

No. 43909-3-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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IN RE THE DETENTION OF E.S.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

The Honorable Mark Gelman, Commissioner

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Review of the issues is required despite the passage of time because the determination of whether a person is “gravely disabled” and should be subject to involuntary mental commitment has legal consequences in the future and the issues are of continuing and substantial public interest, likely to recur, which this Court should decide.

2. The trial court erred in finding that appellant E.S.<sup>1</sup> was “gravely disabled.”

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The determination of whether someone should be subject to involuntary mental commitment because they are “gravely disabled” has legal consequences which persist even after the term of involuntary commitment has been served. Further, the questions presented in this case about whether the trial court improperly determined that E.S. was “gravely disabled” are questions of substantial and compelling public interest because they involve the proper interpretation of the commitment statute and relevant definitions and the requirements the government must satisfy before taking away the liberty of a citizen.

Should this Court address the issues because of their impact beyond the 180-day period of commitment?

2. Under RCW 71.05.320(3), a court may continue the involuntary commitment of a citizen to a mental institution if the person is “gravely disabled,” defined as either being in danger of “serious physical

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<sup>1</sup>Pursuant to this Court’s General Order 1992-3, appellant will be referred to herein by initials only.

harm” from himself because he cannot provide for his essential needs or as having “severe deterioration” in routine functioning and not receiving care that is essential for health and safety.

Such commitment, however, must be based upon allegations from either two “examining physicians” or one “examining physician and examining mental health professional.”

Did the court err in finding that E.S. was “gravely disabled” based solely upon the testimony of a mental health professional who had only seen E.S. on the ward, had not conducted evaluations of E.S. himself and relied only on what he was told about E.S. by others and in written notations in the chart?

Further, were the findings sufficient under due process to support depriving a citizen of his physical and other liberties when they were based upon such conclusions and hearsay?

C. STATEMENT OF THE CASE

1. Procedural Facts

E.S. was charged in criminal proceedings but on February 20, 2009, those charges were dismissed due to concerns about appellant’s competency, which caused the court to grant a Petition for involuntary commitment that same day. CP 2-7. Subsequent Petitions were granted by a court on August 18, 2009 and January 21, 2010, after a jury finding on May 21, 2010, by a court on October 28, 2010, after a jury finding on June 9, 2011 and by a court on March 5, 2012. CP 10-12, 25-27, 38-39, 47-49, 58-59, 76-78. On August 15, 2012, a subsequent Petition for another 180 days of involuntary treatment was filed and, on August 20,

2012, the Honorable Commissioner Mark Gelman entered findings and an order for such detention. CP 79-92, 94-98.

E.S. appealed and this pleading follows. CP 99-104.

2. Relevant facts

On the afternoon of January 20, 2009, it was alleged that E.S. had assaulted a woman he had never met before. CP 2-7. He had been seen yelling and walking around a parking lot and then was alleged to have accused the woman of following him, after which the assault occurred. CP 2-7. E.S. was subsequently committed to Western State Hospital and recommitted several times.

In the Petition for 180 days of involuntary treatment which is the subject of this appeal, it was alleged that E.S. should be recommitted because he “is gravely disabled.” CP 80. The Petition also alleged by way of boilerplate language that “[r]espondent requires intensive, supervised 24-hour restrictive care and is not ready for less restrictive care[.]” CP 80.

Attached to the Petition was a declaration indicating it was from Rolando Pasion and Hamid Nazemi. CP 81. It reiterated the circumstances of the original admission, detailed the number of times E.S. had been admitted to various locations and described what it said that “nursing progress notes” showed about his mental condition. CP 81. From their own personal experience, the declarants said that E.S. had “adequate” hygiene and appearance, that he wanted to exercise his rights to silence and thus “refused to participate in the current interview.” CP 81. The declaration admitted that previous evaluations had found him “oriented to person, place, time and situation,” and that his speech was

normal both in rate and volume. CP 81-83.

The declarants relied on prior descriptions and information from psychiatric assessments about “delusional (grandiose) thought content about whether he was being held at the hospital “illegally” and other things. CP 81-92. E.S. was diagnosed with a “[s]chizoaffective Disorder, Bipolar Type.” CP 81-82. The “Less Restrictive Treatment” section of the Petition said it was “[n]ot recommended” because of E.S. having “grandiose delusional thought content” such as thinking he knew people who were famous, did not believe he had a mental illness and did not belong at the hospital and because he did not want further treatment, that he had not be able to “engage with social work in a reality-based conversation about discharge planning” because he says he is still in the military or thinks he has a home and income “from the entertainment business.” CP 81-92.

Some of the Petition was based upon information contained in a Petition filed in 2011 by someone named “Valerica Ene-Stroescu.” CP 83. Other parts were “derived through review” of E.S.’s chart, including “nursing progress notes” about E.S. and his “thought content” as well as other things. CP 84-86. None of the people who made these claims were named except by initials. CP 84-92. Some allegations came from “social work” without any indication of the actual names of the people, again with only initials, and including allegations that E.S. was “grandiose.” CP 84-92. Some of the information described what the authors said were contained in “previous psychiatric assessments” conducted by unknown people, identified only by initial. CP 83-92.

At the hearing before Commissioner Gelman on August 20, 2012, E.S. initially tried to talk to the court about calling him “Mr. Doe or John Doe, not Smith” because his “arrest name” was “John Doe.” RP 4. The court then heard from Nazemi, who worked as a psychologist at the mental hospital. RP 6.

Nazemi admitted he had not conducted an interview with E.S. and had only observed him on the ward. RP 6-7. E.S. had only been on the ward and Nazemi was only familiar with him personally since March of 2012, but Nazemi said he had reviewed the “records” and discussed E.S. “with the treatment team.” RP 7. Nazemi had seen E.S. on the ward and asked E.S. to subject himself to an interview for the purposes of the involuntary commitment hearing, but E.S. had declined, saying initially that he was doing so as his own attorney but then saying his attorney was “Rob McKenna.” RP 6-7.

Based upon his review of the records, his brief observation and “discussing his case with the treatment team,” Nazemi testified that E.S. suffered from “schizoaffective disorder, bipolar type,” with his symptoms being “delusional content,” i.e., maintaining he had lots of money, or was famous, or had a Ph.D., or was a lawyer, and that he owned property at the hospital. RP 7-8. He appeared to have a disorientation as to time, as well. RP 8. Nazemi reported what he said E.S. had said to social workers at some point and how “one report” said he had behaved in the past. RP 8. Nazemi also said the “progress notes” indicated that E.S. had, at some time, said things which were “not logical” and that there were “chart notes” from some unspecified person that E.S. was saying, again at some

point not specified, that he did not have mental illness and did not want to discuss follow-up care.” RP 9. “Social work” had written in a “note” that declared E.S. “unable to engage in a real[i]ty- based conversation about discharge planning.” RP 9.

Nazemi admitted that, as far as his own observations, E.S. had said he did not think he needed medication but that E.S. had been “on the ward, generally attentive with his medication regimen,” had “done a good job” with going to assigned groups/treatment and was “respectful” in many of his encounters with Nazemi. RP 9.

Nazemi pointed out that E.S. had been hospitalized at Western State 23 times, but when asked what the reason was, Nazemi only referred to the reason for the original commitment in 2009. RP 10. Nazemi described that as “a history of assaultive behaviors in the community,” but based that on “a psychiatric assessment that [Nazemi] read shortly after admission.” RP 10. At that time, several years earlier, E.S. was saying he would not take medications. RP 10.

When asked what might happen if E.S. was released without “any kind of structure surrounding him,” Nazemi declared his opinion “and the opinion of the treatment team” that E.S. could not obtain his own food, clothing and shelter. RP 10. This was “just based on what” E.S. had said about not wanting to “discuss follow-up care,” which Nazemi thought meant “the chances are that if he were to be discharged at this point, he would discontinue his meds,” which Nazemi thought “would set the stage for decompensation.” RP 10. Nazemi also said E.S. was not ready for less-restrictive placement because he had a “history” of that being revoked

and because Nazemi said he needed “ongoing monitoring and supervision in the context of a structured hospital setting to ensure his ongoing medication adherence and further improvement.” RP 11.

On cross-examination, Nazemi admitted that the “overall presentation” by E.S. had been “fairly consistent” apart from some “fluctuations” that were “not indicative of something clinically meaningful or significant.” RP 12. Nazemi denied, however, that E.S. was at a “baseline level of functioning,” saying that, instead, “[w]e think” that “medication adjustments are ongoing and our opinion is that there is still room for improvement.” RP 12. When asked what led him to believe that “further improvements can be attained,” Nazemi said that the “hope” was to get E.S. to have “that conversation with social work.” RP 13. Nazemi said he thought E.S. believed he had “resources in the community that are not there,” such as a home, money and a car, and that E.S. did not believe he needed medications. RP 13. For Nazemi, it was also significant that E.S. had a history of “many years of being hospitalized and rehospitalized.” RP 13.

Nazemi said “all of these things directly impact his ability to interact with his environment in a reality-based manner to tend to his basic needs.” RP 13. But Nazemi conceded that E.S. was managing daily living while in the hospital, although he requires “some prompting” for changing clothes and “ADLs.” RP 13.

E.S. testified on his own behalf, objecting that, when he was arrested and brought to court in November of 2008, the name on the case was “John Doe,” which was not his name. RP 14-15. He spoke at length

about it, saying his original name was “Joseph H. Stevens” and he thought someone named “E[.] J[.] S[.] Jr. probably got E.S.’s identification when released. RP 18. When asked how he felt about staying in custody, E.S. again talked about the name “John Doe” and ultimately the court said “this is nonresponsive.” RP 19. E.S. then asked if he could give testimony on his own but the court said, “I think we’re finished at this point.” RP 19.

The court then declared there was “[c]lear, cogent, and convincing evidence - - of symptoms and - - diagnosis, both the Court finds cognitive volitional, as well as health and safety basis to conclude grave disability up to 180 days further care,” and “[l]ess restrictive [sic] are not in his best interests or appropriate at the present time.” RP 19-20.

In his written findings of fact, the Commissioner adopted the “Declaration” attached to the Petition, and checked the “boxes” next to boilerplate language which indicated that E.S. was “in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety” and that he “manifest severe deterioration in routine functioning evidence by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.” CP 96.

The written findings also included declarations or findings following a written statement which provided, “[t]he Respondent’s current Mental Status Examination reveals.” CP 94. Included in those declarations were statements of things such as E.S. supposedly stating, “I don’t ever have to work again. I have a home, car, I’ve written famous songs, I know famous people, I have a Ph.D, I’m a lawyer, I own property

at Western State Hospital.” CP 94.

D. ARGUMENT

THE LOWER COURT ERRED IN FINDING THAT E.S. WAS  
“GRAVELY DISABLED” AND THE ISSUES ARE NOT MOOT

Involuntary commitment of a citizen due to mental illness

represents a significant deprivation of liberty. See In re Labelle, 107 Wn.2d 196, 201, 728 P.2d 138 (1986). As a result, under both the state and federal constitutions, before the state can commit someone based on mental illness, mandates of due process must be applied. Id. Further, because of the “significant deprivation of liberty” involved when a person is being committed for mental illness, the statutes authorizing such commitment “must be strictly construed.” In re the Detention of J.R., 80 Wn. App. 947, 955, 912 P.2d 1062, review denied, 130 Wn.2d 1003 (1996).

In this case, the state alleged - and the trial court found - that E.S. should be subjected to involuntary mental commitment because he met the statutory ground of being “gravely disabled.” CP 79-92, 96-98 . This Court should reverse that determination, because the lower court erred in making that decision without the testimony of an “examining” mental health professional, based upon hearsay.

At the outset, the issues are properly before the Court even though E.S. will have already served the entire 180-day term of commitment. An

appeal is “moot” if it presents “merely academic questions” and the reviewing court can no longer provide effective relief. See In re Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983). Where confinement or commitment is part of the court’s ruling below, release from that commitment does not make the appeal “moot,” so long as “collateral consequences flow from the determination authorizing such detention.” In re the Detention of M.K., 168 Wn. App. 621, 626, 279 P.3d 897 (2012).

Here, there are such consequences. Not only is the fact of the commitment used by the court in determining whether to impose further commitment in the future, it is also used as part of the evaluation process, as well. See RCW 71.05.012 (“[c]onsideration of prior mental history is particularly relevant in determining whether the person would receive, if released, such care as is essential for his or her health or safety”); RCW 71.05.212 (evaluations shall include consideration of prior commitment records). Further, under RCW 71.05.012, a “prior history of decompensation leading to repeated hospitalizations” is given “great weight” in determining whether less restrictive alternatives should be ordered in a current case.

As a result, as this Court held in M.K., “each commitment order has a collateral consequence in subsequent petitions and hearings, allowing us to render relief if we hold that the detention under a civil

commitment order was not warranted.” M.K., 168 Wn. App. at 626.

Even if there were not such consequences, review would still be proper. The Court will review a case even in such a situation if the case involves “matters of continuing and substantial public interest.” See Dunner v. McLaughlin, 100 Wn.2d 832, 838, 676 P.2d 444 (1984).

Where, as here, a case involves the clarification or interpretation of the statutory scheme governing civil commitment, it meets that standard. Id.; see In re the Detention of R.S., 124 Wn.2d 766, 770, 881 P.3d 972 (1994).

On review, this Court should reverse, because the lower court erred in finding that E.S. was “gravely disabled” and in ordering commitment on that basis. “Gravely disabled” is defined in RCW 71.05.020(17) as:

a condition in which a person, as a result of a mental disorder: (a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.

The state bears the burden of proving that a citizen meets one of these definitions of “gravely disabled,” by “clear and convincing evidence.” In re the Detention of C.K., 108 Wn. App. 65, 74, 29 P.3d 69 (2001). The seminal case on this particular ground for commitment is Labelle, supra, which upheld it against a challenge that the standard for commitment due to being “gravely disabled” was unconstitutionally vague. See Labelle, 107 Wn.2d at 206-207. In upholding the ground, the Supreme Court

provided what this Court called in M.K. “careful guidelines for the kind of evidence that can be used to show that a person is gravely disabled.”

M.K., 168 Wn. App. at 626-27, citing, Labelle, 107 Wn.2d at 202-208.

The Labelle Court declared:

[W]hen the State is proceeding under the gravely disabled standard . . . **it is particularly important that the evidence provide a factual basis for concluding that an individual “manifests severe deterioration in routine functioning.”** Such evidence must include recent proof of significant loss of cognitive or volitional control. In addition, the evidence must reveal a factual basis for concluding that the individual is not receiving or would not receive, if released, such care as is essential for his or her health or safety.

107 Wn.2d at 208 (emphasis added).

The Labelle Court was especially concerned about the requirements for finding someone “gravely disabled” because of the possibility that the “gravely disabled” standard could be used to improperly commit citizens based solely upon the fact that they suffer from mental illness. Regardless of the state’s significant interests in both taking care of those unable to care for themselves and protecting the public from those who are dangerously mentally ill, the Labelle Court noted, the state cannot subject a person to commitment solely on the basis of mental illness alone. 107 Wn.2d at 201.

Put simply, the Supreme Court declared, “mental illness alone is not a constitutionally adequate basis for involuntary commitment.” Labelle, 107 Wn.2d at 201. Further, the state may not “confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community,” because “the mere presence of mental

illness does not disqualify a person from preferring his own home to the comforts of an institution.” O’Connor v. Donaldson, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed.2d 396 (1975).

Instead, to satisfy the requirements of the state and federal constitutions, in order to commit someone to a mental hospital against their will, the state must prove not only that a person is mentally ill but also that one of the statutory grounds for commitment is met. See Labelle, 107 Wn.2d at 201-202. And due process requires that such proof be more than conclusory but instead be based upon evidence from a mental health professional who has sufficient personal familiarity with the person the state seeks to commit that the allegations are actually proven, not simply declared. See id.

Here, E.S. was committed without such due process. RCW 71.05.290(2) requires that any petition for commitment must be supported by sworn affidavits signed by, *inter alia*, one examining physician and examining mental health professional. In addition, the affidavits must “describe in detail the behavior of the detained person which supports the petition” and must “explain” what less restrictive treatments are available and why they will not suffice. RCW 71.05.290(2).

In J.R., supra, the Court first held that the requirements of RCW 71.05.290(2) apply to subsequent commitments such as the one involved here. J.R., 80 Wn. App. at 954. The Court then examined the requirement that the evidence to support commitment must come from “examining” physicians or mental health professionals, in light of the mandate that civil commitment statutes are to be “strictly construed.” 80 Wn. App. at 955.

The respondents in J.R. had argued, *inter alia*, that the petition for commitment was “defective” because the psychiatrist signing it was not an “examining” psychiatrist in that he had not conducted a recent, formal evaluation of the patient, for the purposes of filing the petition.

The J.R. Court thus looked at the issue of the meaning of the term, “examining” physician. 80 Wn. App. at 955. The Court interpreted the statutory language in light of the verb tense, apparent legislative intent and the nature of adjectives, concluding that the word “examining” “connotes a continuing process or activity, not one that has a finite beginning and end.” Id. The Court concluded:

Pursuant to this interpretation, a doctor who has previously examined a patient, who maintains frequent contact with the patient, and who has extensive current knowledge about the patient’s mental status may qualify as an examining doctor and share his information with the court by mean of the petition. A patient who is being evaluated for a second 180-day commitment period generally has been in the hospital for at least the least the previous six and one-half month. . . Thus, the treating doctor has had a unique opportunity to evaluate the patient and may have a more thorough understanding of the patient then would a doctor who merely conducts a single isolated mental status examination. To find the latter qualified to petition the court, but not the former, could frustrate the goal of providing the court access to the most reliable evidence available.

80 Wn. App. at 956-57.

The Court found that defining “examining” to include a “treating doctor who is familiar with the patient by way of ongoing informal examinations” was consistent with the purpose and language of the statue.

80 Wn. App. at 957.

But the Court was also careful to ensure that this interpretation of the statutory language was not expanded in such a way as to provide

“meaningful protection of the patients’ liberty interests.” 80 Wn. App. at 957. More specifically, the Court declared, “[t]he statute provides protection by requiring that the petitioning doctor be **personally familiar, in detail, with the patient’s illness and prognosis.**” J.R., 80 Wn. App. at 957 (emphasis added). If he or she does not have such personal familiarity with the patient and such personal experience with treating the patient, that will not suffice and dismissal of the petition is required. Id.

Here, as in J.R., the Petition and subsequent commitment were not supported by evidence from an “examining” mental health professional. The court below did not make independent findings about what evidence it felt proved that E.S. was “gravely disabled.” Instead, in the section of the Order of Commitment headed “Findings of Fact,” the document indicated certain facts from “[t]he Respondent’s current Mental Status Examination.” CP 95.

But in fact, there was no “current Mental Status Examination.” CP 86. The only evidence regarding the mental status examination was that Mr. Smith declined, said he wanted to speak with an attorney, said he did not have an attorney, said he would be his own attorney and finally said Rob McKenna was handling his appeal. CP 86.

Further, essentially all of the other “findings” which were declared to come from the “current Mental Status Examination” were not based upon Sabeti’s actual knowledge. The findings on what the “current Mental Status Examination” “revealed” were as follows:

Presents with symptoms of continuous delusional content. For example, he states he has lots of money, stating[,] “I don’t ever

have to work again. I have a home, car, I've written famous songs, I know famous people, I have a Ph.D., I'm a lawyer, I own property at Western State Hospital." He said it was a date, when asked, that had already passed. He has on-going themes with his name. Believes W.S.H. has not recorded his name correctly. All of the above delusions are untrue. Prompts needed for his ADL's. He uses odd words, for example, "I tobaconize, I don't smoke." He denies he has a mental illness; he needs prompts for his ADL's. He is medication non-compliant in the community. He has a history of assaultive behavior in the community. He spontaneously speaks in illogical words. Patient declines attempts to be [unintelligible].

CP 95. These "facts," however, were not based upon Sabeti's experience in treating or evaluating E.S but instead from hearsay declarations by others, many of whom were not identified or only identified by initials. As the Petition and affidavit declares, the evidence Sabeti relied on came from:

- 1) "a previous petition filed with the court on 11/17/11 by Valerica Ene-Stroescu, MD," CP 82; and
- 2) "review of [E.S.'s]. . . Western State Hospital (WSH) chart with reference to the past approximately six months" CP 83, with information from people identified only by their initials or sometimes not at all,

Identified as "nursing progress notes:

"ECT, 3/7/12,"  
"MHT, 4/01/12,"  
"3/30/12,"  
"RT2, 4/17/12,"  
"LPN, 4/26/12,"  
"OT1, 4/27/12,"  
"PA, 4/30/12,"  
"RN, 5/12/12,"  
"OT1, 5/23/12,"  
"LPN2, 5/29/12,"  
"PA, 6/1/12,"  
"RT2, 6/7/12,"  
"RN, 6/11/12,"  
"PA, 7/2/12,"  
"IC2, 7/5/12,"  
"RT2, 7/18/12,"

“MHT, 7/10/12,”

Identified as “social work,”

“PSW3, 3/13/12,”

“PSW3, 4/30/12,”

“PSW3, 5/31/12,”

“PSW3, 6/29/12,”

“PSW3, 7/31/12.”

CP 83-87. For some declarations, the Petition contained *no* citation to even initials, i.e., “[a]ccording to nursing staff,” “[h]e has required some prompting for his ADLs,” etc. CP 83-89. For sections on “Orientation,” “Memory,” “Speech/Ability to Communicate,” “Thought Processes/Content/Disorders/Perception of Reality;” “Judgment,” “Insight,” “Cognitive and/or Volitional Control/Assaultiveness,” information was based on “previous psychiatric assessments,” again using only initials to indicate a potential, otherwise unidentified, source (“MD, 7/27/12; MD, 6/25/12; MD, 6/11/12;” “OT1, 4/27/12,” “OT1, 5/23/12”, MD 5/2/121[sp],” etc.). CP 87-88, 90. For “Insight,” there was also information from “PA, 7/2/12,” described as “in group.” CP 90. For “Judgment,” there are multiple declarations referring only generally to what “social work reports indicate” and what “nursing progress notes have documented,” without citation to any particular person who made these claims. CP 90.

Thus, as in J.R., the person who signed the petition - and who testified at the commitment hearing - lacked “sufficient first-hand familiarity with the patient’s mental status to make a diagnosis and recommendation.” See J.R., 80 Wn. App. at 957. The resulting commitment was in violation of E.S.’s due process rights and reversal is

required.

E. CONCLUSION

This Court should reverse the order of commitment in this case. While the evidence shows that E.S. is mentally ill, his due process rights were violated when the lower court concluded that he was “gravely disabled” based upon a Petition and testimony which was given by a state’s expert who did not have adequate first-hand knowledge to support the commitment.

DATED this 20<sup>th</sup> day of February, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached brief to opposing counsel and E.S. by depositing a true and correct copy of the document as follows: Attorney General's Office, 7174 Clearwater Dr. S.W., P.O. Box 41024, Olympia, WA. 98504, and E.S., Western State Hospital, 9601 Steilacoom Blvd. S.W., Lakewood, Washington 98498-7213.

DATED this 20th day of February, 2013.

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