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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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IN RE THE DETENTION OF

**Johnny Davis,**

Appellant.

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Thurston County Superior Court Cause No. 04-2-00645-4

The Honorable Judge Christine Pomeroy

**Appellant's Reply Brief**

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## ARGUMENT

### **I. THE TRIAL COURT’S INSTRUCTIONS INCLUDED A COMMENT ON THE EVIDENCE, WHICH MAY BE CHALLENGED FOR THE FIRST TIME ON APPEAL.**

#### A. Standard of Review.

Issues of statutory construction are reviewed *de novo*. *In re Detention of Strand*, 167 Wn.2d 180, 186, 217 P.3d 1159, 1162 (2009). RCW 71.09 must be strictly construed because it curtails civil liberties. *In re Detention of Martin*, 163 Wn.2d 501, 508, 182 P.3d 951 (2008). A court reading RCW 71.09 must choose a “narrow, restrictive construction” over a “broad, more liberal interpretation.” *Id.*, at 510.

Constitutional violations and errors in jury instructions are reviewed *de novo*. *Id.*, at 506; *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009). An instruction that comments on the evidence may be challenged for the first time on review, because such an instruction “invades a fundamental right.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Contrary to Respondent’s assertion, such errors are not waived by a failure to object or a failure to propose instructions. Brief of Respondent, pp. 9, 12.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818,

823, 203 P.3d 1044 (2009). 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.” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).<sup>1</sup>

Where erroneous instructions relieve the Department of its burden of proof, they may be challenged for the first time on review under RAP 2.5(a)(3). Instructions that misstate an element are not harmless unless (beyond a reasonable doubt) the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

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<sup>1</sup> The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

- B. Civil commitment under RCW 71.09 requires proof that the detainee previously committed a “crime of sexual violence,” which is different from a “sexually violent offense.”

A sexually violent predator is a person who (among other things) has been “convicted of or charged with a crime of sexual violence.” RCW 71.09.020(18). The phrase “crime of sexual violence” is not defined in the statute. Where a statute fails to define a term, the term must be given its plain and ordinary meaning. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006). Applying this rule, along with the requirement that RCW 71.09 be strictly construed, the phrase “crime of sexual violence” must be given the most restrictive meaning derived from the ordinary definition of each word. Assuming a detainee’s predicate offenses qualify as sexual crimes, only the meaning of the word “violence” must be examined. The dictionary definition of violence is “swift and intense force,” or “rough or injurious physical force.” *Dictionary.com, based on the Random House Unabridged Dictionary*, Random House, Inc. 2006.

Accordingly, to commit an individual under RCW 71.09, the Department must prove that the person has been charged with or has committed a sexual crime by means of physical force that was swift, intense, rough, and/or injurious. This requires a factual determination: the jury must decide whether the predicate offense was in fact accomplished

by “swift and intense force,” or “rough or injurious physical force.” RCW 71.09.020(18); *Dictionary.com*. Under these circumstances, the jury may not rely on a list of offenses, but must examine the underlying facts and determine whether actual violence was employed in the predicate offense under consideration.<sup>2</sup> This is consistent with the statute’s purpose: to address the risks posed by the “small but extremely dangerous group of sexually violent predators”—those who are likely to engage in “repeat acts of predatory sexual violence”—and not the larger pool of nonviolent sexual offenders. *See* RCW 71.09.010.

Where the legislature uses different language in the same statute, different meanings are intended. *State v. Costich*, 152 Wn.2d 463, 475-476, 98 P.3d 795 (2004). Accordingly, the phrase “crime of sexual violence” must be distinguished from the phrase “sexually violent offense,” used elsewhere in the statute. *See* RCW 71.09.020(17).<sup>3</sup> The

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<sup>2</sup> Some sexually violent offenses—such as those involving forcible compulsion—will by definition involve actual violence. Others, however—such as Child Molestation or Residential Burglary with Sexual Motivation—might be accomplished without actual violence.

<sup>3</sup> The phrase “sexually violent offense” is defined by the statute: “‘Sexually violent offense’ means ... rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; [an equivalent offense under a prior statute, federal law, or from another jurisdiction]; an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second

latter phrase is defined with reference to a list of offenses; it does not require a factual determination as to the use of actual violence in the commission in the offense. *See* RCW 71.09.020(17).

Here, the Department established that Mr. Davis had been convicted of Rape of a Child in the First Degree, Child Molestation in the First Degree, and Kidnapping in the First Degree with Sexual Motivation. Exhibits 1-9, CP. One question for the jury was whether or not Mr. Davis accomplished these offenses by physical force that was rough, injurious, swift, and/or intense. RCW 71.09.020(18); *Dictionary.com*.

C. The court's comment on the evidence relieved the state of its burden to prove a prior "crime of sexual violence."

A judge may not comment on the evidence through its instructions to the jury. Wash. Const. Article IV, Section 16; *State v. Becker, supra*; *State v. Eaker*, 113 Wn.App. 111, 53 P.3d 37 (2002).

In this case, the trial judge commented on the evidence by directing the verdict with regard to Mr. Davis's predicate convictions. Instruction No. 3 allowed the jury to return a "yes" verdict if it found (among other things) that Mr. Davis had been "convicted of a crime of

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degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act [was done with sexual motivation]; or... an attempt, criminal solicitation, or criminal conspiracy to commit [one of the listed offenses]." RCW 71.09.020(17).

sexual violence, namely Rape of a Child in the First Degree, Child Molestation in the First Degree or Kidnapping in the First Degree with Sexual Motivation.” Instruction No. 3, Court’s Instructions to the Jury, CP 26. This, especially when combined with the absence of an instruction defining “crime of sexual violence.” left no room for the jury to make the required factual determination regarding the physical force used to accomplish the prior offenses. RCW 71.09.020(18).

The instruction directed the jury to return a “yes” verdict if it found that Mr. Davis had been convicted of one of the listed offense, regardless of whether or not his past crime involved actual violence. The Supreme Court has found similar instructions to be improper comments on the evidence in other contexts. *State v. Levy*, 156 Wn.2d 709, 722, 132 P.3d 1076 (2006) (“We hold that the ‘to-wit’ references to the building and the crowbar qualified as judicial comments...”); *see also State v. Becker*, at 65 (Trial court’s reference to Youth Education Program as a school amounted to a comment on the evidence).

Although trial counsel conceded in closing argument that Mr. Davis had been convicted of “terrible crimes” and “rapes of children,” he did not concede that the prior offenses involved “swift and intense force,” or “rough or injurious physical force.” RCW 71.09.020(18); *Dictionary.com*. Counsel’s passing (and ambiguous) comment regarding

the first element required for commitment (“That’s only one element of the three elements the State has to prove,” RP 802) was not a binding concession preventing Mr. Davis from arguing on appeal that the court’s instructions included a comment on the evidence. *See* Brief of Respondent, p. 12-13.

The problem is structural and is not subject to harmless error analysis. *State v. Jackman*, 125 Wn.App. 552, 560, 104 P.3d 686 (2004). Contrary to Respondent’s argument, Mr. Davis is not required to “establish consequential prejudice.” Brief of Respondent, p. 11. Reversal is required regardless of prejudice. *Id.*, at 560. Accordingly, the commitment order must be vacated and the case remanded for a new trial. *Id.*, *supra*.

D. The court’s instructions relieved the Department of its burden to prove the elements required for commitment, and thus may be challenged for the first time on review.

Jury instructions are sufficient if they allow each party to argue its theory, are not misleading, and properly convey the applicable law. *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). Jury instructions must be “manifestly clear,” since juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004). Just as the instructions in a criminal case must specify all the elements necessary for conviction, the

jury must be instructed on the Department's burden to prove all the elements required for commitment in a case under RCW 71.09; instructions that relieve the Department of its burden to prove a required element violate due process. *See State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997).

Here, the court's instructions relieved the Department of its burden to prove a prior "crime of sexual violence." Although Mr. Davis did not object to the court's instructions or propose instructions of his own, the issue is not waived because it presents a manifest error affecting a constitutional right under RAP 2.5(a)(3). Contrary to Respondent's assertion, this court may review Mr. Davis's argument on its merits. *See* Brief of Respondent, pp. 9, 12.

Instruction No. 3 included the phrase "crime of sexual violence," but failed to define it. Instruction No. 3, Court's Instructions to the Jury, CP 26. Instead, Instruction No. 3 allowed the jury to return a "yes" verdict based solely on proof that Mr. Davis had been convicted of one of the offenses listed. *See* Instruction No. 3, Court's Instructions to the Jury, CP 26. This did not make the relevant standard manifestly clear.<sup>4</sup> *Harris*,

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<sup>4</sup> In addition, as argued elsewhere, the instruction was a comment on the evidence.

*supra*. The jury was required to make a decision without knowing of the Department's burden to prove that Mr. Davis's prior offenses were accomplished by physical force that was rough, injurious, swift, and/or intense. RCW 71.09.020(18); *Dictionary.com*.

In the context of trial, the error "actually affected" Mr. Davis's rights. *McFarland*, at 334. First, the jury decided the case without knowing the meaning of "crime of sexual violence." This, by itself, is a violation of Mr. Davis's Fourteenth Amendment rights because civil incarceration achieved by means other than strict compliance with RCW 71.09 deprives a person of liberty without due process. *Martin*, at 511.

Second, although the Department produced some evidence of physical force, the jury could have concluded (based on the evidence presented) that the force used in some of the prior offenses was not swift, intense, rough, and/or injurious, as required to prove a "crime of sexual violence." RP (1/5/09) 49-67, 71-78 86-94; RP (1/6/09) 124-125, 283-284; Ex. 1-9, CP. Accordingly, the jury could have decided that Mr. Davis's prior convictions did not qualify as "crime[s] of sexual violence" within the meaning of RCW 71.09.020(18).

The erroneous instructions relieved the Department of its burden to prove each element required for commitment, and created a manifest error affecting Mr. Davis's Fourteenth Amendment right to due process. They

may, therefore, be challenged for the first time on review. RAP 2.5(a)(3). Because the instructions failed to make the relevant standard manifestly clear, the commitment order must be reversed and the case remanded for a new trial. *Harris, supra*.

**II. APPELLANT CONCEDES THAT RCW 71.09.020 WAS AMENDED AFTER HIS TRIAL WAS COMPLETED.**

As Respondent points out, the amendment defining “personality disorder” became law in May of 2009. Brief of Respondent, p. 14. Since trial had been completed by that time, Mr. Davis withdraws his arguments relating to the court’s failure to define the phrase “personality disorder.”

**III. THE DEPARTMENT FAILED TO PROVIDE LEGALLY COGNIZABLE NOTICE OF ITS INTENT TO PURSUE COMMITMENT UNDER THE THEORY THAT MR. DAVIS HAS A PERSONALITY DISORDER.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Martin*, at 506. Issues of statutory construction are reviewed *de novo*. *Strand*, at 186. RCW 71.09 must be strictly construed because it curtails civil liberties. *Martin*, at 508.

- B. The Department failed to strictly comply with RCW 71.09 by pursuing commitment under an alternate means not alleged in the Petition.

A person may be committed under RCW 71.09 because of a “mental abnormality” or because of a “personality disorder.” RCW 71.09.020(18); *In re Detention of Pouncy*, 144 Wn.App. 609, 184 P.3d 651 (2008), *review granted*, 165 Wn.2d 1007 (2008). In this case, the Department’s Petition alleged only that Mr. Davis suffered from a “mental abnormality.” CP 4. Despite this, the court’s instructions allowed the jury to commit Mr. Davis based on either alternate means. Instruction No. 3, Court’s Instructions to the Jury, CP 26. This was error for two reasons.

First, due process requires adequate notice. *United States v. Baker*, 807 F.2d 1315, 1323 (6<sup>th</sup> Cir. 1986). In a civil commitment proceeding, the government must provide notice of the “specific issues” to be addressed at trial. *In re Gault*, 387 U.S. 1, 34, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (requiring adequate notice for civil commitment of juvenile delinquents).<sup>5</sup> In particular, the Department must provide advance notice of “all alternative grounds” for civil commitment that it intends to pursue

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<sup>5</sup> The *Gault* standards apply to adult civil commitment proceedings. See *Lynch v. Baxley*, 386 F.Supp. 378, 388 (D.C.Al., 1974) (citing *Gault*); *Stamus v. Leonhardt*, 414 F.Supp. 439, 445-447 (D.C.Iowa 1976); *Bell v. Wayne County General Hospital At Eloise*, 384 F.Supp. 1085, 1092 (D.C.Mich. 1974).

at trial. *In re Cross*, 99 Wn.2d 373, 382-383, 662 P.2d 828 (1983) (addressing notice in civil commitment cases brought under RCW 71.05).

Second, a commitment order is void unless achieved through strict compliance with RCW 71.09. *Martin*, at 511. The proper vehicle for providing notice of “all alternative grounds” is the Petition. *See* RCW 71.09.030 (“A petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation...”) RCW 71.09 does not specifically authorize any alternate procedure for providing notice of the grounds for commitment. *See* RCW 71.09, *generally*. By specifying allegations in the Petition, the government gives notice of what it will seek to prove at trial. Because RCW 71.09 authorizes only one method for the Department to provide the constitutionally required notice, a commitment order may only be based on proof of the allegations set forth in the Petition. *Martin*, at 511. Just as a prosecutor may not pursue a criminal conviction for an uncharged alternative means, the Department may not pursue commitment for an alternate means it failed to allege in the Petition. *See, e.g., State v. Chino*, 117 Wn.App. 531, 540, 72 P.3d 256 (2003); *State v. Bray*, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988); *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942).

Respondent's contention—that Mr. Davis received actual notice through some means other than the Petition—is irrelevant. Brief of Respondent, p. 14-15. The Department failed to allege in its Petition that Mr. Davis suffered from a “personality disorder;” accordingly, it failed to strictly follow the procedure outlined in RCW 71.09, and failed to provide legally cognizable notice of the allegations he was required to meet at trial.

The Department's failure to follow the statutory procedure and to provide adequate notice violated Mr. Davis's Fourteenth Amendment right to due process. *Martin*, at 511; *Gault*, *supra*. Because of this, the commitment order must be reversed and the case remanded for a new trial. *Martin*, *supra*; *Gault*, *supra*.

**IV. THE COURT'S INSTRUCTIONS DID NOT REQUIRE JURORS TO FIND MR. DAVIS CURRENTLY DANGEROUS.**

A. Standard of Review

Constitutional violations are reviewed *de novo*, as are jury instructions. *Martin*, at 506; *Hayward*, at 641. Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, at 554.

Instructional error that relieves the Department of its constitutional burden may be raised for the first time on review. RAP 2.5(a)(3); *State v. Bland*, 128 Wn.App. 511, 116 P.3d 428 (2005).

Constitutional error is harmless only if the Department can establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the detainee, and that it in no way affected the final outcome of the case. *State v. Flores*, 164 Wn.2d 1, 25, 186 P.3d 1038 (2008). The Department must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a verdict in favor of commitment. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

B. The court's instructions did not make the "currently dangerous" standard manifestly clear.

Civil commitment under RCW 71.09 requires proof that the detainee is currently dangerous. *In re Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002); *In re Detention of Paschke*, 121 Wn.App. 614, 622, 90 P.3d 74 (2008); *In re Detention of Marshall*, 156 Wn.2d 150, 157, 125 P.3d 113 (2005). This element is not explicit in the statute, but is instead constitutionally required by the Fourteenth Amendment's due process clause. *Albrecht*, at 7.

Although RCW 71.09 does not explicitly require proof of current dangerousness (as required by *Albrecht*), the statute is nonetheless constitutional. *In re Detention of Moore*, 167 Wn.2d 113, 123-126, 216 P.3d 1015 (2009). The requirement of current dangerousness is implicit in the Department’s obligation to prove the detainee “more probably than not will engage in [predatory acts of sexual violence] if not confined.” RCW 71.09.020(7). This standard “includes a temporal component,” because if a detainee “will reoffend only in the far distant future, then there is less likelihood that the ‘more probable than not’ standard has been legally satisfied.” *Moore*, at 124. In other words (according to the Supreme Court), a person who is not currently dangerous is less likely to be civilly committed under RCW 71.09.<sup>6</sup>

Although the *Moore* court found the statute constitutional, it did not comment on the jury instructions required to implement the “currently dangerous” standard. (Moore was committed following a bench trial).

The Supreme Court “has set forth a high threshold for clarity of jury instructions: ‘The standard for clarity in a jury instruction is higher than for a statute; while we have been able to resolve the ambiguous

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<sup>6</sup> Of course, under this standard, some people who are not currently dangerous will be civilly committed anyway. It is difficult to understand how a diminished likelihood of erroneous civil commitment satisfies the constitutional requirement of current dangerousness identified in *Albrecht*.

wording of [a statute] via statutory construction, a jury lacks such interpretive tools and thus requires a manifestly clear instruction.” *State v. Irons*, 101 Wn.App. 544, 550, 4 P.3d 174 (2000) (alterations in original) (quoting *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996)). For example, in *State v. Bland*, the Court of Appeals reversed a conviction where the trial court instructed the jury on the lawful defense of property using a phrase (“about to be injured”) taken directly from the statute. *Bland*, at 515. The Court held that the instruction was not manifestly clear, despite the fact that the language at issue had been taken directly from the statute. *Bland*, at 515-516.

Here, the court’s instructions were not “manifestly clear.” Nothing in the instructions explained to the jury that they were required to find Mr. Davis currently dangerous. Court’s Instructions to the Jury, CP 21-52. Under the court’s instructions, jurors were permitted to decide in favor of commitment, even if they believed that Mr. Davis is not currently dangerous.

Because the “currently dangerous” standard is constitutionally required, the erroneous instructions create a manifest error affecting Mr. Davis’s Fourteenth Amendment right to due process. RAP 2.5(a)(3). Accordingly, Mr. Davis is entitled to challenge them for the first time on

review. Contrary to Respondent's assertion, the challenge is not waived by a failure to submit instructions of his own. Brief of Respondent, p. 16.

The error is not harmless: the Department cannot establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice Mr. Davis, and that it in no way affected the final outcome of the case. *Flores*, at 25. Nor can the Department show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a verdict in favor of commitment. *Burke*, at 222.

Had the jury been properly instructed, it might well have voted against commitment, even if it took the Department's expert testimony at face value and believed that Mr. Davis was likely to reoffend within 6-10 years. See Brief of Respondent, pp. 17-18. This is so first because the reoffense rates do not specifically address the likelihood that Mr. Davis will engage in predatory acts of sexual violence (as defined in RCW 71.09.020), and second because jurors may have believed that Mr. Davis was not *currently* dangerous, even if there was a likelihood of reoffense within 6-10 years. The issue of current dangerousness was a question for the jury; the state's expert testimony did not establish current dangerousness as a matter of law, as Respondent seems to imply. Brief of Respondent, pp. 17-18.

Because the court's instructions did not require proof of current dangerousness, the constitutionally required standard was not "manifestly clear" to the jury. *Irons*, at 550. This is in contrast to the bench trial in *Moore*, where the "manifestly clear" standard did not apply. Accordingly, the commitment order violated Mr. Davis's Fourteenth Amendment right to due process. *Albrecht, supra*. The order must be vacated and the case remanded for a new trial, with instructions to provide a "manifestly clear" explanation of the "currently dangerous" requirement. *Id., supra*.

**V. THE COURT'S INSTRUCTIONS PLACED UNDUE EMPHASIS ON A SINGLE FACTOR.**

A. Standard of Review

Jury instructions are reviewed *de novo*. *Hayward*, at 641.

B. The instructions improperly focused on the offenses Mr. Davis might commit in future.

Respondent describes as "frivolous" Mr. Davis's argument that the court's instructions placed undue emphasis on a single factor. Brief of Respondent, p. 18. As authority, Respondent cites WPIC 365.16 (and the appurtenant "Note on Use"). Brief of Respondent, pp. 18-19. This reliance on the WPIC (and the "Note on Use") is misplaced.

Pattern instructions can create error—sometimes in all cases, and sometimes under the facts of a particular case. *See, e.g., State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000) (WPIC 10.51, outlining accomplice liability, is erroneous); *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000) (same); *compare State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998), *cert. denied*, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed.2d 69 (1999) (WPIC 16.02 and WPIC 16.07, when read together, adequately convey the law of self-defense) *with Irons*, at 552 (WPIC 16.02 and WPIC 16.07 “inadequately conveyed the law of self-defense to the jury under the facts of [this] case...”)

Respondent also argues that the nature of the proceeding requires the jury to be informed about the crimes a detainee might commit in future. Brief of Respondent, p. 19. This may be true; however, there is no requirement that the information be conveyed through an *instruction* rather than through the *evidence*. The better practice would be for the Department to submit evidence outlining the crimes it believes a detainee might commit if unconditionally released. This evidence can include details about the elements of each offense, if necessary.<sup>7</sup>

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<sup>7</sup> For example, the Department could introduce an exhibit listing the potential crimes and their elements. The Department could also introduce the information through testimony, without the aid of documentary evidence.

By including the list of possible crimes (and their elements) in the instructions, the court placed undue emphasis on this factor. *State v. Todd*, 78 Wn.2d 362, 376, 474 P.2d 542 (1970). This, in turn, suggested to the jury that the court found some likelihood that Mr. Davis would reoffend by committing one of the listed offenses. Accordingly, the commitment order must be reversed, and the case remanded for a new trial. *Todd*, at 377.

**VI. THE COMMITMENT ORDER WAS BASED ON EVIDENCE THAT IS UNRELIABLE.**

**A. Standard of Review**

Constitutional violations are reviewed *de novo*. *Martin*, at 506. Review of the admissibility of a novel scientific procedure is also *de novo*. *State v. Sipin*, 130 Wn. App. 403, 413-414, 123 P.3d 862 (2005) (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

Where a manifest error affects a constitutional right, it may be challenged for the first time on review. RAP 2.5(a)(3).

- B. The commitment order violated Mr. Davis's Fourteenth Amendment right to due process because it was based (in part) on evidence that was unreliable.

Involuntary civil commitment involves a "massive curtailment of liberty." *In re Detention of Anderson*, 166 Wn.2d 543, 556, 211 P.3d 994 (2009) (citations and internal quotation marks omitted). Because of this, it can only be permitted on the basis of evidence that is demonstrably reliable; commitment orders based on unreliable evidence violate due process. *See, e.g., State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999) (Due process requires hearsay evidence be demonstrably reliable at revocation hearing); *State v. Kisor*, 68 Wn.App. 610, 620, 844 P.2d 1038 (1993) (Due process requires evidence supporting restitution order to be "reasonably reliable"); *State v. Strauss*, 119 Wn.2d 401, 832 P.2d 78 (1992) (Due process requires that sentencing decisions be based on reliable evidence.)<sup>8</sup>

Although psychology and psychiatry are generally accepted sciences (as noted on p. 21 of Respondent's Brief), an unorthodox

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<sup>8</sup> The reliability requirement has not explicitly been applied to civil commitments. However, the U.S. Supreme Court has implicitly acknowledged that civil commitment can only be based on reliable evidence. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 76 n. 3, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (Psychiatric opinion testimony "is reliable enough to permit the courts to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous..."); *see also California v. Otto*, 26 P.3d 1061 (Cal. 2001) (Due process requires that commitment order be based on reliable evidence).

application of an established theory must be excluded under *Frye*. *Frye* requires exclusion of evidence unless (1) it is based on a scientific principle that is generally accepted in the relevant scientific community, (2) there are generally accepted methods of applying the principle to produce reliable results, and (3) the accepted method was properly applied in the case before the court. *State v. Sipin*, at 413-414 (citing *Frye*).

The Department's expert acknowledged that Mr. Davis did not meet the scientifically accepted diagnostic criteria for pedophilia,<sup>9</sup> but assigned the diagnosis anyway. RP (1/6/09) 289-290, 295. In particular, he ignored the inclusion criterion<sup>10</sup> requiring that a patient be 16 or older (at the time she or he offends against children) by rounding up Mr. Davis's age for his last offense (which occurred before he had turned 16).<sup>11</sup> RP (1/6/09) 290.

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<sup>9</sup> As set forth in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Revised*, 4<sup>th</sup> Edition, Washington DC (2000) ("DSM-IV"), section 302.2 (Pedophilia).

<sup>10</sup> The inclusion and exclusion criteria are the basis for diagnosis under the DSM-IV; ignoring (or "fudging") the criteria decreases the reliability of diagnosis.

<sup>11</sup> The Department's expert also provided an alternate basis for his diagnosis. He claimed that Mr. Davis had intense and recurrent fantasies (after age 16) that caused him marked distress or interpersonal difficulty; however, he was unable to list any actual distress or interpersonal difficulty other than continuing incarceration stemming from the pre-age-16 juvenile offenses. RP (1/6/09) 289.

This technique—ignoring the scientifically established diagnostic criteria when diagnosing a person—has not achieved general acceptance in the scientific community. Accordingly, the evidence is unreliable. It cannot, consistent with due process, sustain the commitment order. *Dahl, supra; Kisor, supra; Strauss, supra*. Because the commitment order violates due process, it may be challenged for the first time on review as a manifest error affecting a constitutional right. RAP 2.5(a)(3). Respondent’s contention that Mr. Davis has waived this issue is accordingly without merit. Brief of Respondent, pp. 20, 21-22, *citing In re Post*, 145 Wn.App. 728, 187 P.3d 803 (2008).

Respondent’s reliance on *Post* is misplaced. In *Post*, Division I sidestepped the appellant’s constitutional claim without engaging in analysis under RAP 2.5(a)(3). *See Post*, at 755 (“Post improperly attempts to transform that which should have been raised as an evidentiary challenge in the trial court into a question of constitutional significance on appeal.”) The court cited *In re Taylor* as authority for its refusal to consider the constitutional dimension of the appellant’s *Frye* claim. *Post*, at 755-756 (citing *In re Detention of Taylor*, 132 Wn.App. 827, 836, 134 P.3d 254 (2006), *rev. denied*, 159 Wn.2d 1006, 153 P.3d 196 (2007)). But the *Taylor* case did not address a constitutional claim; instead, Division II refused to address *Frye* as an evidentiary issue raised for the first time on

appeal without argument under RAP 2.5(a)(3). The appellant in *Taylor* did not argue a constitutional issue. A court should not ignore a manifest error affecting a constitutional right simply because it could have been addressed through an evidentiary objection in the trial court. *Post's* aberrant approach to RAP 2.5(a)(3) should not be followed.

The commitment order is based on unreliable evidence and violates Mr. Davis's Fourteenth Amendment right to due process. *Dahl, supra; Kisor, supra; Strauss, supra*. The order must be reversed and the case remanded for a new trial.<sup>12</sup> *Sipin, supra*.

C. If the *Frye* issue is not preserved, Mr. Davis was deprived of the effective assistance of counsel.

A detainee facing civil commitment under RCW 71.09 is entitled to the effective assistance of counsel. *In re Stout*, 128 Wn.App. 21, 27-28, 114 P.3d 658 (2005). Counsel is ineffective whenever deficient performance causes prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption of adequate performance is overcome whenever there is no conceivable legitimate tactic explaining counsel's performance. *Id.*, at 130.

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<sup>12</sup> In the alternative, the case should be remanded for a *Frye* hearing, at which the Department may seek to establish that its expert's methodology is generally accepted within the scientific community.

Here, trial counsel's failure to raise a *Frye* objection to the unreliable expert testimony prejudiced Mr. Davis. *Reichenbach, supra*. Counsel's strategy included an attack on the pedophilia diagnosis, an objection would likely have been sustained, and the verdict would have been different if the evidence had been excluded (since the Department's primary theory at trial rested on the pedophilia diagnosis).

Respondent suggests that the failure to object under *Frye* was not ineffective because defense experts "conceded that diagnosis could be assigned to a person under the age of 16..." Brief of Respondent, p. 23. This is incorrect for two reasons. First, the quotation upon which Respondent relies ("Dr. Donaldson conceded there could be a 'pathological element to a 15-year-old having sex with a 4-year-old,") is not a concession that the diagnosis could properly be assigned to a person under 16. Brief of Respondent, p. 23. Second, Dr. Donaldson's statement that he "might or might not" diagnose a person 5 days short of age 16 does not establish that the approach urged by the state's expert is generally accepted within the scientific community, as required under *Frye*. Brief of Respondent, p. 23.

Respondent also suggests that the diagnosis was properly based on "extensive evidence at trial of the persistence of Davis' 'urges and fantasies' regarding sexual contact with children," even after he had

turned 16. Brief of Respondent, p. 23. But urges and fantasies are insufficient for a diagnosis of pedophilia. As the state's expert testified, they must cause marked distress and interpersonal difficulty. RP (1/6/09) 289. Mr. Davis didn't suffer marked distress and interpersonal difficulty, other than the fact that he was still confined (for offenses committed before he turned 16). RP (1/6/09) 289. A diagnosis resting on Mr. Davis's fantasies would not rest on established scientific principles. The expert's opinion (that Mr. Davis suffered from pedophilia) was not reliable, regardless of the basis.

If the *Frye* issue is not preserved for review, Mr. Davis was denied the effective assistance of counsel. *Reichenbach*. His commitment order must be reversed and the case remanded for a new trial. *Id., supra*.

**VII. THE TRIAL COURT VIOLATED MR. DAVIS'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY UNFAIRLY PREVENTING MR. DAVIS FROM INTRODUCING RELEVANT AND ADMISSIBLE EVIDENCE.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Martin*, at 506.

- B. Having allowed the Department to prove that Mr. Davis refused to participate in treatment, the trial court should have allowed Mr. Davis to fully explain his reasons.

Just as an accused person has a due process right to present a defense, a detainee facing civil commitment under RCW 71.09 must be allowed to introduce relevant and admissible evidence. *See, e.g., State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007); *see also In re Young*, 122 Wn.2d 1, 43-44, 857 P.2d 989 (1993) (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Furthermore, “[i]t is not proper to ‘allow[ ] one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.’” *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006) (alteration in original) (quoting *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

Here, the Department was allowed to introduce evidence that Mr. Davis declined treatment while detained at the Special Commitment Center. RP (1/5/09) 43-45, 95-111; RP (1/6/09) 124-144, 172, 208-211. Mr. Davis should have been allowed to fully explain the reasons for his decision. Balancing the parties’ interests and the risk of erroneous commitment under *Mathews v. Eldridge* compels this result, as outlined in Appellant’s Opening Brief. *See* Appellant’s Opening Brief, pp. 41-43. In addition, fairness requires this result: the Department chose to introduce

the evidence, and should not have been able to prevent Mr. Davis from explaining what he knew about the federal injunction that was in operation when the Petition was filed, his understanding of the success rate for treatment, and his desire to find his own therapist who could help him. RP (12/29/08) 18-19; RP (12/30/08) 30-37; RP (1/5/09) 97-100; RP (1/6/09) 142-144, 172. By allowing the Department to raise Mr. Davis's refusal to participate but forbidding Mr. Davis from explaining his refusal, the trial court violated Mr. Davis's right to a fair trial under the Fourteenth Amendment's due process clause. *Lord, supra*.

The jury wanted to know why Mr. Davis thought treatment was inadequate. Jury Question, CP 9.<sup>13</sup> Without sufficient explanation from him, jurors could have believed he was being obstreperous, or that he didn't believe he needed treatment, or even that he lacked remorse about his prior offenses.<sup>14</sup> His explanation would not have been relevant in the absence of the Department's evidence that he'd refused treatment. *In re Turay*, 139 Wn. 2d 379, 986 P.2d 790 (1999). However, once the Department elected to introduce evidence of his refusal, Mr. Davis should

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<sup>13</sup> Mr. Davis erroneously cited to all three jury questions in the Opening Brief, as Respondent notes. Brief of Respondent, p. 27 n. 16.

<sup>14</sup> Indeed, Respondent's brief suggests that his lack of participation was relevant because it helped establish these factors. Brief of Respondent, p. 30-31.

have had an opportunity to explain. The jury's question emphasizes the importance of the excluded evidence. CP 9.

Respondent argues that Mr. Davis's explanation was irrelevant, even after introduction of evidence that he refused treatment. Brief of Respondent, pp. 28-29, citing *In re Duncan*, 167 Wn.2d 398, 219 P.3d 666 (2009). But in *Duncan*, the detainee sought to introduce extrinsic evidence—expert testimony unrelated to the detainee's knowledge or understanding—of the treatment's success rate. *Id.*, at 408-410. The trial court excluded the evidence, holding that the trial “was about Duncan, not about the treatment program at the SCC.” *Id.*, at 409. The Court of Appeals held that the trial court acted within its discretion by excluding the evidence. *Id.*, at 409-410. Here, by contrast, Mr. Davis sought to introduce his own testimony about the reason he'd refused to participate in pretrial treatment; he didn't seek to introduce independent evidence about the treatment program's failures. RP (12/29/08) 18-21; RP (12/30/08) 30-37; RP (1/5/09) 43-45; RP (1/6/09) 142-189, 208-211.

The trial court prevented Mr. Davis from responding to the question, leaving the jury left to speculate on his reasons for refusing treatment. This prejudiced him, and violated his Fourteenth Amendment right to due process. *Lord, supra; Mathews v. Eldridge, supra*. Accordingly, the commitment order must be reversed and the case

remanded for a new trial, with instructions to allow Mr. Davis to provide his explanation if the Department chooses to introduce evidence that he has refused to participate in treatment. *Fankhouser, supra*.

**VIII. THE TRIAL COURT ERRONEOUSLY ADMITTED IRRELEVANT EVIDENCE THAT PREJUDICED MR. DAVIS.**

A. Standard of Review

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Hudson*, at 652.

B. The trial court abused its discretion by admitting irrelevant and prejudicial evidence on five occasions.

An erroneous evidentiary ruling requires reversal if there is a reasonable probability that it materially affected the outcome of the trial. *State v. Asaeli*, 150 Wn.App. 543, 579, 208 P.3d 1136 (2009). In this case, the trial court admitted irrelevant evidence on five occasions.

First, the court admitted irrelevant evidence of Mr. Davis's refusal to participate in treatment pending trial. RP (1/5/09) 97-100, 104-105; RP (1/6/09) 142-144, 172. This evidence did not relate to any fact of consequence (especially since treatment has been shown to be of dubious

efficacy). Furthermore, the evidence was highly prejudicial—because it suggested Mr. Davis was unwilling to reduce his chances of recidivism—especially in light of the trial judge’s refusal to allow Mr. Davis to fully explain his refusal. RP (12/29/08) 21; RP (1/6/09) 119. The evidence should have been excluded under ER 402 and ER 403.

The Department seeks to have it both ways: on the one hand Respondent argues Mr. Davis’s refusal was relevant to show his lack of insight, empathy, and remorse, and his unwillingness to reduce his chances of recidivism. Brief of Respondent, pp. 30-31. On the other hand, the Department argues that the explanation for his refusal was irrelevant, even though it went to rebut the very things Respondent seeks to infer from the refusal and which it twice describes as “highly relevant.” Brief of Respondent, pp. 26-30 30, 31. If his refusal to participate in treatment is “highly relevant” because of what it implies, his explanation for that refusal is also relevant because it addresses those implications. The Department should not be allowed to have it both ways. The evidence of Mr. Davis’s refusal should have been excluded. ER 402 ER 403.

Second, testimony about the sex offender notification campaign should have been excluded under ER 402 and ER 403. RP (1/5/09) 52-53. This evidence was irrelevant and unfairly prejudicial because it

emphasized law enforcement's belief that Mr. Davis was a danger to the community.

Respondent appears to concede that the evidence was irrelevant, but argues (1) that trial counsel's general relevance objection was insufficient to preserve the issue for review under ER 403, and (2) that any error was harmless. Brief of Respondent, p. 33-34. If the ER 403 error is not preserved, then Mr. Davis was denied the effective assistance of counsel.<sup>15</sup> *Reichenbach, supra*. Furthermore, the error was not harmless: the evidence amounted to an opinion on an ultimate issue (that the police considered Mr. Davis likely to commit predatory acts of sexual violence, even as a teenager). It was admitted as substantive evidence, which the jury was allowed to use for any purpose. The evidence should have been excluded. ER 402, ER 403.

Third, the evidence of animal abuse during childhood should have been excluded. ER 402, ER 403, ER 404(b). RP (1/5/09) 75. The evidence was irrelevant: the Department did not tie the evidence to an alleged mental abnormality or personality disorder; nor did the Department relate it to the likelihood that Mr. Davis would commit

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<sup>15</sup> The analysis is the same as that outlined for the ineffective assistance claim relating to the *Frye* issue (above), and will not be repeated here.

predatory acts of sexual violence; nor was the evidence used to assess his current dangerousness. Respondent contends that trial counsel's relevance objection was insufficient to preserve the issue for review under ER 403 or ER 404(b);<sup>16</sup> if that is true, Mr. Davis was denied the effective assistance of counsel.<sup>17</sup> *Reichenbach, supra*.

Respondent also suggests that the evidence was harmless in light of the other evidence. Brief of Respondent, p. 35. But evidence of animal abuse is highly prejudicial. *See, e.g., United States v. Jones*, 25 M.J. 567, 569-570 (1987) ("Evidence of this type did no more than establish that the appellant was a 'bad person' who richly deserved to be punished"); (Evidence of animal abuse was "prejudicial and inflammatory.") *Templin v. State* 711 S.W.2d 30, 35 (Tex., 1986).

Finally, Respondent contends that ER 404(b) is inapplicable. But the evidence of animal abuse was not introduced for a limited purpose; instead, the jury was permitted to use it in any way they saw fit, including as propensity evidence suggesting that Mr. Davis might commit future

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<sup>16</sup> Brief of Respondent, p. 35.

<sup>17</sup> The analysis is the same as that outlined for the ineffective assistance claim relating to the *Frye* issue (above), and will not be repeated here.

acts of animal abuse if not confined. The evidence should have been excluded. ER 402, ER 403, ER 404(b).

The fourth item of evidence that the court should not have admitted, the juvenile judge's 1999 findings (that "rape/kidnap is heinous, 4 yr old victim particularly vulnerable, violation of SSODA sentence conditions, sexual [sic] motivated offenses, standard range is inadequate"), was wholly irrelevant and highly prejudicial. Exhibit 9, CP; ER 402, ER 403. The juvenile judge's findings were unambiguous pronouncements from a person in authority that Mr. Davis, even as a juvenile, was worse than other sex offenders. *See, e.g., In re Detention of Pouncy, supra* (discussing the numerous reasons why prior judicial findings are inadmissible).

Respondent apparently concedes that the evidence was irrelevant and prejudicial, but implies that Mr. Davis did not object to the admission of this information.<sup>18</sup> Brief of Respondent, p. 36. This is incorrect; Mr. Davis did object. If trial counsel's objection was insufficient, Mr. Davis

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<sup>18</sup> Respondent also asks the court to disregard the argument because Mr. Davis did not include sufficient argument in the Opening Brief. Appellant contends that very little argument was required, because the error and its prejudice are abundantly clear. In any event, the additional argument provided in this reply brief should negate Respondent's criticism.

was denied the effective assistance of counsel.<sup>19</sup> *Reichenbach, supra*.

There was no basis to admit the manifest injustice disposition and findings; accordingly, the trial court should have sustained the objection and excluded the evidence. ER 402, ER 403.

Fifth, the Department should not have been allowed to ask Mr. Davis if another witness's testimony was incorrect. RP (1/6/09) 141; *State v. Walden*, 69 Wn.App. 183, 187, 847 P.2d 956 (1993). Cross-examination of this sort is improper. *Id., supra*. Mr. Davis's objection should have been sustained.

Respondent apparently concedes that the evidence should have been excluded, but suggests that counsel's objection was insufficient to preserve the error. Brief of Respondent, p. 37. If that is true, Mr. Davis was denied the effective assistance of counsel.<sup>20</sup> *Reichenbach, supra*.

Respondent incorrectly contends that any error was harmless. Brief of Respondent, p. 37. Errors in proceedings under RCW 71.09 have greater prejudicial effect than in other cases. This is so because the jury is tasked with doing more than determining historical facts: in cases brought

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<sup>19</sup> The analysis is the same as that outlined for the ineffective assistance claim relating to the *Frye* issue (above), and will not be repeated here.

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under RCW 71.09, jurors make predictions about future behavior.

Because it is impossible to know the future with certainty, jurors in RCW 71.09 cases are forced to examine everything before them as they carry out their difficult task. Individual jurors may (for example) place great weight on a detainee's demeanor while answering a particular question such as that posed here. Because of this, the possibility of prejudice is magnified when errors occur in cases brought under RCW 71.09. *See, e.g., Post*, at 747 (discussing the care that must be taken in RCW 71.09 proceedings). The court should have prohibited the Department from asking Mr. Davis to comment on the correctness of Ms. Fleming's testimony. The erroneous ruling prejudiced the outcome. ER 402, ER 403; *Walden, supra*.

Finally, reversal is required for cumulative error. *State v. Chamroeum Nam*, 136 Wn. App. 698, 708, 150 P.3d 617 (2007); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Even if these errors don't require reversal when considered individually, they undermine confidence in the outcome when considered together. *Nam, supra*. The case must be remanded for a new trial, with instructions to exclude the irrelevant evidence. *Id., supra*.

**CONCLUSION**

Mr. Davis's commitment order must be reversed and the case remanded to the trial court for a new trial.

Respectfully submitted on February 22, 2010.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

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

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and to:

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

All postage prepaid, on February 22, 2010.

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 February 22, 2010.

  
\_\_\_\_\_  
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