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Supreme Court No. 90479-1
Court of Appeals No. 71067-2-1
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,
vs.

Brian Brush
Respondent/Cross-Petitioner

Pacific County Superior Court Cause No. 09-1-00143-8
The Honorable Judge Michael J. Sullivan

SUPPLEMENTAL BRIEF

Manek R. Mistry
Jodi R. Backlund
Attorneys for Respondent/Cross-Petitioner

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com



ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUES ON REVIEW 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 1

ARGUMENT 8

**I. The erroneous introduction of inadmissible hearsay
prejudiced Mr. Brush because the jury relied on it to establish an ongoing
pattern of abuse over a prolonged period of time.**..... 8

 A. Standard of Review..... 8

 B. The trial judge abused his discretion by admitting
hearsay during the sentencing phase of Mr. Brush’s trial..... 8

**II. The trial court commented on the evidence and relieved
the state of its burden to prove a pattern of abuse over a prolonged period
of time.** 11

 A. Standard of Review..... 11

 B. The trial judge should not have directed a verdict by
telling jurors that “[t]he term ‘prolonged period of time’ means more
than a few weeks.” 12

CONCLUSION 15

TABLE OF AUTHORITIES

FEDERAL CASES

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 13

WASHINGTON STATE CASES

Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 281 P.3d 289 (2012)..... 11

LK Operating, LLC v. Collection Grp., LLC, 181 Wn.2d 48, 331 P.3d 1147 (2014)..... 11

State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995)..... 12, 15

State v. Barnett, 104 Wn. App. 191, 16 P.3d 74 (2001) 13

State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997)..... 11

State v. Edwards, 131 Wn. App. 611, 128 P.3d 631 (2006)..... 10, 11

State v. Epefanio, 156 Wn. App. 378, 234 P.3d 253 (2010)
reconsideration denied, review denied, 170 Wn.2d 1011, 245 P.3d 773
(2010)..... 12, 13, 14

State v. Fisher, 165 Wn2d 727, 202 P.3d 937 (2009)..... 8

State v. Garcia-Trujillo, 89 Wn. App. 203, 948 P.2d 390 (1997) 10

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 11

State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006)..... 11, 13, 15

State v. Mau, 178 Wn. 2d 308, 308 P.3d 629 (2013)..... 13

State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001), *as amended* (July 19,
2002) 8

State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992)..... 14

State v. Wright, 152 Wn. App. 64, 214 P.3d 968 (2009)..... 12

<i>State v. Young</i> , 160 Wn.2d 799, 161 P.3d 967 (2007).....	8, 9
<i>Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.</i> , 171 Wn.2d 88, 249 P.3d 607 (2011).....	8

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV	1, 12
Wash. Const. art. IV, § 16.....	1, 12

WASHINGTON STATUTES

RCW 10.99.020	4
RCW 9.94A.535.....	12

OTHER AUTHORITIES

11A Wash. Prac., Pattern Jury Instr. Crim. (3d Ed).....	13
ER 802	1, 8, 10, 11
ER 803	9, 11
WPIC 300.17.....	13

ISSUES ON REVIEW

1. Hearsay evidence is generally inadmissible. Here, the trial judge overruled Mr. Brush's hearsay objection and allowed the jury to consider Bonney's out-of-court statements as proof of a pattern of abuse. Did the trial judge abuse his discretion by admitting hearsay in violation of ER 802?

2. A trial judge is absolutely prohibited from commenting on matters of fact, and any judicial comment is presumed to be prejudicial. In this case, the judge instructed jurors that "[t]he term 'prolonged period of time' means more than a few weeks." Did the trial judge's comment violate Mr. Brush's rights under Wash. Const. art. IV, § 16?

3. An exceptional sentence based on a pattern of abuse requires the prosecution to prove multiple incidents of abuse occurring over a prolonged period of time. Here, the judge instructed jurors that the phrase "prolonged period of time" was "more than a few weeks." Did the instruction relieve the prosecution of its burden to prove the elements of the domestic violence/pattern of abuse aggravating factor beyond a reasonable doubt, in violation of Mr. Brush's Fourteenth Amendment right to due process?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Brian Brush had a very successful boat business until the economy started to fail in late 2007. RP (12/5/11) 43, 45. Around that same time, his mother passed away, and his wife divorced him. RP (11/28/11) 220; RP (11/29/11) 17-18; RP (12/5/11) 46-48, 111.

Mr. Brush met Lisa Bonney online, and they fell in love. RP (11/28/11) 208, 238; RP (12/5/11) 49. They were very attached to each other; however, their relationship was volatile. At one point they became engaged; the engagement was broken off during the summer of 2009. RP (11/28/11) 230, 238; RP (12/5/11) 51, 110. By this time, Mr. Brush was estranged from his children, his business was in receivership, and he was under investigation by the Federal Bureau of Investigation for tax-related issues. RP (10/12/11) 62-63; RP (11/28/11) 199-200, 206, 220; RP (12/5/11) 49-51, 111. Mr. Brush suffered from major depression, as well as post-traumatic stress disorder stemming from his previous work as a police officer. RP (12/5/11) 103-106, 113-114, 166-167.

On September 11, 2009, the town of Long Beach put on a car show called Rod Run. The town's beach was crowded with both locals and tourists. RP (10/12/11) 3, 27; RP (12/5/11) 61, 64. That morning, Mr. Brush went hunting with his dog, did some yard work at Bonney's house, and went to the bank to sign over a boat to his creditors. RP (11/28/11) 228, RP (11/29/11) 102, 115; RP (12/5/11) 56. In the afternoon, he met Bonney at the beach. Their relationship was strained, and both felt they would break up permanently. They sat on a bench and spoke about issues relating to assets they shared, including a home he'd purchased for her. RP (11/28/11) 231-232, 247; RP (12/5/11) 57-61, 146, 200.

The couple argued. Bonney didn't want Mr. Brush to allow the bank to foreclose on the home; Mr. Brush saw no other options. At some point, Bonney angrily told Mr. Brush that he was not a man, and called him a "pussy". RP (11/28/11) 249; RP (12/5/11) 57-61. Mr. Brush walked to his truck, grabbed his shotgun, and shot Bonney four times in quick succession. RP (11/28/11) 81-83, 102, 112, 115, 120-122, 124, 135, 138. The shooting occurred at 4:41pm. RP (11/28/11) 104-106.

Three police officers saw him do this and immediately came over and yelled commands. Mr. Brush threw down the gun, walked toward the officers, knelt on the ground, and then lay prone. RP (10/12/11) 17; RP (11/28/11) 83-85, 110-111, 137.

Mr. Brush later gave a statement to police. He described his volatile relationship with Bonney, outlined abuse he'd suffered at her hands, and indicated that he had no memory of the shooting itself. RP (11/28/11) 205-239. Towards the end of his statement, he expressed surprise at discovering that he'd shot Bonney. RP (10/12/11) 73; RP (11/28/11) 239. He also described how Bonney had scratched him, hit him, and told him to "be a f*cking man." He told the officer that the last thing he remembered was Bonney telling him "Be a man, don't be a pussy." He also said he didn't remember getting the gun from the truck. Ex. H, Ex. K.

The state charged Mr. Brush with Murder in the First Degree. The state alleged several aggravators, including that:

The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present: (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. CP 11-13.

The trial was bifurcated, so that jurors would not hear any allegations of a pattern of domestic violence until a second sentencing phase. RP (11/15/11) 102-126.

During the guilt phase, one state expert opined that at least one of the shots was fired from a distance of three feet or less, and that the others were fired from three to nine feet away. RP (11/29/11) 66-71. The medical examiner who conducted the autopsy opined that the first shot was to Bonney's torso, from roughly four or five feet away. He testified that the shot would have caused pain, but would not have been fatal. RP (11/30/11) 20-24. The second shot was a fatal shot: it hit her spine and pierced many vital organs. RP (11/30/11) 25-27, 31-33. The third shot hit her buttocks, and was also fatal. RP (11/30/11) 34-37. The last shot was to her head, displacing bone and tissue from her skull; it too was a fatal shot. RP (11/30/11) 38-43.

The medical examiner told the jury that the third and fourth shots were not necessary to kill Bonney, but that they were “to make sure she was dead”. RP (11/30/11) 45-46. Over defense objection, he opined that the damage done by the shots was “far in excess of what is required to just kill somebody.” RP (11/30/11) 48-49.

Mr. Brush presented expert testimony in support of a diminished capacity defense. The prosecution countered with its own expert, who claimed that Mr. Brush acted intentionally and with premeditation. RP (12/5/11) 25-224. Both experts diagnosed Mr. Brush with major depression, post-traumatic stress disorder, and a personality disorder. RP (12/5/11) 103-106, 113-114, 166-167.

The defense expert discussed past incidents she considered in developing her opinion. RP (12/5/11) 51-60, 130-153. These included an incident in which Mr. Brush hit Bonney’s car with a hammer during an argument, and another incident in which he’d followed Bonney to a man’s home and confronted both of them.¹ RP (12/5/11) 51-60, 133, 138. The hammer incident occurred near the end of July; the other incident occurred in August sometime. RP (12/5/11) 52, 143.

¹ Mr. Brush apparently also threatened Bonney with “financial ruin” during a counseling session. RP (12/5/11) 139-141.

The jury found Mr. Brush guilty of Murder in the First Degree.²
CP 200.

Following these verdicts, the court held the second phase of the trial to address the allegation that Mr. Brush engaged in a pattern of domestic violence. The state sought to admit evidence from Bonney's then 20-year-old daughter Elizabeth Bonney³ regarding statements Bonney had made about prior alleged domestic violence incidents with Mr. Brush. Mr. Brush objected. RP (11/15/11) 102-128; RP (12/6/11) 137-167; CP 207-222. The court ruled the evidence admissible. RP (12/6/11) 161, 167.

Elizabeth testified that she and her mother became convinced that Mr. Brush was following them as they went for a walk in August of 2009. RP (12/6/11) 174-178. During that walk, Bonney told Elizabeth that the day before, Mr. Brush had driven past the house of a male friend while she was there. RP (12/6/11) 184. In describing the incident, Bonney said that "[Mr. Brush] always stalks the house." The court overruled a defense objection. RP (12/6/11) 180.

² They also returned special verdicts finding that Mr. Brush and Bonney were members of the same family or household, that Mr. Brush was armed with a firearm, that Mr. Brush's conduct manifested deliberate cruelty, that the injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense, and that the crime was an "aggravated domestic violence offense" (based on allegations that Mr. Brush's conduct manifested deliberate cruelty and that Bonney's injuries substantially exceeded those necessary to meet the elements of the offense). CP 201-205.

³ To avoid confusion, Elizabeth Bonney will be referred to as "Elizabeth."

Over defense objection, the court gave an instruction on the “pattern of abuse” aggravator. The instruction included the following language:

That the offense was part of an ongoing pattern of psychological abuse of the victim manifested by multiple incidents over a prolonged period of time.

An “ongoing pattern of abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks.

CP 229; RP (12/6/11) 206-209.

The jury endorsed this aggravating factor. RP (12/6/11) 227-230; CP 232.

The judge imposed an exceptional sentence of 1000 months, plus a 60-month firearm enhancement. RP (2/9/12) 67-68; CP 45-66. Mr. Brush timely appealed. CP 45-68.

The Court of Appeals affirmed the conviction but reversed Mr. Brush’s exceptional sentence and vacated the “ongoing pattern of abuse” aggravating factor.⁴

⁴ The Court of Appeals also vacated two other aggravating factors. Opinion, p. 11-17. The state’s Petition addresses only the “ongoing pattern of abuse” aggravating factor.

ARGUMENT

I. THE ERRONEOUS INTRODUCTION OF INADMISSIBLE HEARSAY PREJUDICED MR. BRUSH BECAUSE THE JURY RELIED ON IT TO ESTABLISH AN ONGOING PATTERN OF ABUSE OVER A PROLONGED PERIOD OF TIME.

A. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wn2d 727, 750, 202 P.3d 937 (2009). A trial court abuses its discretion when its ruling is manifestly unreasonable or based upon untenable grounds or reasons. *Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011). An evidentiary error is harmless if it 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.⁵ *Id.*

B. The trial judge abused his discretion by admitting hearsay during the sentencing phase of Mr. Brush's trial.

Hearsay is generally inadmissible. ER 802. A statement's proponent must establish an exception to this general rule. *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). Here, the prosecution did not

⁵ A party can also show prejudicial error by establishing that there is a reasonable probability that the outcome of trial would have been materially affected had the error not occurred. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), *as amended* (July 19, 2002).

do so when it introduced Bonney's out-of-court statements through her daughter's testimony.

The prosecution offered the hearsay as an excited utterance under ER 803(a)(2). RP (11/15/11) 102-128; RP (12/6/11) 137-167; CP 207-222. A statement is not admissible as an excited utterance unless the proponent "satisf[ies] three 'closely connected requirements' that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition." *Young*, 160 Wn.2d at 806.

In this case, Bonney's statement to her daughter did not qualify as an excited utterance. The statement did not relate "to the startling event or condition" that caused Bonney's stress. *Young*, 160 Wn.2d at 806. Instead, the information she related to her daughter involved an earlier source of stress.⁶ RP (11/15/11) 102-128; RP (12/6/11) 137-167; CP 207-222.

The excited utterance rule does not permit the introduction of hearsay relating to *all* stressful events, just because the declarant is currently under stress caused by a recent startling event or condition. *Id.*;

⁶ The daughter was permitted to relay Bonney's description of prior encounters she'd had with Mr. Brush. RP (12/6/11) 174-186.

ER 803(a)(2). The exception only applies to statements relating to the recent startling event or condition. The daughter's testimony should have been excluded under ER 802.

Where improperly admitted hearsay relates to a critical issue, a reviewing court must reverse. *State v. Garcia-Trujillo*, 89 Wn. App. 203, 211, 948 P.2d 390 (1997). Such an error is not harmless unless the untainted evidence is overwhelming. *State v. Edwards*, 131 Wn. App. 611, 615, 128 P.3d 631 (2006).

Here, the hearsay related to a critical issue. Bonney's statements to her daughter pertained directly to the domestic violence aggravating factor. Bonney's description of prior incidents contributed to the jury's finding that there had been an "ongoing pattern of abuse... over a prolonged period of time." CP 229. Without Bonney's hearsay statements, the jury would not have found such a pattern. Aside from the hearsay, the limited evidence describing prior incidents did not clarify the timeframe.⁷ Thus, the state did not produce overwhelming untainted evidence.

Edwards, 131 Wn. App. at 615. The error was not harmless. *Id.*

Because Bonney's statements were critical to the prosecution's case, the erroneous admission of hearsay prejudiced Mr. Brush. *Garcia-*

Trujillo, 89 Wn. App. at 211. The evidence supporting the aggravating factor was not “overwhelming.” *Edwards*, 131 Wn. App. at 615. The jury’s special verdict must be vacated. *Id.* If a new sentencing hearing is held, Bonney’s statements to her daughter must be excluded. ER 802; ER 803(a)(2).

II. THE TRIAL COURT COMMENTED ON THE EVIDENCE AND RELIEVED THE STATE OF ITS BURDEN TO PROVE A PATTERN OF ABUSE OVER A PROLONGED PERIOD OF TIME.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014). Jury instructions are also reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

A comment on the evidence “invades a fundamental right” and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Judicial comments are presumed prejudicial. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d

⁷ During the guilt phase, one expert had testified that the couple had a bad fight at the end of July and that Mr. Brush had allegedly stalked Bonney sometime in August. RP (12/5/11) 52, 143.

1076 (2006). A comment on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Id.* This is a higher standard than that normally applied to constitutional errors. *Id.*

B. The trial judge should not have directed a verdict by telling jurors that “[t]he term ‘prolonged period of time’ means more than a few weeks.”

The Washington constitution provides “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Art. IV, § 16. The Fourteenth Amendment right to due process prohibits a trial judge from instructing jurors in a manner that relieves the state of its burden of proof. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

The domestic violence/pattern of abuse aggravating factor requires proof of “multiple incidents over a prolonged period of time.” RCW 9.94A.535(3)(h)(i). Whether a pattern of abuse stretches over a prolonged period of time is a factual question to be decided by the jury. *State v. Epefanio*, 156 Wn. App. 378, 392, 234 P.3d 253 (2010) *reconsideration denied, review denied*, 170 Wn.2d 1011, 245 P.3d 773 (2010).

Evidence of a two-week period has been held insufficient to establish a prolonged period of time. *State v. Barnett*, 104 Wn. App. 191, 203, 16 P.3d 74 (2001). By contrast, evidence of a six-week period has

been found sufficient to support the aggravating factor. *Epefanio*, 156 Wn. App. at 392.

In this case, the court instructed jurors that “[t]he term ‘prolonged period of time’ means more than a few weeks.” CP 229.⁸ This amounted to a comment on the evidence. *Levy*, 156 Wn.2d at 725. It relieved the state of its burden to prove the aggravating factor beyond a reasonable doubt, and directed the jury’s verdict in the prosecution’s favor.

The instruction conflates the court’s duty to determine evidentiary sufficiency with the task of instructing the jury. The test for evidentiary sufficiency is whether the evidence, viewed in a light most favorable to the state, could persuade a rational factfinder beyond a reasonable doubt. That is not the standard the jury applies.

Instead, due process requires the jury to apply the reasonable doubt standard. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The jury does not take the evidence in a light most favorable to the state. Nor does the jury examine the case to determine if a verdict of guilty would be merely rational. *Id.*

The phrase “more than a few weeks” may describe evidence that is sufficient to submit the aggravating factor to the jury (or to sustain it on

⁸ The court’s instruction here was based on WPIC 300.17. 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.17 (3d Ed).

(Continued)

appeal). *Epefanio*, 156 Wn. App. at 392. But a finding of sufficiency does not make the phrase “prolonged period of time” mean “more than a few weeks.” A pattern of abuse lasting more than a few weeks does not automatically establish a prolonged period of time as a matter of law.

Rather than defining “prolonged,” the phrase “more than a few weeks” marks the point at which the evidence, when taken in a light most favorable to the prosecution, will sustain the aggravating factor. *Epefanio*, 156 Wn. App. at 392. Petitioner suggests that the instruction merely provides a correct statement of the law. Petition, p. 11-12 (citing *Epefanio*). This argument shows a misunderstanding of the difference between the definition of a term and the sufficiency of the evidence.⁹

It is up to the jury to determine whether the facts show a length of that qualifies as “prolonged” in a particular case.¹⁰ *Epefanio*, 156 Wn. App. at 392. The court’s instruction told jurors that any period longer than

⁹ The reasoning underlying Petitioner’s argument would turn any appellate decision on the sufficiency of the evidence into a valid instruction telling jurors to vote guilty if they find similar facts. Thus a court might tell jurors “Premeditation is established by multiple stab wounds inflicted during a struggle.” Such an instruction would be consistent with *State v. Ortiz*, 119 Wn.2d 294, 312-313, 831 P.2d 1060 (1992), but would amount to a directed verdict on the issue of premeditation.

¹⁰ Thus, for example, one jury might conclude that a three-week period qualifies as “prolonged” when the parties have only been together for a few months. Another jury might decide that the same evidence doesn’t prove a “prolonged period of time” in the context of a 20-year relationship. Similarly, reasonable juries might differ on what qualifies as a prolonged period of time depending on the intensity of the abuse during the period.

a few weeks automatically qualified as “prolonged,” taking the essence of the question from them.

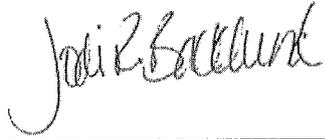
By defining “prolonged period of time” as “more than a few weeks,” the judge commented on the evidence and relieved the prosecution of its burden to establish the aggravating factor beyond a reasonable doubt. *Levy*, 156 Wn.2d at 725; *Aumick*, 126 Wn.2d at 429. Accordingly, the Supreme Court should affirm the Court of Appeals and the case should be remanded for a new sentencing hearing. *Levy*, 156 Wn.2d at 725.

CONCLUSION

The trial court improperly allowed the prosecution to introduce inadmissible hearsay. The court also commented on the evidence. The Court of Appeals correctly determined that these errors require reversal of the domestic violence/pattern of abuse aggravating factor. The Supreme Court should affirm the Court of Appeals.

Respectfully submitted December 1, 2014.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for Respondent



Manek R. Mistry, No. 22922
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Supplemental Brief,
postage pre-paid, to:

Brian Brush, DOC #337561
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

With the permission of the recipient(s), I delivered an electronic version of
the brief to:

Pacific County Prosecuting Attorney
dburke@co.pacific.wa.us

I filed the Supplemental Brief electronically with the Supreme Court.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE
LAWS OF THE STATE OF WASHINGTON THAT THE
FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 1, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Respondent/Cross-Petitioner

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Attached is respondent's supplemental brief.

Thank you.

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Backlund & Mistry
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870