

FILED

APR 04 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28889-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

IN RE THE DETENTION OF CALVIN MINES

STATE OF WASHINGTON,

Respondent,

v.

CALVIN MINES,

Petitioner/Appellant.

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

The Honorable John W. Lohrmann

BRIEF OF PETITIONER/APPELLANT

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENTS OF ERROR

1. Mines' referral for commitment proceedings under Chap. 71.09 RCW violated the due process and equal protection clauses of the Fourteenth Amendment and article I, sections 3 and 12 of the Washington Constitution because Mines was never convicted of a sexually violent offense.

2. Mines' referral for commitment proceedings under Chap. 71.09 RCW was contrary to statute because Mines was never convicted of a sexually violent offense.

3. The trial court erred in entering Finding of Fact 1 in support of its Order Denying Respondent's Motion to Dismiss. CP 281.

4. The trial court's failure to bifurcate the proceedings violated Mines' right to equal protection safeguarded by the Fourteenth Amendment and was an abuse of discretion.

5. The trial court violated Mines' right under the Fourteenth Amendment and article I, section 3 to a commitment trial free from unfair prejudice when it authorized the admission of criminal charging documents alleging Mines committed sex offenses where Mines was not convicted of these offenses.

6. The trial court violated Mines' right under the Fourteenth Amendment and article I, section 3 to a commitment trial free from unfair prejudice when it refused to issue Mines' requested limiting instruction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under Chap. 71.09 RCW, the State may only seek to civilly commit a person who has been released from confinement if the State can establish two predicates: (1) that the person was previously convicted of a sexually violent offense; and (2) that the person committed a recent overt act. In addition to several enumerated crimes that automatically qualify as "sexually violent" offenses, the Legislature has provided that a sexually violent offense may also be:

an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030[.]

RCW 71.09.020(17).

To the extent that the statute creates an ambiguity, does the narrow construction mandated by due process require that the

sexual motivation allegation be proven at the time of conviction?

(Assignments of Error 1-3)

2. Alternatively, where the statute would create two classes of civil commitment detainees – those who enjoyed the full panoply of rights afforded criminal defendants because the sexual motivation allegation was proven during the criminal proceeding, and those who are stripped of those rights because sexual motivation is proven at the civil commitment trial – should this Court conclude that a construction that allows the State to later prove sexual motivation violates equal protection? (Assignment of Error 1)

3. Where the alleged recent overt act would have been a crime if charged, and the presentation of this evidence in conjunction with the evidence of mental abnormality and dangerousness at the civil commitment trial would prevent a fair determination of whether the act had been committed, did the trial court abuse its discretion and violate Mines' right to equal protection when it failed to bifurcate the proof of the recent overt act from the rest of the proceedings? (Assignment of Error 4)

4. The filing of a criminal information is not proof that the charge is true and cannot be considered as proof that the accused

committed the act or acts charged. With respect to each of Mines' prior convictions, Mines pled guilty to reduced charges. Were the original charging documents alleging the commission of much more serious acts irrelevant, prejudicial, and inadmissible? (Assignment of Error 5)

5. A limiting instruction is available as a matter of right when evidence is admitted for a limited purpose. Although the State conceded that evidence of other alleged sexual misconduct by Mines should not be considered by the jury as proof of his propensity to commit the recent overt act, the trial court refused to issue Mines' proposed limiting instruction that would have directed the jury not to consider it for this purpose. Was the trial court's failure to give the requested instruction prejudicial error?

(Assignment of Error 6)

C. STATEMENT OF THE CASE

1. Illegal petition. After completing his 1994 sentence for rape in the third degree – the only sex offense of which he was ever convicted – Calvin Mines was released from custody and spent over three years in the community without being charged or

convicted of any offense. 5RP 17.¹ In 2001, Mines assaulted a man who tried to intervene in a discussion Mines was having with his girlfriend. 5RP 78. Mines also assaulted two police officers who responded to the scene, and as a result was convicted of two counts of third degree assault and remanded to prison. Id.

On March 15, 2006, while Mines was still in custody for these offenses, the Department of Corrections referred Mines to the Joint Forensic Unit for evaluation under Washington's Sexually Violent Predator Law. 3RP 84-85. Although the Department of Corrections had administered psychological evaluations to Mines on eight prior occasions, none of these diagnosed him with a paraphilia. 4RP 73. In fact, Mines had previously been evaluated under Washington's Sexually Violent Predator law but the evaluator determined that he did not meet the statutory criteria for commitment. 4RP 110, 121.

However, Dr. Harry Goldberg, the expert retained by the State for the 2006 evaluation, concluded that Mines met the criteria for commitment and on March 15, 2006, the State filed a petition

¹ Citations to eight numbered volumes of transcripts from pretrial hearings and trial proceedings are by volume number and page, e.g., 5RP 17. A supplemental volume containing a transcript of a probable cause hearing is not cited.

pursuant to Chap. 71.09 RCW and a certification for determination of probable cause. CP 1-58.

In the petition and certification, the State alleged that Mines' prior conviction for assault in the first degree from 1970 qualified as a sexually violent offense. CP 1, 3-5. The State conceded that assault in the first degree was not "specifically enumerated" as a sexually violent offense in RCW 71.09.020 but asserted that at trial it would introduce evidence to permit a finding that the crime had been sexually motivated. CP 3-4.

The State listed among "other sexual offenses and misconduct" Mines' convictions for: (1) unlawful imprisonment (1990); (2) unlawful imprisonment (1991); and (3) rape in the third degree (1994). CP 5-6. Because Mines was in custody on a non-sex offense after having been released from total confinement when the petition was filed, the State asserted that a sexual assault alleged to have been committed by Mines against another prison inmate in 2003 qualified as a recent overt act. CP 8-9.

Prior to trial, Mines moved to dismiss the petition, contending, inter alia, that principles of due process prohibited the State from relying upon the assault in the first degree charge to establish a sexually violent offense. CP 88-112. In response, the

State argued that Mines pled guilty to assault in the first degree “as charged in the information” and that the court that sentenced him in 1970 entered findings of fact and conclusions of law which established he committed assault “with intent to rape.” CP 121. Following argument on the motion to dismiss, the court denied it by written ruling. CP 281-84.

2. Failure to bifurcate. Mines proceeded to a jury trial on the State’s petition. Prior to trial, Mines requested the court bifurcate the proceedings and hold a preliminary trial on the question of whether Mines had committed a recent overt act. CP 79-84. Mines noted that the sexual assault alleged to constitute the recent overt act had never been criminally charged and thus had not been tested by the adversarial process. CP 79-84; 1RP 46. Mines also noted that there were proof problems with the alleged recent overt act.

Mines contended that he would not receive a fair determination of whether the act had been established if the State were permitted to introduce the evidence in support of the act in conjunction with testimony regarding his offense history. Id. He argued that he was entitled to bifurcated proceedings by the equal protection clauses of the federal and state constitutions. He also

argued that bifurcation would protect his due process rights and serve the interests of judicial economy. He noted that the court had the discretion to bifurcate under CR 42(b).

The court agreed that as soon as evidence of offense history and mental condition was presented “[you] have introduced prejudice” because “nobody likes a rapist.” 1RP 54. Nevertheless, finding there was no “precedent” for the relief Mines requested, the court denied the motion. 1RP 71; CP 279-81.

3. Prejudicial trial errors. During the trial, the State sought to introduce charging documents alleging the commission of more serious offenses than the crimes to which Mines pleaded guilty. 2RP 133; 3RP 18. With regard to Mines’ 1989 conviction for unlawful imprisonment, the court authorized the admission of an information charging Mines with rape in the second degree by forcible compulsion. Ex. 5; 3RP 19. With respect to Mines’ 1991 unlawful imprisonment conviction, the court admitted a criminal information charging Mines with rape of a child in the third degree. Ex. 9; 2RP 133.

The court also freely allowed the testimony of witnesses who claimed that they had been sexually abused by Mines in prison, as well as hearsay testimony regarding allegations that Mines had

sexually assaulted residents during his confinement at the Special Commitment Center. 2RP 62-68; 5RP 83-96; 6RP 53-80.

Mines' counsel voiced the concern that the jury would consider this testimony as evidence of Mines' propensity to sexually offend while in custody, and thus as propensity evidence with regard to the alleged recent overt act. 6RP 117; 7RP 11-12, 14. Mines requested a limiting instruction be included in the jury instruction packet. 7RP 11-12, 14. Mines' proposed limiting instruction would have informed the jury:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony by Mathew Engles, Bradley Braun, and Joseph Carver and may be considered by you only for the purposes of proof of mental abnormality and proof of current dangerousness. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 951.

The State agreed that it would be inappropriate to argue that Mines had a propensity to commit sexual offenses with regard to the recent overt act. 7RP 13. Nevertheless, the State objected to any limiting instruction being included in the jury instruction packet and the court did not give the instruction. 7RP 14.

The jury concluded that the State had proven Mines met the criteria for commitment under Chap. 71.09 RCW. CP 948. This appeal follows. CP 954-55.

D. ARGUMENT

1. MINES' REFERRAL FOR COMMITMENT PROCEEDINGS VIOLATED DUE PROCESS BECAUSE MINES WAS NEVER CONVICTED OF A SEXUALLY VIOLENT OFFENSE.

a. The Fourteenth Amendment guarantee of substantive and procedural due process applies to the involuntary commitment of individuals under sexually violent predator statutes.

The due process clauses of the Fourteenth Amendment and article I, section 3 of the Washington Constitution protect a person from the deprivation of life, liberty, or property without due process of law. U.S. Const. amend. XIV; Const. art. I, § 3. Freedom from physical restraint “has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” Foucha v. Louisiana, 504 U.S. 71, 80, 118 L.Ed.2d 437, 112 S.Ct. 1780 (1992).

“The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement.” Foucha, 504 U.S. at 79 (quoting Vitek v. Jones, 445 U.S. 480, 492, 100 S.Ct.

1254, 53 L.Ed.2d 522 (1980)). “Commitment to a mental hospital produces a ‘massive curtailment of liberty’ . . . and in consequence ‘requires due process protection.’” Vitek, 445 U.S. at 491-92 (internal citations omitted); accord In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

Laws that impinge on a person’s liberty must therefore (1) further compelling state interests and be narrowly tailored to achieve those interests, In re Detention of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993); and (2) meet fundamental requirements of procedural due process in order to satisfy the Fourteenth Amendment. Wolff v. McDonnell, 418 U.S. 539, 558-60, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

The United States Supreme Court has upheld statutes providing for the forcible civil detainment of individuals alleged to be sexually violent predators against constitutional challenges when

(1) “the confinement takes place pursuant to proper procedures and evidentiary standards,” (2) there is a finding of dangerousness either to one’s self or to others,” and (3) proof of dangerousness is “coupled . . . with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’”

Kansas v. Crane, 534 U.S. 407, 409-10, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) (quoting Kansas v. Hendricks, 525 U.S. 346,

357-58, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)). The Washington Supreme Court has found that “there is no doubt that commitment [under Chap. 71.09 RCW] is predicated on dangerousness under the statute.” Young, 122 Wn.2d at 32. Yet, given the liberty interest at stake, the commitment proceeding must still satisfy fundamental due process. In re Detention of Fair, 167 Wn.2d 357, 363, 219 P.3d 89 (2009) (citing In re Detention of Henrickson, 140 Wn.2d 686, 694, 2 P.3d 473 (2000)).

b. A petition for commitment under Chap. 71.09 RCW may only be filed in the county where a person has been charged or convicted of a sexually violent offense, or where a recent overt act has been committed. According to statute, a “sexually violent predator” (“SVP”) is “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(020)(18).² A petition to civilly commit someone alleged to be a SVP may be filed by the prosecuting attorney when:

² Citations are to the current version of Chap. 71.09 RCW. See In re the Detention of Durbin, __ Wn. App. __, __ P.3d __, 2011 WL 799772 (March 8, 2011) (holding 2009 legislative amendments apply retrospectively).

[I]t appears that: (a) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement; (b) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement; (c) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released, pursuant to RCW 10.77.086(4); (d) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released, pursuant to RCW 10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or (e) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act.

RCW 71.09.030(1).

In pertinent part, a “sexually violent offense” is defined as:

[A]n act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined

beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030[.]

RCW 71.09.020(17).³

The statute further restricts the filing of the petition to the “prosecuting attorney^[4] of a county in which . . . [t]he person has been charged or convicted with a sexually violent offense” or where the recent overt act occurred. RCW 71.09.030(2); In re Detention of Martin, 161 Wn.2d 501, 513-14, 182 P.3d 951 (2008) (holding that this provision serves as a limitation both upon who may file a petition under Chap. 71.09 RCW and where it may be filed).

There thus are specific predicates to the filing of a SVP petition. Because Mines was released from custody on his 1994 Rape in the Third Degree charge and spent over three years in the community before again being incarcerated, the State had to establish:

³ RCW 71.09.060 also provides:

If the state alleges that the prior sexually violent offense that forms the basis for the petition for commitment was an act that was sexually motivated as provided in RCW 71.09.020(15)(c), the state must prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated as defined in RCW 9.94A.030.

RCW 71.09.060(1).

⁴ RCW 71.09.030 permits the county prosecuting attorney to request the attorney general file and prosecute a case under Chap. 71.09 RCW, as happened in this case.

(1) that Mines had previously been convicted of a sexually violent offense and had committed a recent overt act, RCW 71.09.030(1)(e); and

(2) that the action was commenced in the county where the conviction or recent overt act arose. RCW 71.09.030(2).

Mines had previously been charged with a sexually violent offense in Island County, i.e., rape in the second degree, but he was convicted by guilty plea of an offense that did not qualify as sexually violent under RCW 71.09.020, specifically, rape in the third degree. Ex. 13, 14. For this reason, the State had to reach to Walla Walla County in order to find an offense that arguably could qualify under the statute.⁵

In 1970 Mines suffered a conviction in Walla Walla County for assault in the first degree. Mines initially had been charged with assault in the first degree and sodomy. CP 288. The sodomy charge was dismissed. Id. Mines pled guilty to “Assault in the First Degree while armed with a deadly weapon.” Ex. 2 at 2; Ex. 4 at 1. The sentencing court entered written findings of fact which

⁵ It is not clear why the State chose to gamble with prosecuting the action in Walla Walla County based upon an offense that might not qualify as a sexually violent offense, instead of commencing the action in Spokane County, where the incident alleged to be the recent overt act took place. See 3RP 25-32 (Brown testifies that Mines sexually assaulted him while they were confined at Airway Heights Corrections Center). The State’s decision not to attempt its experiment with regard to Mines’ prior convictions for unlawful imprisonment is indicative, perhaps, of its recognition that it had proof problems with these offenses.

provided, in pertinent part, that Mines “on the 17th day of November, 1969, with intent to rape, did assault a female child with a deadly weapon.”⁶ Ex. 4 at 1.

Under pre-SRA sentencing law, “it was understood the sentencing authority would consider surrounding circumstances and uncharged acts in setting a term of incarceration.” State v. Shephard, 53 Wn. App. 194, 198, 766 P.2d 467 (1988) (citing D. Boerner, Sentencing in Washington § 2.4, at 2-27, § 5.2, at 5-2 (1985)). Nowhere in the court’s findings of fact and conclusions of law, however, is it reflected that the finding was made beyond a reasonable doubt.

c. The petition to commit Mines under Chap. 71.09 RCW was statutorily barred. The trial court determined that the State could proceed with the civil commitment petition, despite the the fact that Mines’ prior assault in the first degree was not per se a conviction for a sexually violent offense, because of the sentencing judge’s finding that the assault was committed with the intent to rape. CP 281. This was an error: RCW 71.09.020(17) requires

⁶ Prior to the enactment of the Sentencing Reform Act of 1984, a finding of fact at sentencing that an offender was armed with a deadly weapon at the time of the commission of a felony obligated the parole board to fix his minimum term of confinement at not less than five years. See Laws of 1955, ch. 133, § 5.

that the factual finding at sentencing be made “beyond a reasonable doubt.”

Likewise, the State’s effort to prove sexual motivation at Mines’ trial was statutorily prohibited because RCW 71.09.030 restricts the filing of a petition for involuntary commitment to persons who have “previously been convicted” of a sexually violent offense. When interpreting a statute, the court’s objective is to ascertain and carry out the Legislature’s intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). “[I]f the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” Id. (quoting Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). The “plain meaning” of a statutory provision is discerned “from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” Id. If the statute is susceptible to two or more reasonable interpretations, it is ambiguous and the Court will utilize additional tools of statutory construction in determining the meaning of the statute. In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010).

In addition, statutes that involve a deprivation of liberty must be strictly construed. . . . Strict construction requires that, “given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, [the court] must choose the first option.”

Id. (citations omitted). A question of statutory construction is reviewed de novo. Jacobs, 154 Wn.2d at 600.

RCW 71.09.030’s use of the word “previously” in reference to a conviction for a sexually violent offense signals that conviction for an offense enumerated in RCW 71.09.020(17) must antedate the filing of the petition for involuntary commitment. Any other interpretation would violate the “plain meaning” rule of statutory construction.⁷

The definition of “sexually violent offense” in RCW 71.09.020(17)(c) does not compel a different result. Chap. 71.09 RCW contemplates that a petition for involuntary commitment may be filed against a person who is charged with a sexually violent offense. RCW 71.09.030. See RCW 71.09.030(1)(c); RCW 71.09.030(2). In the context of a person who has been found to be incompetent to stand trial on the charged offense, for example, it makes sense that in the civil trial on the State’s petition for

⁷ In re Detention of Stout, 159 Wn.2d 357, 150 P.3d 86 (2007), does not address the issue as Stout did not contest that his predicate burglary in the first degree was sexually motivated. 159 Wn.2d at 365 n. 3.

involuntary commitment the State would be obligated to prove beyond a reasonable doubt that the crime was sexually motivated. See RCW 71.09.060(2).⁸

If, however, the language in RCW 71.09.020(17)(c) is construed to permit the State to prove sexual motivation during the civil commitment proceedings, then the phrase “previously been convicted” in RCW 71.09.030 conflicts with RCW 71.09.020 and must be overlooked or considered mere surplusage. But “[s]tatutes must be interpreted and construed so that all the language is given effect, with no portion rendered meaningless or superfluous.” Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Disregarding the use of the word “previously” would violate this fundamental tenet of statutory construction.

Additionally, it is possible to imagine many situations where an individual subject to proceedings under Chap. 71.09 RCW would

⁸ RCW 71.09.060(2) provides in pertinent part:

If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be or has been released pursuant to RCW 10.77.086(4), and his or her commitment is sought pursuant to subsection (1) of this section, the court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.086(4) that the person committed the act or acts charged. . . . If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

not receive a fair determination of whether his serious violent crime was sexually motivated. For example, the conviction may be old, or may have arisen in another jurisdiction. In this instance, both the State and the defense might be unable to locate or procure the testimony of necessary witnesses. Furthermore, in the criminal prosecution where it was alleged that an offense was sexually motivated, the civil commitment detainee would have had the right to compulsory process. U.S. Const. amend. VI; Const. art. I, § 22. In the criminal trial, he would also have had the right to remain silent. U.S. Const. amend. V. But in the SVP trial the detainee would not enjoy these fundamental rights, because “the rights afforded under the Fifth and Sixth Amendments do not attach to SVP petitioners.” In re Detention of Strand, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009).

Likewise, the rules of evidence in criminal proceedings, as well as the presumption of innocence and the due process right to a fair trial, prohibit the introduction of unduly prejudicial or inflammatory evidence that might predispose a jury in favor of conviction. See State v. Fisher, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009). In a SVP proceeding, the State is obligated to introduce evidence of the alleged SVP’s other sexual offenses and

predatory acts, to the extent that these are necessary to establish the existence of “a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18). Thus, in the SVP proceeding, even if the evidence of sexual motivation for a predicate serious violent offense is weak, evidence of the individual’s other deviant or sexually motivated behavior would be likely to make the jury more inclined to overlook deficiencies in the State’s case.

In short, construing RCW 71.09.020 to authorize the State to prove sexual motivation with respect to any prior serious violent offense would be an absurd result. Courts presume that in drafting statutes, the Legislature did not intend absurd results. State v. Ervin, 169 Wn.2d 815, 823-24, 259 P.3d 834 (2009). This Court should conclude that according to the plain language of RCW 71.09.030, the State had to show that Mines had previously been convicted of a qualifying offense under RCW 71.09.020(17), and could not prove the sexual motivation for the offense at the commitment trial.

d. Any other result would violate equal protection. In response, the State may contend that the procedure was

permissible under Abolafya v. State, 114 Wn. App. 137, 56 P.3d 608 (2002), rev. denied, 149 Wn.2d 1020 (2003). In Abolafya, the State filed a petition for involuntary commitment under Chap. 71.09 RCW based on a predicate conviction for residential burglary, which the State alleged it would prove was sexually motivated at the SVP commitment proceeding. 114 Wn. App. at 142. The trial court dismissed the petition “for failure of the State to establish probable cause to believe that Benjamin Abolafya has committed the necessary predicate sexually violent offense as defined in RCW 71.09.020(11).” Id. at 142.

Without engaging in statutory construction, Division One⁹ rejected Abolafya’s contention that “previously been convicted” required proof of sexual motivation in the criminal trial. Id. at 144-45. Instead of addressing the discrepancy between the two provisions, the Court simply concluded that “[t]he prior conviction for residential burglary, together with the current allegation of sexual motivation is adequate to establish a sexually violent offense conviction for the purpose of filing a civil commitment proceeding. “Id.

⁹⁹ The issue has not been considered in Divisions Two or Three of the Court of Appeals.

The Court also rejected Abolafya's argument that allowing the State to prove the sexual motivation allegation at a civil proceeding where he would not have the right to remain silent and where the State could introduce evidence that would have been inadmissible at the criminal proceeding violated his Fourteenth Amendment right to equal protection.¹⁰

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). Abolafya contended that there was no rational basis to deny him constitutional protections that would have been available to a person subject to proceedings under Chap. 71.09 RCW who had had the sexual motivation finding established in a criminal trial.

Division One rejected this argument, reasoning:

¹⁰ Abolafya does not appear to have argued that proving the prior conviction was sexually motivated at the civil proceeding would violate his right to due process.

Abolafya argues that he is similarly situated to people who have already faced criminal sanctions for a special allegation of sexual motivation and who are now facing civil commitment as a result of that criminal conviction. This is incorrect. Abolafya is now facing only civil commitment, not criminal sanctions. Criminal defendants face increased prison sentences or periods of probation for findings of sexual motivation. Constitutionally they are afforded greater protections than civil respondents. Abolafya is not similarly situated to criminal defendants facing an allegation of sexual motivation.

114 Wn. App. at 146.

The Court's analysis lacks logical cogency. The comparison is not to the criminal defendant. Rather, the similarly situated classes of persons are (1) the civil commitment detainees who, at their civil commitment trial, are confronted for the first time with a sexual motivation allegation with respect to a past conviction and (2) the civil commitment detainees whose allegations of sexual motivation were proven at the earlier criminal proceeding. The latter enjoyed the full panoply of constitutional rights afforded criminal defendants. The former are stripped of the presumption of innocence, the right to confront witnesses, the right to compulsory process, the right to remain silent, and the right to have unduly prejudicial propensity evidence excluded.

There is no rational basis to distinguish between these persons. However, having falsely characterized Abolafya's

comparison, Division One had little difficulty identifying bases to differentiate a person charged with a criminal offense from a person facing civil commitment proceedings under Chap. 71.09 RCW. 114 Wn. App.at 146. This Court should not make the same error.

The question is whether there is a rational basis to distinguish the detainee who was convicted of a sexually violent offense through the criminal process, with its attendant constitutional protections, from the detainee who is newly confronted in civil commitment proceedings with a sexual motivation allegation with respect to an old conviction. There is not. This Court should conclude that construing Chap. 71.09.020 to permit proof of sexual motivation with regard to a previous conviction at the SVP commitment trial violates equal protection.

e. Any other result would violate due process. The State's proposed construction of RCW 71.09.020 would create an open season for prosecutors to initiate civil commitment proceedings against individuals who never were convicted of sexually violent offenses through the criminal process. Thus, where because of a want of proof or other deficiency the State was unable to establish sexual motivation in a criminal trial, it would nevertheless be permitted a second bite at the apple in a

proceeding where the defendant is stripped of fundamental constitutional rights.

As noted by the Court in Hawkins, involuntary civil commitment is a “massive curtailment of liberty.” 169 Wn.2d at 801; Vitek, 445 U.S. at 491. Because of the liberty interest at stake, civil commitment statutes must be narrowly construed. Id. This Court should conclude that the State’s proposed construction would result in an overly-broad construction of the statute, in derogation of due process.

2. THE FAILURE TO BIFURCATE THE PROCEEDINGS TO ALLOW FOR A SEPARATE DETERMINATION BEYOND A REASONABLE DOUBT OF THE RECENT OVERT ACT VIOLATED EQUAL PROTECTION.

Mines moved for a bifurcated proceeding where the jury would first determine whether he had committed the recent overt act alleged by the State. CP 79-84. He argued that bifurcation was necessary to permit a fair determination of the facts and that it was required by the equal protection clause, because Chap. 71.09 RCW mandates a separate proceeding on the existence of prior offenses where the State seeks to commit a person who has been found incompetent to stand trial. Id.

The court denied his motion on three bases: first, it found that there was no precedent for bifurcation and that the issues to be determined with respect to the recent overt act and ultimate determination of SVP status were “inextricably woven together”; second, it ruled that a unitary trial would not violate Mines’ equal protection rights, because there is a rational basis for a separate standard for resolution of unadjudicated prior offenses for incompetent SVPs; and third, it ruled that the State is not obligated to prove the independent commission of a crime when alleging a recent overt act. CP 278-79. This ruling was erroneous. The court had the authority to bifurcate the proceedings, bifurcation was necessary to ensure a fair determination of whether the recent overt act had been committed, and the failure to bifurcate violated Mines’ right to equal protection.

a. The court had authority to bifurcate the proceedings to allow for a determination beyond a reasonable doubt whether Mines had committed the act alleged to be a recent overt act. The trial court initially questioned whether there was “precedent” for bifurcation in a SVP proceeding. 1RP 71. The absence of “precedent,” in fact, was a principal basis for the court’s refusal to grant Mines’ motion. CP 279-80. This was the incorrect

emphasis. Trial courts are vested with substantial discretion by the Superior Court Civil Rules to conduct and structure trials. Sprague v. Sysco Corp., 97 Wn. App. 169, 171-72, 982 P.2d 1202 (1999).

Under CR 42(b), the court is specifically authorized to bifurcate proceedings:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third party claims, or issues, always reserving inviolate the right of trial by jury.

CR 42(b). An order to bifurcate proceedings is reviewed for an abuse of discretion. Myers v. Boeing Co., 115 Wn.2d 123, 140, 794 P.2d 1272 (1990). “Failure to exercise discretion is an abuse of discretion.” Bowcutt v. Delta North Star Corp., 95 Wn. App. 311, 320, 976 P.2d 643 (1999).

b. The order denying the motion to bifurcate was an abuse of discretion. While bifurcation may not be customary in SVP proceedings, the trial court erred in requiring Mines to produce “statutory [or] case authority . . . that . . . requires the State to prove the act or threat independent of the other requirements of the ROA decision.” CP 180. This misses the point. Certainly there is no requirement for bifurcation, except that which is necessary to

ensure a fair verdict. Mines was asking the court to exercise its discretion.

Under CR 42(b), the trial court had broad authority to bifurcate the determination of the recent overt act from the ultimate determination whether Mines was a sexually violent predator. Essentially, the court abdicated this authority by predicating any action on the presentation of “precedent” – notwithstanding the plain precedent provided by the court rule and the general latitude afforded trial courts to manage civil trials. To the extent that the court refused to exercise its discretion, the court abused its discretion.

c. Failure to bifurcate denied Mines his Fourteenth Amendment right to equal protection. As noted supra, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. In the context of a person who is incompetent to stand trial who the State seeks to commit on the predicate offense, Chap. 71.09 RCW mandates a separate proceeding. RCW 71.09.060(2). Yet, where the person is not incompetent, proof of a recent overt act is required for commitment, and the alleged recent overt act would be a crime if charged, the State is free to present its evidence in conjunction with the

inflammatory and prejudicial evidence of mental abnormality and dangerousness. These disparate standards violate equal protection.

i. Bifurcation is required by statute where the person alleged to be a SVP has been found incompetent. In the context of SVP proceedings where the person has previously been found incompetent to stand trial, RCW 71.09.060 provides:

[T]he court shall first hear evidence and determine whether the person did commit the act or acts charged if the court did not enter a finding prior to dismissal under RCW 10.77.086(4) that the person committed the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his or her own behalf, the extent to which the evidence could be reconstructed without the assistance of the person, and the strength of the prosecution's case. If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

RCW 71.09.060(1).

ii. The failure to bifurcate violated equal protection. Even though RCW 71.09.060(1) establishes that the Legislature clearly contemplated bifurcation in SVP proceedings, the trial court found no equal protection violation, ruling as follows:

Nor would a unitary trial violate Mr. Mines' equal protection rights. RCW Chapter 71.09 causes no unequal treatment of SVP respondents regarding ROAs. An incompetent respondent does not have the right to a separate ROA evidentiary hearing, but only to a separate trial concerning predicate offenses that never have been criminally adjudicated because of the mental illness. The separate standard for incompetent persons in this context has a rational basis.

CP 280.

This conclusion fails to account for the circumstances that must be present in order for commitment proceedings to be initiated against an incompetent person. The separate proceeding requirement contained in RCW 71.09.060 applies to civil commitment proceedings initiated pursuant to RCW 71.09.030(1), specifically, to "a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released, pursuant to RCW 10.77.086(4)."

RCW 10.77.086(4), in turn, provides in relevant part:

For persons charged with a felony, at the hearing upon the expiration of the second ninety-day period or at the end of the first ninety-day period, in the case of a defendant with a developmental disability, if the jury or court finds that the defendant is incompetent, the charges shall be dismissed without prejudice, and either civil commitment proceedings shall be instituted or the court shall order the release of the defendant.

RCW 10.77.086(4).

When these provisions are read in conjunction with one another, it is evident that “the act or acts charged” referenced in RCW 71.09.060 is the sexually violent offense that must form the predicate for a petition for involuntary commitment. For this reason, the State would never find itself in the situation of having to prove the commission of a recent overt act by an incompetent person. The incompetent persons referenced in RCW 71.09.030 and .060 fall within the specific and narrow class of persons “charged with a felony” (in this instance, a crime of sexual violence) and subject to the release and civil commitment provisions of RCW 10.77.086(4). It was thus a fallacy for the court to rule that “[a]n incompetent respondent does not have the right to a separate ROA evidentiary hearing.” CP 280. The State would not be obligated to prove a recent overt act with regard to the class of incompetent respondents at issue.

With regard to the purported “rational basis” for the difference in substantive rights, it is true, as the State argued to the trial court, that a “recent overt act” does not have to be a completed act.¹¹ See 1RP 53. This generalization, however, sidesteps the question of what procedure should be followed where the recent overt act would be a crime if charged but was not prosecuted.

In this case, Jeromy Brown’s allegation against Mines was referred to the police but no criminal charges were ever filed. The State’s expert witness intimated that this was because prosecuting agencies do not pursue inmate sex offenses. (The trial court overruled Mines’ objection to this testimony. 4RP 112.) Brown testified, however, that police officers told him there was a “lack of evidence” and referred the matter back to the Department of Corrections. 3RP 63.

In addition to this “lack of evidence,” there were proof problems with the allegation. Brown had been convicted of a crime of dishonesty. 3RP 24. Although the sexual contact allegedly occurred in an open shower stall and Brown’s cell, where his

¹¹ “Recent overt act” means any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.

RCW 71.09.020(12).

cellmate was sleeping, the State did not present the testimony of any eyewitnesses. 3RP 29-32. Further, Brown delayed reporting the incident until he was transferred to a work release facility. 3RP 62. There also were inconsistencies between Brown's deposition testimony and his trial testimony. 3RP 58-61. Finally, Brown sought to gain a benefit for his testimony, thus there was a basis to question his bias and motive. 3RP 9-10.

The determination whether an incompetent person has committed a charged but unproven crime of sexual violence is a prerequisite for filing a petition under Chap. 71.09 RCW. RCW 71.09.060(2) ("If, after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, it . . . may proceed to consider whether the person should be committed pursuant to this section."). Importantly, the full panoply of constitutional rights afforded criminal defendants, as well as the rules of evidence applicable in criminal cases, must be applied in this proceeding. Id.

The only conceivable legislative rationale for requiring this procedure is to ensure that the sexually violent offense that is the necessary predicate for a petition under Chap. 71.09 RCW is proven in proceedings that carry the due process safeguards of a

criminal trial. RCW 71.09.060(1). A recent overt act also must be proven beyond a reasonable doubt. But this proof is adduced in proceedings in which the detainee does not have the constitutional rights afforded to incompetent persons.

The trial court acknowledged that Mines had a “valid concern” in making his motion for bifurcation because “as soon as you start talking about . . . the mind of an objective person who knows of the history and mental condition of the person engaging in the act, you immediately have prejudiced him.” 1RP 54. This prospect of prejudice was insufficient to persuade the court that bifurcation was appropriate.

Finally, contrary to the trial court’s belief that proof of the recent overt act was “inextricably woven together” with the issues at trial, CP 280, it would be easy to divorce the act itself from the separate question whether the act “has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.” RCW 71.09.020(12). Indeed, if the State seeks to prove only that the act has “caused harm of a sexually violent

nature”, then there is no basis to distinguish the recent overt act from a criminal offense.

This Court should conclude that if an alleged recent overt act would be a crime if charged, it violates equal protection to deny a person subject to proceedings under Chap. 71.09 RCW the right to a separate determination of whether the act was committed. The order committing Mines must be reversed.

3. THE ADMISSION OF CRIMINAL INFORMATION
CHARGING MINES WITH SEX OFFENSES
WHERE HE WAS NOT CONVICTED OF THESE
CRIMES VIOLATED MINES' DUE PROCESS
RIGHT TO A FAIR TRIAL.

During the trial, the court admitted certified copies of Mines' Judgment and Sentences and guilty plea forms from his 1989 and 1991 convictions for unlawful imprisonment and 1993 conviction for rape in the third degree. Ex. 11, 12, 14, 15. Over Mines' strenuous objections, the court also admitted the original criminal informations in the 1989 and 1991 cases charging Mines, respectively, with rape in the second degree by forcible compulsion and rape of a child in the third degree. 2RP 133; 3RP 18; Ex 5, 9.

Christina Sams, the complainant in the 1989 offense, did not testify at the trial. However Goldberg, the State's expert witness, testified extensively regarding the unproven alleged "facts" of the

case, which he gleaned from the police reports. 3RP 102-04. Goldberg characterized the crime as a “very violent sexual offense.” 3RP 102. He asserted that Mines forced Sams into her bedroom, grabbed her by the neck, and twisted her jaw, hurting her. Id. He stated that Mines then engaged in several acts of sexual intercourse against Sams’ will, and would not permit her to leave the bedroom, so that at one point she was forced to urinate on the bed. Id. at 102-03.¹²

In his videotaped deposition, portions of which were played before the jury, Mines admitted that he had sex with Sams against her will because she said “no” to him and he did not respect her wishes. Ex. 18 at 33, 41.¹³ Mines denied having sex with her more than once and asserted that she was free to leave. Id. at 38-39.

a. The criminal informations charging Mines with greater crimes than the crimes to which he pled guilty were irrelevant and inadmissible. “It is a fundamental rule of evidence that ‘[e]vidence which is not relevant is not admissible.’” In re

¹² Mines moved in limine to bar Goldberg from testifying to “facts” in the record where the declarant was unavailable and the information was in controversy. CP 356-59. The court denied the motion but prohibited Goldberg from stating he believed the information was true and issued a limiting instruction to the jury that the information should be considered only inasmuch as it formed the basis for the expert’s opinion. 3RP 52-53; CP 922.

¹³ References herein are to the transcript of Mines’ deposition, which was admitted for illustrative purposes as Exhibit 18.

Detention of Post, 170 Wn.2d 302, 311, 241 P.3d 1234 (2010) (quoting ER 402). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Further, even relevant evidence must be excluded if its prejudicial value outweighs its probative effect. ER 403.

It is axiomatic that the filing of a criminal information “is not evidence that the charge is true.” WPIC 1.01; RCW 10.77.180 (“The plea of not guilty is a denial of every material allegation in the indictment or information . . .”). In each of Mines’ prior convictions, he pled not guilty to the originally charged information and entered a guilty plea to an amended information. Although Mines admitted his guilt or that the State could prove his guilt as to the amended charges,¹⁴ the allegations in the original informations were unproven and presumptively not true. For this reason, there is no way that the originally-filed informations had “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

¹⁴ In at least one of the cases, Mines entered an Alford plea. 2RP 152.

would be without the evidence.” ER 401. The evidence should have been excluded.

b. The admission of the evidence was prejudicial.

The hearsay testimony of Mines’ alleged misconduct was admitted solely for the purpose of providing a foundation for the opinion of expert witnesses. For any number of reasons – proof problems, credibility issues with the State’s witnesses, the interests of judicial economy – the State reduced Mines’ criminal charges in each of his criminal prosecutions. In most instances, the reduction in the severity of the charge was substantial. The reasons for the reduction of the charges were not identified to the jury, and likely would not have been pertinent to any question the jury was asked to decide. Thus the sole relevant charges were those contained in the informations to which Mines pled guilty.

The admission of the irrelevant charging documents setting forth the higher charges was likely to have had multiple prejudicial consequences. First, the informations conveyed the impression that the State (either the prosecutor who filed the charges or the assistant attorney general representing the State at the SVP proceeding) believed that the allegations contained in the informations were true. Second, the informations indirectly

vouched for the credibility of the three complainants who testified, Jennifer Kinler, Angela Cecotti and Tammy Haggert. Third, the informations encouraged the jury to believe that the hearsay allegations underlying Mines' 1990 conviction for unlawful imprisonment of Christina Sams, testified to by Goldberg, were true, the court's limiting instruction notwithstanding.

Given that Mines' only prior conviction for a sex offense was his 1993 rape in the third degree conviction, which is not a sexually violent crime, the prejudicial impact of this evidence cannot be underestimated. The State's case depended on the jury concluding that there was more to Mines than his bare criminal history would attest. Despite eight prior evaluations – in which the evaluators were looking for signs of sexual deviancy¹⁵ – Mines had never previously been determined suitable for commitment under Chap. 71.09 RCW. The Department of Corrections evaluator who specifically assessed whether commitment proceedings should be initiated against Mines concluded that Mines' crimes were not predatory in nature, but crimes of opportunity. 4RP 125. In short, the State's case depended almost entirely upon unproven

¹⁵ 4RP 118.

allegations. This Court should conclude that the admission of the criminal informations was prejudicial.

4. MINES WAS DENIED A FAIR TRIAL WHEN THE COURT REFUSED TO ISSUE HIS PROPOSED LIMITING INSTRUCTION THAT WOULD HAVE PRECLUDED THE JURY FROM USING HIS PRIOR CHARGED OFFENSES AS PROOF OF HIS PROPENSITY TO COMMIT THE RECENT OVERT ACT.

Finally, even though the State conceded that the testimony of prison inmates who claimed they had been sexually assaulted or propositioned by Mines was not relevant to prove his propensity to commit the recent overt act, the trial court refused to issue Mines' proposed limiting instruction. 7RP 13-14. This too was prejudicial error.

a. A limiting instruction is available as a matter of right. According to ER 105,

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

ER 105. And, "if evidence is admissible only for a limited purpose, an appropriate limiting instruction is available as a matter of right." State v. Luj, 153 Wn. App. 304, 323 n. 20, 221 P.3d 948 (2009)

.. •

(citing State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003)).

The court reasoned that it should not restrict the purpose for which the jury considered the evidence of Mines' alleged prior sexual misconduct in prison, stating that "the purpose of it is to buttress the testimony of Dr. Goldberg and to indicate that these are not just anecdotal stories." 7RP 13. This analysis is a non sequitur to the question whether a limiting instruction was necessary to ensure that the jury did not consider the testimony as probative of Mines' propensity to commit the recent overt act.

Mines' proposed limiting instruction was carefully worded to ensure the jury would be able to consider the evidence "for the purposes of proof of mental abnormality and proof of current dangerousness." CP 951. Certainly, this limitation would have permitted the State to use the evidence to buttress Goldberg's testimony. The trial court erred in ruling that no limiting instruction would be given.

b. The error in failing to issue the limiting instruction prejudiced Mines. The trial court did not voice an objection to the wording of the limiting instruction. Rather, the court disagreed that a limiting instruction was warranted at all. 7RP 14. Because of the

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court's inexplicable refusal to issue the instruction, the jury was free to consider the evidence of Mines' other alleged sexual misconduct in prison to conclude he had the propensity to commit a recent overt act, which was an essential element of the sexually violent predator finding the jury had to make. Ironically, the precise danger articulated by Mines in his motion to bifurcate was realized: because the recent overt act was presented in the SVP proceeding, the jury heard abundant evidence of uncharged, unproven, similar misconduct. The jury was free to use this evidence in any way it chose, including to bolster the otherwise-uncertain evidence of the recent overt act. This Court should conclude that the failure to give Mines' proposed limiting instruction prejudiced him.

E. CONCLUSION

This Court should conclude that Mines' prior conviction for assault in the first degree did not qualify as a sexually violent offense, and that according to statute and principles of due process and equal protection, the State was barred from presenting evidence of sexual motivation at the SVP commitment proceeding. In the alternative, this Court should conclude that Mines had an equal protection right to a bifurcated proceeding with regard to the proof of his alleged recent overt act. This Court should reverse the order of commitment.

DATED this 31st day of March, 2011.

Respectfully submitted:



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Attorneys for Appellant

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

IN RE DETENTION OF)	
CALVIN MINES)	
)	
)	
CALVIN MINES,)	NO. 28889-7-III
)	
)	
APPELLANT.)	
)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **BRIEF OF PETITIONER/APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MALCOM ROSS, AAG	(X)	U.S. MAIL
OFFICE OF THE ATTORNEY GENERAL	()	HAND DELIVERY
800 5th Ave Ste 2000	()	_____
SEATTLE, WA 98104-3188		

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF MARCH, 2011.

X _____ 

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