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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B:

NO. 28417-4-III

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

In re Detention of Shawn Botner,

STATE OF WASHINGTON,

Respondent,

v.

SHAWN BOTNER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by ordering appellant to submit to penile plethysmograph (PPG) testing.¹ CP 574.

2. The court erred in finding the PPG testing was necessary. CP 572 (Finding of Fact 11).

3. The court erred in finding the rules enacted under RCW 71.09.040 provide that a PPG forms part of a comprehensive evaluation. CP 572 (Finding of Fact 12).

4. The order compelling Botner to submit to PPG testing violated his state and federal constitutional privacy and due process rights.

5. RCW 71.09.040 and WAC 388-880-034 are unconstitutional to the extent they authorize compulsory PPG testing for candidates for commitment under chapter 71.09 RCW.

6. The court erred in failing to instruct the jury it must be unanimous as to the acts constituting a recent overt act.

7. The trial court erred in admitting evidence of the pedophilia diagnosis.

8. The trial court erred in admitting evidence of the 2007 Milloy study.

¹ A very similar issue regarding compulsory polygraph lie-detector tests for commitment candidates under chapter 71.09 RCW is pending before the Washington Supreme Court in In re Detention of Hawkins, No. 82907-1. Oral argument was held May 6, 2010.

9. Cumulative error requires reversal.

10. The trial court erred in refusing the defense request to narrow the risk prediction to the foreseeable future.

Issues Pertaining to Assignments of Error

1. The court ordered appellant to submit to PPG testing as part of the evaluation required by RCW 71.09.040(4). He refused to participate, but agreed to a stipulation to avoid being jailed for contempt.

a. Chapter 71.09 RCW, which curtails civil rights, must be strictly construed to its terms. The statute does not expressly authorize a court to order pre-trial PPG testing. Did the trial court exceed its statutory authority by ordering appellant to submit to PPG testing?

b. The relevant implementing regulations mention PPG testing only in the context of a review of records. Did the court err in concluding the PPG was properly part of the evaluation under WAC 388-880-034?

c. Agencies may only exercise those powers conferred on them expressly or by necessary implication. RCW 71.09.040 does not expressly authorize the Department to impose requirements for evaluations. Nor are such regulations necessary to implement chapter 71.09 RCW. Did the Department exceed its authority by promulgating

regulations requiring PPG testing as part of evaluations under RCW 71.09.040?

d. Does forcible PPG testing violate state and federal constitutional rights to privacy and due process by compelling intimate sexual conduct?

2. The State was required to prove appellant committed a “recent overt act.” In closing, the prosecutor argued the jury could choose among numerous acts that satisfied this element, some of which are insufficient as a matter of law. Did the trial court err in failing to instruct the jury it must be unanimous as to the recent overt act?

3. Was appellant prejudiced by the admission of unreliable, minimally probative, and highly prejudicial evidence when, over defense objection, the court admitted the following:

a. Evidence of a 2007 study showing the percentage of those recommended for civil commitment but not committed who then re-offended and

b. Evidence appellant was diagnosed with pedophilia although the foundation for this diagnosis was weak at best and the State did not rely on it to show a mental abnormality under the statute?

4. Did cumulative error deny appellant a fair trial?

5. Did the trial court deny appellant's due process rights by failing to limit the risk prediction to the foreseeable future?

B. STATEMENT OF THE CASE

1. Procedural Facts

In 2006, the State filed a petition alleging appellant Shawn Botner is a sexually violent predator (SVP). CP 1. A jury found the State proved the allegations beyond a reasonable doubt and Botner was ordered committed to the Special Commitment Center (SCC). CP 348-49, 514. Notice of appeal was timely filed. CP 352.

2. Substantive Facts

Born when his mother was only 15 years old, Botner never knew his father. RP 769-72. When he was two, his mother married the first of Botner's stepfathers. RP 772. The pair were married for seven years, and during this time, the man sexually abused him. RP 773. Botner's mother was unaware of the abuse at the time and failed to protect her son. RP 773.

At age 9, Botner threw a rock from an overpass onto a car and was convicted of malicious mischief. RP 341-42. As a child he also committed theft, resisted arrest, and sold drugs. RP 341-42. At age 15, Botner was found guilty as a juvenile of indecent liberties with a child under age 14, his cousin Heather. RP 342. Botner told Dr. Harry Hoberman, the State's psychological evaluator, that he was clumsy and merely wanted to know

where all the parts were. RP 402. At age 16 or 17, he began experiencing rape fantasies. RP 343-44. He moved out of his mother's house at age 18. RP 776.

In 1991, Botner engaged in an aborted assault that he later admitted was sexually motivated. RP 967. The woman, a stranger to Botner, was leaving a park bathroom when Botner put his hands on her throat and tried to choke her. RP 243-44. A struggle ensued, and when the woman would not stop screaming and other people were around, Botner broke away and fled. RP 244-46, 250.

In 1992, Botner again aborted an attempt at rape. He came up behind a woman leaving a restroom at an adult education center and choked her with an electrical cord. RP 353-54. She was unconscious and although he pulled down her pants and underwear, he did not rape her. RP 354-54. He could not explain why he stopped. RP 355. Botner was convicted of attempted first-degree rape and sentenced to 110 months. RP 355.

While in prison on this offense, Botner completed sex offender treatment. CP 411; RP 258-59. According to his treatment provider he "actively participated," "worked on identifying new skills," and was "very interested in making changes." CP 410. He "developed some skills to manage his aggression and some of his attitudes that are related to his offending." CP 410. He demonstrated "improved ability to recognize his

antisocial attitudes and resulting behaviors,” and “the ability to change his antisocial attitudes into prosocial attitudes.” CP 419-20. While his ability to apply these skills was inconsistent if he were caught unawares or were extremely upset, he was “consistent in using the skills when he has the opportunity to plan for difficult situations.” CP 419.

After release, Botner was jailed for violating various conditions of his release numerous times, but committed no new sex offenses. RP 264-71. On July 7, 2006, Gonzaga University’s campus security received a report of women’s clothing along the Centennial Trail, part of which passes along the campus. RP 294-95. Police responded and found used Kleenex, blankets, a dress, pornographic magazines, a milk jug, two duffle bags, and a wig. RP 296-304. The grey duffle bag contained a binder full of collages of pornographic photographs. RP 307-08. The bag was labeled “Shawn B.” RP 274. In the bag, police also found a handwritten note and a letter addressed to Botner. RP 275.

The note, found in a spiral notebook, began with a list of items: “1) dildo, 2) pocket pussy, 3) 2-sexy outfits, 4) handcuffs, 5) vibrator, 6) set dildos, vibrators, 7) more lubricant (flavored), 8) blow up doll.” CP 455.

The text read:

Go in dressed as a woman, get all the items you wish, smash clerk in head with blackjack, and lock the door, tie clerk [sic] up, and tape mouth shut. Get all money and novelty

items that you desire. Get clerk's keys and load all items into car. Load clerk last. Take car and go to park and have your way with the whore. Mags, novelties, sexy clothing, whole maniquin. Take clerk to river and continue to have way with, take car to remote area and completely douse inside with gas and set on fire, wipe down outside of car for fingerprints. Dismember body with a saw, go buy cheap saw

RP 276; CP 455.

Botner explained he wrote the note in an attempt to deal with his recurrent fantasies, to get them down on paper and out of his head so he would be less likely to act on them. RP 364, 373, 972. Maia Christopher, Botner's former treatment provider, explained² offenders are often encouraged to keep "arousal logs," some of which would include descriptions of the fantasies, in addition to the date and time. CP 435-36. Without information about the context of the note, she could not say why it was written or whether it was appropriate. RP 443. She explained some people never act on fantasies and the level of detail may be an indicator of risk. RP 449. She believed Botner had learned skills for managing his deviant arousal, but may have trouble applying them when caught off guard. RP 419. In that vein, she opined that writing out fantasies may assist Botner in anticipating and preparing for difficult situations. RP 447.

On the evening of July 30, 2006, around 2 a.m., Spokane police stopped Botner for riding his bicycle without a headlamp or rear reflector.

² Christopher did not testify in person, but her video deposition, CP 398-456, was played for the jury. RP 258-59.

RP 318-19. As the police approached, Botner dropped the hammer he was carrying because he did not want to provoke police by appearing armed. RP 977. Botner was dressed as a woman, which he usually did only in private and when using methamphetamine. RP 976-78. In his bag, which police searched with his consent, were sex toys, rubber gloves, rope, a wig, a French maid costume, women's underwear, pornographic photos, dildos, and condoms. RP 321, 75-76. He wore a nylon stocking over his hair and a bra but no shirt. RP 320-21. When asked, he told police he was on his way to his grandfather's. RP 322. He told the officer, "You'd be surprised what could be traced back to you by forensic evidence." RP 322. Police let Botner go after a warning. RP 322-23.

After receiving a call from the officer who stopped Botner, Botner's Community Corrections Officer requested a warrant, and Botner was subsequently arrested for violating his community custody conditions and failing to register as a sex offender. RP 270-71, 284. In December 2006, while Botner was serving his sentence for failure to register, the State petitioned to commit him under chapter 71.09 RCW. CP 1-2.

At trial, Botner did not contest that he had been previously convicted of a sexually violent offense. RP 1091. The State relied on two prior convictions: Botner's juvenile disposition for indecent liberties and his 1992 conviction for attempted first-degree rape. RP 1065-66. With regards to the

recent overt act requirement, the prosecutor argued in closing that the jury could choose which of several acts met that requirement:

So it's not just the note. It's not just the duffle bags. It's not just being stopped on the bicycle. It's everything about him. It's his constant refusal to comply with supervision, his failure to register, his use of drugs in the community. All of those things play into it. It's his continuing and acknowledged engagement in bondage situations with his girlfriends. All of these things play into who he is, and you have to identify which of those things constitute risk factors for Mr. Botner to start going down that offense cycle and the behaviors he outlined in that plan.

RP 1080 (emphasis added).

Before trial, the State moved to compel the psychological evaluation required by RCW 71.09.040, to include both polygraph and (PPG) testing. CP 520-58. Botner strenuously objected to the forced polygraph and PPG tests as violations of his constitutional rights. CP 559-69. The court ordered Botner to comply, and when Botner refused, the State moved to hold him in contempt. CP 574, 576-92. To prevent being jailed for contempt, Botner stipulated, "the jury may infer from Mr. Botner's refusal that he is deviantly aroused by forcible, non-consensual sexual contact with females." CP 314-15, 319-20; RP 27.

3. Psychiatric Diagnoses

At trial, the jury heard testimony from Dr. Hoberman, who evaluated Botner as required by RCW 71.09.040. RP 393-97. Hoberman diagnosed

Botner with sexual sadism, pedophilia, antisocial personality disorder, and psychopathy. RP 428, 436-38, 451-52, 461. He opined that three of these diagnoses, sexual sadism, antisocial personality disorder, and psychopathy, constitute mental abnormalities under the statute because each is an acquired or congenital condition that affects Botner's emotional or volitional control. RP 428, 440, 454, 461.

Defense expert Dr. Theodore Donaldson disputed these diagnoses. He found Hoberman's pedophilia diagnosis "far-fetched." RP 838. He explained that it was extremely difficult to distinguish between someone who molests a child for any number of reasons from a person who acts out the mental illness of pedophilia. RP 836-37. He explained that while a PPG is the best tool available for showing arousal, it still is not particularly good evidence, since 20% of college students show deviant sexual arousal to children when a PPG is administered. RP 838. Moreover, Botner's PPG showed deviant arousal to females ages 10-17, with no distinction between that large age range. Pedophilia requires arousal to pre-pubescent persons, but many in the age range of 10-17 are likely to be post-pubescent. RP 838.

Hoberman conceded Botner was too young when he committed the offense against his cousin to be diagnosed with pedophilia solely on that basis. RP 601-02. He also conceded many of the images in the PPG were likely of people over 13. RP 604-17. Nevertheless, he diagnosed Botner

with pedophilia because he felt the DSM is not a “cookbook.” RP 617. He considered pedophilia a risk factor for re-offense even though it did not amount to a mental abnormality under the statute. RP 439, 441.

Donaldson disputed the sadism diagnosis because there was no evidence Botner was specifically aroused by causing pain to his victims, as opposed to merely using force to obtain compliance or being aroused by non-consent. RP 830-31, 850, 852. And even if the sadism diagnoses were correct, Donaldson explained, the evidence shows it did not cause Botner serious difficulty in controlling his behavior because in each instance, Botner stopped before committing the rape, unable to bring himself to do it. RP 847.

Hoberman admitted it was difficult to determine whether Botner was actually aroused by pain or whether pain was merely a means to achieving the sexual congress he desired. RP 638. Nevertheless, he based his sadism diagnosis on Botner’s admitted fantasies of rape, the fact that Botner had acted on and masturbated to them, and the stipulation that PPG testing would show deviant arousal to forcible sexual contact. RP 422-23, 425-26, 736-37.

Donaldson agreed Botner has antisocial personality disorder, but explained that such a disorder does not cause an inability to control behavior in general and cannot cause a predisposition to any particular type of behavior, such as the requisite sexually violent behavior under the statute.

RP 853-55. He discussed the utter lack of scientific evidence distinguishing between diminished ability to control one's behavior (required under the statute) and mere unwillingness to control one's behavior. RP 857. Donaldson did not score Botner on the psychopathy checklist because he was not trained on that instrument. RP 932-33.

4. Risk Assessment

In assessing Botner's risk of re-offense, Hoberman applied four actuarial instruments: the Static-99, the Static-2002, the Minnesota Sex Offender Screening Tool – Revised (MnSOST-R), and the Sex Offender Risk Appraisal Guide (SORAG). RP 466. Hoberman admitted none of the actuarial instruments is perfect but claimed confidence is increased when, as here, all four point generally in the same direction. RP 506.

Hoberman testified that the Static-99 is still valid, despite dropping base rates of re-offense in the United States. RP 468-70. He scored Botner a seven, which is associated with high risk of re-conviction for a new sex offense: 39% over five years, 45% over ten years, and 52% over fifteen years. RP 476-77. He testified this is a conservative measure because many sex offenses are unreported or if reported do not result in a conviction. RP 477-78. He also testified he would expect the risk of re-offense would continue to rise after fifteen years. RP 479.

Since the Static-99 was developed, Hoberman explained, percentages have been recalculated, based on newer recidivism rates. RP 483. Based on the new rates, a score of seven resulted in a 23% risk of a new arrest or conviction over ten years for the group classified as low risk. RP 485. Hoberman would place Botner, however, in the group classified as high risk, with a 43% risk of a new arrest or conviction over ten years. RP 485.

On the Static-2002, Hoberman scored Botner a nine, placing him in the high-risk category. RP 488-89. Similarly to the Static-99 under the newer norms, the scores are broken down into low and high risk categories. RP 489. A low-risk score of nine would result in a 24% risk of re-arrest or re-conviction after ten years; a high-risk score of nine would result in a 41% risk. RP 489. Hoberman again classified Botner as high risk. RP 490.

On the MnSOST-R, a score of 8 or higher places a person in the highest risk category. RP 493. Hoberman scored Botner as a 17. RP 493. A score of 13 or higher is associated with a 72% risk of being re-arrested for a new sex offense in a six-year period. RP 493.

Finally, on the SORAG, Hoberman scored Botner a 49. RP 496. The SORAG measures risk of all interpersonal violence, not just sex-offenses and thus is over-inclusive. RP 494, 497. However, Hoberman testified it has the same degree of predictive accuracy for sex offenses as the other instruments used. RP 494. Botner's score placed him in the "highest

bin” associated with a 100% risk of re-offense over a ten-year period. RP 497.

Hoberman also discussed the SVR-20, a list of factors that may increase risk for re-offense, but which does not assign a quantitative value to that risk. Hoberman testified that a strong showing of even two or three of the risk factors could indicate moderate to high risk of re-offense. RP 525. He assessed Botner as having 19 of 20 risk factors. RP 525.

While treatment can be helpful, Hoberman testified that studies show similar rates of re-offense with or without sex offender treatment. RP 526. Based on these actuarial and non-actuarial assessments, Hoberman opined Botner would more likely than not engage in predatory acts of sexual violence if not confined in a secure facility. RP 540.

By contrast, Donaldson opined that the Static-99 was calculated based on base recidivism rates so much higher than recent Washington rates, that its percentages are invalid. RP 865-66. If the low recidivism rates of under 5% are used, it is impossible to score anyone at a risk greater than 50%. RP 871. In his opinion, the Static-2002 is the only valid actuarial instrument because it at least partly accounts for the lower true base recidivism rates. RP 874-75. He scored Botner an 8 on that test, putting him in the moderate to high-risk category. RP 881-83. However, he explained that such relative categories are meaningless in terms of predicting

probability of re-offense because it only places Botner on a spectrum of risk. RP 884. The label is meaningless if, for example, Botner is at the high end of a group, all of whom are extremely low risk. RP 884. The high-risk group in the Static 2002 study used a base rate of 29% and calculated a ten year risk of 36% for those with Botner's score. RP 885. But with Washington's recent much lower base rates of recidivism, even that number is likely far too high. RP 886. Donaldson concluded there was no empirical basis to predict Botner was more likely than not to commit a new sexually violent offense. RP 887.

Additional facts relating to the specific issues raised herein are more fully set forth below.

C. ARGUMENT

1. BOTNER'S CONSTITUTIONAL PRIVACY AND DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS THREATENED WITH JAIL TIME FOR REFUSING TO SUBMIT TO PENILE PLETHYSMOGRAPH TESTING.

Penile plethysmograph testing is not a "run of the mill medical procedure." United States v. Weber, 451 F.3d 552, 562 (9th Cir. 2006). It is "exceptionally intrusive in nature and duration." Id. The description of the procedure is one which "one would expect to find . . . gracing the pages of a George Orwell novel." Id. at 554. This Orwellian procedure is not authorized as part of the evaluation required by RCW 71.09.040. Nor is it

required by the DSHS regulations enacted under that statute. Additionally, in requiring Botner to submit, the court violated Botner's constitutional rights to substantive due process, privacy, and to be free from unreasonable searches.

a. Facts Relevant to Forced PPG Order

Penile plethysmograph (PPG) testing involves placing a mercury strain gauge around a man's penis. E.g., State v. Riles, 135 Wn.2d 326, 343 n. 57, 957 P.2d 655 (1998). The test subject is then "instructed to become fully aroused, either via self-stimulation or by the presentation of so-called 'warm-up stimuli' in order to derive a baseline against which to compare later erectile measurements." Jason R. Odesloo, Of Penology And Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 9 (2004). "After the individual has returned to a state of detumescence," he is presented with various "stimulus materials, auditory and visual, encouraging him to think about and look at materials indicative of sexual activity with different ages of people, different genders and different sexual activities." Odesloo, supra, at 9; Riles, 135 Wn.2d at 343 n. 57 (quoting State v. King, 130 Wn.2d 517, 545 n. 13, 925 P.2d 606 (1996) (Sanders, J., dissenting)). The gauge then is used to "determine the man's level of sexual attraction by measuring minute changes in his erectile responses." Odesloo, supra, at 2.

After probable cause was found to detain Botner for potential commitment, the State moved to compel him to participate in the evaluation required under RCW 71.09.040. CP 520. The evaluation was to include a PPG in order to ensure it was “as current and comprehensive as possible.” CP 522. The State attached a declaration by Dr. Hoberman, who was to perform the evaluation, stating that the evaluation should include a PPG and that mental health professionals routinely use PPG results in conducting sexually violent predator evaluations. CP 535.

Botner opposed the State’s motion, calling the PPG an “unimaginable intrusion of his body and mind.” CP 559. Botner opposed compulsory PPG testing as unauthorized by statute or regulation and an unnecessary violation of his constitutional rights. Id. After a hearing, the court found that the PPG would assist Hoberman in performing his evaluation, that it was necessary to ensure the evaluation was comprehensive, and that DSHS regulations authorize a PPG as part of the evaluation required by RCW 71.09.040. CP 572. The court ordered Botner to participate in the evaluation process, to include PPG testing. CP 574.

When the test administrator arrived at the SCC, Botner refused to participate in the PPG testing. CP 592. The State moved for an order of contempt to coerce Botner to comply. CP 576, 578. The day before the contempt hearing, Botner agreed to the State’s proposed stipulation to avoid

being jailed for contempt. CP 314-15. Botner requested the court give the State's proposed jury instruction in lieu of holding Botner in the Spokane County Jail and imposing a fine. CP 316. During argument on pre-trial motions, counsel reiterated Botner agreed to the stipulation only because he would otherwise have been jailed for contempt. RP 26.

During Dr. Hoberman's testimony, the following stipulation was read to the jury:

Prior to trial, the court ordered Mr. Botner to take part in a comprehensive sexually violent predator evaluation. Among other procedures, the court ordered Mr. Botner to submit to a penile plethysmograph test. Mr. Botner refused to take part in that test, and the court found that he had no lawful justification for his refusal. Mr. Botner's refusal prevented Dr. Hoberman from obtaining relevant information about Mr. Botner's sexual arousal patterns. The jury may infer from Mr. Botner's refusal that he is deviantly aroused by forcible, non-consensual sexual contact with females.

RP 425-26. Dr. Hoberman relied on this stipulation in diagnosing Botner with sexual sadism. RP 423. The State additionally relied on this stipulation in closing argument to the jury. RP 1120-21.

b. RCW 71.09.040 Does Not Authorize the Court to Compel Botner to Submit to Invasive PPG Testing.

Because it curtails civil rights, RCW 71.09.040 must be strictly construed to its terms. In re Detention of Martin, 163 Wn.2d 501, 508, 182 P.3d 951 (2008). To strictly construe a statute means that "given a choice between a narrow, restrictive construction and a broad, more liberal

interpretation, we must choose the first option.” Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973). Questions of statutory construction are reviewed de novo. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

Civil incarceration deprives a person of liberty without due process of law if the process does not strictly comply with the procedures set forth in chapter 71.09 RCW. Martin, 163 Wn.2d at 511; U.S. Const. amend XIV; Const. art. I, § 3. Thus, in Martin, the court reversed and dismissed the commitment petition because it was filed by a prosecutor in another county, rather than the county in which the offense occurred, as required by the statute. Martin, 163 Wn.2d at 505-06.

In keeping with Martin, Washington’s Supreme Court has held that RCW 71.09.040 provides the exclusive means for evaluating a person for civil commitment under chapter 71.09 RCW. In re Detention of Williams, 147 Wn.2d 476, 55 P.3d 597 (2002). In Williams, three detainees argued they could not be required to submit to a mental examination under CR 35, in addition to the examination already required by RCW 71.09.040. 147 Wn.2d at 488-89. Because the civil commitment statute provides for evaluations in RCW 71.09.040, but makes no mention of evaluations as a part of pre-trial discovery, the court held “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).” Williams, 147 Wn.2d at 491; see also In re Audett, 158 Wn.2d 712, 718-19, 147 P.3d 392 (2006) (“Given the express provisions for various mental examinations occurring both prior to and after trial, in Williams we concluded that additional mental examinations prior to trial that were not provided for in the statute were inconsistent with the statutory scheme.”)

Just as RCW 71.09.040 does not include any provision for pre-trial discovery examinations under CR 35, it also does not contain any provision requiring a respondent to undergo PPG testing prior to trial. The sections pertaining to pre-trial procedures – including the section relating to pre-trial evaluation – do not mention PPG testing. See RCW 71.09.040.³ Given the court's duty to strictly construe chapter 71.09 RCW to protect civil liberties and the absence of any mention of PPG testing, chapter 71.09 RCW must be

³ RCW 71.09.040(4) reads:

If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections. In no event shall the person be released from confinement prior to trial. A witness called by either party shall be permitted to testify by telephone.

interpreted to preclude the trial court from compelling Botner to submit to such testing before trial.

Express mention of PPG testing in other parts of chapter 71.09 RCW lends support to this interpretation. RCW 71.09.096(4), governing conditions for release to a less restrictive alternative, *does* require an adjudicated sexually violent predator to submit to PPG testing if recommended. RCW 71.09.096(4).⁴ Where the Legislature uses different language in the same statute, different meanings are intended. State v. Costich, 152 Wn.2d 463, 475-76, 98 P.3d 795 (2004) (citing State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002)). The absence of any reference to PPG testing in RCW 71.09.040, juxtaposed with its specific inclusion in RCW 71.09.096(4), suggests the Legislature did not intend to authorize courts to compel PPG testing. Had it wished to grant such authority, it would have said so, as it did in RCW 71.09.096.

⁴ The statute provides:

These conditions shall include, but are not limited to the following: Specification of residence, prohibition of contact with potential or past victims, prohibition of alcohol and other drug use, participation in a specific course of inpatient or outpatient treatment **that may include monitoring by the use of polygraph and plethysmograph**, monitoring through the use of global positioning satellite technology, supervision by a department of corrections community corrections officer, a requirement that the person remain within the state unless the person receives prior authorization by the court, and any other conditions that the court determines are in the best interest of the person or others.

RCW 71.09.096(4) (emphasis added).

Additionally, whenever possible, courts should construe a statute so as to uphold its constitutionality. State v. Abrams, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008). If the statutory and regulatory framework imposed on those awaiting trial for civil commitment under chapter 71.09 RCW requires them to submit to PPG testing against their will, the applicable statutes and regulations violate state and federal constitutional rights to due process of law and privacy, as argued in argument section C.1.d, infra.

c. DSHS Regulations Do Not Require Botner to Submit to PPG testing.

Nor do DSHS regulations governing evaluations under RCW 71.09.040 require respondents to submit to PPG testing. Absent a contrary legislative intent, language in an unambiguous regulation is given its plain and ordinary meaning. Tesoro Ref. & Mktg Co. v. Dep't of Revenue, 164 Wn.2d 310, 322, 190 P.3d 28 (2008). Furthermore, the rules of statutory construction apply to agency regulations. Id.

DSHS has promulgated rules pertaining to chapter 71.09 RCW. Those rules are set forth in chapter 388-880 WAC, and include criteria for conducting evaluations under RCW 71.09.040. See WAC 388-880-030. WAC 388-880-035 is captioned, "Evaluator – Pre-trial evaluation responsibilities," and requires that evaluations be based on:

- (1) Examination of the resident, including a forensic interview and a medical examination, if necessary;

(2) Review of the following records, tests or reports relating to the person:

(a) All available criminal records, to include arrests and convictions, and records of institutional custody, including city, county, state and federal jails or institutions, with any records and notes of statements made by the person regarding criminal offenses, whether or not the person was charged with or convicted of the offense;

(b) All necessary and relevant court documents.

(c) Sex offender treatment records and, when permitted by law, substance abuse treatment program records, including group notes, autobiographical notes, progress notes, psycho-social reports and other material relating to the person's participation in treatment;

(d) Psychological and psychiatric testing, diagnosis and treatment, and other clinical examinations, including records of custody in a mental health treatment hospital or other facility;

(e) Medical and physiological testing, including plethysmography and polygraphy;

(f) Any end of sentence review report, with information for all prior commitments upon which the report or reports were made;

(g) All other relevant and necessary records, evaluations, reports and other documents from state or local agencies;

(h) Pertinent contacts with collateral informants;

(i) Other relevant and appropriate tests that are industry standard practices;

(j) All evaluations, treatment plans, examinations, forensic measures, charts, files, reports and other information made for or prepared by the SCC which

relate to the resident's care, control, observation, and treatment.

WAC 388-880-034. The regulation thus divides the evaluation into two parts: examination of the resident and review of records. Id.

The fact that a “review of records” includes review of physiological testing does not authorize the evaluator to compel participation in new testing. A “review” of records contemplates “an act of inspecting or examining” records that already exist, not the creation of new ones. Webster’s Third New International Dictionary 1944 (Philip Babcock Gove et al. eds. 1993).

The examination includes only a forensic interview and medical examination, if necessary. WAC 388-880-034. Unlike the records review, it does not include “physiological testing, including plethysmography and polygraphy.” Id. Nor does it authorize “Other relevant and appropriate tests that are industry standard practices.” Id. Because the regulation uses different language when describing the two parts of the evaluation, different meanings are presumed. Costich, 152 Wn.2d at 475-76. Thus, the phrases “forensic interview” and “medical examination” cannot be stretched to include PPG testing.

Additionally, the maxim that mention of one alternative indicates exclusion of others not mentioned compels the same interpretation. Martin,

163 Wn.2d at 510. Under this principle, omissions are deemed exclusions. Adams v. King County, 164 Wn.2d 640, 650, 192 P.3d 891 (2008). Thus, the omission of polygraph and PPG testing from a list that includes “forensic interview” and “medical examination” compels the conclusion that the regulation does not authorize pre-trial PPG testing. Martin, 163 Wn.2d at 508, 510.

d. The Department Exceeded Its Authority By Requiring Respondents Under Chapter 71.09 RCW To Submit To PPG Testing.

In the event this Court interprets WAC 388-880-035 as authorizing a PPG as part of the evaluation under RCW 71.09.040, that regulation exceeds the authority granted to DSHS. Agencies may only exercise “those powers conferred on them expressly or by necessary implication.” In re Impoundment of Chevrolet Truck, 148 Wn.2d 145, 156, 60 P.3d 53 (2002). If a statute does not authorize a particular regulation, either expressly or by necessary implication, that regulation is invalid, “despite its practical necessity or appropriateness.” Id. at 156-57 (quoting Wash. Indep. Telephone Ass’n v. Telecomm. Ratepayers Ass’n for Cost-Based & Equitable Rates, 75 Wn. App. 356, 363, 880 P.2d 50 (1994)).

Interpretation of a statute and its implementing regulations is a question of law reviewed de novo. Chevrolet Truck, 148 Wn.2d at 153. If the statute’s meaning is plain on its face, the court must give effect to that

plain meaning as expression of the Legislature's intent. State Owned Forests v. Sutherland, 124 Wn. App. 400, 409, 101 P.3d 880 (2004).

The plain language of RCW 71.09.040 does not grant authority to promulgate regulations requiring respondents in cases under chapter 71.09 RCW to submit to PPG testing. The statute directs the Department to develop rules, in consultation with the Department of Health and the Department of Corrections, for establishing the qualifications of persons selected to evaluate respondents; however, the statute does not direct or authorize the Department to establish rules for the conduct of evaluations ordered under RCW 71.09.040. Thus, the Department exceeded its authority in promulgating WAC 388-880-035, the regulation purporting to require PPG testing as part of the evaluation required under RCW 71.09.040. Because chapter 71.09 RCW does not authorize the Department to regulate the conduct of evaluations, the trial court's order cannot be sustained based on WAC 388-880-035.

If the statute's grant of authority is ambiguous, this Court should, as noted above, construe the statute narrowly to its terms. Martin, 163 Wn.2d at 508. Thus, the statute should be construed as authorizing only regulations for qualifying evaluators, rather than for the wider scope of both qualifying evaluators and conducting the examination itself. The Legislature should

say so clearly if it intends to authorize DSHS to require invasive testing involving forced sexual stimulation.

e. Compulsory PPG Testing Violates Due Process and Privacy Rights Under the State and Federal Constitutions.

Even incarcerated prisoners retain due process privacy rights. See, e.g., Turner v. Safley, 482 U.S. 78, 84, 94, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (inmates retain fundamental constitutional right to marriage). Yet the court ordered Botner to place a mercury strain gauge around his penis, stimulate himself to the point of maximum engorgement, relax to a state of non-arousal, and then allow himself to be stimulated by various visual and audio stimuli while every minute change in his arousal was measured by the gauge around his penis. Odeshoo, supra, at 9. It is a question of first impression whether compelling this invasive procedure violates constitutional rights to privacy, due process, and freedom from unreasonable searches. Constitutional violations are reviewed de novo. In re Detention of Strand, 167 Wn.2d 180, 186, 217 P.3d 1159 (2009).

First, the court's order violated procedural due process because chapter 71.09 RCW does not authorize compulsory PPG testing. The process due in commitment proceedings is the process prescribed by the statutes. Martin, 163 Wn.2d at 511. Thus, deviation from those statutes violates due process. Because it was not statutorily authorized as described

above, the order compelling Botner to submit to PPG testing violated his constitutional right to procedural due process. However, even if the statute is construed as authorizing the court's order, compulsory PPG testing runs afoul of substantive due process because it invades Botner's personal autonomy without being narrowly tailored to achieve a compelling government interest.

The Fourteenth Amendment to the United States Constitution provides "heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 719, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). The right to personal autonomy in matters of sexual activity is a fundamental liberty interest, triggering strict constitutional scrutiny. Cf. Lawrence v. Texas, 59 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), (right to liberty under the due process clause includes the right to engage in consensual sexual conduct without interference from the government). If the right to privacy in sexual matters protects the choice to engage in sexual conduct, certainly it also must protect the right to refrain from sexual conduct. For example, in Harrington v. Almy, 977 F.2d 37, 44-45 (1st Cir. 1992), the First Circuit reversed summary judgment against a suspended police officer required to submit to PPG testing as a condition of reinstatement. The court described the PPG process as "degrading" bodily manipulation and held that

a reasonable factfinder could find the requirement violated substantive due process. Id.

Interference with a fundamental right is constitutional only if the State can show that it has a compelling interest and such interference is narrowly drawn to meet the compelling state interest involved. In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998) aff'd sub nom Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Thus, the government may not compel Botner to engage in the sexual stimulation required for a PPG test unless the requirement is narrowly tailored to achieve a compelling government interest.

Article I, section 7 of Washington's constitution provides even greater protection for personal autonomy than the federal constitution. Butler v. Kato, 137 Wn. App. 515, 527, 154 P.3d 259 (2007); State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Article I, section 7 protects the right to privacy with no express limitations. State v. Ferrier, 136 Wn.2d 103, 110, 960 P.2d 927 (1998). Forced PPG testing also implicates Fourth Amendment requirement that searches be, at a minimum, reasonable. Pool v. McKune, 267 Kan. 797, 987 P.2d 1073 (1999) (citing Lile v. McKune, 24 F. Supp. 2d 1152, 1162 (D. Kan. 1998)). Infringement of the fundamental right to autonomy under Washington's constitution requires

strict scrutiny by the courts and is impermissible unless narrowly tailored to achieve a compelling government interest. Butler, 137 Wn. App. at 527.

RCW 71.09.040 does not require, and the trial court did not identify, a compelling government interest necessitating this extreme intrusion into Botner's personal autonomy. A statute is narrowly drawn only if it is the least restrictive means to achieve the government's purpose. See, e.g., Arizona Right to Life PAC v. Bayless, 320 F.3d 1002, 1011 (9th Cir. 2003). There is no evidence Dr. Hoberman could not reach a conclusion to a reasonable degree of psychological certainty without such invasive testing. On the contrary, he had already reached such a conclusion based on a review of records. CP 63, 82.

Moreover, there are other, far less intrusive methods of assessing sexual deviancy. Weber, 451 F.3d at 567-68 (discussing alternatives to PPG testing); Odeshoo, supra, at 13-14 (same). In Weber, the court considered whether compulsory PPG testing was permitted under federal law mandating that conditions of release involve "no greater deprivation of liberty than is reasonably necessary for the purposes of supervised release."⁵ 451 F.3d at 567. The court first discussed the "exceptionally intrusive" nature of the PPG. Id. at 563. Noting the substantial liberty interest at stake, the court

⁵ Although Weber was decided on statutory, rather than due process grounds, the court's reasoning is also instructive in a substantive due process analysis. 451 F.3d. at 563 n. 14.

stated, “Harrington⁶ rests on the premise that the strong liberty interest in one’s own bodily integrity is impaired by the plethysmograph. We find the First Circuit’s analysis persuasive in this regard.” Weber, 451 F.3d at 563-64. The court went on to note that although PPG testing has been declared useful in diagnosis and treatment, courts have “uniformly declared” the results of PPG testing are inadmissible because there are no accepted standards in the scientific community. Id. at 565 n. 15, 565-66.

The court then employed the narrow tailoring analysis required by the federal statute. Id. at 566-67. The court held that, before PPG testing could be required as a condition of supervised release, the trial court must explain on the record 1) why the test is likely to reap its intended benefits in the case at hand and 2) why other, less intrusive procedures would be inadequate under the circumstances. Id. at 567-68. The court vacated the condition because no such findings were made. Id. at 570.

As in Weber, the court in this case imposed a requirement that Botner submit to “exceptionally intrusive” PPG testing without finding other alternatives would be inadequate. The failure to consider less restrictive alternatives, when a substantial liberty interest is at stake fails to pass strict scrutiny.

⁶ Harrington v. Almy, 977 F.2d 37 (1st Cir.1992).

Thus, the order compelling Botner to engage in PPG testing violated his constitutional privacy rights. Additionally, to the extent it is construed as authorizing the order, RCW 71.09.040 is unconstitutional, both facially and as applied to Botner. “[A] prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line at which the government must stop. Penile plethysmography testing crosses it.” Weber, 451 F.3d at 571 (Noonan, J., concurring).

f. Reversal Is Required Because Botner Was Forced to Choose Between Jail Time and Invasion of his Rights to Privacy and Personal Autonomy.

The risk of incarceration for refusal to comply with the invasion of one’s constitutional rights is sufficient to trigger constitutional protection. See Butler, 137 Wn. App. at 526 (risk of incarceration for violating condition of release requiring alcohol evaluation was sufficient to trigger Fifth Amendment protection). When coerced statements are admitted in a civil proceeding in violation of the Fifth Amendment, exclusion of the statements is required so long as the record demonstrates the coercion. Strand, 167 Wn.2d at 192-93 (citing Cuevas-Ortega v. Immigration & Naturalization Serv., 588 F.2d 1274, 1277 (9th Cir. 1979); United States v. Alderete-Deras, 743 F.2d 645, 648 (9th Cir. 1984)). By analogy, when evidence is obtained by means of a constitutional due process violation, that evidence should also

be excluded. For example, the Washington Supreme Court in Audett held that although the lower court erred in ordering a mental examination under CR 35, exclusion was not required because Audett did not object to admission of the evidence and the error did not amount to a due process violation. Audett, 158 Wn.2d at 723-27. Here, where a due process violation has coerced a stipulation, this Court should provide a remedy, as the Audett court suggested.

Division Two of this Court has already fashioned a remedy in a similar case, In re Detention of Meints, 123 Wn. App. 99, 96 P.3d 1004 (2004). Meints refused to comply with the court's order that he submit to a mental examination under CR 35. Id. at 101. As a sanction for his refusal, the trial court excluded the testimony of Meints' own expert. Id. The court agreed Meints was improperly sanctioned because CR 35 examinations are not authorized in SVP proceedings. Id. at 104. Because the trial court erred both in ordering Meints to submit to the CR 35 examination and in sanctioning him for refusing, the court reversed the commitment order. Id. at 105-06.

The court's order and sanction in this case were similarly improper and this Court should reverse the commitment order as Division Two did in Meints. As discussed above, the order compelling Botner to submit to PPG testing both exceeded the court's authority and violated his constitutional

rights. Indeed, the PPG testing ordered here is far more invasive than the additional mental examination ordered under CR 35 in Meints. Nevertheless, when Botner continued to decline PPG testing, he was threatened with contempt of court. CP 576. As a direct result of that threat, Botner was coerced into accepting a stipulation that the results of PPG testing would have demonstrated deviant arousal to forcible sexual contact. RP 27, 423-26; CP 315. This stipulation formed the basis of Dr. Hoberman's diagnosis of sexual sadism, one of the mental abnormalities leading to the order of commitment, and the State explicitly relied on it in closing argument. RP 423-26, 1120-21. Under these circumstances, Botner should be granted a new commitment trial. Meints, 123 Wn. App. at 105-06.

2. BOTNER'S RIGHT TO JURY UNANIMITY WAS VIOLATED BECAUSE THE JURY WAS NOT REQUIRED TO UNANIMOUSLY AGREE ON A RECENT OVERT ACT.

- a. Neither the Jury Instructions Nor the Prosecutor's Closing Argument Required the Jury to Unanimously Agree Which Act, Threat, or Combination Thereof Constituted the "Recent Overt Act."

Like a criminal conviction, a civil commitment under chapter 71.09 RCW must rest upon a unanimous jury verdict. In re Pers. Restraint of Young, 122 Wn.2d 1, 48, 857 P.2d 989 (1993); see also In Re Campbell, 139 Wn.2d 341, 354-55, 986 P.2d 771 (1999) (noting chapter 71.09 RCW requires a unanimous jury to find the individual a sexual predator beyond a

reasonable doubt, and commitment under chapter 71.09 RCW resembles a criminal proceeding). Criminal cases analyzing the need for a unanimity instruction are applicable to civil commitment cases under chapter 71.09 RCW. In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006).

Specifically, the jury must be unanimous as to the act that forms the basis for a criminal charge. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Additionally, the jury must be unanimous as to each element of the offense. State v. Coleman, 159 Wn.2d 509, 515, 150 P.3d 1126 (2007). When the jury hears evidence of several acts which could form the basis of a charge, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing Petrich, 101 Wn.2d at 570; State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911)).

The failure to require jury unanimity is manifest constitutional error that may be considered for the first time on appeal. State v. Bobenhouse, 166 Wn.2d 881, 214 P.3d 907 (2009); State v. Crane, 116 Wn.2d 315, 325, 804 P. 2d 10 (1991). Review of such a constitutional challenge is de novo. State v. Jones, 159 Wn.2d 231, 237, 149 P.3d 636 (2006). Reversal is required unless the State affirmatively proves the error was harmless beyond

a reasonable doubt. State v. Fisher, 165 Wn.2d 727, 755, 202 P.3d 937 (2009).

Here, the State argued there were numerous different acts that could satisfy the element of a “recent overt act.” RP 1080. The prosecutor argued the recent overt act was not just the note, but also Botner’s refusal to comply with supervision, his failure to register as a sex offender, and his drug use. RP 1080. Given the multiple acts that the jury could have found to be a “recent overt act,” a unanimity instruction was required. Kitchen, 110 Wn.2d at 409.

- b. Even if the Various Bases for a Recent Overt Act Finding Are Considered Alternative Means Rather than Multiple Acts, Reversal Is Required Because There Was Insufficient Evidence to Support Each Alternative Means.

In an alternative means case, “Unanimity is not required . . . as to the means by which the crime was committed so long as substantial evidence supports each alternate means.” Kitchen, 110 Wn.2d at 410. If this Court concludes the various ways of satisfying the recent overt act requirement are merely alternative means, reversal is required because substantial evidence does not support each of the alternative means. Halgren, 156 Wn.2d at 810-11.⁷

⁷ In Halgren, the court held the “mental abnormality” and “personality disorder” are alternative means for finding a person meets commitment criteria under RCW 71.09. 156 Wn.2d at 811. The court found no error in failing to give a unanimity instruction because

The substantial evidence test⁸ is satisfied if the reviewing court is convinced “a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt.” Halgren, 156 Wn. 2d at 811 (quoting Kitchen, 110 Wn.2d at 411). If one or more of the alternative means is not supported by substantial evidence and there is only a general verdict, the verdict must be reversed unless this Court can determine that it was based on only one of the alternative means and that substantial evidence supported that alternative means. State v. Nicholson, 119 Wn. App. 855, 860, 863, 84 P. 3d 877 (2003), overruled on other grounds, State v. Smith, 159 Wn.2d 778, 154 P.3d 873, 877 (2007). Here, the State explicitly relied on numerous different acts and combinations thereof to find a recent overt act. RP 1080. Among these, however, were several that are insufficient as a matter of law to establish a recent overt act.

Mere community custody violations are insufficient, without more, to show a recent overt act. In re Detention of Broten, 115 Wn. App. 252, 257, 62 P.3d 514 (2003). However, nothing precluded the jury from finding the recent overt act element satisfied based on community custody violations

the evidence was sufficient for a reasonable jury to conclude Halgren had both a mental abnormality and a personality disorder beyond a reasonable doubt. Id.

⁸ In conducting alternative means analyses, the terms “substantial evidence” and “sufficient evidence” are used interchangeably. See State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994) (sufficient evidence). Whatever the label, the test for determining the necessary quantum of proof is the same.

that were testified to by Botner's CCO and explicitly relied on in closing by the State.

"An appellate court must be able to determine from the record that jury unanimity has been preserved." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993). This Court is unable to make that determination in this case because the jury may have relied on different acts, including community custody violations that were insufficient as a matter of law, to find a recent overt act. Because jury unanimity was not preserved, this Court should reverse Botner's commitment.

3. THE TRIAL COURT ERRED IN ADMITTING UNFAIRLY PREJUDICIAL EVIDENCE OF A 2003 STUDY OF WASHINGTON RECIDIVISM AND A PEDOPHILIA DIAGNOSIS.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 403 prohibits admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.⁹ Dr. Hoberman's flawed and irrelevant diagnosis of pedophilia falsely portrayed Botner to the jury as a child molester. The Milloy study of recidivism among those recommended for commitment but

⁹ ER 403 provides: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

not filed on was similarly irrelevant to any proper purpose and prejudicially vouched for the State's filing decisions. Yet the court overruled Botner's objections to both types of evidence. RP 39, 119-20, 439. The decision to admit this evidence was an abuse of discretion under the circumstances.

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

a. The Court Erred In Admitting Evidence Of Pedophilia.

Evidence of Botner's pedophilia diagnosis was far more inflammatory and prejudicial than probative in this case. First, the evidence did not support the diagnosis. Second, evidence of child molestation is highly inflammatory and likely to encourage the jury to render a verdict based on passion or prejudice rather than the facts before it.

“Evidence which is unreliable has little or no probative value and is not helpful to the trier of fact and, therefore, is inadmissible.” State v. Huynh, 49 Wn. App. 192, 196, 742 P.2d 160 (1987); see also State v. Rupe, 101 Wn.2d 664, 690, 683 P.2d 571 (1984) (polygraph evidence inadmissible because it simply does not reach the minimal threshold of reliability).

An expert’s opinion should have an adequate factual basis and be based on substantial evidence. Farm Crop Energy, Inc. v. Old Nat. Bank of Wash., 109 Wn.2d 923, 928, 750 P.2d 231 (1988)). The opinion of an expert must be based on facts, not assumptions. Rogers Potato Service, LLC v. Countrywide Potato, LLC, 119 Wn. App. 815, 820, 79 P.3d 1163 (2003), rev’d., 152 Wn.2d 387, 97 P.3d 745 (2004). Division Three in Rogers Potato Service reversed a judgment in a breach of contract case because an expert’s opinion on the defective potato seed was based on assumption rather than fact. Rogers Potato Service, 119 Wn. App. at 820- 22. The Supreme Court reversed, reasoning the expert’s testimony “was plainly based on facts since both experts visited the field, inspected the seed and the growing crop, and relied upon forensic reports from reputable sources.” Rogers Potato Service, 152 Wn.2d at 392.

In contrast to the expert opinion in Rogers Potato Service, Hoberman’s pedophilia diagnosis does not reach the minimal threshold of reliability and does not rest on a factual foundation. A pedophilia diagnosis

requires that the person be over 16 years of age, yet Hoberman based his diagnosis on acts committed when Botner was only 14 and 15 years old. RP 601-02. Hoberman justified this by saying that the Diagnostic and Statistical Manual (DSM) is not a “cookbook” and that his diagnosis was supported by a 2000 PPG test showing Botner had deviant arousal to females between the ages of 10 and 17. RP 617. But pedophilia also requires deviant arousal to pre-pubescent people, meaning those under the age of 13. RP 617.

Hoberman admitted he had no information about the specific types of images used in the PPG test or how many of them were over the age of puberty. RP 604-16. There was insufficient evidence to support Hoberman’s diagnosis, and it should have been excluded either for lack of foundation or, as counsel argued regarding Botner’s juvenile sex offenses, because its weak probative value was far outweighed by the substantial risk of unfair prejudice against those perceived to be child molesters. RP 111-13, 115-16, 119-20, 439.

The State may argue the pedophilia diagnosis was admissible because it formed part of the basis for Dr. Hoberman’s opinion that Botner was likely to reoffend. This argument should be rejected. ER 705 allows an expert to relay the factual basis for an opinion in appropriate circumstances. This does not mean all information relied upon by an expert should automatically be recounted at trial. In re Guardianship of Stamm, 121 Wn.

App. 830, 838, 91 P.3d 126 (2004). “An expert can testify regarding the basis for his opinion for the limited purpose of showing how he reached his conclusion only if the probative value of the basis for the opinion is not substantially outweighed by its prejudicial nature.” State v. Acosta, 123 Wn. App. 424, 436, 98 P.3d 503 (2004). Thus, whether an expert is permitted to disclose the basis for an opinion involves balancing the information’s probative value in assisting the jury to weigh the expert’s opinion with the risk of prejudice resulting from the jury’s potential misuse of the information for substantive purposes. The pedophilia diagnosis should have been excluded under this analysis because of the enormous risk of unfair prejudice.

A limiting instruction, such as was given in this case regarding the bases for expert opinions, may, in some circumstances, be “a recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else.” Bruton v. United States, 391 U.S. 123, 134 n.8, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932); accord United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985) (“To tell a jury to ignore the defendant’s prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities. In such cases, it

becomes particularly unrealistic to expect effective execution of the ‘mental gymnastic’ required by limiting instructions, and ‘the naive assumption that prejudicial effects can be overcome by instructions to jury’ becomes more clearly than ever ‘unmitigated fiction.’”). In those circumstances, the limiting instruction is nothing more than a “judicial lie,” a placebo device that satisfies form while violating substance. Bruton, 391 U.S. at 134 n.8; Nash, 54 F.2d at 1007.

Courts nevertheless often indulge in the “sanctioned ritual” that jurors are capable of using evidence for one permissible purpose while disregarding it for an impermissible one as a matter of practical expediency. United States v. De Sisto, 329 F.2d 929, 933 (2d Cir. 1964); Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 78 L. Ed. 196 (1933). In short, jurors are presumed to follow instructions. State v. Dent, 123 Wn.2d 467, 486, 869 P.2d 392 (1994). But this presumption has limits. Id. “[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” Id. (quoting Bruton, 391 U.S. at 135-36). Those limits were stretched to the breaking point in Botner’s case.

Child molestation in particular is the type of crime a jury cannot be expected to ignore. See, e.g., State v. Sutherby, 165 Wn.2d 870, 887, 204

P.3d 916 (2009) (holding counsel was ineffective for failing to move to sever child molestation and rape charges noting inflammatory and prejudicial nature of those crimes); see also State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008) (hearsay evidence of prior child sex abuse was highly prejudicial and there was “no guarantee the jury could effectively disregard” it). The court erred in admitting this evidence. In the context of assessing whether Botner met the criteria for commitment, the unreliable and unsupported diagnosis of pedophilia was far more prejudicial than probative because it placed Botner squarely in the camp of child molesters.

b. The Court Erred In Admitting Testimony Regarding The 2007 Study Purporting To Establish Base Rates Of Recidivism For Washington Sex Offenders.

Dr. Hoberman’s testimony regarding the 2007 Milloy recidivism study¹⁰ suffers from similar problems of foundation, relevance, and prejudice. Dr. Hoberman testified the 2007 Milloy study found a 23% rate of recidivism after six years among Washington sex offenders who had been recommended for civil commitment but where no petition was filed. RP 510-11. He used this study to argue that Washington base rates of recidivism were not so different from the base rates used in the Static-99 and

¹⁰ Cheryl Milloy, Six-Year Follow-Up of 135 Released Sex Offenders Recommended for Commitment Under Washington’s Sexually Violent Predator Law, Where No Petition Was Filed, Washington State Institute for Public Policy #07-06-1101 (June 2007), available at <http://www.wsipp.wa.gov/pub.asp?docid=07-06-1101>, last visited 5/2/2010.

other actuarial studies so as to render the results invalid for current Washington populations. RP 510-11. But the study is more prejudicial than probative and Botner's objection should have been sustained for several reasons. First, the sample size in the Milloy study was too small to be relevant. Second, the Milloy study does not cross-validate the actuarials for current Washington populations because it tracks only recommendations made by the Department of Corrections. In short, the Milloy study does not establish a base rate of recidivism in Washington. Without any relevance for its stated purpose of modifying the actuarial instruments for current Washington populations, the jury could only have used it as defense counsel feared – as an assertion that the mere recommendation of commitment correctly predicts re-offense in nearly one out of four offenders.

Each of the actuarial instruments used to predict the likelihood of re-offense in this case was based on populations substantially different from Botner. For example, the Static-99 was developed using prison and psychiatric facility populations in Canada and the United Kingdom in the 1980s. RP 682. Dr. Hoberman testified that current Washington inmates are not so different from similar groups in other states that the actuarials would be invalid. RP 509-10. But Dr. Donaldson explained that where underlying base rates are significantly different, the resulting predictions from the actuarials must be significantly adjusted. RP 865-66. Scholarly literature

bears out Dr. Donaldson's opinion. "There are many reasons to suspect that these normative rates do not apply to other jurisdictions, especially when the base rate of reoffending in a jurisdiction differs from the normative sample." Marcus T. Boccaccini et al., Field Validity of the Static-99 and MnSOST-R Among Sex Offenders Evaluated for Civil Commitment as Sexually Violent Predators, 15 *Psychology, Public Policy & Law* 278, 300 (2009).

Before using empirically derived actuarial measures, there must be supportive data from a sample "sufficiently large and representative of the population for which the test is intended." Boccaccini et al., supra, at 282 (quoting standard 3.13, American Educational Research Ass'n, American Psychological Ass'n, and National Council on Measurement in Education 1999 at 46). Milloy's study is quite up-front about the fact that it is a "very small percentage" of released sex offenders. Milloy, supra, n. 9 at 1. The report is also clear that it tracked recommendations by the Department of Corrections and others, with no discussion whatsoever of the bases for those recommendations. Id. By contrast, a 1999 Texas study illustrates the type of study that would be relevant to establish local base rates. Boccaccini et al., supra, at 285. In the Texas study, the Static-99 and the MnSOST-R were routinely applied to sex offenders nearing release. Id. It then tracked the predictive value of these actuarial tests on a recent Texas population. Id.

The Milloy study does not purport to be an actuarial study or report base rates of recidivism.

In sum, the Milloy study may be meaningful to the Department of Corrections in assessing its own procedures, but it is not relevant or probative with respect to the validity of the Static-99 and other actuarial instruments to a modern Washington population. This minimal probative value is easily outweighed by the substantial prejudice that occurs when the jury is fed information tending to validate the judgment of the Department of Corrections in referring a person for civil commitment. The court erred in admitting this evidence because, not unlike presenting a judge's determination of probable cause, it appears to present the jury with a foregone conclusion.

c. The Admission of Unfairly Prejudicial Evidence Requires Reversal of Botner's Commitment.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. Neal, 144 Wn.2d at 611. Improper admission of evidence constitutes harmless error only if the evidence is trivial, of minor significance in reference to the evidence as a whole, and in no way affected the outcome. Id.; State v. Oswald, 62 Wn.2d 118, 122, 381 P.2d 617 (1963); State v. Sanford, 128 Wn. App. 280, 287-88, 115 P.3d 368 (2005). Additionally, when expert testimony is improperly

admitted, reviewing courts must be acutely aware of “the aura of special reliability” that surrounds such testimony in determining the danger of unfair prejudice. State v. Ciskie, 110 Wn.2d 263, 280, 751 P.2d 1165 (1988); State v. Black, 109 Wn.2d 336, 349, 745 P.2d 12 (1987); see also Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (“[W]hen ruling on somewhat speculative testimony, the trial court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert.”) (quoting Davidson v. Municipality of Metropolitan Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569 (1986)).

Particularly given the aura of reliability of expert testimony, the evidentiary errors in this case were prejudicial. The jury was likely to vote to commit Botner because expert opinion appeared to scientifically validate the State’s decision to seek commitment and because of the well-documented prejudice against those perceived as child molesters.

4. CUMULATIVE ERROR

The errors described above all affected Botner’s right to due process and a fair proceeding. The cumulative error doctrine states that while some errors, standing alone, might not constitute grounds for a new trial, the accumulation of such errors may. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Alexander, 64 Wn. App. 147, 158, 822 P. 2d 1250 (1990).

Botner asserts that any of these errors could independently warrant a new trial. But if they do not, as all three errors adversely affected his due process right to a fair proceeding, their combined prejudice requires a new trial.

5. INDEFINITE CIVIL COMMITMENT WITHOUT A FINDING OF CURRENT DANGEROUSNESS, AND DANGEROUSNESS IN THE NEAR FUTURE, VIOLATES DUE PROCESS.

Botner argued due process required narrowly tailoring the risk prediction to the foreseeable future. The court erred by refusing to grant the defense request. CP 125-30; RP 60.

Due process requires the state to establish a person is mentally ill and dangerous before the state may commit that person. The state may hold the person only so long as he remains dangerous. U.S. Const. amend. 14; Const. art. 1, § 3; Foucha Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). Because the jury was not required to limit the risk prediction to the foreseeable future, the state failed to prove current dangerousness and the commitment order violates due process. See generally, In re Detention of Moore, 167 Wn.2d 113, 127-29, 216 P. 3d 1015 (2009) (Sanders, J., dissenting).¹¹

¹¹ Botner recognizes the Moore majority rejected the due process claim; he raises the issue to exhaust it for possible federal review.

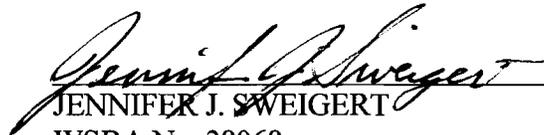
D. CONCLUSION

For the foregoing reasons, this Court should reverse Botner's commitment.

DATED this 18th day of May, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert".

JENNIFER J. SWEIGERT

WSBA No. 38068

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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

| | | |
|-------------------------|---|---------------------|
| In re the Detention of: |) | |
| |) | |
| SHAWN BOTNER, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | COA NO. 28417-4-III |
| |) | |
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JANNA HARTMAN
ATTORNEY GENERAL'S OFFICE
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SUITE 2000
SEATTLE, WA 98104

- [X] SHAWN BOTNER
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THE 18TH DAY OF MAY, 2010.

x *Patrick Mayovsky*