it a basis of her opinion?

24 MR. ITKIN: You said one of the basis for her opinion of
25 the anti-social personality is he does illegal activity like

1 marijuana use -- like marijuana use. And I want to know how
2 unusual it is and how serious this disorder is.

3 MS. HEIKKILA: Those two don't relate, Mr. Itkin. One,
4 is the question is very basic, did he or did he not do an illegal
5 action? The answer to that is yes. That's all that it takes to
6 trigger that particular issue or that element. It doesn't take
7 an assessment of society as a whole. You're not comparing him to
8 others. You're simply asking, yes or no, did he do this illegal
9 activity.

10 MR. ITKIN: We can leave it up to the judge.

11 BY MR. ITKIN:

12 Q. I want to be clear, Ms. Moore, you're not saying that
13 you alone and I don't want to talk about the other people who
14 participated in Justin's diagnosis, I want to talk about you
15 personally, you alone are not qualified to make a diagnosis of
16 anti-social personality disorder, are you?

17 A. I'm clearly qualified to make a diagnosis.

18 Q. Are you qualified to give expert testimony on whether he
19 suffers from that disorder?

20 A. That would be up to the judge to swear me in as an
21 expert.

22 Q. Well, what kind of -- what's the basis for your opinion
23 that he has anti-social personality disorder?

24 A. I went over that. In my professional opinion and I am
25 licensed, under my license, I am clearly and legally able to

1 diagnose in the State of Nevada.

2 Q. Okay. Now, anti-social personality disorder, that's
3 kind of a judgment call diagnosis, right?

4 A. Any diagnosis is subjective, but there are -- that's
5 where a diagnostic manual comes in. If you can't explain that
6 out, I mean, like you're throwing out sticks of gum, I mean, it
7 has to have some bearing on it. And based on Justin's history
8 that was given and in talking with his mother, but mostly talking
9 with Justin, that's when that diagnosis was made. And in
10 watching him on the unit and then that's when that diagnosis was
11 made. We do admission diagnosis. We're always watching that
12 throughout the course of care and then we give a discharge
13 diagnosis.

14 Q. Sure. And I'm going to object to the responses. My
15 question is solely whether or not anti-social -- I understand
16 there are -- let me start over. There are guidelines to help you
17 make a diagnosis for anti-social personality disorder, correct?

18 A. That's correct.

19 Q. And there's no, this is definite or indefinite,
20 ultimately the decision has to be made by a trained professional
21 using those guidelines, is that correct?

22 A. That's correct.

23 Q. And in your opinion, you went through the guidelines and
24 made a proper diagnosis of Justin, correct?

25 A. That's correct.

1 Q. And we already went over the basis of how arrived at
2 that diagnosis, correct?

3 A. That's correct. If I would have been conflicted with
4 the doctor, that would have been shown in my report.

5 Q. There's levels of severity of anti-social personality
6 disorder, correct?

7 A. Like any disorder, you can have mild, you can have
8 moderate, you can have severe. But, really, with personality
9 disorders, in the diagnostic manual, there's not qualifiers for
10 that. For the depression, there is. You can have mild, moderate
11 to severe. With anti-social personality disorder, you have it or
12 you don't. You can also put anti-social traits. We felt he met
13 the full personality disorder.

14 Q. My question is whether or not there's different levels
15 of severity for anti-social personality disorder, is that correct
16 or incorrect?

17 A. I mean, you can discuss degrees of it, but there's
18 anti-social personality disorder, it doesn't matter if it's mild
19 to severe, as long as they meet the criteria.

20 Q. Okay. Are you aware that Justin worked -- before seeing
21 you, Justin worked five months on a vessel without any attendance
22 problems or any formal reprimands?

23 A. I know he worked for five months on a fishing boat.

24 Q. If you'll assume with me that he didn't have any
25 attendance problems and he had no reprimands or performance

1 problems, how would that affect your diagnosis?

2 MS. HEIKKILA: I'll object as a mischaracterization.
3 There's no testimony to support what you have just characterized
4 of his work on the boat. You can go ahead and answer the
5 question.

6 BY MR. ITKIN:

7 Q. Let me rephrase the question. I'm asking you to assume
8 that Justin held a steady job for five months until he was
9 injured. I want you to further assume that he didn't have any
10 attendance problems. I want you to further assume that he didn't
11 have any performance problems. And I want you to further assume
12 that he didn't have any problems getting along with anyone else,
13 any of his coworkers. How would that affect your diagnosis?

14 MS. HEIKKILA: I'll once again state the same objection.
15 You're mischaracterizing testimony. You're also assuming
16 testimony that is not in the record here.

17 MR. ITKIN: Kara, you're trying to qualify her as an
18 expert.

19 MS. HEIKKILA: I'm not trying to qualify her as an
20 expert.

21 MR. ITKIN: I'm not characterizing any testimony. I'm
22 not mischaracterizing. Those are the facts.

23 MS. HEIKKILA: Where is there testimony in the record of
24 any of those things?

25 MR. ITKIN: I'm not saying there's testimony in the

1 record. I'm asking her to assume they're true and give me her
2 opinion based on those assumptions.

3 MS. HEIKKILA: I'm stating an objection to that. She
4 can go ahead and answer the question.

5 MR. ITKIN: Let me rephrase the question. And, Kara, I
6 understand you're going to object, and we'll have a running
7 objection.

8 MS. HEIKKILA: I'm not going to do a running objection.
9 You've stated the question and Ms. Moore can answer the question.

10 BY MR. ITKIN:

11 Q. Ms. Moore, let me restate the question so we have a
12 clear record. I want you to assume that Justin worked five
13 months on a fishing vessel. And I want you to further assume
14 that he didn't have attendance problems on the fishing vessel. I
15 want you to further assume that he didn't have any performance
16 problems. And I want you to further assume that the only reason
17 he left the employment was because he sustained an on-the-job
18 injury. Based on those assumptions, how does that affect, if at
19 all, your diagnosis of anti-social personality disorder?

20 MS. HEIKKILA: Before you answer that, Ms. Moore, I just
21 want to state that I'm objecting to the form of that question
22 based on my prior objection.

23 THE WITNESS: I do -- I find this question -- I mean, if
24 somebody were able to -- I mean, it depends. With anti-social
25 personality disorder, it depends on the level of authority. Was

1 he on this boat and had a lot of independence and, you know,
2 autonomy to where he was able to do his own thing and be checked
3 on once in a while, sure, he could manage a job for five months.

4 BY MR. ITKIN:

5 Q. Assume that he didn't have a level of autonomy and he
6 had supervisors he had to constantly report to.

7 A. You know, I don't see this changing my diagnosis. I
8 mean, five months is really -- I mean, it's not a huge level
9 length of employment, but it wouldn't change when I saw him and
10 assessed him on how he presented. I mean, I assessed him not
11 based on his job five months ago or when he was on his fishing
12 vessel. I assessed him on what I saw, took everything as a
13 whole, including his, you know, his developmental issues that
14 were brought up and talked about, so, I mean, this diagnosis was
15 based on, you know, the whole picture of what I saw when I
16 assessed Justin.

17 Q. Would you agree that Justin comes from a dysfunctional
18 family?

19 A. I know that there was reports of physical abuse by his
20 stepfather.

21 Q. Is that a criteria for finding someone to have a
22 dysfunctional family?

23 A. Oh, well, yeah. As far as was that appropriate role
24 modeling behavior of parents? Well, no, it wasn't. It could
25 have some trauma impact.

1 Q. Would you agree that Justin has below average
2 intelligence?

3 A. We never tested his full scale IQ, but I know he dropped
4 out of school early after completing the 11th grade.

5 Q. What's that tell you?

6 A. Well, it tells me that, and my reports say,
7 documentation say that he was expelled due to, quote -- and as he
8 put it, quote, being a nuisance, unquote. I don't know how much
9 he got out of school. But I know he obviously didn't have a GED
10 or a diploma.

11 Q. You're not offering an opinion as to how Justin's
12 anti-social personality disorder affects his employment
13 prospects, are you?

14 A. I'm sorry. Could you restate the question?

15 Q. You're not offering an opinion today about how Justin's
16 anti-social personality disorder affects his future employment
17 prospects, are you?

18 A. I mean, that is going to be up to Justin. Is Justin
19 going to be willing to address some of these issues and go and
20 find work. That's going to be up to Justin. I mean, when I say
21 his prognosis, I can tell you that I think his prognosis is
22 extremely guarded.

23 Q. I'm just reviewing some of my notes. If you'll bear
24 with me for a minute.

25 A. Sure.

1 Q. Ms. Moore, can severe intractable chronic pain, can that
2 exacerbate underlying psychological disorders?

3 A. Yes.

4 Q. Can it exacerbate anti-social personality disorder?

5 A. It could probably mimic some irritability and have some
6 mood impact.

7 Q. Right.

8 A. It can also impact maybe some concentration or
9 attention.

10 Q. Did Justin ever complain to you about pain in his arm?

11 A. Well, when he was assessed, and that's something when
12 reviewing the records, he -- when I saw him, and let me reference
13 my records here real quick. He had told me that he did have
14 chronic pain. Let's see here. Let's go back. I don't have it
15 documented, or recall him coming up to me and saying: 'I'm in
16 pain. That's typically, they would go to the nurse.

17 Q. Okay. I also noted in your -- the medical records from
18 your facility that Justin was diagnosed with arthritis?

19 A. Well, I mean, when you say diagnosed, I mean, you're
20 right, I mean, it does say on the H and P diagnosis. I mean,
21 that's based off -- it's not based on tests. It's based on what
22 Justin told us. And Justin states that he suffers from
23 arthritis.

24 Q. Let me kind of get a mental picture of how this works.
25 Justin tells someone in your facility, I have arthritis, and

1 Justin says, I have these symptoms and someone at your facility
2 writes it down as arthritis?

3 A. Again, I don't know the length of -- I don't know what
4 occurred in the health and physical. I wasn't in the room, so I
5 don't know. But, obviously, this is based on his history. I
6 didn't see that they did any tests, you know, other than I think
7 there was a thyroid level done and they did some blood level at
8 the hospital when he was referred, but I don't know what took
9 place there. But I know he's -- on several of the records,
10 arthritis was stated. And then he said he was blind in one eye
11 and had arm pain.

12 Q. I also notice in some of these records that someone
13 remarked that Justin had a good range of motion with his arms.
14 Do you remember seeing that?

15 A. Well, I think -- are you referring to -- let me see if I
16 can find that. You know, I just want to elaborate. If somebody
17 says I have hepatitis C, it's not normal for us, not necessarily
18 would we run out and confirm hep C, but we would write hep C
19 down.

20 Q. That makes perfect sense.

21 A. Are you looking at the MR 1132, abnormal involuntary
22 movement scale?

23 Q. No. You know, I reviewed these records on an airplane
24 and made some notes what I'm referring to and if it's not there,
25 it's not there.

1 A. It says extremity movements which includes, arm, wrists,
2 hands, fingers, and they said there was no abnormalities noted.
3 It says zero.

4 Q. When we talk about movement, that's just moving up and
5 down, correct?

6 A. Well, and it can be slow, it can be, you know, is there
7 tremors, is it repetitive, rapid movements, so any unusual
8 movement that is detected.

9 Q. I mean, my point is, no one put a 50-pound weight in
10 Justin's arms to determine what his lifting capabilities are, did
11 they?

12 A. Not to my knowledge.

13 Q. And to your knowledge, no one determined how much weight
14 he's able to lift or push or pull, did they?

15 A. Not to my knowledge.

16 Q. Okay. And to you, range of motion doesn't refer to that
17 type of testing, does it?

18 A. Not to my knowledge, no. Not that I've seen.

19 Q. I know we already covered this, but I kind of missed
20 your answer and wanted to go back over it. I was wondering what
21 the difference between polysubstance abuse and polysubstance
22 dependence is. I think you told me that one of those diagnoses
23 doesn't exist.

24 A. Basically, the difference, I mean, you look at abuse and
25 somebody goes out and drinks alcohol one night, vomits, maybe

1 doesn't make it into work, and so it causes an impairment, but
2 it's not on a regular continued persisting basis. This is kind
3 of simplifying this.

4 Like, for instance, with cannabis dependence, this -- it
5 begins where you started. There's a real tolerance factor. So
6 when dependence comes in, you're starting to increase the amount
7 that you use, you're starting to increase the frequency that
8 you're using the substance. More behavior is being spent trying
9 to obtain a substance. And it's, you know, rather than it -- you
10 know, going out and bingeing or using a drug and it causes you
11 impairment that day and maybe you could get arrested or something
12 like that.

13 But dependence really has to do with the tolerance
14 factor where it's becoming more than abuse. It's becoming to
15 where you're spending a lot of energy and time to get the drug
16 and you need more of it.

17 Q. And you guys never diagnosed Justin was polysubstance
18 abuse, did you?

19 A. No. And the reason why we didn't do that is, you know,
20 and also looking at the drug tests, but he did discuss a remote
21 history of using polysubstances. But in talking with him, he
22 reported that everything had been either in high school or years
23 ago.

24 Q. Okay. But you did diagnose him with marijuana
25 dependence, which we already covered, correct?

1 A. That tended to be, what we noted with him, it seemed to
2 be just one of the primary focus for him was, you know, marijuana
3 was in everything he talked about. It seemed like it was pretty
4 -- consuming a big part of his life. And he started smoking it
5 when he was age 13 before, you know, chronic pain had onset.

6 Q. Sure. How do you -- what are the factors you
7 diagnosed -- you look at when you want to diagnose someone with
8 dependence on marijuana?

9 A. Well, you look at several things here. And let me --

10 Q. I'm just asking in general. Not necessarily about
11 Justin. I think you mentioned going out of your way to get it
12 and taking risks and things like that. But I don't want to put
13 words in your mouth. Let me ask an actual question so you can
14 answer it. What factors do you look at when you diagnose a
15 patient with marijuana dependence?

16 A. Well, you look at the frequency of how often they're
17 using. You look at, you know, is it a progressive? Has it
18 become progressive use of the drug? Are they smoking it, you
19 know, more and more? What lengths do they go about to get the
20 drug? And what type of impact is it having on them? I mean,
21 those are a lot of the factors I look at. I think, let's see, I
22 just want to make sure -- I mean, that's kind of the general
23 factors there.

24 And also, you know, has it caused -- what kind of
25 consequences, any health consequences, any social, employment

1 impairment, those types of things.

2 Q. I mean, I don't want to generalize, but is it basically
3 a -- you look at it and determine is this causing so much
4 problems in someone's life and bad consequences that it doesn't
5 make sense that they would continue the activity anymore, but
6 they do it anyway?

7 A. That's exactly. And that's something where, for
8 instance, like alcohol, if people know it's destroying their
9 liver, they've seen their liver panel, and they continue to use
10 it, absolutely, and there's the tolerance factor. So yeah.

11 Q. Is there a -- the dependence on that sort of scale be
12 defined as someone who wants to stop but they can't?

13 A. Yes. They've made --

14 Q. Do you know if Justin wanted to stop using marijuana?

15 A. No, he didn't. He thought it was the only thing that
16 helped him. His mother -- his mother had, it was in the Lyon
17 County also said if he smoked a joint, his mood stabilized so
18 that was supported by his mother as well. But he did not want to
19 stop. He felt that helped him the most.

20 Q. Obviously, though, you didn't think that helped him?

21 A. Correct. We did not feel that was in his best
22 interests. And, again, you know, we talk about he was irritable,
23 and, you know, there's a lot of symptoms. People think of
24 cannabis as really not a drug and that is obviously not so. It
25 does have its impact on people.

1 But, no, he wanted that more than meds, which obviously
2 those are two completely different things, psychotropics and
3 cannabis.

4 Q. I'm look for -- I have a record here, it's a -- his date
5 of admission, it's the Northern Nevada Adult Mental Health
6 Physical Examination, at the bottom left, it says MR 115. At the
7 top it says date of admission June 24th, 2004 and it's a
8 four-page record.

9 A. What was the number of that, MR?

10 Q. 115.

11 A. I think that's where I just was. That's the involuntary
12 or abnormal movement. Let me see here if I can find that. Are
13 you talking about the health and physical?

14 MS. HEIKKILA: That's what I understood we admitted as
15 Exhibit 1.

16 THE WITNESS: That's correct.

17 MR. ITKIN: It's the same one we already admitted as
18 Exhibit 1?

19 MS. HEIKKILA: Yes.

20 THE WITNESS: Yeah, that's the health and physical.

21 BY MR. ITKIN:

22 Q. And I was just looking at the bottom, and it's signed by
23 Dr. Oksenholt and we already talked about this, but the
24 recommendations, one, per psychiatry, two, if he could bring in
25 Marinol pills will give, and if not, we'll give trial Vicodin.

1 Is that the record you have as Exhibit 1?

2 A. I do.

3 Q. I just wanted to make sure it was admitted into the
4 record. And let me just review my notes and make sure I don't
5 have any more questions, but I think that's probably going to be
6 be it. But just give me a minute to make sure.

7 That's all I have for right now. Thank you, Ms. Moore.

8 EXAMINATION

9 BY MS. HEIKKILA:

10 Q. Ms. Moore, I just have a couple of follow-up questions.
11 To clarify, we've admitted all four of Exhibit Number 1?

12 A. Yes. Uh-huh.

13 Q. And on page three of the third notation down is
14 extremities, that's where it says: Full range of motion
15 throughout all extremities. It then goes on to say that there
16 are no deformities of the limbs, is that correct?

17 A. That's correct.

18 Q. And under the recommendation section, we had some
19 speculation about what the entry means: If can bring in Marinol
20 pills, we'll give. If not, we'll trial Vicodin. Might that be
21 because that the doctor was trying to confirm whether
22 Mr. Endicott was telling the truth as to whether he was a
23 Marinol?

24 MR. ITKIN: Objection, calls for speculation.

25 ///

1 BY MS. HEIKKILA:

2 Q. You can go ahead and answer.

3 A. I know he had a Marinol prescription with him from
4 Oregon. But if you note that -- the Marinol was never brought
5 nor was the Vicodin given. So this is always done on a patient
6 first gets in, so obviously something changed there because he
7 ended up having Tylenol 650 milligrams.

8 Q. Let me clarify that. You know he had a Marinol
9 prescription from Oregon, or were you told that?

10 A. I actually, I didn't see at this time personally, but
11 I've seen it documented in the record that he actually had a
12 script that was in his belongings. But it was -- you know, it
13 was the paper form, it wasn't filled.

14 Q. Okay. And that was from the State of Oregon from a
15 doctor in Oregon?

16 A. That was -- I'm not sure who it was prescribed to him.
17 Obviously had been to a doctor of some sort and my understanding
18 it was from the State of Oregon and it was documented by an RN.

19 Q. Okay. Because we've never been able to confirm that in
20 any record in this case. So the fact that Mr. Endicott testified
21 that he never filled that prescription for Marinol. It's been a
22 bit of a mystery for us.

23 A. You want me to find the entry for you?

24 Q. Do you think it's in the nursing notes?

25 A. Let me see here, because I've got some things

1 highlighted here for quick reference. So let me see if I can
2 find that.

3 Well, it says, like I say, the Lyon County reports has
4 script for Marinol, but hasn't filled the script. That doesn't
5 tell me if he told him he had the script. But let me check it
6 some more. They documented that he has a script but didn't fill
7 it. Let's see here.

8 That was -- yeah, that was the Lyon County. Let's check
9 here. Let me look in the inpatient notes here. Let me check on
10 that. My understanding is I thought I saw it in the progress
11 notes, which the MR 109.

12 Now, I look at his property sheets when he came in.

13 Q. Right.

14 A. There was a prescription card and here -- I mean, if he
15 had miscellaneous papers, which I don't see documented here, that
16 would have been in there, but I don't see that. He may have had
17 it in his wallet, which wasn't inventoried because it's something
18 that's not obviously of monetary value. Let me check here.

19 Well, like I say, maybe I'm not seeing it jumping in
20 front of me here. Maybe that what I had seen there. Mom was at
21 the emergency room with him in Lyon County and it was reported
22 that he has scripts. So I guess, you know, that can be
23 interpreted in several ways.

24 Q. Right. Right. Okay. So at this point we don't see
25 anything in the record as to an actual script for that?

1 A. No. No, I don't see it. It's not in the property
2 sheet, no. It's just been reported as such.

3 Q. And in any event, at this point in time, Mr. Endicott
4 was living in Nevada and would be subjected to Nevada law with
5 respect to his use of marijuana?

6 A. That's correct. I don't know about the Marinol pills.
7 To my knowledge -- I don't know if Marinol is able to be given
8 here in Nevada. To my knowledge, it has not been. But I do know
9 no Marinol pills was given nor the Vicodin. So we ended up going
10 Tylenol for the pain. We do have Vicodin in the formulary, but
11 it was not prescribed.

12 Q. You made a comment that you think his prognosis is
13 guarded. Would you expand on that?

14 A. Well, I mean, you know, this was a very alarming case,
15 just with the content that was discussed and also with his
16 diagnosis. Anti-social personality disorder has a fairly poor
17 response to treatment, especially due to what they call defense
18 mechanisms and being defensive and blaming and it's hard to get
19 through that. It's like the wall of denial.

20 And it would take a substantial amount of psychotherapy
21 to make some changes here and a lot of behavior modification. So
22 I would consider that guarded. But like I say, it would take a
23 lot of work on Justin's part, and I don't know if he's been
24 working on that.

25 Q. Okay. All right. And then the other place where the

1 injury was noted, other than the H and P, was on the psychiatric
2 evaluation, MR 147.

3 A. Okay. I'm sorry. What was the question?

4 Q. I'm just asking --

5 A. The 147, that's a psychiatric eval, yes.

6 Q. It talks about his arm and his chronic pain complaints.
7 I wanted to ask you a question. It's also noted his medical
8 history on the psychiatric eval as well, is that correct, MR 147?

9 A. Right. It talks about the blindness in the right eye.
10 Okay. Yeah, I have that here. I'm sorry. What was the
11 question?

12 Q. Sure. I'm getting to that. I wanted to make sure you
13 had the record. And I'm specifically looking at page two, where
14 it lists past medical history?

15 A. Right. I have that in front of me.

16 Q. Where it says that he sustained the injury to an
17 accident on a fishing boat?

18 A. Uh-huh.

19 Q. And it goes on to say he ripped off his right arm and
20 had to have a plate in it?

21 A. Right.

22 Q. Is that consistent with what he told you?

23 A. No. What I had been told was that he mangled his right
24 arm. But I was told also there was a plate in it.

25 Q. Okay. This goes on to say that he stated at one time,

1 he stabbed himself in order to open the wound and see the plate.

2 A. That's correct.

3 Q. And did he tell you that?

4 A. He had said that he had -- and it's documented. The way
5 I documented was that he cauterized himself. And I don't know if
6 it's in my progress notes, but he was curious to see what it
7 looked like and he cauterized himself with a hot metal plate to
8 close the wound.

9 Q. And this would have been at some point prior to his
10 admission in June of 2004?

11 A. That's correct. I mean, if he would have had an open
12 wound we would have documented that and been treating him for it.

13 Q. Okay. All right. I think that's all the question we
14 have for you, Ms. Moore. We certainly appreciate your time on
15 both of these occasions to clarify our questions about the
16 records. You do have the opportunity, now that we have finalized
17 this process, to review this record to make sure that all of your
18 testimony has been taken down accurately. You have the option to
19 waive that as well.

20 We are under a bit of time constraint because we have a
21 trial coming up in August in this case. So I'll need to clarify
22 if you do want to review and sign this deposition or if you want
23 to waive that, if you do want to review and sign it, we'll ask
24 that the court reporter provide this to you as promptly as
25 possible and then as quickly as you can, that you do go through

1 that process. But it's entirely up to you, Ms. Moore.

2 A. I believe I'm feeling pretty comfortable to waive that.

3 MS. HEIKKILA: All right. So we will do that, and with
4 that, we are done with you today. Again, our appreciation for
5 your time.

6 --oOo--
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DAWNE MOORE

Subscribed and sworn to before me
this _____ day of _____, 2007.

Notary

1 STATE OF NEVADA)
) ss.
 2 County of Washoe)

3 I, STEPHANIE KOETTING, a notary public in and for the
 4 County of Washoe, State of Nevada, do hereby certify;

5 That on Thursday, July 19th, 2007, at the hour of 1:30
 6 p.m. of said day, at the NORTHERN NEVADA ADULT MENTAL HEALTH
 7 FACILITY, 480 Galletti Way, Reno, Nevada, personally appeared
 8 DAWNE MOORE, who was duly sworn by me to testify the truth, the
 9 whole truth, and nothing but the truth, and thereupon was deposed
 10 in the matter entitled herein;

11 That said deposition was taken in verbatim stenotype notes
 12 by me, a Certified Court Reporter, and thereafter transcribed
 13 into typewriting as herein appears;

14 That the foregoing transcript, consisting of pages 44
 15 through 94, is a full, true and correct transcript of my
 16 stenotype notes of said deposition to the best of my knowledge,
 17 skill and ability.

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20 DATED: At Reno, Nevada this 31st day of July, 2007.

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STEPHANIE KOETTING, CCR #207