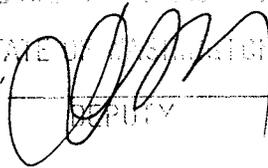


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DIVISION II

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STATE OF WASHINGTON
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No. 37359-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

John Coppin,

Appellant.

Lewis County Superior Court

Cause No. 05-2-01742-1

The Honorable Judge Richard Brosey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial judge erred by refusing Mr. Coppin's request for a jury trial.
2. The commitment order violated Mr. Coppin's constitutional right to a jury trial under Wash. Const. Article I, Section 21.
3. The commitment order violated Mr. Coppin's statutory right to a jury trial under RCW 71.09.050 (3).
4. The commitment order was based on insufficient evidence.
5. The state failed to establish that Mr. Coppin had been convicted of a "crime of sexual violence."
6. The state failed to establish that Mr. Coppin had committed a recent overt act.
7. The admission of evidence obtained unlawfully violated Mr. Coppin's constitutional rights under Wash. Const. Article I, Section 7.
8. The commitment order was entered in violation of Mr. Coppin's constitutional right to due process.
9. The state violated the exclusive procedures set forth in RCW 71.09.040 by subjecting Mr. Coppin to an SVP evaluation before filing a petition.
10. The state violated the exclusive procedures set forth in RCW 71.09.040 by subjecting Mr. Coppin to an SVP evaluation before obtaining a determination of probable cause.
11. Mr. Coppin was denied the effective assistance of counsel when his attorney failed to object to the use of Dr. Doren's evaluation at trial.
12. The trial court erred by admitting Mr. Coppin's custodial statements without conducting a hearing to determine whether or not they were voluntary.
13. The trial court erred by adopting Finding No. 5, which reads as follows:

The Respondent was totally confined on the date the state filed this sexually violent predator (SVP) action against him and had been totally confined since his incarceration for the offenses referenced above.

14. The trial court erred by adopting Conclusion of Law No. 3, which reads as follows:

The Respondent has been convicted of a crime of sexual violence as that term is defined in RCW 71.09.020(15), namely two counts of Statutory Rape in the First Degree.

15. The trial court erred by adopting Conclusion of Law No. 10, which reads as follows:

The evidence presented at the Respondent's trial proves beyond a reasonable doubt that the Respondent is a sexually violent predator, as that term is defined by RCW 71.09.020(16).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under CR 81, the Rules of Civil Procedure do not apply when they are inconsistent with rules or statutes applicable to special proceedings. RCW 71.09.050 (3) governs the right to a jury trial in SVP cases, and conflicts with CR 38. Is CR 38 inapplicable to special proceedings under RCW 71.09? Assignments of Error Nos. 1-3.

2. RCW 71.09 must be strictly construed because the statute curtails civil liberty. RCW 71.09.050 (3) provides that a person facing commitment as a sexually violent predator "shall have the right to demand that the trial be before a twelve-person jury." When strictly construed, does RCW 71.09.050 (3) permit a jury demand to be made orally, late in the proceedings, even after an initial waiver of the right? Assignments of Error Nos. 1-3.

3. RCW 71.09.050 (3) imposes no restrictions limiting a respondent's right to demand a jury trial in a sexually violent predator case. Mr. Coppin made an oral demand the morning of trial, after initially waiving his right to a jury trial. Should the trial judge have honored Mr. Coppin's jury demand? Assignments of Error Nos. 1-3.

4. The Washington Constitution declares that “[t]he right of trial by jury shall remain inviolate...” The trial court did not honor Mr. Coppin’s demand for a jury trial. Did the trial court violate Mr. Coppin’s constitutional rights under Wash. Const. Article I, Section 21? Assignments of Error Nos. 1-3.

5. To commit a person as a sexually violent predator, the state must prove that she or he has been charged with or convicted of a “crime of sexual violence.” The statute does not define the phrase “crime of sexual violence.” When strictly construed, does the statute require proof that the respondent was charged with or convicted of a crime that includes an element of swift, intense, rough, and injurious physical force? Assignments of Error Nos. 4-5.

6. Due process requires the state to prove a recent overt act for certain offenders, despite their incarceration on the day the Petition was filed. Here, on the day the Petition was filed, Mr. Coppin was unlawfully detained pursuant to an unconstitutionally imposed exceptional sentence. Was the state constitutionally required to prove a recent overt act, since Mr. Coppin was unconstitutionally incarcerated when the Petition was filed? Assignments of Error Nos. 4, 6.

7. The state may not disturb a person in her or his private affairs without authority of law. Evidence obtained in violation of the state constitutional right to privacy may not be admitted at trial. Did the admission at trial of evidence unlawfully obtained violate Mr. Coppin’s right to privacy under Wash. Const. Article I, Section 7? Assignment of Error No. 7.

8. RCW 71.09 requires the state to file a Petition and obtain a judicial determination of probable cause before subjecting a person to an SVP evaluation. In this case, the state violated the exclusive procedures set forth in RCW 71.09.040 by evaluating Mr. Coppin prior to filing a Petition and without a judicial determination of probable cause. Did the commitment order violate Mr. Coppin’s

constitutional right to due process? Assignments of Error Nos. 8-10.

9. A respondent in an SVP proceeding is entitled to the effective assistance of counsel. Mr. Coppin's attorney failed to object to the state's improper use of a pre-filing SVP evaluation. Was Mr. Coppin denied the effective assistance of counsel? Assignment of Error No. 11.

10. Due process prohibits the use of a respondent's involuntary statements at trial. The trial court admitted Mr. Coppin's statements without holding a hearing to determine voluntariness. Must the case be remanded for a voluntariness hearing? Assignments of Error No. 12.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On December 17, 1987, John Coppin pled guilty to two counts of Statutory Rape in the First Degree. Exhibit 3 (Statement on Plea of Guilty), p. 1, Supp. CP. His standard sentencing range was 77-102 months. Exhibit 3 (Statement on Plea of Guilty), p. 1, Supp. CP. Although the prosecuting attorney recommended a standard range sentence of 102 months, the sentencing court imposed an exceptional sentence of 300 months, or 25 years. Exhibit 3 (Statement on Plea of Guilty), p. 2, Supp. CP.; Exhibit 3 (Judgment and Sentence), p. 3, Supp. CP.

The sentencing judge's bases for the exceptional sentence are set forth in Appendix D to the Judgment and Sentence. Exhibit 3 (Judgment and Sentence – Appendix D), Supp. CP. The Judgment and Sentence indicates that the conviction was based on a plea of guilty; there is no indication that any aggravating factors were submitted to a jury for determination. Exhibit 3 (Judgment and Sentence, p. 1), Supp. CP.

In July of 2005, Mr. Coppin signed a consent form advising him that he would be evaluated as a sexually violent predator. Consent Form, Supp. CP. Among other things, the form outlined the procedure and told Mr. Coppin that he had a "right to choose to participate or not with the

interview,” which it described as “your opportunity to present your side of things (about the records concerning you), to discuss whatever benefit from treatment you have already obtained, and to provide other written items if you wish.” Consent Form, Supp. CP. The form included a recommendation that Mr. Coppin speak with an attorney, but did not indicate that he had any right to counsel at public expense if he could not afford an attorney. Consent Form, Supp. CP.

In September of 2005, Mr. Coppin was evaluated for commitment as a Sexually Violent Predator by Dr. Dennis Doren, PhD, a member of Washington’s Joint Forensic Unit. Certification for Determination of Probable Cause, p. 6, Supp. CP. Dr. Doren advised Mr. Coppin (among other things) of his right to refuse to submit to the interview, but did not ask him if he wished to consult with an attorney. Doren SVP Evaluation, pp. 1-2, Supp. CP.

At the time Mr. Coppin was evaluated, no Petition had been filed, and there had not been a prior determination of probable cause. *See* Petition (November, 2005) CP 12; Certification for Determination of Probable Cause (November 2005), Supp. CP; Order Determining Probable Cause (November, 2005), Supp. CP. Dr. Doren found that Mr. Coppin qualified as a sexually violent predator. Certification for Determination of Probable Cause pp. 6-8, Supp. CP.

The state filed a Petition to Commit Mr. Coppin as a sexually violent predator in November of 2005, relying (in part) on Dr. Doren's evaluation. CP 12-13. The state filed a written jury demand on November 22, 2005, but retracted its demand less than a week before trial was scheduled to begin. Jury Demand, Supp. CP; Waiver of Demand for Jury Trial, Supp. CP; RP (1-16-08) 2-7.

At that time, Mr. Coppin also agreed to waive his right to a jury trial. RP (1-16-08) 2-7. However, before trial began on January 22, 2008, he asked to withdraw his waiver and have the trial heard by a jury. RP (1/22/08) 5-13. He argued that since he was fighting for his life, and trial had not yet begun, there was no reason the court should deny him his right to a jury trial. RP (1/22/08) 5-12. The court refused his request, noting that Mr. Coppin had not filed a written jury demand, and that the state would be prejudiced if forced to try their case to a jury, having prepared for a bench trial. RP (1/22/08) 12-13.

At trial, the state relied on Mr. Coppin's 1987 conviction for statutory rape in the first degree to establish that he had a conviction for a crime of sexual violence. RP (1/23/08) 49-50; Exhibits 2 and 3, Supp. CP. The state introduced Mr. Coppin's deposition and his statements to Dr. Doren, in support of Dr. Doren's opinion. RP (1/22/08) 23-164; RP

(1/23/08) 3-5. The court did not hold a voluntariness hearing prior to the admission of these statements. RP (1/22/08) 23-164; RP (1/23/08) 3-5.

The trial judge found Mr. Coppin qualified as a sexually violent predator, and entered Findings of Fact and Conclusions of Law. CP 5.

Mr. Coppin appealed. CP 3.

ARGUMENT

I. THE ORDER OF COMMITMENT WAS ENTERED IN VIOLATION OF MR. COPPIN’S RIGHT TO A JURY TRIAL UNDER BOTH RCW 71.09.050 (3) AND WASH. CONST. ARTICLE I, SECTION 21.

A. The trial court should have honored Mr. Coppin’s jury demand.

Article I, Section 21 of our state constitution declares that “[t]he right of trial by jury shall remain inviolate...” According to our Supreme Court, “[t]he term ‘inviolable’ connotes deserving of the highest protection...” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636 at 656, 771 P.2d 711, 780 P.2d 260 (1989). The right to a jury trial “may not be impaired by either legislative or judicial action.” *Wilson v. Olivetti N. Am., Inc.*, 85 Wn. App. 804 at 808, 934 P.2d 1231 (1997). Article I, Section 21 has no federal counterpart.

RCW 71.09.050 is captioned “Trial—Rights of Parties,” and reads (in relevant part) as follows: “[t]he person, the prosecuting attorney or attorney general, or the judge shall have the right to demand that the trial

be before a twelve-person jury. If no demand is made, the trial shall be before the court.” RCW 71.09.050 (3). RCW 71.09.050 is the only provision relating the right to a jury trial or to waiver of that right in SVP cases (except for the provision dealing with conditional release after commitment, *see* RCW 71.09.090)

Words in a statute are given their plain and ordinary meaning, unless a contrary intent is evident in the statute. *State v. Lilyblad*, 163 Wn.2d 1 at 6, 177 P.3d 686 (2008). Furthermore, procedural statutes should be construed liberally to preserve a party's right to a fair trial. *State v. Boiko*, 138 Wn. App. 256, 156 P.3d 934 (2007). Because the word “demand” is not defined in RCW 71.09, the word’s plain and ordinary meaning may be derived from a dictionary. *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196 at 202, 172 P.3d 329 (2007). The word “demand” is used as both a noun and a transitive verb in RCW 71.09.050 (3). The transitive verb “to demand” means “1. to ask for with proper authority; claim as a right... 2. to ask for peremptorily or urgently... 3. to call for or require as just, proper, or necessary...” *Dictionary.com, based on the Random House Unabridged Dictionary*, Random House, Inc. 2006. When used as a noun, “demand” means “something that is demanded.” *Dictionary.com, based on the Random House Unabridged Dictionary*, Random House, Inc. 2006.

The statute does not require a written demand for a jury. First, there is no reference to a written demand in the plain language of RCW 71.09.050 (3). Second, the ordinary meaning of “demand” does not imply that a demand must be in writing. Third, the statute refers to demands being *made*, rather than *filed* and/or *served*. For all these reasons, any request for a jury trial, whether oral or in writing, qualifies as a “demand” under RCW 71.09.050 (3).

For similar reasons, the statute does not impose a deadline for a jury demand. Nothing in RCW 71.09.050 (3) or in the ordinary meaning of “demand” creates such a deadline. The legislature could easily have imposed a deadline; for example, the statute could have required the jury demand to be made at trial setting or a certain amount of time before trial. The final sentence of the statute could have included a time limit, i.e. “If no demand is made prior to the week before trial...”

Finally, nothing in the statute (or the definition of “demand”) prohibits a respondent from demanding a jury trial after initially waiving that right. RCW 71.09.050 (3). Under the statute, a litigant is permitted to change her or his mind.

Thus under the plain language of the statute, a trial court must honor a jury demand even if it is made orally, late in the proceedings, and after an initial waiver of the jury right. This is in keeping with the

admonition that procedural statutes should be liberally construed. *Boiko, supra.*

Mr. Coppin made an oral demand for a jury on the day his case was set for trial, after having waived his jury right six days earlier. Under the plain language of the statute, the trial court was required to honor his demand, despite the earlier waiver and the lack of a written request. RCW 71.09.050 (3). The trial court refused to impanel a jury. RP (1/22/08) 12-13. This refusal violated Mr. Coppin's right to a jury trial under Wash. Const. Article I, Section 21, and under RCW 71.09.050 (3).

B. Civil Rule 38 does not apply to SVP proceedings because the rule is in conflict with RCW 71.09.050 (3).

Commitment proceedings under RCW 71.09 are civil in nature. *In re Det. of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002). Washington's rules of civil procedure generally govern civil suits in superior court; however, the civil rules do not govern where they are "inconsistent with rules or statutes applicable to special proceedings..." CR 81(a). SVP proceedings under RCW 71.09 are "special proceedings" within the meaning of CR 81. *Williams*, at 488. Accordingly, the civil rules do not apply where they are inconsistent with RCW 71.09. *In re Detention. of Young*, 163 Wn.2d 684 at ____, 185 P.3d 1180 (2008) (*Young I*).

As noted above, the statutory provisions relating to an SVP respondent's right to a jury trial and waiver of that right are set forth in RCW 71.09.050 (3). The civil rule relating to jury demands and waiver is CR 38.¹ CR 38 is entitled "Jury trial of right," and provides (in relevant part) as follows:

(a) Right of jury trial preserved The right of trial by jury as declared by article 1, section 21 of the constitution or as given by a statute shall be preserved to the parties inviolate.

(b) Demand for jury At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, by filing the demand with the clerk, and by paying the jury fee required by law. If before the case is called to be set for trial no party serves or files a demand that the case be tried by a jury of 12, it shall be tried by a jury of 6 members with the concurrence of 5 being required to reach a verdict.

...

(d) Waiver of jury The failure of a party to serve a demand as required by this rule, to file it as required by this rule, and to pay the jury fee required by law in accordance with this rule, constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

CR 38.

¹ Both the legislature and the judiciary have authority over this area. Under Article I, Section 21, "the legislature may provide... for waiving of the jury in civil cases where the consent of the parties interested is given thereto." Wash. Const. Article I, Section 21. This clause has been interpreted as a limit on legislative authority. *Sackett v. Santilli*, 146 Wn.2d 498 at 508, 47 P.3d 948 (2002). Judicial power relating to jury waivers inheres in the Supreme Court's rulemaking authority. *Santilli*, at 508. The judicial and legislative rights are coextensive. *Santilli*, at 508.

CR 38 is inconsistent with RCW 71.09.050 (3); accordingly, the civil rule does not govern. *Young I, supra*. First, the statute grants the right to demand a twelve-person jury. RCW 71.09.050 (3). By contrast, CR 38 allows for juries of six or twelve. Second, under the statute, a party may demand that “the trial” be in front of a jury. RCW 71.09.050(3). CR 38 permits a party to demand that a jury to hear “any issue triable of right by a jury,” thus allowing for bifurcated trials heard by judge and jury. Third, the statute does not require a written demand, does not set a deadline for the demand, does not require filing and service of the demand, does not require payment of a jury fee, and does not explicitly mention waiver of the right (although failure to make the demand will result in a bench trial.) On the other hand, under the civil rule, the demand must be in writing, must be filed and served at the trial setting, and must be accompanied by payment of a fee; furthermore, waiver is presumed from failure to timely file and serve a demand or failure to pay the fee.

For all these reasons, CR 38 does not apply to a person’s right to a jury trial under RCW 71.09. Given the court’s duty to strictly construe the statute, Mr. Coppin’s oral demand on the morning of trial—even after he waived the right on the previous week—should have been sufficient to require the trial court to impanel a jury. The commitment order must be reversed, and the case remanded for a jury trial.

II. AS A MATTER OF LAW, THE STATE FAILED TO ESTABLISH THAT MR. COPPIN HAD BEEN CONVICTED OF A “CRIME OF SEXUAL VIOLENCE.”

RCW 71.09 must be strictly construed because it curtails civil liberties. *In re Detention of Martin*, 163 Wn.2d 501 at 508, 182 P.3d 951 (2008). The Supreme Court has described strict construction as follows: “To strictly construe a statute simply means that given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.” *Martin*, at 510. Words in a statute are given their plain and ordinary meaning, unless a contrary intent is evident in the statute. *Lilyblad*. Where language is undefined, its plain and ordinary meaning may be derived from a dictionary. *Lindeman*.

To commit a person under RCW 71.09, the state is required to establish beyond a reasonable doubt that the person is a sexually violent predator. RCW 71.09.060(1). A sexually violent predator is “any person who has been convicted of or charged with a *crime of sexual violence* and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(16), *emphasis added*. The statute does not define the phrase “crime of sexual violence.” *See* RCW 71.09, *generally*. By contrast, the statute does define the phrase

“sexually violent offense,” specifically listing those offenses that qualify.

See RCW 71.09.020(15).²

Where the legislature uses different language in the same statute, different meanings are intended. *State v. Costich*, 152 Wn.2d 463 at 475-476, 98 P.3d 795 (2004). Accordingly, the phrase “crime of sexual violence” means something different from the phrase “sexually violent offense.” *Costich*.

Applying these rules of construction, the phrase “crime of sexual violence” has the most restrictive meaning derived from the ordinary definition of each word. Assuming Mr. Coppin’s conviction qualified as a sexual crime, it was a “crime of sexual violence” only if the offense required proof of “swift and intense force,” or “rough or injurious physical force.” *Dictionary.com, based on the Random House Unabridged Dictionary*, Random House, Inc. 2006.

The state relied on Mr. Coppin’s 1987 convictions for statutory rape in the first degree to establish that he’d been convicted of a crime of sexual violence. RP (1/23/08) 49-50; Exhibits 2 and 3, Supp. CP.; *see also* Finding No. 3, CP 6; Conclusion No. 3, CP 8. That offense required

² The trial judge erroneously relied on this provision in determining that Mr. Coppin’s prior offenses qualified him for civil commitment. Conclusion No. 3, CP 8.

proof that a person over the age of 13 had sexual intercourse with a person younger than age 11. Former RCW 9A.44.070 (1987); *see also* Exhibit 2 (Information), Supp. CP; Exhibit 3 (Statement on Plea of Guilty, p. 3), Supp. CP. The offense did not require proof that the sexual intercourse be achieved through swift, intense, rough, and injurious physical force, and thus did not qualify as a “crime of sexual violence.” RCW 71.09.020(16).

Since the state failed to prove Mr. Coppin had been convicted of a “crime of sexual violence,” the evidence was insufficient to establish that he was a sexually violent predator. RCW 71.00.060(1); RCW 71.09.020(16). The commitment order must be reversed and the Petition dismissed.

III. BECAUSE MR. COPPIN WAS ILLEGALLY DETAINED AT THE TIME THE PETITION WAS FILED, THE STATE SHOULD HAVE BEEN REQUIRED TO PLEAD AND PROVE A RECENT OVERT ACT; ITS FAILURE TO DO SO REQUIRES DISMISSAL.

Freedom from physical detention is “the most elemental of liberty interests...” *Hamdi v. Rumsfeld*, 542 U.S. 507 at 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). Such freedom lies at the heart of the liberty that the due process clause protects. *Zadvydas v. Davis*, 533 U.S. 678 at 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001); *see also Kansas v. Hendricks*, 521 U.S. 346 at 356, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). Due process prohibits commitment under RCW 71.09 unless the respondent is

both mentally ill and currently dangerous. *In re Personal Restraint of Young*, 122 Wn.2d 1 at 27, 857 P.2d 989 (1993) (*Young II*). Accordingly, the state must prove a recent overt act if the offender is not incarcerated at the time the commitment petition is filed. *Young II*, at 41.

The legislature has amended the commitment statute to conform to *Personal Restraint of Young*; under the current statute, the state must plead and prove a recent overt act if the offender is not incarcerated when the petition is filed:

If, on the date that the petition is filed, the person was living in the community after release from custody, the state must also prove beyond a reasonable doubt that the person had committed a recent overt act.

RCW 71.09.060(1).

Although RCW 71.09.060 does not require proof of a recent overt act when a petition is filed against an incarcerated individual, the constitution may impose such a requirement. *In re Detention of Albrecht*, 147 Wn.2d 1, 51 P.3d 73 (2002). In *Albrecht*, the offender had been released into the community, but was incarcerated on the day the Petition was filed for a violation of community custody. The Court held that due process required the state to prove a recent overt act, despite the fact that the offender was in custody on the day the Petition was filed. According to the Supreme Court, “[t]o relieve the State of the burden of proving a recent overt act because an offender is in jail for a violation of the

conditions of community placement would subvert due process.”

Albrecht, at 11.

Here, Mr. Coppin was given a 300-month exceptional sentence. Exhibit 3 (Judgment and Sentence), p. 3, Supp. CP. The sentencing court imposed the sentence without a jury finding, and without obtaining a waiver of Mr. Coppin’s right to a jury trial and his right to proof beyond a reasonable doubt; this violated Mr. Coppin’s constitutional rights under the Sixth and Fourteenth Amendments. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Had Mr. Coppin received a standard range sentence, he would have been released no later than 1996. *See* Exhibit 3 (Judgment and Sentence, pp. 2, 3), Supp. CP.

Under these circumstances, due process requires the state to plead and prove a recent overt act. First, the cornerstone of due process is fairness; it would be fundamentally unfair to allow the state to unlawfully imprison a person, and then, based on such unlawful imprisonment, to excuse the state from pleading and proving a recent overt act. Second, the state is required to plead and prove a recent overt act whenever an offender is in custody for reasons other than commission of a sexually violent offense. *See, e.g., Albrecht*, at 10 (to excuse the state from proving recent overt act where offender was in jail on violation of community placement would subvert due process). Although Mr. Coppin was

incarcerated when the Petition was filed, he was not incarcerated for a sexually violent offense or a recent overt act. His incarceration for a sexual offense lawfully terminated in 1996; after that date, he was incarcerated without a lawful basis.

Because the state incarcerated Mr. Coppin beyond his statutory maximum in violation of *Blakely*, it was required to plead and prove a recent overt act. Its failure to do so requires reversal of the order of commitment and dismissal of the Petition. *Young II, supra; Albrecht, supra.*

IV. THE ADMISSION OF UNLAWFULLY OBTAINED EVIDENCE VIOLATED MR. COPPIN'S CONSTITUTIONAL RIGHTS UNDER WASH. CONST. ARTICLE I, SECTION 7.

Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7. The right to privacy established by this provision applies regardless of context; it is not limited to cases where the government seeks to prosecute.³ *See, e.g., McNabb v. Dep't of Corr.*, 163 Wn.2d 393, 180 P.3d

³ By contrast, the Fourth Amendment's exclusionary rule applies only in certain types of civil proceedings: "Evidence obtained by means of an illegal search and seizure conducted in violation of the Fourth Amendment is not admissible in a civil proceeding that is quasi-criminal in nature... Such evidence has also been held inadmissible in cases in which the government is seeking to exact a penalty from, or in some way punish, the person

1257 (2008) (Article I, Section 7 provides some protection to a competent individual's right to refuse food and water); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008) (Article I, Section 7 prohibits random drug testing for student athletes); *Robinson v. City of Seattle*, 102 Wn. App. 795, 10 P.3d 452 (2000) (Article I, Section 7 prohibits pre-employment drug testing for city positions not implicating public safety issues).

When the trial record establishes a clear violation of Article I, Section 7, the violation may be raised for the first time on review as a manifest error affecting a constitutional right under RAP 2.5(a). *State v. McFarland*, 127 Wn.2d 322 at 334, 899 P.2d 1251 (1995); *State v. Holmes*, 135 Wn. App. 588 at 592, 145 P.3d 1241 (2006); *State v. Littlefair*, 129 Wn. App. 330 at 338, 119 P.3d 359 (2005); *State v. Contreras*, 92 Wn. App. 307 at 313-314, 966 P.2d 915 (1998). To meet this standard, “[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *McFarland*, at 334; *see also*

against whom the evidence is sought to be admitted.” *McDaniel v. Seattle*, 65 Wn. App. 360 at 363-364, 828 P.2d 81 (1992), *citations omitted*.

Contreras, supra, at 313-314. In this case, Mr. Coppin did not move to suppress evidence obtained in violation of Article I, Section 7; however, the record contains sufficient information to enable review. Because of this, the erroneous admission of unlawfully seized evidence is a manifest error affecting a constitutional right. RAP 2.5(a).

Physical detention – even a brief detention—disturbs an individual’s private affairs, and may not be effectuated without authority of law. *See, e.g., State v. Day*, 161 Wn.2d 889, 168 P.3d 1265 (2007) (Article I, Section 7 prohibits brief detention to investigate parking infraction); *State v. Duncan*, 146 Wn.2d 166 at 175, 43 P.3d 513 (2002) (Article I, Section 7 prohibits brief detention to investigate civil non-traffic infraction). Under Washington’s exclusionary rule, evidence obtained as a result of an unlawful detention may not be admitted at trial; exclusion is constitutionally required to vindicate the individual’s privacy rights and to preserve the integrity of the judiciary.⁴ *State v. Ladson*, 138 Wn.2d 343 at 359-360, 979 P.2d 833 (1999).

The exclusionary rule applies even where evidence is obtained by officials acting in good faith pursuant to a court order. *See, e.g., State v.*

⁴ This is in contrast to the federal exclusionary rule: “The primary purpose of the Fourth Amendment’s exclusionary rule is the deterrence of official misconduct.” *Wallin*.

Wallin, 125 Wn. App. 648, 105 P.3d 1037, review denied at 155 Wn.2d 1012, 122 P.3d 186 (2005). In *Wallin*, a CCO searched an offender serving a term of community placement. The term of community placement had mistakenly been extended beyond its original expiration date, under color of a statute that did not apply to the defendant. Division I determined that the court order extending the defendant's community placement did not provide authority of law to sustain the search, and suppressed the evidence. *Wallin*, at 654.

In this case, Mr. Coppin was detained without authority of law in violation of Article I, Section 7. As noted above, his 300-month exceptional sentence was imposed without a jury determination of aggravating factors; this violated his right to a jury trial and his right to due process. *Blakely, supra*. While he was unlawfully detained, he submitted to the interview that contributed to Dr. Doren's finding that he qualified as a sexually violent predator. Because Mr. Coppin was unlawfully detained at the time of his interview, his statements to Dr. Doren and any other evidence derived from the illegal detention, including Dr. Doren's testimony, must be suppressed. *Day, supra; Wallin, supra*.

The Florida Supreme Court has reached a similar result. *Tanguay v. State*, 880 So. 2d 533 (FL, 2004). In *Tanguay*, after determining that unlawful detention did not deprive the lower court of jurisdiction to hear a

petition for civil commitment, the Florida Supreme Court held that no evidence derived from the unlawful detention could be used at trial:

[T]he petitioner is not to be prejudiced in proceeding under the Act by reason of the unlawful detention beyond the expiration of his sentence. Therefore, no evidence obtained from the petitioner during the sixteen days that he was detained beyond the expiration of his sentence is to be used during the commitment proceedings. *Tanguay* at 537.⁵

As in *Tanguay* and *Wallin*, the evidence derived from Mr. Coppin's unlawful detention should not have been admitted at trial. The state's use of this evidence "actually affected [Mr. Coppin's] rights... [and] this showing of actual prejudice... makes the error 'manifest,' allowing appellate review." *McFarland*, at 334. First, the record establishes a violation of Article I, Section 7. Second, the state relied on illegally-obtained evidence to establish probable cause. Third, the state relied on illegally-obtained evidence at trial, through Dr. Doren's testimony and through admission of Mr. Coppin's statements. The unlawful intrusion into Mr. Coppin's private affairs (and the use of evidence obtained through exploitation of the illegality) renders the lower court's commitment order unconstitutional, in violation of Wash. Const. Article I, Section 7. Accordingly, the order must be reversed and the case

⁵ The Florida court did not indicate the basis for its decision.

remanded for a probable cause hearing, with instructions to exclude any evidence derived from the illegal detention. *Wallin, supra*.

V. THE STATE ACTED OUTSIDE THE EXCLUSIVE PROCEDURES OF RCW 71.09 BY EVALUATING MR. COPPIN AS A SEXUALLY VIOLENT PREDATOR WITHOUT A JUDICIAL FINDING OF PROBABLE CAUSE.⁶

A. RCW 71.09.040 provides the exclusive means by which the state may obtain a sexually violent predator evaluation.

As previously noted RCW 71.09 must be strictly construed because it curtails civil liberties. *Martin, supra*. Civil incarceration achieved by means other than strict compliance with the procedures set forth in RCW 71.09 deprives a person of liberty without due process of law, in violation of the federal and state constitutions. *Martin*, at 11-12; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3.

RCW 71.09.040 provides the exclusive means for evaluating a person for commitment as a sexually violent predator. *In re Detention of Williams, supra*. Under the statute, an evaluation is appropriate “only after probable cause has been determined... The legislature expressly provided procedures for special mental health evaluations in the SVP

⁶ The Supreme Court has accepted review of this issue in *Detention of Strand*, 139 Wn. App. 904, 162 P.3d 1195 (2007). Oral argument on the *Strand* case was heard on September 9, 2008.

statute and did not intend to allow for additional [evaluations].” *In re Detention of Meints*, 123 Wn. App. 99 at 103-104, 96 P.3d 1004 (2004). Accordingly, “the mental examination by the State's experts of a person not yet determined to be a sexually violent predator is limited to the evaluation required under RCW 71.09.040 (4).” *In re Detention of Williams*, at 491. *See also In re Audett*, 158 Wn.2d 712 at 718-719, 147 P.3d 982 (2006) (“Given the express provisions for various mental examinations occurring both prior to and after trial, . . . additional mental examinations prior to trial that [are] not provided for in the statute [are] inconsistent with the statutory scheme.”)

B. By acting outside RCW 71.09.040, the state violated Mr. Coppin’s right to due process.

The state did not follow the procedures set forth in RCW 71.09.040. Instead, it subjected Mr. Coppin to a sexually violent predator evaluation without first obtaining a judicial determination of probable cause. Because the state ignored the procedures established by the legislature in RCW 71.09, it deprived Mr. Coppin of his fundamental right to liberty without due process of law. *Martin, supra*, at 11-12. *See also, e.g., Ross v. Alabama*, 15 F. Supp. 2d 1173 at 1185 (1998) (“[W]here a comprehensive child welfare statute creates a legitimate and sufficiently vested claim of entitlement, children may state a procedural due process

claim based upon a deprivation of a liberty interest when officials fail to follow the law's mandates"); *Carter v. Salina*, 773 F.2d 251 at 254 (10th Cir. 1985) (in zoning cases, "municipalities and other political subdivisions must scrupulously comply with statutory requirements, including notice and hearing, in order to provide due process of law"); *Government of Canal Zone v. Brooks*, 427 F.2d 346 at 347 (5th Cir. 1970) ("[I]t is a denial of due process for any government agency to fail to follow its own regulations providing for procedural safeguards to persons involved in adjudicative processes before it.")

1. The error is a manifest error affecting Mr. Coppin's constitutional right to due process

A manifest error affecting a constitutional right may be reviewed even in the absence of an objection below. RAP 2.5(a)(3). A constitutional error is "manifest" if it has practical and identifiable consequences. *State v. Mills*, 154 Wn.2d 1 at 6, 109 P.3d 415 (2005). Here, the state's failure to follow procedures required by RCW 71.09 raises a manifest error affecting Mr. Coppin's constitutional rights, and thus review is appropriate under RAP 2.5(a)(3).

The failure to follow statutory procedure violates due process under the state and federal constitutions. *Martin, supra*, at 11-12. This error is "manifest" because it had practical and identifiable consequences.

1. The pre-filing interview influenced the trial court's probable cause determination.

Had the state complied with RCW 71.09, it would have filed its petition and proceeded to a probable cause hearing without Mr. Coppin's participation in Dr. Doren's SVP evaluation. Dr. Doren scored Mr. Coppin using "all available information," including the interview. Doren SVP Evaluation, pp. 2, Supp. CP. Dr. Doren's "diagnostic impressions" of Mr. Coppin were "[b]ased on all of the information available," including the interview. Doren SVP Evaluation, pp. 3, Supp. CP. Since the pre-filing interview contributed (at least in part) to Dr. Doren's testing and conclusions, the state may have been unable to establish probable cause without it.

This is especially true regarding Dr. Doren's conclusions on the effect of Mr. Coppin's sex offender treatment. Dr. Doren believed that Mr. Coppin was deceptive regarding chemical dependency treatment and participation in AA, and noted that Mr. Coppin "has never had a period living in the community without using substances (by his own report, since he started using) of longer than one month..." Doren SVP Evaluation, pp. 7, Supp. CP. According to Dr. Doren, Mr. Coppin varied his report of uncharged sexual offenses, including during the interview. Doren SVP Evaluation, pp. 9, Supp. CP. Dr. Doren found it

notable that this last report was made virtually at the end of the subject's time in treatment, and that the report does not match the inmate's report from either prior to treatment or during treatment. The reason this matters is because the process of keeping secrets about sexual misbehaviors is a key component to sexual offending. By making different reports to different people, Mr. Copin is still showing the process of keeping sexual misbehavior secrets. Doren SVP Evaluation, pp. 9, Supp. CP.

Finally, Dr. Doren notes that "Mr. Coppin made other statements during the evaluation interview that misrepresented reality, apparently to portray an inaccurately positive image of himself." Doren SVP Evaluation, pp. 9, Supp. CP. Dr. Doren explained that "[t]hese conflicting statements represent both deceitfulness and impression management, again both of these being components of the sexually assaultive lifestyle." Doren SVP Evaluation, pp. 9, Supp. CP. Dr. Doren concluded that "[a]ttempts at deception and impression management were found at various times during the evaluation interview, *these behaviors being reason for significant concern about his true benefit from treatment.*" Doren SVP Evaluation, pp. 9-10, Supp. CP, *emphasis added*. These observations influenced Dr. Doren's ultimate conclusion "that Mr. Coppin's previous treatment experience has not adequately addressed the risk of future sexually violent offense he represents." Doren SVP Evaluation, p. 11, Supp. CP.

If Mr. Coppin had not been subjected to a prefiling interview, the court might have viewed Mr. Coppin's completion of sex offender treatment differently when determining the existence of probable cause. Because of this, the prefiling interview influenced the probable cause determination. If the outcome of the probable cause hearing had been different, the trial court would not have ordered an evaluation under RCW 71.09.040, and the case would not have proceeded to trial.

2. The prefiling evaluation deprived Mr. Coppin of the opportunity to consult with counsel.

Had the court found probable cause and ordered an evaluation, Mr. Coppin would have had the opportunity to consult with counsel and have his attorney present during the evaluation. RCW 71.09.050 (1); *In re Detention of Kistenmacher*, 63 Wn.2d 166, 178 P.3d 949 (2008).

Although Mr. Coppin did not have a general right to remain silent during the evaluation, competent counsel would have advised him to exercise his right to remain silent with respect to alleged uncharged misconduct, and Mr. Coppin would not have made admissions regarding such alleged misconduct. Having chosen to remain silent regarding alleged uncharged misconduct during his evaluation, he would also have exercised the

privilege during his subsequent deposition and in his trial testimony.⁷ In the alternative, competent counsel would have reviewed Mr. Coppin's prior uncharged offenses with his client, advised him to fully disclose those offenses that he had previously disclosed, and helped him to limit identifying information that could have assisted in prosecution of those uncharged incidents.

Because Mr. Coppin's partial disclosure (regarding his uncharged history) was a major factor in Dr. Doren's assessment of Mr. Coppin's progress in treatment, the presence of counsel would have had an impact on Dr. Doren's opinion, and thus on the outcome of the case. The state's violation of Mr. Coppin's due process rights had practical and identifiable effects in the trial court, both at the probable cause stage and at the trial stage. Because the issue is a manifest error affecting a constitutional right, the error was not waived by trial counsel's failure to object to the use of the pre-filing evaluation at Mr. Coppin's trial. RAP 2.5(a)(3).

Furthermore, even if this case does not raise a manifest error affecting constitutional rights, this Court should exercise its discretion and reach the merits rather than relying on the doctrine of waiver. *See* RAP 2.5(a).

⁷ His attorney's decision to allow him to respond to questions about the uncharged misconduct, and to admit that he was the person accused, was undoubtedly influenced by the fact that he had already made similar admissions to Dr. Doren. Otherwise, counsel was not providing effective assistance.

2. Reversal is required because the error prejudiced Mr. Coppin.

Constitutional error is presumed to be prejudicial; the state bears the burden of proving beyond a reasonable doubt that such error was harmless. *City of Bellevue v. Lorang*, 140 Wn.2d 19 at 32, 992 P.2d 496 (2000), quoting *State v. Smith*, 131 Wn.2d 258 at 263-64, 930 P.2d 917 (1997). Before finding constitutional error harmless, a reviewing court must determine that the error is trivial, or formal, or merely academic, that it was not prejudicial to the substantial rights of the party assigning error, and that it in no way affected the outcome of the case. *Lorang*, at 32. In this case, the state cannot make the required showing.

First, as noted above, the case may not have proceeded beyond the probable cause stage if the state had followed the statutory procedure outlined in RCW 71.09.040. By violating Mr. Coppin's constitutional right to due process, the state obtained and presented additional information to the court that would not have been available had it followed the procedure adopted by the legislature.

Second, without Mr. Coppin's admissions, Dr. Doren might not have found that he qualified as a sexually violent predator. In the alternative, if he did conclude that Mr. Coppin met the criteria, his opinion

would have been founded on less information and would have been less persuasive at trial.

Thus, the state cannot prove (beyond a reasonable doubt) that the state's violation of Mr. Coppin's due process rights in no way affected the outcome of the case. *Lorang, supra*.

The state's decision to ignore the procedures set forth in RCW 71.09 prejudiced Mr. Coppin. Because the error was not harmless, the trial court's order committing Mr. Coppin as a sexually violent predator must be vacated.

C. A sexually violent predator evaluation is not the same as the "mental health evaluation" referred to in RCW 71.09.025.

The state's pre-filing evaluation cannot be justified under RCW 71.09.025 (1)(b)(v). That subsection requires the referring agency to provide the prosecutor with "[a] current mental health evaluation or mental health records review." First, a broad interpretation of the phrase "mental health evaluation" is inappropriate, because the SVP statute must be construed strictly. *Martin, supra*. The language at issue ("current mental health evaluation or mental health records review") should not be construed to include a sexually violent predator evaluation of the type contemplated in RCW 71.09.040.

Second, where the legislature uses different language in the same statute, different meanings are intended. *State v. Costich, supra*. Because it used different language, the legislature intended the phrase “mental health evaluation” to mean something other than the “evaluation as to whether the person is a sexually violent predator” provided for in RCW 71.09.040. *Costich, supra; see also In re Det. of Williams, supra*.

Third, RCW 71.09.025 does not direct the referring agency to evaluate the offender, and does not require the offender to submit to an evaluation. Applying the maxim *expressio unius est exclusio alterius* and the duty to strictly construe statutes curtailing civil liberties, the “mental health evaluation” in RCW 71.09.025 (1)(b)(v) must be a pre-existing psychological assessment, not an in-depth evaluation directed at the SVP criteria and prepared in anticipation of litigation under RCW 71.09.⁸ *See Martin, at 9*.

For all these reasons, the state’s pre-filing evaluation of Mr. Coppin cannot be considered a simple “mental health evaluation” under RCW 71.09.025. The state’s failure to abide by the requirements of RCW

⁸ Where the agency lacks a pre-existing evaluation that qualifies as “current,” it must instead submit a current review of the offender’s records. RCW 71.09.025.

71.09 requires reversal of the order committing Mr. Coppin as a sexually violent predator.

VI. IF MR. COPPIN'S CLAIMS REGARDING THE ILLEGAL PREFILING EVALUATION AND THE VIOLATION OF HIS CONSTITUTIONAL RIGHT TO PRIVACY ARE NOT PRESERVED FOR REVIEW, THEN MR. COPPIN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The standard for evaluating whether or not counsel provided effective assistance in a proceeding under RCW 71.09 is the same standard used in criminal cases. *In re Stout*, 128 Wn.App. 21 at 27-28, 114 P.3d 658 (2005). In order to establish ineffective assistance, an appellant must first show that counsel's performance was deficient, and then that the deficient performance prejudiced his case. *In re Greenwood*, 130 Wn.App. 277 at 286-287, 122 P.3d 747 (2005).

If the issues presented in this brief are not preserved for appellate review, then Mr. Coppin was denied the effective assistance of counsel. First, competent counsel would have raised an objection to the pre-filing SVP evaluation, and to the admission of evidence obtained in violation of Wash. Const. Article I, Section 7. Second, if counsel had objected, the state may not have been able to establish probable cause, and would not have had Dr. Doren's evaluation for use at trial. Without this damaging evidence, the outcome of the trial would likely have been different.

If these issues are waived as a result of counsel's failure to object, then Mr. Coppin was denied the effective assistance of counsel. The order committing him as a sexually violent predator must be reversed, and the case remanded to the trial court. *Greenwood, supra*.

VII. THE TRIAL COURT SHOULD HAVE DETERMINED WHETHER MR. COPPIN'S STATEMENTS WERE VOLUNTARY BEFORE ADMITTING THEM AT HIS SEXUALLY VIOLENT PREDATOR TRIAL.

- A. Trial courts must hold a pretrial voluntariness hearing before admitting statements of an alleged Sexually Violent Predator at a jury trial.

Due process prohibits the use of involuntary statements in civil proceedings. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3; *Bong Youn Choy v. Barber*, 279 F.2d 642 at 646 (9th Cir. 1960); *United States v. Alderete-Deras*, 743 F.2d 645 at 647 (9th Cir. 1984). The trial court must employ a procedure that is "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." *Jackson v. Denno*, 378 U.S. 368 at 391, 84 S.Ct. 1774, 12 L.Ed. 908 (1964).

Washington's Sexually Violent Predator statute does not include any mechanism for determining the voluntariness of a respondent's statements. Instead, such statements are routinely admitted into evidence

without any examination of whether they are voluntary or involuntary.

That is what occurred here. *See* Report of Proceedings, *generally*.

Whenever the state seeks to admit a respondent's statements, the trial court must hold a hearing to determine voluntariness. Mr. Coppin's case should be remanded to the trial court for a voluntariness hearing.

Jackson v. Denno, supra.

B. Any statements compelled by threat of contempt must be excluded at trial.

As noted above, due process prohibits the use of involuntary statements in civil proceedings. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3; *Bong Youn Choy v. Barber, supra; United States v. Alderete-Deras, supra.* Statements given under threat of the state's contempt power are involuntary: "In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt." *New Jersey v. Portash*, 440 U.S. 450 at 459, 99 S. Ct. 1292, 59 L. Ed. 2d 501 (1979). Persons facing commitment pursuant to RCW 71.09 may be compelled to participate in evaluations and depositions, upon threat of contempt. *Young II.*

Accordingly, any statements given by Mr. Coppin under threat of contempt are involuntary, and may not be used in any proceeding, whether

civil or criminal. *New Jersey v. Portash, supra.* When the trial court conducts a voluntariness hearing, it must exclude any statements made under threat of the state's contempt power. *New Jersey v. Portash, supra.*

CONCLUSION

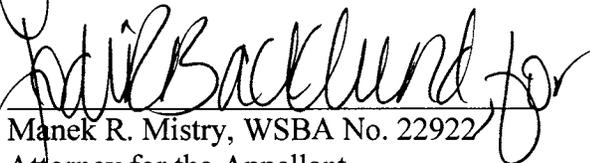
For the foregoing reasons, the trial court's order committing Mr. Coppin as a sexually violent predator must be reversed and the Petition dismissed. In the alternative, the case must be remanded for a new trial with instructions to require proof of a recent overt act, to exclude Dr. Doren's testimony and any information derived from the pre-filing SVP evaluation, and to hold a voluntariness hearing to determine the admissibility of Mr. Coppin's statements.

Respectfully submitted on September 16, 2008.

BACKLUND AND MISTRY



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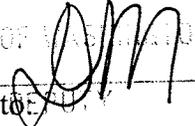


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COURT OF APPEALS
DIVISION II

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CERTIFICATE OF MAILING

STATE OF WASHINGTON
BY 

I certify that I mailed a copy of Appellant's Opening Brief to:

John Coppin
McNeil Island Corrections Center
P. O. Box 88600
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and to:

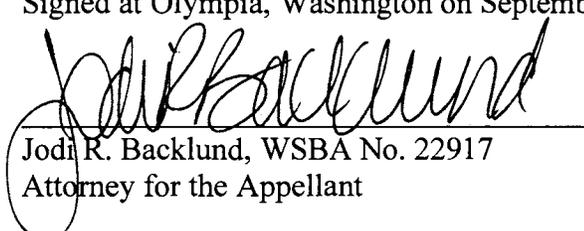
Lewis County Prosecuting Attorney
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Chehalis, WA 98532-1925

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 16, 2008.

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 September 16, 2008.



Jodi R. Backlund, WSBA No. 22917
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