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COURT OF APPEALS  
STATE OF WASHINGTON  
2013 JUL 24 PM 3:57

NO. 69626-2-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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In re the Detention of:

MICHAEL PITTMAN,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT**

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ROBERT W. FERGUSON  
Attorney General

SARAH B. SAPPINGTON  
Senior Counsel  
WSBA #14514  
Criminal Justice Division  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-2019

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## I. ISSUES PRESENTED

**Is Pittman entitled to a new trial where his trial counsel's performance, while deficient, did not affect the outcome of his trial?**

## II. STATEMENT OF THE CASE

Respondent accepts Appellant Pittman's statement of the case except as otherwise noted below.

Michael Pittman is a compulsive Pedophile with an Antisocial Personality Disorder. His only conviction for a sexually violent crime occurred in 1999, when he was convicted of first degree rape of a child. Ex. 10. In 1997 Pittman, then 32,<sup>1</sup> befriended an 11-year-old boy while homeless in the boy's neighborhood. He took the child to a secluded location, and, after playing a "farting game," fellated the boy while masturbating. 5RP at 92-94. When Pittman was arrested, clippings of boys in the same age range as his victim were found in his wallet. *Id.* at 95. He was sentenced to 147 months. Ex. 10. Shortly before his release date of September 13, 2010, the State filed a petition alleging that he was a Sexually Violent Predator pursuant to RCW 71.09. CP at 99-156; 157-

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<sup>1</sup> Pittman was born on June 29, 1965. CP at 99. He was 45 when the State's Petition was filed. *Id.*

158. He has been housed at the Special Commitment Center (“SCC”) on McNeil Island, since that time.

Trial began on October 30, 2012. At trial, the State called Lyne Piché, PhD, who had conducted an evaluation of Pittman on behalf of the State. 5RP at 68 through 7RP at 25. Dr. Piché diagnosed Pittman with both pedophilia and an antisocial personality disorder. 5 RP at 88; 111-130. In forming her opinions, Dr. Piché reviewed roughly 1000 pages of materials relating to Pittman’s criminal and institutional history, materials customarily relied upon by experts to form opinions in sexually violent predator actions. 5RP at 79-80. In addition, she interviewed Pittman, spoke to his caseworker at the SCC, and reviewed past psychiatric and psychological assessments. *Id.* at 77-79.

In forming her opinion that Pittman suffered from pedophilia, Dr. Piché considered not only information pertaining to Pittman’s 1999 conviction for first degree rape of a child, but documentation relating to other reported but unadjudicated instances of sexual misconduct with young boys. 5 RP at 79-82. These incidents occurred between 1991 and 1993. *Id.* at 98-99. In one incident, Pittman, after having offered to provide a 12-year-old boy with alcohol and drugs, had the boy rub his penis on Pittman’s face while Pittman masturbated. *Id.* Although charged with second degree child molestation, Pittman was not convicted. *Id.* at

98. In another incident, Pittman befriended the family of his 10-year-old victim. While babysitting for the child, he fondled the boy's genitals when the boy pretended to be sleeping. *Id.* at 99-100. This happened regularly for roughly one year. *Id.* at 101; 6 RP at 75-56. The incident was not reported until the victim was 17 or 18 and, although police investigated, Pittman was not charged. *Id.* at 100.

In addition to considering his sexual offenses, Dr. Piché relied upon Pittman's behaviors while incarcerated—both in prison and at the Special Commitment Center—in formulating her opinions. Pittman had a longstanding practice of collecting clippings and photographs of young boys in the age group against whom he had offended. 5 RP at 89. To continue this behavior while incarcerated, Dr. Piché indicated, was “quite rare.” *Id.* at 103. Over the years, Pittman had been cited many times for such behavior; when asked how many times he had been cited, Dr. Piché commented that there were “too many citations for me to count.” *Id.* Pittman admitted to having difficulty controlling the urges to collect these pictures. 6 RP at 21. Dr. Piché commented that, “It was kind of like, well, you know, it starts happening, and I really want to do this, and I just say screw it and do it.” 5 RP at 106. In his interview with Dr. Piché, however, Pittman denied both sexual interest in males and in children and youth and claimed to collect these pictures for research on television. 6 RP at 20-21; 43-44.

The compulsivity of his pedophilic impulses is, however, undeniable. At trial, the State called numerous witnesses to discuss Pittman's many infractions for possession of depictions of minors.<sup>2</sup> Maureen McIntyre, a classification counselor at Monroe Correctional Complex, testified that Pittman had been assigned to her caseload for a short period in 2001. 3RP at 31- 32. While there, Pittman was under a condition to have no contact with minors, not develop any relationships with females with minor children, and not have any pictures of minors. *Id.* at 35. Searches of Pittman's cell during this period, however, turned up numerous pictures of minor males. *Id.* at 36. During this same period, Pittman was found to have been contacting females in the community asking about their children. *Id.* at 36-37. Ms. McIntyre testified that, during the time she worked with Pittman, he requested frequent cell moves, often asking to move into a cell with another offender, typically younger than he. *Id.* at 39. Those moves were denied, she explained, because "part of my responsibility is to also protect the offenders that are assigned to my caseload." *Id.* She was particularly concerned about an inmate named Michael Davis who, although he was 22, "looked like he was 12 years old." *Id.* He looked, she added, "very vulnerable." *Id.*

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<sup>2</sup> The testimony of these witnesses will be presented chronologically, as opposed to in the order presented at trial.

In 2002, Thomas L'Heureux was a correctional specialist 3 at McNeil Island Correctional Center. 4RP at 4-5. While there, Pittman received numerous pamphlets from the Providence Children's Museum detailing what the Museum had to offer. The pamphlets showed children walking through the museum. *Id.* at 7. When he spoke to Pittman about these materials, informing him that the materials were in violation of his conditions, Pittman responded, "Basically, 'So. I don't care.'" *Id.* at 9. A later room search revealed a homemade scrapbook, roughly four inches thick, full of pictures of children between the ages of 5 to 14. *Id.* at 10-11. There were "pictures from National Geographic, pictures from *Teen Magazine*, of, you know ..the Jonas boys. *Harry Potter* movies...movies that had pictures of little kids in them, Disney movies... pictures of kids in underwear out of the J.C. Penney's flyers you get in the Sunday paper..." *Id.* at 13. Other pictures were of nude or "half naked" kids. *Id.* at 14. There were "just thousands" of pictures in the scrapbook. *Id.*

Also found in Pittman's cell were city maps, each of which had colored dots which, upon closer examination, prison officials were able to determine indicated the location of daycare centers, head start programs, elementary schools, "and so on." 4 RP at 21. Also discovered were multiple letters Pittman had written to one of his "pen pals," a woman with two small children. *Id.* at 21. Pittman asked her about the ages of her

children, what they looked like, what kind of clothing they liked to wear, and what kind of activities they liked. *Id.* at 22. When L'Heureux spoke to Pittman about these materials, Pittman's reaction was "basically it's none of your business, I can do this, I have the right to...write to these places." *Id.* at 23. He threatened to sue the Department of Corrections. *Id.* at 29. L'Heureux testified that Pittman was sanctioned roughly 15 times while there. *Id.* at 22.

Harold Snively, formerly a unit manager at the Department of Corrections, also testified on behalf of the State. 3RP at 12. Mr. Snively was responsible for Pittman while Pittman was in the protective custody portion of his unit at Washington State Penitentiary at Walla Walla in 2004. *Id.* One of his responsibilities was to review Pittman's mail. *Id.* at 16. Pittman "would receive multiple packets from different places or organizations that would contain pictures of children." *Id.* at 17, 20. Receipt of this material was in violation of a condition that had been imposed upon him not to possess pictures of children, and Pittman was sanctioned for possessing materials of this type on six or seven occasions. *Id.* at 20, 22.

The State also called Michael Estes, a correctional officer at Walla Walla State Penitentiary. 4 RP at 38. While conducting a search of Pittman's cell in March of 2005, he found cut out pictures of a young girl and a "piece of paper with a reference to NAMBLA," or "North American

Man Boy Lovers [sic] Association.”<sup>3</sup> *Id.* at 40. He also found a class photo of children “fifth grade and under.” *Id.* at 41. He also found a drawing of a “nude adult male and a young boy embracing.” *Id.* at 43-44. A serious infraction report was issued after these materials came to light. *Id.* at 42. That same year, Laura Lindsay, a warehouse operator in the property department at Washington State Penitentiary conducted an inventory of his property. *Id.* at 61. In the course of her inventory, she discovered a thick book, roughly three to four inches thick. *Id.* at 62. Taped into the inside pages of the larger book was a smaller book, roughly 10 pages, two inches by two or three inches. *Id.* at 62-63. The “basic subject” of the smaller book “was baby rape and child rape.” *Id.* at 63. After reviewing the contents, Ms. Lindsay testified, she “went to the bathroom and I threw up and I cried.” *Id.* She turned the book over to the Intelligence and Investigations Unit. *Id.*

In January of 2007, during a routine cell search, staff at the Stafford Creek Corrections Center located numerous photos and magazine cutouts of young boys. 4 RP at 70-71. Tammy Gwin-Cork, an investigator at the facility, testified that the boys depicted appeared to be between 8 and 10 years old. *Id.* at 71. Because Pittman was not permitted to possess photographs of young men or boys, he received an infraction. *Id.* at 72.

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<sup>3</sup> NAMBLA stands for North American Man/Boy Love Association.

Two months later, in March of 2007, during another random cell search produced the same type of items, including “images of young boys partially dressed.” *Id.* at 74. Pittman again received an infraction. *Id.* In July of 2007, Ms. Gwin-Cork testified, another cell search revealed more pictures of children, with “cutouts of young boys taped throughout them as if to hide them. So within the magazine were cutouts pasted within other magazines.” *Id.* He again received an infraction. *Id.* at 75. More photographs were found during a cell search in August of 2007. *Id.*

Even after the State had filed a Sexually Violent Predator petition against him in 2010 and he had been placed at the Special Commitment Center pending trial, Pittman could not stop his compulsive collecting of images of children. In February of 2011, before trial but while residing at the Special Commitment Center, materials were seized from Pittman’s room. 4 RP at 116-117. Ginger Hawkins, an investigator at the SCC who reviewed the materials seized, testified that Pittman “had quite a few items that were taped on cardboard where he would string up pictures of cut out pictures of children probably in the age range from 8 to 12. He had some pictures of families, he had a lot of cutouts of kids spending the night over in sleeping bags...” *Id.* at 118. He had a phonebook “that had quite a few depictions of children or minors,” drawings with “vaginas and penises on a fence,” and another “with a man holding a gun.” *Id.* at 118-120. When

she spoke to Pittman about the materials, he “basically” said “that there wasn’t anything wrong with the items.” *Id.* at 132.

Brandi Bonnema, a residential rehabilitation counselor at the SCC, testified that, in April of 2012, she inspected an envelope with Pittman’s name on it containing several clippings from a magazine of young boys. 5 RP at 55. The envelope also contained an index card holder that had several index cards, on each of which was a child actor’s name with every movie the child had been in. *Id.* at 55. All were of young boys, some of whom had shirts off, others fully dressed. *Id.* at 56. The boys appeared to be between six and eight years old. *Id.* Nor was Pittman’s fixation on children restricted to photographs and clippings: William Holmes, a security guard at the SCC, testified that, in 2012, he observed Pittman “skimming through a movie,” and then stopping at “certain parts” of the movie that showed “adolescent young kids.” *Id.* at 48-49. Pittman would then watch the parts he was interested in, rewinding them and watching them again. *Id.* at 50-51.

Pittman neither testified nor presented any witnesses. After the five day trial, the jury returned a unanimous verdict to commit Pittman as a Sexually Violent Predator. CP at 5.

### III. ARGUMENT

Pittman argues that this case should be reversed because, due to his trial counsel's deficient performance, the trial court gave an erroneous instruction. He further argues that this erroneous instruction prejudiced him because it "gave the jury the option of finding Pittman was likely to engage in acts of indecent liberties upon an incapacitated victim, which would not be possible under the more narrow definition." App. Br. at 10. As such, he argues, he is entitled to a new trial.

Pittman's argument must be rejected. The State concedes that Instruction No. 15 misstated the law and that Pittman's attorney's performance was deficient in failing to object to the erroneous instruction.<sup>4</sup> Pittman, however, has failed to demonstrate that, but for counsel's deficient performance, the result of his civil commitment trial would have been different. The evidence was overwhelming that Pittman was a compulsive and utterly obsessed Pedophile who, because of his mental disorders, was likely to commit predatory acts of sexual violence if not confined. There is no reasonable probability that, but for the erroneous

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<sup>4</sup> Instruction No. 15 reads as follows: "A person commits the crime of indecent liberties by forcible compulsion when he knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion, or when the other person is incapable of consent by reason of being mentally defective or mentally incapacitated, or when the other person is incapable of consent by reason of being physically helpless."

instruction, the result would have been any different. Pittman's commitment should be affirmed.

**A. Pittman Cannot Show Prejudice Due To His Counsel's Deficient Performance**

To be successful on an ineffective assistance claim, the appellant in a sexually violent predator proceeding must establish not only that counsel's conduct fell below an objective standard of reasonableness, but must show as well that, but for counsel's error, there is a reasonable probability the outcome would have been different. *In re Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); *In re Det. of Smith*, 117 Wn.App. 611, 617-18, 72 P.3d 186 (2003). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). In evaluating whether there is a reasonable probability the outcome of a trial would have been different, the court may consider the actual argument by counsel and evaluate whether defense counsel was able to argue his or her theory of the case under the instructions given by the trial court. *Id.*, 144 Wn.2d at 230.

While the State concedes both that Instruction No. 15 misstated the law and that Pittman's attorney's performance was deficient in failing to object to this instruction, he is not entitled to a new trial. In light of the

facts of this case, there is no reasonable probability that, but for the erroneous instruction, Pittman would not have been committed.

The State's expert, Dr. Lyne Piché, discussed the basis for her diagnosis of Pedophilia at length. 5RP at 88-107. In the course of this discussion, she referenced reports of Pittman's having fondled the genitals of a young boy "at nighttime where the victim would just pretend to be asleep." *Id.* at 90, 100. The victim was believed to have been approximately 10 years old at the time of the offense. *Id.* at 101. Pittman argues that, because the victim in this case was asleep or appeared to be asleep, "Pittman purportedly showed a willingness to repeatedly fondle a boy who at least appeared physically helpless." App. Br. at 14. This fact, against the backdrop of an "expanded definition of forcible compulsion" "gave the jury the option of finding Pittman was likely to engage in acts of indecent liberties upon an incapacitated victim, which would not be possible under the more narrow definition." App. Br. at 10.

Pittman's argument succeeds only if one assumes the jury was completely indifferent to the actual evidence in the case. In light of that evidence, no reasonable juror would have believed that Pittman would be likely to commit indecent liberties by having sexual contact with an adult who is incapable of consent by virtue of mental deficiency, incapacitation, or physical helplessness. Pittman was an antisocial pedophile, suffering

from an obsessive, seemingly uncontrollable sexual interest in young males under the age of 13. Asked about the sorts of persons against whom Pittman would be likely to reoffend in the future, Dr. Piché stated that “the likelihood of future offending *would likely parallel past offending* which had to do with Mr. Pittman getting to know families with young boys, spending time with boys, and working toward sexually offending them.” 6 RP at 29 (emphasis added). Pittman does not now deny that history, citing to his 1999 conviction for first degree rape of a child, nor does he deny or even attempt to explain away the evidence of his ongoing sexual fascination with young males. App. Br. at 2.<sup>5</sup> Indeed the evidence of his continuing obsession is stunning: Even while incarcerated and under tight supervision, Pittman could not stop collecting photographs and depictions of the objects of his intense desire, collecting images, pasting them into books, attaching them to strings, and secreting them inside of other books. In the absence of minors, Pittman sought out the next best thing: young adults who looked like minors, “frequently” requesting to be moved into cells with younger-looking inmates, one of whom “looked like he was 12 years old,” 3 RP 39-41; 5RP 105-05.

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<sup>5</sup> Appellant erroneously refers to the 1999 conviction as having occurred in 1998.

While there was overwhelming evidence at trial of Pittman's sexual interest in young boys, Pittman points to absolutely no evidence that he had ever had any interest whatsoever in sexual contact with adults who were incapacitated or physically helpless. Nor did either his trial counsel or counsel for the State at any point suggest that this was a way in which he might reoffend if released. To suggest that the jury might have been confused by the erroneous instruction, or might have voted to commit him on the basis of this instruction where they might otherwise have not, strains credulity.

Pittman argues that, if Pittman were believed likely to reoffend by fondling a sleeping 10-year-old boy, a juror could incorrectly believe that such action constituted indecent liberties by forcible compulsion. Such an assault, however, referred to by the State's attorney as "molestation" during direct examination (5 RP at 101), would in fact constitute first degree child molestation, a sexually violent offense identified and defined in the Court's instructions. Instructions Nos. 7 & 18. Thus, if a juror did in fact believe that this would be the way in which Pittman would reoffend, this would not have the effect of lowering or altering the State's burden of proof: The State is required to prove beyond a reasonable doubt that Pittman is likely to commit predatory acts of sexual violence. Since fondling a sleeping child would in fact be a crime of sexual violence—that

is, first degree child molestation—the erroneous instruction cannot possibly have affected the verdict. As such, there is no “reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *Stout*, 159 Wn.2d at 377.

**B. With The Exception Of The Erroneous Indecent Liberties Instruction, The Instructions As Given Were Sufficient To Inform The Jury Of The Applicable Law**

Jury instructions are sufficient when they allow parties to argue their case theories, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). The jury instructions in Pittman’s case were sufficient to inform the jury of the applicable law and allowed Pittman to argue his theory of the case. The instructions correctly set forth the role of the jury (Instruction No. 1); the State’s burden of proof (No. 3) the elements necessary for commitment (No. 4); definitions of various statutory terms (No. 5 (“mental abnormality”); No. 6 (“personality disorder”); No. 7 (“sexual violence”); No.8 (“predatory”); No. 9 (“likely to engage in predatory acts of sexual violence if not confined in a secure facility,”); No. 11 (“sexual intercourse,”); No. 13 (“forcible compulsion,”); No. 17 (“sexual contact,”)) and definitions of relevant crimes (No. 10 (rape 1<sup>st</sup>); No. 12 (rape 2<sup>nd</sup>); No. 14 ( rape of a child, 1<sup>st</sup> and 2<sup>nd</sup> degree)). Pittman’s counsel was able to argue his theory of the case, which was that none of the information or instruments

upon which the State's expert relied for purposes of risk assessment had been demonstrated to be at all reliable. 7RP at 64-80. Neither party referenced the indecent liberties instruction during closing, or otherwise suggested that Pittman might reoffend by having sexual contact with an incapacitated individual.

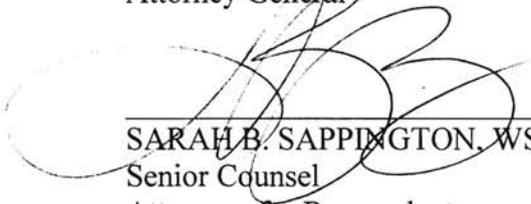
Given the totality of the evidence in this case, there is no basis whatsoever to suggest that the erroneous indecent liberties instruction had any effect whatsoever on the verdict, and Pittman "has not met the *Strickland*<sup>6</sup> requirement that his counsel's errors were so serious as to deprive him of a fair trial." *Cienfuegos*, 144 Wn.2d at 230. Pittman's commitment should be affirmed.

#### IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Pittman's commitment as a sexually violent predator

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of July, 2013.

ROBERT W. FERGUSON  
Attorney General



SARAH B. SAPPINGTON, WSBA #14514  
Senior Counsel  
Attorneys for Respondent

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<sup>6</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

NO. 69626-2-I

**WASHINGTON STATE COURT OF APPEALS, DIVISION I**

In re the Detention of:

Michael Pittman,

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DECLARATION OF  
SERVICE

I, Allison Martin, declare as follows:

On July 24, 2013, I sent via e-mail and United States mail a true and correct copy of Brief of Respondent, postage affixed, addressed as follows:

Eric Nielsen  
Law Offices Of Nielsen, Broman, & Koch, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
[Nielsene@nwattorney.net](mailto:Nielsene@nwattorney.net)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24<sup>th</sup> day of July, 2013, at Seattle, Washington.

  
ALLISON MARTIN

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STATE OF WASHINGTON

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ROBERT W. FERGUSON  
Attorney General

SARAH B. SAPPINGTON  
Senior Counsel  
WSBA #14514  
Criminal Justice Division  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-2019

*Snohomish  
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98. In another incident, Pittman befriended the family of his 10-year-old victim. While babysitting for the child, he fondled the boy's genitals when the boy pretended to be sleeping. *Id.* at 99-100. This happened regularly for roughly one year. *Id.* at 101; 6 RP at 75-56. The incident was not reported until the victim was 17 or 18 and, although police investigated, Pittman was not charged. *Id.* at 100.

In addition to considering his sexual offenses, Dr. Piché relied upon Pittman's behaviors while incarcerated—both in prison and at the Special Commitment Center—in formulating her opinions. Pittman had a longstanding practice of collecting clippings and photographs of young boys in the age group against whom he had offended. 5 RP at 89. To continue this behavior while incarcerated, Dr. Piché indicated, was “quite rare.” *Id.* at 103. Over the years, Pittman had been cited many times for such behavior; when asked how many times he had been cited, Dr. Piché commented that there were “too many citations for me to count.” *Id.* Pittman admitted to having difficulty controlling the urges to collect these pictures. 6 RP at 21. Dr. Piché commented that, “It was kind of like, well, you know, it starts happening, and I really want to do this, and I just say screw it and do it.” 5 RP at 106. In his interview with Dr. Piché, however, Pittman denied both sexual interest in males and in children and youth and claimed to collect these pictures for research on television. 6 RP at 20-21; 43-44.

The compulsivity of his pedophilic impulses is, however, undeniable. At trial, the State called numerous witnesses to discuss Pittman's many infractions for possession of depictions of minors.<sup>2</sup> Maureen McIntyre, a classification counselor at Monroe Correctional Complex, testified that Pittman had been assigned to her caseload for a short period in 2001. 3RP at 31- 32. While there, Pittman was under a condition to have no contact with minors, not develop any relationships with females with minor children, and not have any pictures of minors. *Id.* at 35. Searches of Pittman's cell during this period, however, turned up numerous pictures of minor males. *Id.* at 36. During this same period, Pittman was found to have been contacting females in the community asking about their children. *Id.* at 36-37. Ms. McIntyre testified that, during the time she worked with Pittman, he requested frequent cell moves, often asking to move into a cell with another offender, typically younger than he. *Id.* at 39. Those moves were denied, she explained, because "part of my responsibility is to also protect the offenders that are assigned to my caseload." *Id.* She was particularly concerned about an inmate named Michael Davis who, although he was 22, "looked like he was 12 years old." *Id.* He looked, she added, "very vulnerable." *Id.*

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<sup>2</sup> The testimony of these witnesses will be presented chronologically, as opposed to in the order presented at trial.

In 2002, Thomas L'Heureux was a correctional specialist 3 at McNeil Island Correctional Center. 4RP at 4-5. While there, Pittman received numerous pamphlets from the Providence Children's Museum detailing what the Museum had to offer. The pamphlets showed children walking through the museum. *Id.* at 7. When he spoke to Pittman about these materials, informing him that the materials were in violation of his conditions, Pittman responded, "Basically, 'So. I don't care.'" *Id.* at 9. A later room search revealed a homemade scrapbook, roughly four inches thick, full of pictures of children between the ages of 5 to 14. *Id.* at 10-11. There were "pictures from National Geographic, pictures from *Teen Magazine*, of, you know ..the Jonas boys. *Harry Potter* movies...movies that had pictures of little kids in them, Disney movies... pictures of kids in underwear out of the J.C. Penney's flyers you get in the Sunday paper..." *Id.* at 13. Other pictures were of nude or "half naked" kids. *Id.* at 14. There were "just thousands" of pictures in the scrapbook. *Id.*

Also found in Pittman's cell were city maps, each of which had colored dots which, upon closer examination, prison officials were able to determine indicated the location of daycare centers, head start programs, elementary schools, "and so on." 4 RP at 21. Also discovered were multiple letters Pittman had written to one of his "pen pals," a woman with two small children. *Id.* at 21. Pittman asked her about the ages of her

children, what they looked like, what kind of clothing they liked to wear, and what kind of activities they liked. *Id.* at 22. When L'Heureux spoke to Pittman about these materials, Pittman's reaction was "basically it's none of your business, I can do this, I have the right to...write to these places." *Id.* at 23. He threatened to sue the Department of Corrections. *Id.* at 29. L'Heureux testified that Pittman was sanctioned roughly 15 times while there. *Id.* at 22.

Harold Snively, formerly a unit manager at the Department of Corrections, also testified on behalf of the State. 3RP at 12. Mr. Snively was responsible for Pittman while Pittman was in the protective custody portion of his unit at Washington State Penitentiary at Walla Walla in 2004. *Id.* One of his responsibilities was to review Pittman's mail. *Id.* at 16. Pittman "would receive multiple packets from different places or organizations that would contain pictures of children." *Id.* at 17, 20. Receipt of this material was in violation of a condition that had been imposed upon him not to possess pictures of children, and Pittman was sanctioned for possessing materials of this type on six or seven occasions. *Id.* at 20, 22.

The State also called Michael Estes, a correctional officer at Walla Walla State Penitentiary. 4 RP at 38. While conducting a search of Pittman's cell in March of 2005, he found cut out pictures of a young girl and a "piece of paper with a reference to NAMBLA," or "North American

Man Boy Lovers [sic] Association.”<sup>3</sup> *Id.* at 40. He also found a class photo of children “fifth grade and under.” *Id.* at 41. He also found a drawing of a “nude adult male and a young boy embracing.” *Id.* at 43-44. A serious infraction report was issued after these materials came to light. *Id.* at 42. That same year, Laura Lindsay, a warehouse operator in the property department at Washington State Penitentiary conducted an inventory of his property. *Id.* at 61. In the course of her inventory, she discovered a thick book, roughly three to four inches thick. *Id.* at 62. Taped into the inside pages of the larger book was a smaller book, roughly 10 pages, two inches by two or three inches. *Id.* at 62-63. The “basic subject” of the smaller book “was baby rape and child rape.” *Id.* at 63. After reviewing the contents, Ms. Lindsay testified, she “went to the bathroom and I threw up and I cried.” *Id.* She turned the book over to the Intelligence and Investigations Unit. *Id.*

In January of 2007, during a routine cell search, staff at the Stafford Creek Corrections Center located numerous photos and magazine cutouts of young boys. 4 RP at 70-71. Tammy Gwin-Cork, an investigator at the facility, testified that the boys depicted appeared to be between 8 and 10 years old. *Id.* at 71. Because Pittman was not permitted to possess photographs of young men or boys, he received an infraction. *Id.* at 72.

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<sup>3</sup> NAMBLA stands for North American Man/Boy Love Association.

Two months later, in March of 2007, during another random cell search produced the same type of items, including “images of young boys partially dressed.” *Id.* at 74. Pittman again received an infraction. *Id.* In July of 2007, Ms. Gwin-Cork testified, another cell search revealed more pictures of children, with “cutouts of young boys taped throughout them as if to hide them. So within the magazine were cutouts pasted within other magazines.” *Id.* He again received an infraction. *Id.* at 75. More photographs were found during a cell search in August of 2007. *Id.*

Even after the State had filed a Sexually Violent Predator petition against him in 2010 and he had been placed at the Special Commitment Center pending trial, Pittman could not stop his compulsive collecting of images of children. In February of 2011, before trial but while residing at the Special Commitment Center, materials were seized from Pittman’s room. 4 RP at 116-117. Ginger Hawkins, an investigator at the SCC who reviewed the materials seized, testified that Pittman “had quite a few items that were taped on cardboard where he would string up pictures of cut out pictures of children probably in the age range from 8 to 12. He had some pictures of families, he had a lot of cutouts of kids spending the night over in sleeping bags...” *Id.* at 118. He had a phonebook “that had quite a few depictions of children or minors,” drawings with “vaginas and penises on a fence,” and another “with a man holding a gun.” *Id.* at 118-120. When

she spoke to Pittman about the materials, he “basically” said “that there wasn’t anything wrong with the items.” *Id.* at 132.

Brandi Bonnema, a residential rehabilitation counselor at the SCC, testified that, in April of 2012, she inspected an envelope with Pittman’s name on it containing several clippings from a magazine of young boys. 5 RP at 55. The envelope also contained an index card holder that had several index cards, on each of which was a child actor’s name with every movie the child had been in. *Id.* at 55. All were of young boys, some of whom had shirts off, others fully dressed. *Id.* at 56. The boys appeared to be between six and eight years old. *Id.* Nor was Pittman’s fixation on children restricted to photographs and clippings: William Holmes, a security guard at the SCC, testified that, in 2012, he observed Pittman “skimming through a movie,” and then stopping at “certain parts” of the movie that showed “adolescent young kids.” *Id.* at 48-49. Pittman would then watch the parts he was interested in, rewinding them and watching them again. *Id.* at 50-51.

Pittman neither testified nor presented any witnesses. After the five day trial, the jury returned a unanimous verdict to commit Pittman as a Sexually Violent Predator. CP at 5.

### III. ARGUMENT

Pittman argues that this case should be reversed because, due to his trial counsel's deficient performance, the trial court gave an erroneous instruction. He further argues that this erroneous instruction prejudiced him because it "gave the jury the option of finding Pittman was likely to engage in acts of indecent liberties upon an incapacitated victim, which would not be possible under the more narrow definition." App. Br. at 10. As such, he argues, he is entitled to a new trial.

Pittman's argument must be rejected. The State concedes that Instruction No. 15 misstated the law and that Pittman's attorney's performance was deficient in failing to object to the erroneous instruction.<sup>4</sup> Pittman, however, has failed to demonstrate that, but for counsel's deficient performance, the result of his civil commitment trial would have been different. The evidence was overwhelming that Pittman was a compulsive and utterly obsessed Pedophile who, because of his mental disorders, was likely to commit predatory acts of sexual violence if not confined. There is no reasonable probability that, but for the erroneous

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<sup>4</sup> Instruction No. 15 reads as follows: "A person commits the crime of indecent liberties by forcible compulsion when he knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion, or when the other person is incapable of consent by reason of being mentally defective or mentally incapacitated, or when the other person is incapable of consent by reason of being physically helpless."

instruction, the result would have been any different. Pittman's commitment should be affirmed.

**A. Pittman Cannot Show Prejudice Due To His Counsel's Deficient Performance**

To be successful on an ineffective assistance claim, the appellant in a sexually violent predator proceeding must establish not only that counsel's conduct fell below an objective standard of reasonableness, but must show as well that, but for counsel's error, there is a reasonable probability the outcome would have been different. *In re Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); *In re Det. of Smith*, 117 Wn.App. 611, 617-18, 72 P.3d 186 (2003). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). In evaluating whether there is a reasonable probability the outcome of a trial would have been different, the court may consider the actual argument by counsel and evaluate whether defense counsel was able to argue his or her theory of the case under the instructions given by the trial court. *Id.*, 144 Wn.2d at 230.

While the State concedes both that Instruction No. 15 misstated the law and that Pittman's attorney's performance was deficient in failing to object to this instruction, he is not entitled to a new trial. In light of the

facts of this case, there is no reasonable probability that, but for the erroneous instruction, Pittman would not have been committed.

The State's expert, Dr. Lyne Piché, discussed the basis for her diagnosis of Pedophilia at length. 5RP at 88-107. In the course of this discussion, she referenced reports of Pittman's having fondled the genitals of a young boy "at nighttime where the victim would just pretend to be asleep." *Id.* at 90, 100. The victim was believed to have been approximately 10 years old at the time of the offense. *Id.* at 101. Pittman argues that, because the victim in this case was asleep or appeared to be asleep, "Pittman purportedly showed a willingness to repeatedly fondle a boy who at least appeared physically helpless." App. Br. at 14. This fact, against the backdrop of an "expanded definition of forcible compulsion" "gave the jury the option of finding Pittman was likely to engage in acts of indecent liberties upon an incapacitated victim, which would not be possible under the more narrow definition." App. Br. at 10.

Pittman's argument succeeds only if one assumes the jury was completely indifferent to the actual evidence in the case. In light of that evidence, no reasonable juror would have believed that Pittman would be likely to commit indecent liberties by having sexual contact with an adult who is incapable of consent by virtue of mental deficiency, incapacitation, or physical helplessness. Pittman was an antisocial pedophile, suffering

from an obsessive, seemingly uncontrollable sexual interest in young males under the age of 13. Asked about the sorts of persons against whom Pittman would be likely to reoffend in the future, Dr. Piché stated that “the likelihood of future offending *would likely parallel past offending* which had to do with Mr. Pittman getting to know families with young boys, spending time with boys, and working toward sexually offending them.” 6 RP at 29 (emphasis added). Pittman does not now deny that history, citing to his 1999 conviction for first degree rape of a child, nor does he deny or even attempt to explain away the evidence of his ongoing sexual fascination with young males. App. Br. at 2.<sup>5</sup> Indeed the evidence of his continuing obsession is stunning: Even while incarcerated and under tight supervision, Pittman could not stop collecting photographs and depictions of the objects of his intense desire, collecting images, pasting them into books, attaching them to strings, and secreting them inside of other books. In the absence of minors, Pittman sought out the next best thing: young adults who looked like minors, “frequently” requesting to be moved into cells with younger-looking inmates, one of whom “looked like he was 12 years old,” 3 RP 39-41; 5RP 105-05.

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<sup>5</sup> Appellant erroneously refers to the 1999 conviction as having occurred in 1998.

While there was overwhelming evidence at trial of Pittman's sexual interest in young boys, Pittman points to absolutely no evidence that he had ever had any interest whatsoever in sexual contact with adults who were incapacitated or physically helpless. Nor did either his trial counsel or counsel for the State at any point suggest that this was a way in which he might reoffend if released. To suggest that the jury might have been confused by the erroneous instruction, or might have voted to commit him on the basis of this instruction where they might otherwise have not, strains credulity.

Pittman argues that, if Pittman were believed likely to reoffend by fondling a sleeping 10-year-old boy, a juror could incorrectly believe that such action constituted indecent liberties by forcible compulsion. Such an assault, however, referred to by the State's attorney as "molestation" during direct examination (5 RP at 101), would in fact constitute first degree child molestation, a sexually violent offense identified and defined in the Court's instructions. Instructions Nos. 7 & 18. Thus, if a juror did in fact believe that this would be the way in which Pittman would reoffend, this would not have the effect of lowering or altering the State's burden of proof: The State is required to prove beyond a reasonable doubt that Pittman is likely to commit predatory acts of sexual violence. Since fondling a sleeping child would in fact be a crime of sexual violence—that

is, first degree child molestation—the erroneous instruction cannot possibly have affected the verdict. As such, there is no “reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *Stout*, 159 Wn.2d at 377.

**B. With The Exception Of The Erroneous Indecent Liberties Instruction, The Instructions As Given Were Sufficient To Inform The Jury Of The Applicable Law**

Jury instructions are sufficient when they allow parties to argue their case theories, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). The jury instructions in Pittman’s case were sufficient to inform the jury of the applicable law and allowed Pittman to argue his theory of the case. The instructions correctly set forth the role of the jury (Instruction No. 1); the State’s burden of proof (No. 3) the elements necessary for commitment (No. 4); definitions of various statutory terms (No. 5 (“mental abnormality”); No. 6 (“personality disorder”); No. 7 (“sexual violence”); No.8 (“predatory”); No. 9 (“likely to engage in predatory acts of sexual violence if not confined in a secure facility,”); No. 11 (“sexual intercourse,”); No. 13 (“forcible compulsion,”); No. 17 (“sexual contact,”)) and definitions of relevant crimes (No. 10 (rape 1<sup>st</sup>); No. 12 (rape 2<sup>nd</sup>); No. 14 ( rape of a child, 1<sup>st</sup> and 2<sup>nd</sup> degree)). Pittman’s counsel was able to argue his theory of the case, which was that none of the information or instruments

upon which the State's expert relied for purposes of risk assessment had been demonstrated to be at all reliable. 7RP at 64-80. Neither party referenced the indecent liberties instruction during closing, or otherwise suggested that Pittman might reoffend by having sexual contact with an incapacitated individual.

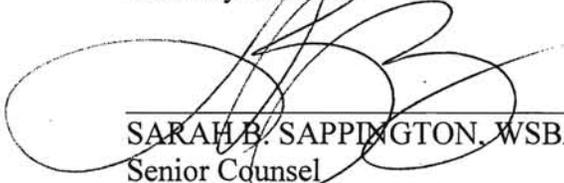
Given the totality of the evidence in this case, there is no basis whatsoever to suggest that the erroneous indecent liberties instruction had any effect whatsoever on the verdict, and Pittman "has not met the *Strickland*<sup>6</sup> requirement that his counsel's errors were so serious as to deprive him of a fair trial." *Cienfuegos*, 144 Wn.2d at 230. Pittman's commitment should be affirmed.

#### IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Pittman's commitment as a sexually violent predator

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of July, 2013.

ROBERT W. FERGUSON  
Attorney General



SARAH B. SAPPINGTON, WSBA #14514  
Senior Counsel  
Attorneys for Respondent

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<sup>6</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

NO. 69626-2-I

**WASHINGTON STATE COURT OF APPEALS, DIVISION I**

In re the Detention of:

Michael Pittman,

Appellant

DECLARATION OF  
SERVICE

I, Allison Martin, declare as follows:

On July 24, 2013, I sent via e-mail and United States mail a true and correct copy of Brief of Respondent, postage affixed, addressed as follows:

Eric Nielsen  
Law Offices Of Nielsen, Broman, & Koch, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
[Nielsene@nwattorney.net](mailto:Nielsene@nwattorney.net)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24<sup>th</sup> day of July, 2013, at Seattle, Washington.

  
ALLISON MARTIN