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Supreme Court No. 85422-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

PHIENGCHAI SISOUVANH
Appellant.

ANSWER TO AMICI CURIAE BRIEF BY FRED T. KOREMATSU
CENTER FOR LAW AND EQUALITY, ONEAMERICA, NORTHWEST
IMMIGRANT RIGHTS PROJECT, ASIAN COUNSELING &
REFERRAL SERVICE, KOREAN AMERICAN BAR ASSOCIATION
OF WASHINGTON, MIDDLE EASTERN LEGAL ASSOCIATION OF
WASHINGTON, AND DR. DARYL FUJII IN SUPPORT OF
APPELLANT

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ORIGINAL

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INTRODUCTION

Amici raises an important issue concerning cultural competency and evaluations to determine competency to stand trial. Amici properly does not argue that RCW 10.77.060 requires evaluation by a "culturally competent" expert. However, the Amici request that this Court adopt a requirement of culturally competent evaluations by Court decision is not supported by any authority from any jurisdiction.

The specific facts of this case also do not support application of such a rule for this case. If the rule suggested by Amici was to be adopted, it would be better done through the legislative process that could address the practical issues created by implementation of the rule.

ARGUMENT

DEFENDANT DID HAVE ACCESS TO CULTURALLY COMPETENT EXPERT.

Unfortunately, Amici does not address the actual facts or record of this sad case. This includes the facts of the defendant's life. So

that even if RCW 10.77.060(1)(a) requires a culturally competence evaluation in appropriate cases, it would not in this case for this defendant.

More important, Amici does not address the fact that prior to the competency hearing, the defendant was evaluated by Dr. Van Leng, a Lao psychologist.

The best evidence of Dr. Leng's evaluation and testing of the defendant prior to the competency hearing comes from the competency hearing itself. At that hearing, Dr. Richard Adler, the defense expert, testified that the defendant was not competent to stand trial.

In explaining the reasons behind his opinion, Dr. Adler testified, "I closely coordinated with Dr. Leng throughout my work to make sure that the various tools or manner of administration was culturally appropriate." (RP 03/24/10, 194).

Dr. Adler also testified that he had the benefit of the raw data from Dr. Leng's evaluation of the defendant dated September 25, 2008, as well as having Dr. Leng's 18-page report dated December 31, 2008. Dr. Adler described Dr. Leng as the team's cultural consultant, and as a Lao psychologist and mental health professional. (RP 03/24/10, 173, 175).

The competency hearing includes many specific references to Dr. Leng's work, and consultation with Dr. Leng that Dr. Adler used in developing his opinion.

For example, Dr. Leng specifically recommended the Post Traumatic Stress Disorder scale, and administered it himself. He also assisted with interpreting its results. (RP 03/24/10, 193, 194).

Dr. Leng also recommended using the Dissociative Experiences Scale, and administered it himself. Eight weeks later, Dr. Adler

administered the same test with "remarkably" similar results. (RP 03/24/10, 209-10).

Dr. Leng also recommended the Rorschach test, and administered it himself. Dr. Adler testified that Dr. Leng had administered over 100 or 150 Rorschach tests to people of Laotian background. (RP 03/24/10, 213).

Dr. Adler relied on Dr. Leng's work while testifying as to why he disagreed with Eastern State Hospital's finding of malingering. Dr. Adler described the difficulty of faking Rorschach results and cited Dr. Leng's finding that it was even harder "in Laotian people because by virtue of their cultural experience, given the nature of ghosts and shadows and dragons and snakes, the inkblots kind of provide an opportunity for a heyday of very elaborate, you know, very over the top if you will, responses." (RP 03/24/12, 217).

Dr. Adler's consultation with Dr. Leng on the Rorschach continued after Eastern State

Hospital administered the Rorschach to the defendant in January 2010. Dr. Adler provided the Eastern State report to Dr. Leng, and Dr. Leng told Adler that he was really impressed about how similar the Rorschach protocols were, that they were almost identical even though the Eastern State hospital test was administered more than a year later. (RP 03/24/10, 219).

Dr. Adler continued to consult with Dr. Leng after the competency hearing began.

Dr. Adler did some additional testing after Dr. Strandquist testified in the competency hearing, the day before Dr. Adler testified on direct. (RP 03/24/10, 249). This included administering the MMPI, which had been administered by Dr. Strandquist at Eastern State Hospital. Dr. Leng had not recommended the MMPI in 2008 during the "earlier consultative question," but recommended the administration during the competency hearing. (RP 03/24/10, 250). After Dr. Adler administered the MMPI

report on March 23, 2010, he e-mailed it to Dr. Leng and then discussed the results with him by phone. (RP 03/24/10, 252). Dr. Leng also had the Eastern State Hospital report. Dr. Adler testified as to Dr. Leng's conclusions after Dr. Leng's review of the recent test results done for the competency hearing. (RP 03/24/10, 258).

Dr. Leng gave the defendant an IQ test and found that her IQ was in the 90s. (RP 03/24/10, 417). Dr. Adler relied on Dr. Leng's IQ testing more in forming his competency to stand trial opinion than in diagnosing the defendant for mental illness. (RP 03/24/10, 413).

It should be noted that while Dr. Adler consulted with Dr. Leng during the competency process and relied on Dr. Leng's testing and evaluation in developing his opinion on competency to stand trial, Dr. Leng's testing was done at a different phase.

Dr. Leng was retained during the time the defendant was facing a potential death penalty.

Both Dr. Adler and Dr. Leng wrote reports on that issue. Dr. Adler did testify that if at the time of the mitigation reports there had been concerns about the defendant's competency to stand trial, that they could have been expressed to defense counsel. (RP 03/24/10, 247). Dr. Adler testified that no concerns about the defendant's competency to stand trial were raised at that time. (RP 03/24/10, 346-47).

While Dr. Adler continued to consult with Dr. Leng throughout the competency process and consulted with Dr. Leng the night before Dr. Adler testified about his reliance on the MMPI results on the issue of competency to stand trial, he did not discuss the issue of competency to stand trial with Dr. Leng that night.

The State can only speculate why the highly skilled and very experienced defense counsel in this case did not ask Dr. Leng to testify at the competency hearing, or ask his opinion about competency to stand trial.

This is especially intriguing since Dr. Leng continued to review Eastern State Hospital reports and recommend what additional testing should be done, and helped interpret the results of testing done for the purpose of competency determination.

One possible answer may be connected to the fact that when Dr. Leng wrote a report to help determine if the defendant should face the death penalty, he did not note any issues of competency to stand trial.

There is no claim that the defendant sought to have Dr. Leng or another "culturally competent" mental health professional examine the defendant for competence to stand trial. Instead, the defense expert relied on work and consultation with Dr. Leng to develop and support his opinion.

An apparent strategic decision by a highly skilled defense attorney does not create a due process claim.

AMICI CONCERN SHOULD BE ADDRESSED IN LEGISLATIVE PROCESS

Amici does not argue that RCW 10.77.060's use of the word "qualified" includes cultural competence. Indeed, they concede that the meaning of qualified is beyond the scope of their brief. (Amici WACDL brief, 6).

Instead, Amici asks the Court to create a rule to require that the competency of a criminal defendant be determined by an expert or professional person who is culturally competent. (Amici WACDL brief, 17). Amici does not cite any case or authority from any State or Federal jurisdiction that has adopted such a rule.

There are many reasons for the Court not to adopt such a rule in the present case.

First, as discussed earlier, this is not a case where there was not involvement or input by a culturally competent expert. The fact that Amici chose to ignore Dr. Leng's involvement does not change the fact that the defense used a

culturally competent expert during the competency process.

Second, the record is not clear that the defendant in this case was in need of a culturally competent evaluator. The defendant had lived in the United States since she was age six, had integrated into normal school and work settings, and even became involved in school activities that were unrelated to her Lao background.

Third, there are practical difficulties in implementing a broad rule by Court decision. If a requirement of culturally competent evaluations for appropriate cases was needed, it would be better done through a legislative change to RCW 10.77.060. The legislative process could better address the practical challenges in implementing such a rule.

Practical challenges would need to be addressed by such a rule. For example, culture would need to be defined. In this case, for

example, would it be Lao background or refugee background, or Laos who were also refugees? In fact, within the Lao culture, there could be subcultures. A rule would need to address how far it would extend.

The term competent would also have to be addressed. Issues could include whether the evaluator would have to be of the culture to be competent, or could an evaluator obtain such competence through education, experience, or training? That, of course, would raise issues as to how much education, experience, or training would constitute competence.

Such practical considerations show that if adding a requirement of cultural competence is appropriate, it should be done through the legislative process.

APPENDIX IN AMICI BRIEF SHOULD NOT BE CONSIDERED.

The State received the Amici brief from the Fred Korematsu Center 15 days before the due date of the reply. The Amici brief included four

different appendices totaling about forty-five pages that were not part of the trial record.

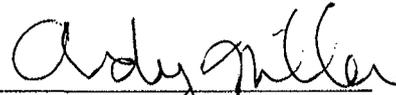
The State is aware of the general rule that appellate courts will not consider evidence from outside the record. See generally *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 252, 850 P.2d 1298 (1993) (“Cases on appeal are decided only on evidence in the record.”). This rule, however, has not been consistently adhered to by this Court with respect to extra-record material offered by amicus curiae. In *State v. Boyd*, 160 Wn.2d 424, 439, 158 P.3d 54 (2007), this Court based its opinion, in part, on “[t]he unrebutted declaration in amicus brief of WACDL.”

Therefore, because the appendices are outside the scope of the record, do not allow time for meaningful review by the State, and are not material to the specific legal issue before the Court, the State respectfully asks this Court to not consider them.

CONCLUSION

The State understands the importance of the issue raised by the Amici. However, this is not the case nor the venue to propose implementation of a requirement that competency evaluations be done by "culturally competent" experts.

RESPECTFULLY SUBMITTED this 27th day of April 2012.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of Respondent's Answer to Amici Curiae as follows:

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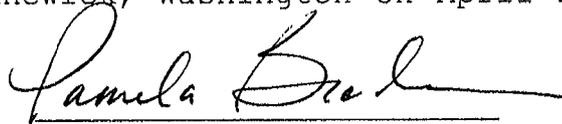
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Supreme Court No. 85422-0 - State of Washington v. Phiengchai Sisouvanh

Dear Mr. Carpenter:

Attached for filing, please find the State's Answer to Amici Curiae Brief, and Certificate of Service.

Thank you,

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