

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jul 07, 2011, 2:50 pm
BY RONALD R. CARPENTER
CLERK

E

Supreme Court No. 85422-0

RECEIVED BY E-MAIL

hjh

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

vs.

PHIENGCHAI SISOUVANH,

Appellant.

BRIEF OF APPELLANT

Michael Iaria, WSBA 15312
Attorney for Appellant

Law Office of Michael Iaria PLLC
1111 Third Avenue
Suite 2220
Seattle, Washington 98101
206-235-4101

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

I. ASSIGNMENTS OF ERROR.. 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

III. STATEMENT OF THE CASE..... 3

IV. ARGUMENT.. 14

 A. The Trial Court Violated the Due Process Clause of the Fourteenth Amendment by Not Requiring That the Person Appointed or Designated as the Court’s Expert or Professional Person under RCW 10.77.060(1)(a) Be “Qualified” To Evaluate and Report upon the Competency of Ms. Sisouvanh.. 14

 1. The trial court’s failure to follow mandatory statutory procedures regarding competency to stand trial violated due process... 14

 2. “Qualified” as used in RCW 10.77.060(1)(a) means “fit for the particular, not general, task at hand.”... 17

 3. Only redundancy allows a psychologist, merely by virtue of being licensed, to be “qualified” under RCW 10.77.060(1)(a).. 21

 4. Only disregard of context and acceptance of redundancy allows “qualified” as used in RCW 10.77.060(1)(a) to mean the same thing as in ER 702.. 23

 5. The Washington code of ethics for psychologists is part of the statutory context that requires “qualified” as used in RCW 10.77.060(1)(a) to be defined as “fit for the particular purpose” of evaluating and reporting upon the unique person in issue... 25

6. Even if the ER 702 standard is an analog for being
“qualified” to evaluate and report upon the competency of
the defendant under RCW 10.77.060(1)(a), Dr. Strandquist
was not qualified to evaluate Ms Sisouvanh..... 32

V. CONCLUSION..... 34

TABLE OF AUTHORITIES

Federal Cases

<i>Blazak v. Ricketts</i> , 1 F. 3d 891 (9th Cir.1993).....	36
<i>De Kaplany v. Enomoto</i> , 540 F. 2d 975 (9th Cir. 1976).	36
<i>Djouma v. Gonzales</i> , 429 F. 3d 685 (7th Cir. 2005).	31
<i>Drope v. Missouri</i> , 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).	14, 15, 36
<i>Iao v. Gonzales</i> , 400 F. 3d 530 (7th Cir. 2005).....	31
<i>Medina v. California</i> , 505 U.S. 437, 112 S.Ct. 2572, 120 L. Ed. 2d 353 (1992).....	14
<i>Pate v. Robinson</i> , 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966).	14, 15
<i>Riggins v. Nevada</i> , 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992).....	15
<i>Siripongs v. Calderon</i> , 35 F. 3d 1308 (9th Cir. 1994).....	31
<i>United States v. Goldenberg</i> , 168 U.S. 95, 18 S. Ct. 3, 42 L. Ed. 394 (1897).....	18
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).	31

Washington Cases

<i>American Home Assur. Co. v. Cohen</i> , 124 Wn. 2d 865, 881 P. 2d 1001 (1994).	27
<i>Arborwood Idaho, LLC v. City of Kennewick</i> , 151 Wn. 2d 359, 89 P. 3d 217 (2004).	17, 18

<u>Auto Drivers v. Retirement Systems</u> , 92 Wn. 2d 415, 598 P. 2d 379 (1979).	18, 19
<u>Burnham v. State Dept. of Social and Health Services</u> , 115 Wn. App. 435, 63 P. 3d 816 (2003).	23
<u>Burton v. Lehman</u> , 153 Wn. 2d 416, 103 P. 3d 1230 (2005).	19
<u>City of Bellevue v. Lorang</u> , 140 Wn. 2d 19, 992 P. 2d 496 (2000).	18, 19
<u>City of Seattle v. Winebrenner</u> , 167 Wn. 2d 451, 219 P. 3d 686 (2009).	19
<u>Deatherage v. State, Examining Bd. of Psychology</u> , 134 Wn. 2d 131, 948 P. 2d 828 (1997).	27
<u>DeLong v. Parmelee</u> , 157 Wn. App. 119, 236 P. 3d 936 (2010).	20
<u>Dep't of Ecology v. Campbell & Gwinn, LLC</u> , 146 Wn. 2d 1, 43 P. 3d 4 (2002).	17, 18, 19
<u>Dot Foods, Inc. v. Dep't of Revenue</u> , 166 Wn. 2d 912, 215 P. 3d 185 (2009).	17
<u>Garrison v. Wn. State Nursing Bd.</u> , 87 Wn. 2d 195, 550 P. 2d 7 (1976).	18
<u>In re Detention of A.S.</u> , 138 Wn. 2d 898, 982 P. 2d 1156 (1999).	19
<u>In re Pers. Restraint of Fleming</u> , 142 Wn. 2d 853, 16 P. 3d 610 (2001).	14, 15
<u>In re Marshall v. State</u> , 156 Wn. 2d 150, 125 P. 3d 111 (2005).	33

<u>Lake v. Woodcreek Homeowners Ass'n</u> , 169 Wn. 2d 516, 243 P. 3d 1283 (2010).....	17, 18, 19
<u>Seattle v. Gordon</u> , 39 Wn. App. 437, 693 P.2d 741 (1985).....	15
<u>State v. Buckner</u> , 133 Wn. 2d 63, 941 P. 2d 667 (1997).....	32
<u>State v. Cauthron</u> , 120 Wn. 2d 879, 846 P. 2d 502 (1993).....	32
<u>State v. Heddrick</u> , 166 Wn. 2d 898, 215 P. 3d 201 (2009).....	15, 16, 24, 33
<u>State v. Lundquist</u> , 60 Wn. 2d 397, 374 P. 2d 246 (1962).....	19
<u>State v. Marshall</u> , 144 Wn. 2d 266, 27 P. 3d 192 (2001).....	34
<u>State v. O'Neal</u> , 23 Wn. App. 899, 600 P. 2d 570 (1979).....	15, 33
<u>State v. Russell</u> , 125 Wn. 2d 24, 882 P. 2d 747 (1994).....	32
<u>State v. Stephens</u> , 93 Wn. 2d 186, 607 P. 2d 304 (1980).....	35
<u>State v. Wicklund</u> , 96 Wn. 2d 798, 638 P. 2d 1241 (1982).....	15, 16
Statutes, Rules, Regulations	
Chapter 10.77 RCW.....	17, 34
Chapter 18.83 RCW.....	22, 26

Chapter 18.130 RCW	27
ER 702.....	23, 24, 25, 26, 32, 33
RCW 10.77.010(18).....	21, 26
RCW 10.77.060(1)(a).	15-34 passim
RCW 10.77.060(2).....	23
RCW 10.77.060(3).....	24
RCW 10.77.065(1)(a)(I).	16, 24
RCW 10.77.100.....	24, 25
RCW 18.83.020(1).....	27
RCW 18.83.050(5).....	27
RCW 18.83.121(2).....	27
RCW 18.83.121(4).....	28
RCW 18.130.160.....	27
RCW 18.130.180(4).....	28
RCW 18.130.185.....	27
RPC 1.1 and commentary.	21
WAC 246-924-353(1).	27
WAC 246-924-353(2).	28
WAC 246-924-365(2).	30

Other Authority

2002 Ethics Code of the American Psychological Association. 29, 30

Chicago Manual of Style (University of Chicago Press (16th Edition 2010) 22

Diagnostic and Statistical Manual of Mental Disorders IV-TR (2000). 29

Garner’s Modern American Usage (Oxford University Press 2009) 22

Oxford English Dictionary, Third Edition (2007). 20

Webster’s Third New International Dictionary (1986). 20

I. ASSIGNMENTS OF ERROR.

1. The trial court violated the Due Process Clause of the Fourteenth Amendment by not requiring that the person appointed or designated as the court's expert or professional person under RCW 10.77.060(1)(a) be "qualified" to evaluate and report upon the competency of Ms. Sisouvanh, a lowland Lao national whose culture, native language, religion, ethnicity, and refugee experience are well outside the American mainstream.
2. The trial court violated the Due Process Clause of the Fourteenth Amendment by not filing the written report of the person appointed or designated as the court's expert or professional person under RCW 10.77.060(1)(a) to evaluate the competency of Ms. Sisouvanh.
3. The trial court erred in concluding that Ms. Sisouvanh had not carried her burden of proving incompetency.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court's failure to follow the mandatory statutory procedures regarding competency to stand trial as set forth in RCW 10.77.060(1)(a) violate due process?
2. Does "qualified" as used in RCW 10.77.060(1)(a) mean "fit for the particular, not general, task at hand"?

3. Is a psychologist, merely by virtue of being licensed, “qualified” under RCW 10.77.060(1)(a) to evaluate the competency of any defendant, no matter what the defendant’s unique cultural, ethnic, spiritual, and linguistic attributes?

4. Is a psychologist who is appointed or designated to be the trial court’s expert or professional person on competency “qualified” as used in RCW 10.77.060(1)(a) merely because he or she meets the low threshold requirements under ER 702?

5. Is the Washington code of ethics for psychologists part of the statutory context that requires “qualified” as used in RCW 10.77.060(1)(a) to be defined as “fit for the particular purpose” of evaluating and reporting upon the unique person in issue?

6. Whether, in a case involving a lowland Lao refugee born in a Thai refugee camp, the mandatory procedure in RCW 10.77.060(1)(a) that a “qualified expert or professional person” perform a competency evaluation is satisfied, using any reasonable definition of “qualified”, by someone who does not speak Lao; who knows nothing of the defendant’s lowland Lao culture, religion, and refugee experience; and who wrongly assumes the defendant has led an “average American life”?

7. Whether the trial court erred under ER 702 in admitting the testimony of an unqualified expert and in concluding that Ms. Sisouvanh had not carried her burden of proof?

III. STATEMENT OF THE CASE.

The State charged Phiengchai Sisouvanh with one count of aggravated murder in the first degree, occurring in June of 2008. CP 1-2. The State alleged that Ms. Sisouvanh, then twenty-three, stabbed to death Araceli Gomez Camacho, who was eight and one-half months pregnant at the time, and then cut the fetus from her womb to claim as her own baby (the child, a boy, lived). CP 281-282. As the State noted when it declined to seek the death penalty, “[t]here are mental health evaluations that show detachment from reality and other issues with [Ms. Sisouvanh’s] mental health.” CP 5.

Ms. Sisouvanh is a lowland Lao national. Competency Hearing Exhibit K.¹ She and her family arrived in the United States at the end of a long multi-generational flight from the trauma of war. When Ms. Sisouvanh’s parents were growing up, the violent overthrow of various

¹ The facts recited hereunder regarding Ms. Sisouvanh’s background come from Competency Hearing Exhibit K, the social history section of the defense mitigation package that helped convince the State not to seek the death penalty. *See also* CP 46-101; Competency Hearing Exhibits F and K.

Southeast Asian governments, including that of their homeland, Laos, resulted in a refugee crisis of immense proportions. After multiple journeys of extraordinary deprivation, Ms. Sisouvanh's parents ended up in Thailand's Phanat Nikhom Refugee Camp, where Ms. Sisouvanh was born.

The camp was surrounded by a barbed-wire fence. Armed security personnel stood watch at the gates. Wooden guard towers were placed at points around the perimeter. The camp's residents were housed in tightly-spaced and even more tightly occupied shacks made of tin, plywood, bamboo thatch, and cardboard. On May 11, 1984, some six months before Phiengchai was born, Pope John Paul II visited the camp and noted the suffering, hardship, and pain endured by the internees. He called their plight an evil, part of a situation so extreme that it was difficult for an outsider to fathom.

In 1991, when she was almost seven, Ms. Sisouvanh and her family flew from Bangkok to Seattle, having no idea where they were going or who was going to meet them. They arrived in Seattle, where they passed through the immigration checkpoint not knowing that their ultimate destination actually was Austin, Minnesota, a town of 23,000 where very

few people spoke their language or understood their culture or religion.

The Sisouvanhs' religion was not in the mainstream. Some sixty-five percent of the Lao population practices some form of Buddhism. Animist beliefs attract another thirty-three percent and Christian religions just over one percent. As is the case for Ms. Sisouvanh and her family, Buddhism is frequently mixed with an animist belief in the reality of spirits that cross over into our world from the world of the dead, inhabiting objects and humans and controlling our fortunes. Vang Leng Mouanoutoua, Ph.D., a Lao-speaking Hmong clinical psychologist, notes that "Lao people ... believe in the world of the dragon, flying bird, spirits/ghosts, divinities, animals... . Entities from these other worlds easily come across [to the] human world and are believed to exert influence[] over human[] behaviors, fortunes, or misfortunes." CP 57.

Mental health issues are very sensitive for Laos. It is considered shameful to be treated for a mental illness. In Laos, psychiatrists are solely for insane people. There are no professional counselors who deal with personal or family problems or depression. Many believe that mental illness is related to conflicts with spirits.

On October 20, 2009, the trial court found that there was reason to

doubt Ms. Sisouvanh's competency and therefore ordered, as mandated by RCW 10.77.060(1)(a), that she be evaluated by a "qualified expert or professional person." CP 12-17. Eastern State Hospital designated Dr. Randall Strandquist, Psy. D., to act as the court's expert in performing this critical evaluation. After conducting the evaluation, Dr. Strandquist reported in writing directly to the trial court, 3-12-10 RP 18:18, 19:10, 24:3, 30:25, and 36:5-13, but his report apparently was not filed.² At the competency evidentiary hearing in March and April of 2010, the position of the defense was that Dr. Strandquist, by virtue of his complete lack of relevant cultural competency to evaluate Ms. Sisouvanh, was not a "qualified expert or professional person" as required by RCW 10.77.060(1)(a). CP 40-130; CP 140-147.

Dr. Strandquist admitted that the multiaxial scheme of the Diagnostic and Statistical Manual (DSM), which he used, is designed to make sure that no relevant part of the whole person is overlooked in a diagnosis. 3-12-10 RP 93. He also conceded that an understanding of a patient or subject's age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, and socioeconomic status may be essential for effective implementation of

² It is not mentioned in the clerk's docket nor is it noted on any exhibit list.

psychological services and part of the whole person with which the DSM's multiaxial scheme is concerned. 3-12-10 RP 92-94. He agreed that selection, administration, and interpretation of psychometric tests must take into consideration the particular individual being tested and that the clinician's awareness regarding the subject's culture was important. 3-12-10 RP 94-96. Giving the right test to the right patient population is absolutely critical and not a peripheral issue. 3-12-10 RP 162. He conceded that the failure to understand a particular person's culture or religious beliefs could result in a misdiagnosis. 3-12-10 RP 97-98.

The testimony and evidence at the hearing demonstrated that, despite some ill-defined training in graduate school about the "unique characteristics" of a variety of unspecified cultures, 3-12-10 RP 107, Dr. Strandquist was culturally unqualified to do an evaluation of and write a report about the competency of Ms. Sisouvanh, the only Lao patient who mattered. Competency Hearing Exhibit A (Strandquist's curriculum vitae); 3-12-10 RP *passim*. Dr. Strandquist does not speak Lao, and his knowledge of the country of Laos, lowland Lao culture and religion, Thai refugee camps, and the "forced march" refugee experience lived by Ms. Sisouvanh and her family, ranged from virtually nothing to nothing at all.

Id. Dr. Strandquist did not, as directed by the Code of Ethics of the American Psychological Association, which he professed to follow, acquire the requisite competence or consult or associate with an expert who had such competence before evaluating Ms. Sisouvanh. 3-12-10 RP 88-99.

Dr. Strandquist's lack of cultural competence caused him to make gross professional errors. He assumed that Ms. Sisouvanh had led a "pretty average American [life.]" 3-12-10 RP 29:13-14. Relying upon the psycho-social report written by an intake social worker who failed to contact any of Ms. Sisouvanh's family members, 3-12-10 RP 104-105, Dr. Strandquist did not have the cultural competence to understand the core of Ms. Sisouvanh's life. The cross-examination of Dr. Strandquist on this point is telling:

Q Average American life; is that what you said in describing what Miss Sisouvanh described to you? She described for you what you interpreted to be, what you viewed to be, an average American life; is that correct?

A That's what I said.

Q What do you really know about her life? What do you know about the first five years of her life?

A Well, she said she moved here. She was probably in Thailand.

Q Tell me everything you know about the first five years of her life.

A I know nothing.

Q Tell me everything you know about the next ten years of her life.

A Nothing.

Q Tell me what you know about her religion.

A She identified herself as Buddhist.

Q Tell me what you know about her form of Buddhism.

A She said she -- it's Buddhism and Christian, and she went to a Russian church. That's all I know.

Q Tell me what you know about her culture.

A Not much.

3-12-10 RP 40:7 - 41:3.

Dr. Strandquist was right: he did not know much about Ms. Sisouvanh or her culture. He knew she was not born in the United States, but beyond that he could not say what her legal status was, whether she was a U.S. or a Lao citizen, or whether she holds a passport. 3-12-10 RP 52-53. He knew nothing about her religion and how it played into her life. 3-12-10 RP 98-99. He had no real understanding of the refugee crisis that Ms. Sisouvanh had endured as a child. 3-12-10 RP 120-122. Knowing nothing about the first fifteen years of Ms. Sisouvanh's life, he therefore knew nothing of the "corroborated evidence that [she had been] severely physically abused a number of times while growing up, including one incident that required hospitalization and placement in foster care." CP 5.

Not surprisingly for someone who knew so little about the unique human being he was ordered to evaluate, and who therefore had no

understanding of her cultural response styles, Dr. Strandquist became so angry at Ms. Sisouvanh during his clinical interview of her that “he was unable to ask certain questions in a way that could elicit a meaningful response from Ms. Sisouvanh.” CP 128.

Dr. Strandquist administered psychometric tests to Ms. Sisouvanh that were neither created for nor normed using Lao test takers. 3-12-10 RP 19, 101-109, 113-114. He administered no instruments to assess Ms. Sisouvanh’s level of acculturation, 3-12-10 RP 102-103, and admitted that he did not know enough to assess whether she was in touch with her native culture. 3-12-10 RP 108. He asserted that her belief that she had been pregnant for much longer than a nine-month gestational period was a bizarre delusion (and evidence he used to claim she was malingering), but admitted he did not know if such a belief was something he would have to “test on the basis of her spiritual, cultural and religious understanding of how the universe works.” 3-12-10 RP 76:23-77:5. On the basis of her relatively low verbal IQ score, he theorized that “she might have some sort of a verbal expression disorder or something along the lines of some learning disability” 3-12-10 RP 13:22-24, instead of language deficits from being raised by illiterate parents who spoke only Lao to her.

Dr. Richard Adler, M.D., a forensic psychiatrist who consulted extensively with Dr. Vang Leng, a Lao-speaking Hmong clinical psychologist, 3-24-10 RP 173-179, who himself was very familiar with Lao culture and who had evaluated Ms. Sisouvanh, testified for the defense. Dr. Adler was not appointed pursuant to RCW 10.77.060(1)(a), but, rather, had been retained by the defense early in the case to assist with a “mitigation evaluation” of Ms. Sisouvanh to use in arguing to the Prosecuting Attorney that he should not seek the death penalty.³

In discussing why it was important to consult with Dr. Leng, Dr. Adler noted that the DSM-IV “aptly recognizes that understanding the culture ... of the examinee is absolutely important.” 3-24-10 RP 175:16-18. He further noted that, without cultural competency, “the likelihood that one is going to make misdiagnoses ... and perhaps give inappropriate treatment or interventions is very high ... [and that] ... it’s exceptionally important that one understands the context and background of the examinee.” 3-24-10 RP 175:18-21, 175:23-25. He testified that “there’s a marked difference in the rate of certain diagnoses if you really don’t understand the person that you are working with.” 3-24-10 RP 176:19-20. Language issues can create barriers for the evaluator who does not

³ See Competency Hearing Exhibit F (Dr. Adler’s Mitigation Report).

understand the nuances or the idioms with the colloquial language that an examinee grew up using. 3-24-10 RP 176. "A lot of the subtleties... will kind of go over your head." 3-24-10 RP 177:1-2.

Having once worked as a psychiatrist at Seattle Mental Health, a community mental health center that serves the disadvantaged of all cultures, he referred to a requirement imposed by DSHS (which, of course, is Dr. Strandquist's employer) that mandated cultural consultations as part of the provision of mental health treatment. 3-24-10 RP 177-178. "If you as a clinician didn't undertake that step, you were essentially derelict in your duties. So this isn't just some kind of frosting on the cake or elective thing." 3-24-10 RP 178:13-15. He testified that the two psychometric tests given by Dr. Strandquist to Ms. Sisouvanh were "clearly inappropriate" to give her and "absolutely not" interpreted in a culturally competent manner. 3-24-10 RP 269:4-9.

In its written submission to the trial court, the defense argued that "the threshold question is not whether Ms. Sisouvanh is competent, but whether the mandatory statutory procedures have been followed."⁴ CP 42

⁴ For the record, various mental health evaluators came to different conclusions on the issue of competency. Dr. Strandquist asserted that Ms. Sisouvanh was competent and malingering. 3-12-10 RP 30-31, 37-38. Dr. Adler opined that Ms. Sisouvanh suffered from various Axis I major mental health disorders, including delusional disorder, dissociative disorder, and post-traumatic stress disorder, and also that she was not competent to stand trial. 3-24-10 RP 168-169. Dr. Adler reported that Dr. Philip Barnard,

(Defendant's Memorandum on Competency Issues at 3). At oral argument after the competency evidentiary hearing, the defense asserted that Dr. Strandquist was not "qualified" as required by RCW 10.77.060(1)(a), that the trial court's order that Ms. Sisouvanh be evaluated by a "qualified" expert or professional person had been disregarded, and that Ms. Sisouvanh should be sent back to Eastern State to be re-evaluated by someone who knew enough about her ethnicity, language, culture, and religion to be so qualified. 4-13-10 RP 445-448. The trial court questioned whether it had the authority to order that Ms. Sisouvanh be re-evaluated. 4-13-10 RP 458-60. In response, the defense submitted a memorandum pointing out the court's authority. CP 140-147.

The trial court entered findings and an order ruling that Ms. Sisouvanh had not carried her burden of proof on the issue of competency but that did not rule on the specific arguments the defense had made regarding the threshold issue of whether Dr. Strandquist was a "qualified expert or professional person" under RCW 10.77.060(1)(a) or whether it had the authority to order a re-evaluation of Ms. Sisouvanh. CP 151-154.

The case proceeded to trial on an insanity defense and Ms.

Ph.D., a defense expert, felt that Ms. Sisouvanh had been competent in 2009, 4-8-10 RP 356, an opinion that Dr. Barnard continued to maintain, Exhibit 130 (this exhibit was not filed as part of any competency proceedings) and with which Ms. Sisouvanh disagreed.

Sisouvanh was convicted as charged and sentenced to life without the possibility of parole. This appeal timely followed.

IV. ARGUMENT.

A. The Trial Court Violated the Due Process Clause of the Fourteenth Amendment by Not Requiring That the Person Appointed or Designated as the Court's Expert or Professional Person under RCW 10.77.060(1)(a) Be "Qualified" To Evaluate and Report upon the Competency of Ms. Sisouvanh.

1. The trial court's failure to follow mandatory statutory procedures regarding competency to stand trial violated due process.

The criminal trial of an incompetent defendant violates due process. *Medina v. California*, 505 U.S. 437, 453, 112 S.Ct. 2572, 120 L. Ed. 2d 353 (1992); *Drope v. Missouri*, 420 U.S. 162, 171-172, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966) (1966); *In re Pers. Restraint of Fleming*, 142 Wn. 2d 853, 861, 16 P. 3d 610 (2001). The significance of this right is not open to dispute:

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

Riggins v. Nevada, 504 U.S. 127, 139-140, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992) (Kennedy, J., concurring) (citing Drope at 171-172). “The failure to observe procedures adequate to protect this right is a denial of due process.” State v. O’Neal, 23 Wn. App. 899, 901, 600 P. 2d 570 (1979) (citing Drope, 420 U.S. 162; Pate, 383 U.S. 375).

In Washington, Chapter 10.77 RCW provides the procedures designed to protect a defendant’s due process competency rights. These “[p]rocedures ... are mandatory and not merely directory.” Fleming at 863 (citing State v. Wicklund, 96 Wn. 2d 798, 805, 638 P. 2d 1241 (1982)); Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741 (1985). The failure to observe these procedures is a violation of due process. State v. Heddrick, 166 Wn. 2d 898, 909, 215 P. 3d 201 (2009) (citing Fleming at 863; O’Neal at 901). No additional balancing of interests is necessary. Heddrick at 904

Under RCW 10.77.060(1)(a), whenever a defendant has pled not guilty by reason of insanity, or there is reason to doubt her competency,

the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

“[T]he procedures of RCW 10.77.060(1) are mandatory and not merely directory.” *Wicklund* at 805. The psychologist appointed or designated pursuant to this provision was not “qualified” to evaluate Ms. Sisouvanh. Thus, her due process rights were violated.

In *State v. Heddrick*, the trial court, contrary to the requirements of RCW 10.77.065(1)(a)(I), failed to enter into evidence the report of the Western State Hospital experts or professional persons appointed pursuant to RCW 10.77.060(1)(a). Additionally, the defense expert never memorialized his findings into a report for distribution to the parties and to the court. These seemingly minor procedural lapses, which occurred in the absence of any evidentiary hearing, led this Court to state, “On these facts alone, it would seem that Heddrick did not receive due process under the law.” 166 Wn. 2d at 904.⁵ Here, in addition to the trial court’s apparent

⁵ However, because Heddrick, after his own expert had reported that he was competent, “expressly withdrew his competency challenge”, *id.* at 908, this Court held that he had waived the statutory procedural requirements. *Id.* at 907-909. By contrast, Ms. Sisouvanh expressly stated that she did not waive the statutory requirement under RCW 10.77.060(1)(a) that a “qualified” expert or professional person be appointed or designated to evaluate her for competency and write a report. CP 43 (Defendant’s Memorandum On Competency Issues at 4). She did, however, waive her right to “two qualified experts or professional persons,” agreeing to only one. CP 12-17.

Relying upon the testimony of Dr. Adler, she expressly advanced the argument that she was incompetent and entitled to have the court’s expert be “qualified” to evaluate her. Although before trial Dr. Barnard opined that she was competent, Exhibit 130, this was nothing new, as he had previously maintained this opinion. 4-8-10 RP 356. Ms. Sisouvanh disagreed with his opinion and never expressly adopted it as her own or expressly waived her competency challenge.

failure to file Dr. Strandquist's report, the issue involves the fitness of Dr. Strandquist to evaluate Ms. Sisouvanh. Because he was not fit for this particular purpose, he was not "qualified" under RCW 10.77.060(1)(a) and, even before the evidentiary hearing began, Ms. Sisouvanh was denied due process of law.

2. **"Qualified" as used in RCW 10.77.060(1)(a) means "fit for the particular, not general, task at hand."**

"Qualified" is not specifically defined in Chapter 10.77 RCW . Nevertheless, application of basic rules of statutory interpretation leads to the conclusion that it means "competent for the particular, not general, task at hand."

Statutory interpretation is a question of law that is reviewed *de novo*. *Dot Foods, Inc. v. Dep't of Revenue*, 166 Wn. 2d 912, 919, 215 P. 3d 185 (2009). The fundamental objective is to ascertain and carry out the legislature's intent. *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn. 2d 359, 367, 89 P. 3d 217 (2004). Such intent is derived primarily from the statutory language. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn. 2d 1, 9-10, 43 P. 3d 4 (2002).

The first step is to look at the plain language of the statute. *Lake v.*

Woodcreek Homeowners Ass'n, 169 Wn. 2d 516, 526, 243 P. 3d 1283 (2010). The duty of the reviewing court is to give effect to the plain meaning of the statutory language as an expression of legislative intent. Arborwood Idaho, LLC at 367. If the language is unambiguous, the statute's meaning is derived solely from such language and the inquiry is over. Campbell & Gwinn at 9-10; Lake at 526.

To determine the plain meaning, a reviewing court "construe[s] and appl[ies] words according to the meaning that they are ordinarily given, taking into account the statutory context, basic rules of grammar, and any special usages stated by the legislature on the face of the statute." Campbell & Gwinn at 11. See also United States v. Goldenberg, 168 U.S. 95, 103, 18 S. Ct. 3, 42 L. Ed. 394 (1897) (noting that lawmakers are "presumed to know the ... rules of grammar"). If a term is undefined by the legislature, a reviewing court may look to the dictionary to determine its plain meaning. Garrison v. Wn. State Nursing Bd., 87 Wn. 2d 195, 196, 550 P. 2d 7 (1976). See, e.g., City of Bellevue v. Lorang, 140 Wn. 2d 19, 25, 992 P. 2d 496 (2000) (reviewing various dictionaries to ascertain the definition of "profane" in telephone harassment ordinance).

The legislature is presumed not to use superfluous words. Auto

Drivers v. Retirement Systems, 92 Wn. 2d 415, 421, 598 P. 2d 379 (1979). Wherever possible, each word of a statute should be given meaning. State v. Lundquist, 60 Wn. 2d 397, 403, 374 P. 2d 246 (1962). Redundancy is to be avoided. See Lorang at 25 (disagreeing with a reading of “profane” that renders it redundant with “indecent” and “obscene” in telephone harassment ordinance). Even though a reviewing court examines the broader statutory context, it does not add words where the legislature has not included them, and it construes statutes “such that all of the language is given effect.” Lake at 526. A reviewing court will construe a statute so as to avoid strained or absurd consequences. In re Detention of A.S., 138 Wn. 2d 898, 911, 982 P. 2d 1156 (1999).

If, after this plain-language inquiry, a statute remains susceptible of more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to legislative history and circumstances surrounding the statute’s enactment to determine legislative intent. Lake at 527; Campbell & Gwinn at 12; City of Seattle v. Winebrenner, 167 Wn. 2d 451, 456, 219 P. 3d 686 (2009). A statute is not ambiguous merely because different interpretations are conceivable. Burton v. Lehman, 153 Wn. 2d 416, 423, 103 P. 3d 1230 (2005). Where ambiguities exist, it may be

appropriate to consider public policy in defining a term. *See DeLong v. Parmelee*, 157 Wn. App. 119, 146, 236 P. 3d 936 (2010) (noting that as long as the statutory language is unambiguous, public policy does not justify a departure from the natural meaning).

According to Webster's Third New International Dictionary 1858 (1986), the main sense of "qualified" has two coordinate subsenses: "fitted (as by endowments or accomplishments) for a given purpose : competent, fit" and "having complied with specific requirements or precedent conditions (as for an office or employment) : eligible, certified." In the Oxford English Dictionary, Third Edition 1533 (2007), the primary sense of "qualified" is "possesses a certain quality or qualities", of which there are two coordinate subsenses: "[h]aving qualities or possessing accomplishments which fit one for a certain end, office, or function; having an officially recognized qualification to practise as a member of a particular profession; fit, competent" and "[h]aving the attributes required by law, custom, etc., for doing or being something (specified or implied)." Thus, the coordinate subsenses as found in both dictionaries evidence some tension between the concepts of "fit for a given or particular purpose" and "generally fit to practice a particular profession or engage in

certain employment.”

These subsenses are subtly, but clearly different, as a person might qualify for membership in a profession yet not be an appropriate candidate to perform certain specialized services within the profession. Take, for example, a licensed attorney who for thirty years has limited her criminal defense practice to handling misdemeanors in state courts of limited jurisdiction. She is certainly qualified for membership in the profession and, in a general sense, to practice criminal defense. However, without substantial additional training and study, she would not be qualified or competent to handle such a highly specialized matter as a criminal securities fraud case in federal court. *See* RPC 1.1 and commentary.

3. Only redundancy allows a psychologist, merely by virtue of being licensed, to be “qualified” under RCW 10.77.060(1)(a).

Because RCW 10.77.010(18) already defines “professional person” according to such general employment- or licensing-based criteria, this meaning of “qualified” would be redundant, however, rendering the word superfluous. Under subsection 18, “professional person” means:

(a) A psychiatrist licensed as a physician and surgeon in this state who has, in addition, completed three years of graduate training in psychiatry in a program approved by the American medical association or the American osteopathic association and is certified

or eligible to be certified by the American board of psychiatry and neurology or the American osteopathic board of neurology and psychiatry;

(b) A psychologist licensed as a psychologist pursuant to chapter 18.83 RCW; or

(c) A social worker with a master's or further advanced degree from an accredited school of social work or a degree deemed equivalent under rules adopted by the secretary.

Indeed, it would go beyond mere redundancy into the absurd to say that Dr. Strandquist, a licensed psychologist and therefore a “professional person,” was a “qualified professional person” because he was licensed.

The State might argue that “qualified”, appearing in the phrase “qualified experts or professional persons,” modifies only “experts” and not “professional persons” and thus Dr. Strandquist, a “professional person,” did not need to be “qualified” in order to perform his critical duty to the court. However, “professional person” has already been assigned a statutory definition, which allows it to be viewed as a single unit of meaning. Moreover, “professional” as used in the phrase is either a noun or an adjective acting as a noun, *see* Garner’s Modern American Usage (Oxford University Press 2009) at 380-381; and in either case “professional person” would be deemed a compound noun, *see* Chicago Manual of Style (University of Chicago Press (16th Edition 2010) at 372-

373. When two nouns (or, of course, compound nouns) joined by the coordinating conjunction “or” are preceded by a single adjective, it is readily and commonly understood that each noun is modified by the single adjective. Thus, in *Burnham v. State Dept. of Social and Health Services*, 115 Wn. App. 435, 442-443, 63 P. 3d 816 (2003), the court held that, in the administrative code definition of “prosthetic devices”, which prevent or correct “physical deformity or malfunction”, the adjective “physical” modified both of the nouns “deformity” and “malfunction”, and not just “deformity”. Similarly, here, “qualified” modifies both the noun “experts” as well as the compound noun “professional persons”.⁶

4. Only disregard of context and acceptance of redundancy allows “qualified” as used in RCW 10.77.060(1)(a) to mean the same thing as in ER 702.

The State might argue that “qualified” as used in RCW 10.77.060(1)(a) means nothing more than what the Rules of Evidence have to say about the qualifications of expert witnesses under ER 702.⁷

⁶ Another example of a single modifier acting to modify two nouns joined by “or” is found in RCW 10.77.060(2), which mandates “that the defendant shall have access to all information obtained by the court appointed experts or professional persons.” In this subsection, “court appointed” modifies both “experts” and “professional persons” (both of whom, since they are “court appointed” must, of course, be qualified”).

⁷ Under ER 702,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as

Contextually, that would make little sense, as the experts and professional persons who are appointed or designated under RCW 10.77.060(1)(a) are not necessarily testifying experts. They occupy a special position of trust, reporting directly to the court in writing. *See* RCW 10.77.060(3); 10.77.065(1)(a)(I).

Additionally, the parties often rely very heavily on such reports. Trial courts frequently enter orders regarding competency on the basis of such reports alone, without any testimony (this is precisely what happened in *Heddrick*). The experts or professional persons who report directly to the court under RCW 10.77.060(1)(a) must therefore be “qualified” in a more exacting and specific sense than required under ER 702.

Moreover, if an expert or professional person is “qualified” under RCW 10.77.060(1)(a) merely for being qualified under ER 702, there would be redundancy between RCW 10.77.060(1)(a) and RCW 10.77.100, as well as within RCW 10.77.100 itself, which states:

Subject to the rules of evidence, experts or professional persons who have reported pursuant to this chapter may be called as witnesses at any proceeding held pursuant to this chapter. Both the prosecution and the defendant may summon any other qualified expert or professional persons to testify.

an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Since the experts or professional persons who have “reported pursuant to this chapter” are already “qualified” under RCW 10.77.060(1)(a), the reference to “the rules of evidence” would be redundant, at least insofar as ER 702 is concerned. Furthermore, once the legislature stated, in RCW 10.77.100, that the testimony of “experts or professional persons who have reported pursuant to this chapter” was “subject to the rules of evidence”, there was no need to state, in the second sentence, that “the prosecution and the defendant may summon any other qualified expert or professional persons to testify” unless “qualified” means something other than what is meant in ER 702. To avoid superfluosity, absurdity, inconsistency, and redundancy, and to give meaning to every word in the statute, “qualified” as used in RCW 10.77.060(1)(a) must mean more than being qualified under ER 702 to testify in court as an expert.

5. The Washington code of ethics for psychologists is part of the statutory context that requires “qualified” as used in RCW 10.77.060(1)(a) to be defined as “fit for the particular purpose” of evaluating and reporting upon the unique person in issue.

To the extent that there is reasonable ambiguity between whether the legislature, in using the adjective “qualified”, meant one coordinate subsense (fit for a particular task or purpose), the other coordinate

subsense (compliance with the general requirements for employment or licensing), or the ER 702 sense, or to the extent that there is reasonable ambiguity in what makes a psychologist fit to evaluate and report upon the mental status and competency of a particular defendant with unique cultural, ethnic, spiritual, and linguistic attributes, it is worth taking a closer look at the statutory context and the public policy it represents. Dr. Strandquist is a licensed psychologist and thus a professional person under subsection 18(b). Accordingly, the focus should be on what light the statutory scheme sheds on the standards of practice by which licensed psychologists abide. This requires a look at Chapter 18.83 RCW, which is part of the statutory context in which the legislature placed “qualified”.

A reasonable contextual assumption is that the legislature could not have meant that a “psychologist licensed as a psychologist pursuant to chapter 18.83 RCW” and therefore a “professional person” under RCW 10.77.010(18)(b) was “qualified” under RCW 10.77.060(1)(a) even though his competency evaluation constituted unprofessional conduct and subjected him to discipline under chapter 18.83 RCW. Indeed, a psychologist who fails to abide by the ethical commands of his profession is not acting even as a “professional person”, let alone a “qualified

professional person”.

“This state’s statutes express a clear public policy in favor of putting an end to unethical and unprofessional behavior on the part of therapists.” *American Home Assur. Co. v. Cohen*, 124 Wn. 2d 865, 880, 881 P. 2d 1001 (1994). Psychologists must be licensed under RCW 18.83.020(1) in order to “safeguard the people of the state of Washington from the dangers of unqualified and improper practice of psychology.” *Id.* The legislature has directed the examining board of psychology to adopt a code of ethics for psychologists “designed to protect the public interest.” RCW 18.83.050(5). A psychologist who violates the code commits unprofessional conduct and is subject to discipline.⁸ RCW 18.83.121(2). The language and purpose of RCW Chapter 18.130 authorizes the initiation of a disciplinary proceeding to be based upon unprofessional conduct as an expert witness. *Deatherage v. State, Examining Bd. of Psychology*, 134 Wn. 2d 131, 139-140, 948 P. 2d 828 (1997).

Under the ethical code, a “psychologist shall limit practice to the areas in which he/she is competent.” WAC 246-924-353(1). With

⁸ Discipline may include suspension or revocation of the psychologist's license, monitoring, restricting or limiting the psychologist's practice, requiring treatment or education of the psychologist, fines, censure or reprimand. RCW 18.130.160 (part). Additionally, an injunctive action may be brought by any person, in the name of the State of Washington, to enjoin the unprofessional conduct of a psychologist. RCW 18.130.185.

competency, at a minimum, “based upon appropriate education, training, or experience,” *id.*, a psychologist without the requisite competency “shall refer to other health care resources, legal authorities, or social service agencies when such referral is in the best interest of the client.” WAC 246-924-353(2). Practicing in an area of psychology for which the person is clearly untrained or incompetent is deemed to be unprofessional conduct. RCW 18.83.121(4). Moreover, under RCW 18.130.180(4) it is unprofessional conduct to commit an act of “[i]ncompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed.”

On the issues of competence, negligence, malpractice, and standard of care, Dr. Strandquist himself conceded that an understanding of a patient or subject’s age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, and socioeconomic status could be important for the effective implementation of psychological services. 3-12-10 RP 92-94. He agreed that the failure to understand a particular person’s culture or religious beliefs could result in a misdiagnosis. 3-12-10 RP 97-98. Dr. Adler noted the very high likelihood of misdiagnoses and inappropriate treatment in the absence of a

complete cultural understanding of the examinee. 3-24-10 RP 175-176.

This notion of basic “cultural competence” is also found in the Diagnostic and Statistical Manual of Mental Disorders IV-TR (2000), which includes an outline for cultural formulation to guide diagnostic interviews and assessments of cross-cultural patients. The DSM-IV-TR highlights various areas, including an examination of the patient’s multi-cultural background, and the role a patient’s cultural background may play in terms of expression and evaluation of patient symptoms. *See* 3-12-10 RP 44, 97-99.

It is also found in The 2002 Ethics Code of the American Psychological Association, which Dr. Strandquist himself followed. APA Std 2.01(b) requires that:

Where scientific or professional knowledge in the discipline of psychology establishes that an understanding of factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, or socioeconomic status is essential for effective implementation of their services or research, psychologists [must] have or obtain the training, experience, consultation, or supervision necessary to ensure the competence of their services, or they make appropriate referrals, except as provided in Standard 2.02, Providing Services in Emergencies.⁹

Additionally, a psychologist must recognize the limitations of

⁹ The APA code is found at CP 109-123.

psychometric test results; when reporting on the results of an assessment procedure, he shall include any relevant reservations, qualifications or limitations which affect the validity, reliability, or other interpretation of results. WAC 246-924-365(2). According to the APA Code, “a psychologist[must] use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists [must] describe the strengths and limitations of test results and interpretation.” APA Std 9.02(b). In general, efforts should be made to select tests and norms that a) come as close as possible to meeting recognized scientific standards of validation, b) are representative of the population with whom they are being used, and c) follow standards of translation and adaptation. APA Std 9.02. Dr. Strandquist agreed with these standards of care, conceding that selection, administration, and interpretation of psychometric tests must take into consideration the particular individual being tested and that the clinician’s awareness regarding the subject’s culture was important. 3-12-10 RP 94-96. He admitted that giving the right test to the right patient population is absolutely critical and not a peripheral issue. 3-12-10 RP 162.

Nevertheless, he administered tests to Ms. Sisouvanh that were neither created for nor normed using Lao test takers and administered no tests to assess her level of acculturation. 3-12-10 RP 19, 101-109, 113-114. According to Dr. Adler, the two psychometric tests given by Dr. Strandquist to Ms. Sisouvanh were “clearly inappropriate” and “absolutely not” interpreted in a culturally competent manner. 3-24-10 RP 269:4-9.

Answering the question “Tell me what you know about Ms. Sisouvanh’s culture?” with the answer “Not much”, Dr. Strandquist leaves little doubt that he neither had the requisite cultural competence to evaluate Ms. Sisouvanh, obtained it, nor referred her to or associated with someone who had it.¹⁰

¹⁰ The importance of cultural competence in various legal contexts has long been accepted as the norm, and thus there is nothing “cutting edge” about a requirement that professionals who are statutorily directed to perform critically important competency evaluations be similarly qualified. For example, trial counsel in death penalty cases are obligated under the Sixth Amendment to investigate and consider presenting mitigating evidence in the form of the cultural influences, if any, on their clients. *Wiggins v. Smith*, 539 U.S. 510, 524-525 (2003) (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, p. 133 (1989)). Capital defense counsel may be highly experienced and extraordinarily qualified in a general sense but lack the familiarity with their particular client’s culture that would allow them to have “client-specific” competence. The simple solution is for them to retain a cultural expert or a culturally qualified mitigation specialist to assist them.

In a trial on guilt, “counsel undertaking to represent defendants with unique cultural backgrounds have an obligation at least to consider the effect of that background on their clients’ conduct.” *Siripongs v. Calderon*, 35 F. 3d 1308, 1315 (9th Cir. 1994).

The importance of cultural competence in judicial credibility assessments of witnesses has also been emphasized. *See, e.g., Lao v. Gonzales*, 400 F. 3d 530, 534 (7th Cir.2005) (calling immigration judges’ “insensitivity to the difficulty of basing a determination of credibility on the demeanor of a person from a culture remote from the American” a “disturbing feature” of many immigration cases); *Djouma v. Gonzales*, 429

6. Even if the ER 702 standard is an analog for being “qualified” to evaluate and report upon the competency of the defendant under RCW 10.77.060(1)(a), Dr. Strandquist was not qualified to evaluate Ms. Sisouvanh.

If an expert or professional person is qualified to conduct an evaluation and write a report to the trial court under RCW 10.77.060(1)(a) merely by virtue of satisfying the requirements of ER 702, then the trial court still violated due process, as Dr. Strandquist was not qualified even under that rule. Under ER 702, the trial court may permit "a witness qualified as an expert" to provide an opinion regarding "scientific, technical, or other specialized knowledge" if such testimony "will assist the trier of fact." The two key criteria for admission of expert testimony are a qualified witness and helpful testimony. *State v. Cauthron*, 120 Wn. 2d 879, 890, 846 P. 2d 502 (1993), overruled in part on other grounds by *State v. Buckner*, 133 Wn. 2d 63, 941 P. 2d 667 (1997). A trial court's admission of expert testimony is reviewed for an abuse of discretion. *State v. Russell*, 125 Wn. 2d 24, 69, 882 P. 2d 747 (1994). However, the issue here is not the admissibility of Dr. Strandquist's testimony, but, rather,

F. 3d 685, 687-88 (7th Cir.2005) (lamenting that immigration judges often lack the cultural competence on which to base credibility determinations of an immigrant's demeanor).

whether he was qualified in the first instance to act as the court's expert under the mandatory requirements of RCW 10.77.060(1)(a). Even if the ER 702 standard is an analog for being "qualified", the issue is still one of constitutional magnitude, because the failure to follow the statutory procedure is a failure of due process. *Heddrick* at 909; *O'Neal* at 901.

Although an expert qualified under ER 702 to testify on the mental condition of a person need not necessarily be licensed in Washington, *see In re Marshall v. State*, 156 Wn. 2d 150, 125 P. 3d 111 (2005) (noting that an out-of-state psychologist who may not have held a valid temporary license to practice in Washington was a testifying expert under ER 702 and not an evaluating expert under the sexual predator statute, chapter 71.09 RCW), surely a psychologist whose conduct falls below recognized standards of professional competence and who is thus subject to discipline under the ethics code, is not qualified to provide evidence under that rule. Accordingly, even using ER 702 as an analog to determine the meaning of "qualified" under RCW 10.77.060(1)(a), the trial court violated due process. Indeed, even if this Court treats Ms. Sisouvanh's arguments regarding the qualifications of Dr. Strandquist as an evidentiary objection, then his testimony should not have been admitted at the competency

hearing and the trial court erred in concluding that Ms. Sisouvanh had not carried her burden of proof on competency.

V. CONCLUSION.

The trial court failed to follow the requirements of RCW 10.77.060(1)(a), and thus Ms. Sisouvanh was forced to trial without a determination of competency that complied with due process. The remedy is to vacate her conviction and remand for a new trial to take place only after a competency hearing is held that complies fully with the mandatory, not merely directory, procedural requirements of Chapter 10.77 RCW, assuming one is needed.¹¹ *See State v. Marshall*, 144 Wn. 2d 266, 27 P. 3d 192 (2001) (vacating guilty plea and remanding when trial court, despite reasons to doubt defendant's competency, found defendant competent without the benefit of a statutory competency hearing).

The structural aspect of the error is illustrated by efforts to engage in a review for harmlessness. The failure to observe the statutory procedures in chapter 10.77 RCW is a violation of due process. Thus, a harmlessness analysis, if any, would be one of constitutional dimension,

¹¹ If this Court treats Ms. Sisouvanh's arguments as an admissibility objection under ER 702, then, because the trial court abused its discretion in admitting Dr. Strandquist's testimony and therefore erred in concluding that Ms. Sisouvanh had not carried her burden of proof, the remedy is a remand for a new trial.

requiring this Court to presume prejudice and the State to prove the error was harmless beyond a reasonable doubt. *State v. Stephens*, 93 Wn. 2d 186, 190-91, 607 P. 2d 304 (1980).

Because RCW 10.77.060(1)(a) requires that a “qualified expert or professional person” perform the evaluation and write a report, the harmless inquiry should not be into whether the State can prove beyond a reasonable doubt that the trial court’s findings and conclusions after the competency evidentiary hearing would have been the same in the absence of Dr. Strandquist’s testimony. Simply removing the negative – the evidentiary taint of testimony by an “unqualified expert or professional person” – is insufficient. In the analysis of harmless, Ms. Sisouvanh should be provided with the mandatory positive – a “trial court’s expert” who is culturally qualified. Presuming prejudice – that is, presuming that a culturally qualified expert or professional person whose duty was to report directly to the trial court would have found Ms. Sisouvanh incompetent – the issue is whether the State can prove beyond a reasonable doubt that the trial court would have reached the same conclusion at the end of the competency hearing. Indeed, since the State with virtual certainty would have stipulated to Ms. Sisouvanh’s

incompetency if it received a report, stamped with the imprimatur of Eastern State Hospital, that Ms. Sisouvanh was incompetent, perhaps the real question is whether the State can now prove there would even have been a hearing.

Alternatively, instead of remanding for a new trial, this Court might remand for the trial court to determine 1) if it is possible for a culturally qualified expert or professional person appointed or designated as the trial court's expert to conduct a retrospective competency evaluation and 2) if such an evaluation is possible, whether a retrospective competency hearing is possible. Although retrospective competency hearings are disfavored, *see Drope* at 183; *Blazak v. Ricketts*, 1 F. 3d 891, 894 n. 3 (9th Cir.1993) (Tang, J., for an equally divided court), cert. denied sub. nom *Lewis v. Blazak*, 114 S. Ct. 1866, 128 L. Ed. 2d 487 (1994), they are permissible whenever a court can conduct a meaningful hearing to evaluate retrospectively the competency of the defendant. *De Kaplany v. Enomoto*, 540 F. 2d 975, 986 n. 11 (9th Cir.1976) (en banc), *cert. denied*, 429 U.S. 1075, 97 S. Ct. 815, 50 L. Ed. 2d 793 (1977).

If a meaningful retrospective evaluation or hearing¹² is not possible, then Ms. Sisouvanh would be entitled to a new trial. If a

¹² "Meaningful" and "retrospective" modify both "evaluation" and "hearing".

meaningful retrospective evaluation and hearing are both possible, then the trial court should order that an evaluation be conducted and a report written by a culturally competent expert or professional person and, if necessary, a hearing should be held, with the outcome to determine whether Ms. Sisouvanh gets a new trial or her conviction is affirmed.

DATED: July 7, 2011.

Respectfully submitted,

Law Offices of Michael Iaria PLLC
Attorneys for Appellant

By: S/ _____
Michael Iaria, WSBA No. 15312