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Supreme Court No. 82907-1  
Court of Appeals No. No. 36492-1-II  
IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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In re the Detention of  
**Jake Hawkins,**  
Appellant.

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Lewis County Superior Court Cause No. 06-2-00225-1  
The Honorable Judge H. John Hall

**Petitioner's Supplemental Brief**

Manek R. Mistry  
Jodi R. Backlund  
Attorneys for Appellant

**BACKLUND & MISTRY**  
203 East Fourth Avenue, Suite 404  
Olympia, WA 98501  
(360) 339-4870  
FAX: (866) 499-7475

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## **INTRODUCTION AND SUMMARY**

Polygraph examinations are not admissible in court because they aren't reliable. Despite this, the Department of Social and Health Services seeks to force people awaiting trial under RCW 71.09 to submit to sexual history polygraphs. A person who declines to participate in unreliable and invasive physiological testing cannot be compelled to submit to such testing. Neither RCW 71.09 nor the Department's regulations authorize a trial court to compel a pretrial sexual history polygraph. Furthermore, if the statute or the regulations were interpreted to allow compulsory pretrial polygraphy, they would be unconstitutional.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

While in custody of the Department of Corrections, Jake Hawkins successfully completed a 13-month sex offender treatment program. RP (2/23/06) 8, 10, 15-17. Prior to his release, the state filed a Petition seeking civil commitment under RCW 71.09. CP 8-9; RP (2/23/06) 7. At a probable cause hearing, Dr. Christopher North testified that Mr. Hawkins met the criteria for civil commitment. RP (2/23/06) 8-10, 17-18. Dr. North was able to give his opinion "to a reasonable degree of scientific certainty" despite the absence of a sexual history polygraph. RP (2/23/06) 17-18.

While the Petition was pending, the state sought an order compelling Mr. Hawkins to complete a sexual history polygraph

examination. CP 11; RP (4/12/07) 37. According to Dr. North, a polygraph would provide “necessary and relevant information relating to the central issues” in the case. Petitioner’s Memorandum, Appendix A (Declaration of Dr. Chris North) CP 22. Mr. Hawkins objected. RP (5/10/07) 43-48. The trial court entered an Order Compelling Polygraph, which included the following findings of fact:

1. The Respondent should be compelled to participate in a sexual history polygraph as part of the psychological evaluation of the Respondent mandated by RCW 71.09.040(4).
2. The polygraph should be limited to a sexual history polygraph. CP 6-7.

Mr. Hawkins sought and was granted discretionary review.<sup>1</sup> In an unpublished opinion, Division II affirmed the trial judge’s order, holding (1) that the trial judge did not abuse his discretion by ordering the polygraph, (2) that the Department’s regulations authorized the trial judge to compel a pretrial polygraph, and (3) that the Department did not exceed its statutory authority when it promulgated those regulations. Opinion, p. 4.

### ARGUMENT

**A PERSON AWAITING TRIAL UNDER RCW 71.09 CANNOT BE FORCED TO PARTICIPATE IN UNRELIABLE AND INVASIVE PHYSIOLOGICAL TESTING.**

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<sup>1</sup> The Commissioner initially denied the request, but a Motion to Modify was granted by the court.

A. RCW 71.09 does not authorize a trial court to compel a pretrial detainee to undergo a sexual history polygraph.

Involuntary civil commitment involves a “massive curtailment of liberty.” *In re Detention of Anderson*, 166 Wn.2d 543, 556, 211 P.3d 994 (2009) (internal quotation marks omitted) (quoting *In re Harris*, 98 Wn.2d 276, 279, 654 P.2d 109 (1982)). Because of this, a civil commitment statute such as RCW 71.09 must be strictly construed to its terms. *In re Detention of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951 (2008). Civil incarceration achieved by means other than strict compliance with RCW 71.09 deprives a person of liberty without due process. *Martin*, at 511; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3. This is because “[t]he ‘process due’ to a person subject to an SVP petition is the procedure allocated by ‘the statute which authorizes civil incarceration.’” *State v. Strand*, \_\_\_ Wn.2d \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2009) (quoting *Martin*, at 511).

Statutory construction is a question of law reviewed *de novo*. *Strand*, at \_\_\_. The primary objective of statutory construction is to ascertain and carry out the intent of the legislature. *Strand*, at \_\_\_. Where the legislature uses different language in the same statute, different meanings are intended. *State v. Costich*, 152 Wn.2d 463, 475-476, 98 P.3d 795 (2004). Furthermore, under the maxim *expressio unius est exclusio alterius*, omissions from a statute are deemed to be intentional. *Strand*, at

\_\_\_\_.

Principles of statutory interpretation require a “comprehensive reading” of RCW 71.09, with legislative intent derived from “ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Strand*, at \_\_\_\_ (internal quotation marks and citations omitted). Interpretation of RCW 71.09 is contextual, and individual words should be understood with reference to other words with which they are associated, rather than in isolation. *Strand*, at \_\_\_\_ (quoting *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005)).

The legislature recognizes the difference between candidates for civil commitment and those who have been adjudicated. After adjudication, a person committed under RCW 71.09 loses some of the freedoms enjoyed by citizens who are at liberty. In keeping with this difference, the legislature has not authorized compulsory polygraphs for those awaiting trial under RCW 71.09. Examination of the statute reveals three reasons for this conclusion.

First, the statute does not explicitly authorize compelled polygraphy prior to trial. *See* RCW 71.09.010 – RCW 71.09.060. In the absence of specific authorization, trial courts lack the power to compel pretrial polygraph testing: to infer such authority violates the requirement

that civil commitment statutes be strictly limited to their explicit terms.

*Martin*, at 509.

Second, the only provision that could arguably permit a trial judge to compel a pretrial polygraph is RCW 71.09.040, which directs the trial court to order an “evaluation.” RCW 71.09.040(4). However, that section does not make any specific reference to polygraph testing as part of that evaluation. By contrast, RCW 71.09.096(4) explicitly requires a person *adjudicated and committed* under RCW 71.09 to submit to polygraph testing (if recommended) as a condition of release to a less restrictive alternative:

Prior to authorizing any release to a less restrictive alternative, the court shall impose such conditions upon the person as are necessary to ensure the safety of the community....These conditions shall include, but are not limited to the following: ...participation in a specific course of inpatient or outpatient treatment *that may include monitoring by the use of polygraph and plethysmograph...*

RCW 71.09.096(4) (emphasis added). Different language in the same statute has different meanings; a polygraph requirement is specifically listed on one statute but not in the other. Thus comparison of these statutes establishes that courts may not order a pretrial polygraph. *Costich*, at 475-476.

Third, RCW 71.09.040’s explicit reference to an evaluation without any reference to polygraphy suggests that the omission was

deliberate. Because omissions are deemed to be exclusions, RCW 71.09.040 must be interpreted to preclude a trial court from ordering polygraph testing prior to trial: the legislature intentionally omitted authority for compulsory pretrial polygraphy when it drafted RCW 71.09.040. *Strand*, at \_\_\_\_\_. This makes sense in light of the fact that polygraph results are not admissible in court.<sup>2</sup> *Thomas, supra*.

While the lower court opinion acknowledged that RCW 71.09 must be strictly construed, it did not address the absence of explicit language granting authority for compelled pretrial polygraphs or the explicit authorization of compulsory post-trial polygraphy. Opinion, p. 3-4. Had the legislature intended to allow trial judges to compel pretrial polygraph examinations, it would have included specific language authorizing compelled polygraphy in RCW 71.09.040. The fact that it did not is conclusive. *Strand*, at \_\_\_\_; *Martin*, at 511. The legislature recognized that pretrial detainees have not lost all of their constitutional rights, and should not be forced to participate in unscientific, unreliable, invasive physiological “tests.” In the absence of legislative authorization, the Order Compelling Polygraph Examination was entered in violation of

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<sup>2</sup> This is in contrast to the results of a forensic interview, psychological testing, and actuarial instruments such as the SORAG and Static 99, all of which are admissible in court.

RCW 71.09. *Martin, supra.*

B. Division II's interpretation of RCW 71.09.040 renders the statute unconstitutional.

Wherever possible, a court should construe a statute so as to uphold its constitutionality. *State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008).<sup>3</sup> Division II's reading of RCW 71.09.040 renders the statute unconstitutional for two reasons. First, under Division II's interpretation, RCW 71.09 violates substantive due process because it is not narrowly tailored to achieve a compelling government purpose. Second, under Division II's construction, RCW 71.09 violates Wash. Const. Article I, Section 7 because it permits unlawful intrusion into an individual's private affairs.

1. Division II's interpretation of RCW 71.09.040 violates substantive due process because it is not narrowly tailored to achieve a compelling government interest.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. This clause has a substantive component that provides "heightened protection against government interference with

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<sup>3</sup> See also *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 299, 197 P.3d 1153 (2008) ("We may interpret the mandatory "shall" as permissive if it otherwise would render a statute unconstitutional.")

certain fundamental rights and liberty interests.” *Washington v. Gluksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

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 Dependency of I.J.S.*, 128 Wn.App. 108, 116, 114 P.3d 1215 (2005), *review denied*, 155 Wn.2d 1021, 128 P.3d 1240 (2005). A statute is narrowly drawn only if it is the least restrictive means of protecting the government interest.<sup>4</sup> *See, e.g., Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1011 (9th Cir. Ariz. 2003). Allegations of constitutional violations are reviewed *de novo*. *Strand*, at \_\_\_\_.

The Washington Constitution guarantees that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.<sup>5</sup> This provision recognizes an individual’s right to privacy with no express limitations. *State v.*

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<sup>4</sup> “The term ‘narrowly tailored’ ... may be used to require consideration of whether lawful alternative and less restrictive means could have been used.” *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 280 n. 6, 106 S. Ct. 3320, 92 L. Ed. 2d 728 (1986).

<sup>5</sup> It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than its federal counterpart. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

*Ferrier*, 136 Wn.2d 103, 110, 960 P.2d 927 (1998). The right to privacy encompasses more than just the right to be free from government searches. See e.g., *In re Guardianship of Grant*, 109 Wn.2d 545, 747 P.2d 445 (1987) (right to refuse life sustaining medical care). Other rights protected include the right to personal autonomy and the right to nondisclosure of intimate personal information. *Butler v. Kato*, 137 Wn.App. 515, 527, 154 P.3d 259 (2007).

The right to autonomy is a fundamental right, and is therefore accorded the “utmost” constitutional protection. *Kato*, at 527. Infringement of the right to autonomy is subject to strict scrutiny. *Kato*, at 527.<sup>6</sup> Any interference with personal autonomy must therefore be narrowly tailored to achieve a compelling government interest. *Kato*, *supra*.

Division II’s interpretation of RCW 71.09.040 permits the government to invade Mr. Hawkins’s personal autonomy regardless of whether or not such an invasion is narrowly tailored to achieve a compelling government interest. Under this interpretation, the broad reach

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<sup>6</sup> A lesser standard applies to disclosure of personal information; however, the inquiry must still be carefully tailored to meet a valid governmental interest, and the requested disclosure may not be any greater than is reasonably necessary. *Kato*, at 529. Where state action implicates both rights, strict scrutiny applies. *Robinson v. City of Seattle*, 102 Wn.App. 795, 817-818, 10 P.3d 452 (2000).

of RCW 71.09.040 violates substantive due process. U.S. Const. Amend. XIV; *Kato, supra*.

Under the court's order, the Department's polygrapher will physically attach sensors to Mr. Hawkins's body and record his physiological responses while he answers highly invasive questions about his sexual history.<sup>7</sup> His right to personal autonomy is implicated because he cannot refuse to have the polygraph machine's sensors attached to his body.<sup>8</sup> Although the court found probable cause to detain Mr. Hawkins for potential civil commitment, this finding does not strip him of all constitutional rights. The violation of his personal autonomy is unconstitutional unless it is narrowly tailored to achieve a compelling government interest. *Kato, supra*.

The court's order is not narrowly tailored for two reasons. First, the sexual history polygraph is not necessary to achieve the government's

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<sup>7</sup> If the Department wished merely to compel Mr. Hawkins to answer questions without using a polygraph machine, the lower standard would apply. That is, the Department's inquiry would need to be carefully tailored to meet a valid governmental interest, and the Department could not seek any greater disclosure than reasonably necessary. *Kato*, at 529. However, in order to compel responses, the Department would still need to establish probable cause to believe that additional that additional relevant information would be revealed during a court-ordered interview, as outlined elsewhere in this brief.

<sup>8</sup> His right to nondisclosure is also implicated because refusal to answer the questions will subject him to contempt sanctions. It is difficult to imagine anything more private and deserving of protection than a person's sexual history (including their innermost sexual thoughts and fantasies). A pretrial detainee's personal sexual history (including thoughts and fantasies) deserves as much protection as, for example, a student athlete's urine. *See, e.g.*,  
(Continued)

purpose. Dr. North was able to form his professional opinion “to a reasonable degree of scientific certainty” without access to a sexual history polygraph. RP (2/23/06) 8-10, 17-18. Furthermore, the ATSA standards do not require a sexual history polygraph for a valid assessment. Instead, the standards merely provide that a polygraph *may* be reviewed in evaluating a candidate for civil commitment. *See* Response to Petition for Review, p. 12 n. 5, citing ATSA, *Ethical Standards and Principles for the Management of Sexual Abusers* (1997); *see also* Brief of Respondent, pp. 8-9.

Second, the order did not limit the questions that might be asked during the polygraph examination.<sup>9</sup> Under the court’s order, Mr. Hawkins could be subjected to a wide-ranging compelled interview that covers topics irrelevant to Dr. North’s assessment.

Without any showing that a sexual history polygraph is necessary to achieve the government’s purpose, and without strict limits on the topics to be covered, the court’s order is not narrowly tailored to achieve the government’s objective. If Division II’s interpretation of RCW 71.09.040 is correct, a trial court can order a sexual history polygraph

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*York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008).

<sup>9</sup> Although the reference to “sexual history” provides some broad guidance, the order does not specifically and narrowly delineate the questions to be asked. CP 6.

whenever a petition is filed under RCW 71.09. Under this interpretation, the statute is not narrowly tailored to achieve a compelling government interest.<sup>10</sup> Accordingly, under Division II's interpretation, the statute is unconstitutional.

2. Division II's interpretation of RCW 71.09.040 violates Wash. Const. Article I, Section 7 because it permits the government to unlawfully intrude on an individual's right to privacy.

A cornerstone of the constitutional right to privacy under Article I, Section 7 is the warrant requirement. Unless one of the narrowly drawn and jealously guarded exceptions to the warrant requirement applies, intrusions must be based on probable cause and authorized by a neutral and detached magistrate. Wash. Const. Article I, Section 7; *see, e.g., State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008) ("A search warrant should be issued only if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched.")

Division II's interpretation of RCW 71.09.040 empowers the trial court to order a sexual history polygraph whenever the Department meets the standards set forth in RCW 71.09.040, regardless of whether or not the

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<sup>10</sup> In light of the Court's recent decision in *Strand, supra*, such an examination may even be ordered prior to a finding of probable cause under RCW 71.09.040.

polygraph is likely to reveal useful or necessary information. This interpretation of RCW 71.09.040 violates Wash. Const. Article I, Section 7.

Here, the trial court did not find probable cause to believe a sexual history polygraph would reveal helpful information. Furthermore, the Department cannot establish probable cause because polygraphy is unreliable and inadmissible, and because a polygraph examination will not contribute to Dr. North's evaluation.

In Washington, novel scientific evidence is evaluated using the *Frye* test. *State v. Sipin*, 130 Wn. App. 403, 413, 123 P.3d 862 (2005).<sup>11</sup> Polygraph testing does not pass the *Frye* test. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004). Polygraphy is "not recognized in Washington as reliable evidence..." *Thomas*, at 860. Because polygraphy is unreliable, the government cannot establish probable cause to believe that a polygraph examination will reveal any helpful information about Mr.

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<sup>11</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Under *Frye*, such evidence is inadmissible unless (1) it is based on a scientific principle that is generally accepted in the relevant scientific community, (2) there are generally accepted methods of applying the principle to produce reliable results, and (3) the accepted method was properly applied in the case before the court. *Sipin*, at 414. If there is a significant dispute among qualified experts, scientific evidence is inadmissible. *Sipin*, at 414. Review of a trial court's decision under *Frye* is *de novo*, and the appellate court "may undertake a searching review of scientific literature as well as secondary legal authority before rendering a decision." *Sipin*, at 414. A trial court's decision under *Frye* cannot be sustained "on a mere finding that the record contains sufficient evidence of the reliability of the challenged scientific method." *Sipin*, at

(Continued)

Hawkins's sexual history.

In addition, the record does not establish probable cause to believe a polygraph exam will be helpful in this case. Although Dr. North claimed in his affidavit that a sexual history polygraph would provide "necessary and relevant information relating to the central issues in this SVP matter," he was nonetheless able to testify at the preliminary hearing that Mr. Hawkins qualified for commitment under RCW 71.09. Petitioner's Memorandum, Appendix A (Declaration of Dr. Chris North) CP 22, RP (2/23/06) 8-10, 17-18. Furthermore, he was able to give his expert opinion "to a reasonable degree of scientific certainty," despite the absence of a polygraph examination. RP (2/23/06) 17-18.

A finding under RCW 71.09.040 does not establish probable cause to believe that a pretrial detainee has additional necessary information, or that a sexual history polygraph will reveal any such information. If Division II's interpretation of RCW 71.09.040 is correct, the statute violates the warrant requirement of Wash. Const. Article I, Section 7.

C. WAC 388-880-034 does not authorize a trial court to compel a pretrial detainee to undergo a sexual history polygraph.

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). Where an agency regulation is ambiguous, the rules of statutory construction apply. *Tesoro*, at 322.

DSHS has promulgated rules to implement RCW 71.09. Those rules are set forth in WAC 388-880, and include criteria for conducting evaluations under RCW 71.09.040. *See* WAC 388-880-030 *et seq.* WAC 388-880-033 sets forth qualifications for evaluators. WAC 388-880-034 is captioned "Evaluator – Pretrial evaluation responsibilities," and requires that evaluations be based on the following:

- (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...;
  - (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 divides the evaluation into two parts: (1) examination of the resident and (2) review of records. WAC 388-880-034. The examination includes a forensic interview and medical examination (if necessary). Unlike the records review, it does not include "Medical and physiological testing, including plethysmography and polygraphy;" nor does it authorize "Other relevant and appropriate tests that are industry standard practices." *Compare* WAC 388-880-034(1) with WAC 388-880-034(2).<sup>12</sup>

Because the regulation uses different language when describing the two phases of the evaluation, different meanings are presumed. *Costich, supra*. The phrases "forensic interview" and "medical examination" cannot be stretched to include polygraph testing. *Costich*. The omission of "polygraphy" and "physiological testing" from a list that includes a "forensic interview" and a "medical examination" compels the conclusion that the regulation does not authorize pretrial polygraph testing. *Martin*, at 508, 510.

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<sup>12</sup> Furthermore, a sexual history polygraph is not necessarily a standard practice. The ATSA standards allow but do not require review of a sexual history polygraph as part of an evaluation. *See* <http://www.atsa.com>.

The Court of Appeals reached the opposite result: “It would be unreasonable to read WAC 388-880-034(2)(e) as allowing an evaluator to consider polygraph records but not allowing the trial court to order the examination.” Opinion, p. 4. The court did not explain what it found “unreasonable,” and did not cite any authority in support of its conclusion.

WAC 388-880-034(2)(e) does not authorize trial courts to order polygraph examinations. Instead, the regulation’s plain language allows an evaluator to review polygraph records completed in the past (such as those completed as part of a SSOSA evaluation or treatment). The ability to review past records does not create authority for court-ordered polygraphs.<sup>13</sup>

Under the Court of Appeals’ approach, the trial court has unlimited authority to order any procedure, evaluation or detention prior to trial. For example, the court could order Mr. Hawkins to participate in sex offender treatment or substance abuse treatment, to enable the evaluator to review records generated by such treatment. *See* WAC 388-880-034(2)(c). A person could be ordered detained in a mental health treatment hospital, to enable the evaluator to review any mental health records generated. *See*

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<sup>13</sup> In addition, the Department may ask a detainee to voluntarily participate in a sexual history polygraph, or to answer questions without “verifying” the answers by means of an unreliable and unscientific machine.

WAC 388-880-034(2)(d). Under WAC 388-880-034(2)(g), the court could order Mr. Hawkins to participate in the creation of any “other relevant and necessary records, evaluations, reports and other documents...”

The Court of Appeals’ interpretation ignores the plain language of the regulation, in violation of *Tesoro*. The regulation authorizes an examination (a forensic interview and a medical examination) and a review (of records and test results, including polygraph test results). The regulation does not authorize or require a court-ordered polygraph test prior to trial. WAC 388-880-034.

D. Division II’s reading of WAC 388-880-034 renders the regulation unconstitutional.

Agencies may only exercise “those powers conferred on them expressly or by necessary implication.” *Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 156, 60 P.3d 53 (2002) (internal quotation marks and citations omitted). 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.” *Chevrolet Truck*, at 156-157 (internal quotation marks and citations omitted.) Agency action that exceeds statutory authority violates the constitutional separation of

powers.<sup>14</sup> *Manson Const. and Engineering Co. v. State*, 24 Wn.App. 185, 190, 600 P.2d 643 (1979).

The legislature did not grant the Department authority to promulgate regulations requiring RCW 71.09 detainees to submit to pretrial polygraphs. A grant of rulemaking authority is contained in RCW 71.09.040(4), which reads (in relevant part) as follows:

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.

RCW 71.09.040(4). This provision directs the Department to develop rules (in consultation with the Department of Health and the Department of Corrections) for establishing the qualifications of evaluators.<sup>15</sup> The statute does not direct or authorize the Department to establish rules for the *conduct* of evaluations ordered under RCW 71.09.040. Nor does the statute explicitly permit the Department to require SVP respondents to submit to polygraph testing. *Cf.* RCW 71.09.096.

The statute specifically grants authority to develop regulations governing one subject (the qualifications of evaluators) but not another

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<sup>14</sup> Accordingly, such actions may be addressed for the first time on review under RAP 2.5(a).

<sup>15</sup> This is so because the phrase “pursuant to” modifies the verb “deemed.”

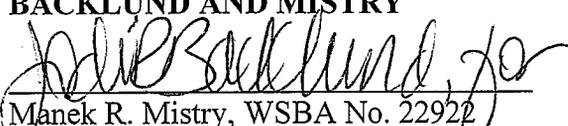
(the content and conduct of evaluations). Since omissions are deemed to be exclusions, the statutory language demonstrates that the legislature did not intend to grant the Department rulemaking authority over the content and conduct of SVP evaluations. *Martin*, at 511 n. 9. In the absence of such legislative authority, the Department was not empowered to promulgate any rules requiring detainees to submit to pretrial polygraphy. To the extent WAC 388-880-034 includes such a requirement (as the Court of Appeals held), it exceeds the authority granted by the legislature, violates the separation of powers, and must be invalidated. *Chevrolet Truck, supra; Manson, supra*. If the trial court's order was based on authority purportedly granted by WAC 388-880-034, it must be vacated.

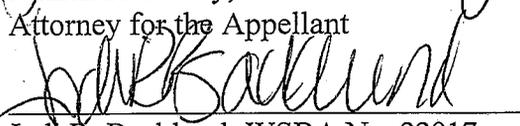
### **CONCLUSION**

For the foregoing reasons, the trial court's Order Compelling Polygraph Examination must be vacated and the case remanded to the superior court.

Respectfully submitted on October 8, 2009.

#### **BACKLUND AND MISTRY**

  
Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

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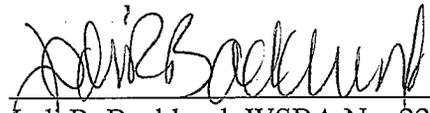
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And that I personally delivered the original and one copy to the Supreme Court for filing;

All on October 8, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 8, 2009.

  
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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant