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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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IN RE THE DETENTION OF

**Johnny Davis,**

Appellant.

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Thurston County Superior Court Cause No. 04-2-00645-4

The Honorable Judge Christine Pomeroy

**Appellant's Opening Brief**

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### ASSIGNMENTS OF ERROR

1. The court's instructions violated Mr. Davis's Fourteenth Amendment right to due process.
2. The court commented on the evidence in violation of Wash. Const. Article IV, Section 16.
3. The court erred by giving Instruction No. 3.
4. The court's instructions relieved the Department of its burden to prove that Mr. Davis had previously been convicted of a "crime of sexual violence."
5. The court erred by failing to define the phrase "personality disorder" for the jury.
6. The Petition was deficient because it failed to allege that Mr. Davis had a "personality disorder."
7. The trial court violated Mr. Davis of his Fourteenth Amendment right to due process by submitting to the jury an alternative means that was not alleged in the Petition.
8. The court's instructions relieved the Department of its burden to prove that Mr. Davis is currently dangerous.
9. The court's instructions placed undue emphasis on a single factor.
10. The court erred by giving Instruction No. 9.
11. The court erred by giving Instruction No. 10.
12. The court erred by giving Instruction No. 11.
13. The court erred by giving Instruction No. 12.
14. The court erred by giving Instruction No. 13.
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17. The court erred by giving Instruction No. 16.
18. The court erred by giving Instruction No. 17.
19. The court erred by giving Instruction No. 18.
20. The court erred by giving Instruction No. 19.
21. The court erred by giving Instruction No. 20.
22. The court erred by giving Instruction No. 21.
23. The court erred by admitting novel scientific testimony that is not generally accepted within the scientific community.
24. The court erred by allowing the Department's expert to testify that Mr. Davis qualifies for diagnosis as a pedophile, even though he does not meet the DSM-IV criteria for the diagnosis.
25. If the erroneous admission of novel scientific testimony is not preserved for review, then Mr. Davis was denied the effective assistance of counsel.
26. The court violated Mr. Davis's Fourteenth Amendment right to due process by preventing Mr. Davis from introducing relevant and admissible evidence.
27. The court erred by refusing to allow Mr. Davis to fully explain why he refused to participate in treatment.
28. The court erred by admitting irrelevant and prejudicial evidence.
29. The court erred by admitting evidence that Mr. Davis refused to participate in treatment while at the S.C.C.
30. The court erred by allowing testimony that Mr. Davis was the subject of a sex offender notification campaign, upon his release from JRA.
31. The court erred by allowing testimony that Mr. Davis had abused animals as a child.

32. The court erred by admitting evidence that Mr. Davis had received a manifest injustice disposition in 1999, based on the juvenile court's determination that "rape/kidnap is heinous, 4 yr old victim particularly vulnerable, violation of SSODA sentence conditions, sexual [sic] motivated offenses, standard range is inadequate."
33. The court erred by allowing the Department's attorney to ask Mr. Davis if another witness's testimony were incorrect.
34. Cumulative error requires reversal.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. In RCW 71.09, the Legislature differentiated between a "crime of sexual violence" and a "sexually violent offense." In this case, the court's instructions conflated the two phrases. Did the trial court's erroneous conflation of these two phrases prejudice Mr. Davis?
2. A court may not comment on the evidence at trial. In this case, the court's instructions included a comment on the evidence, directing the jury to find that Mr. Davis's prior sexually violent offenses qualified as crimes of sexual violence. Must the commitment order be vacated and the case remanded for a new trial?
3. Due process requires the Department to prove beyond a reasonable doubt that a detainee qualifies for commitment under RCW 71.09. In this case, the court's instructions to the jury relieved the Department of its obligation to prove that Mr. Davis's prior offenses qualified as crimes of sexual violence, an essential element under the statute. Does the commitment order violate Mr. Davis's Fourteenth Amendment right to due process?
4. RCW 71.09 provides a specific definition of the phrase "personality disorder." The court's instructions did not define the phrase "personality disorder," leaving the jury to come up with its own definition. Did the court's failure to define "personality disorder" violate Mr. Davis's Fourteenth Amendment right to due process?

5. Due process requires the Department to provide notice of all alternative grounds for commitment under RCW 71.09. In this case, the Department's Petition did not allege that Mr. Davis suffered from a "personality disorder," but the trial court submitted the "personality disorder" alternative to the jury. Does the commitment order violate Mr. Davis's Fourteenth Amendment right to due process?
6. Due process prohibits civil commitment under RCW 71.09 unless the Department establishes that a detainee is currently dangerous. Here, the court's instructions did not explicitly require jurors to find that Mr. Davis is currently dangerous. Does the commitment order violate Mr. Davis's Fourteenth Amendment right to due process?
7. It is improper for jury instructions to place undue emphasis on a single factor. Here, the court's instructions placed undue emphasis on the possibility that a detainee might commit future predatory acts of sexual violence. Did the court's instructions violate Mr. Davis's Fourteenth Amendment right to due process?
8. Novel scientific evidence is inadmissible at trial unless it meets the *Frye* test. Here, the Department's expert opined that Mr. Davis qualified as a pedophile, applying the DSM-IV in a manner that is not generally accepted in the scientific community. Did the trial court err by admitting novel scientific evidence that is not generally accepted in the scientific community?
9. A person facing civil commitment under RCW 71.09 is entitled to the effective assistance of counsel. Here, defense counsel failed to object to the admission of novel scientific evidence that is not generally accepted in the scientific community. If the erroneous admission of this evidence is not preserved for review, was Mr. Davis denied the effective assistance of counsel guaranteed by the Fourteenth Amendment's Due Process Clause?
10. A detainee facing civil commitment under RCW 71.09 has a due process right to present evidence that is relevant and admissible. Here, the trial judge excluded relevant and admissible evidence offered by Mr. Davis. Did the trial court's error violate Mr. Davis's constitutional right to present a defense?

11. The erroneous admission of irrelevant evidence requires reversal whenever there is a reasonable likelihood that it affected the outcome of trial. Here, the trial court erroneously admitted irrelevant and prejudicial evidence on five occasions. Did the trial court's errors violate Mr. Davis's right to a fair trial?

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Long-term civil commitment under RCW 71.09 involves a massive curtailment of liberty based on predictions of future behavior that are necessarily imprecise. Because of this, the Supreme Court requires proceedings under RCW 71.09 to strictly comply with a narrow reading of the statute.

In this case, the trial court committed Johnny Davis—who has been confined since his last sex offense at age 15—following a trial that did not strictly comply with a narrow reading of RCW 71.09. Because of this, the order indefinitely committing him to the Special Commitment Center infringed his Fourteenth Amendment right to due process.

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

- A. Juvenile sex offender Johnny Davis was transferred to the SCC following his 21<sup>st</sup> birthday, and the Department filed a petition for indefinite civil commitment under RCW 71.09.

Johnny Davis was committed to the Juvenile Rehabilitation Administration for sex offenses that occurred when he was 15 years old.<sup>1</sup> He has remained in custody since then. RP (1/6/09) 125-128, 142-144,

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<sup>1</sup> He had previously been granted a SSODA for an earlier sex offense committed when he was age 13. RP (1/6/09) 124-126.

178. Prior to Mr. Davis's twenty-first birthday, the Department of Social and Health Services (the Department) filed a Petition for civil commitment under RCW 71.09. The Petition alleged that Mr. Davis suffered from a "mental abnormality," pedophilia. CP 4. It did not allege that he also had a "personality disorder." CP 4.

In 2004, Mr. Davis was moved from the JRA to the Special Commitment Center (SCC), where he has remained ever since. Order to Transport filed 6/25/04, Supp. CP.

B. The trial court denied Mr. Davis's motion for summary judgment, and allowed the Department to present testimony that Mr. Davis suffered from pedophilia.

Prior to trial, Mr. Davis moved for summary judgment. He pointed out that a person who was 15 at the time of his last sex offense cannot qualify as a pedophile unless (after turning 16) he experiences recurrent and intense fantasies that cause marked distress or interpersonal difficulty.<sup>2</sup> See Motion for Summary Judgment (with attachments), Supp. CP. Mr. Davis had not committed any sex offenses since his last juvenile

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<sup>2</sup> According to the DSM-IV, a pedophile is a person who (1) experiences recurrent and intense sexually arousing fantasies, urges or behaviors involving prepubescent children, (2) has acted on these sexual urges (or experienced "marked distress or interpersonal difficulty" as a result of the fantasies/urges), and (3) is at least age 16. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Revised*, 4<sup>th</sup> Edition, Washington DC (2000) (DSM-IV), section 302.2 (Pedophilia). See attachment to Motion for Summary Judgment, Supp. CP.

offense at age 15, and did not experience intense and recurring fantasies accompanied by marked distress or interpersonal difficulty. The court denied the motion, concluding that the issue was one of fact appropriate for the jury. RP (5/30/08) 12-13.

At trial, the state's expert (Dr. Hoberman) testified that Mr. Davis suffered from pedophilia (even though he was only 15 when he committed his last sex offense). RP (1/6/09) 276. According to Dr. Hoberman, the DSM-IV criteria shouldn't be applied "in a cookbook fashion," and Mr. Davis's age was close enough to 16 since he was 71 days short of his 16<sup>th</sup> birthday at the time of his last offense. RP (1/6/09) 290-292. Although Dr. Hoberman did not claim this application of the DSM-IV was generally accepted in the scientific community, defense counsel did not object to this testimony. *See* RP (1/6/09), *generally*.

Dr. Hoberman also testified that Mr. Davis qualified for a pedophilia diagnosis because of fantasies occurring after he turned 16. RP (1/6/09) 282-283, 290, 292. Dr. Hoberman was unable to point to distress or interpersonal difficulty that arose after age 16, relying instead on Mr. Davis's continued incarceration. RP (1/6/09) 289. He did not claim that this approach was generally accepted in the scientific community, yet defense counsel did not object to this testimony. *See* RP (1/6/09), *generally*.

By the time of trial, Dr. Hoberman had added a second diagnosis for Mr. Davis: antisocial personality disorder. RP (1/6/09) 276; RP (1/7/09) 313-321. He did not testify that this diagnosis qualified as a “personality disorder” within the meaning of RCW 71.09.020.

Dr. Hoberman described several actuarial instruments, noted that they only had moderate predictive accuracy, and then opined—based on these instruments—that Mr. Davis was likely to reoffend. RP (1/7/09) 361-390, 372. He also testified that treatment would not reduce the risk of reoffense. RP (1/7/09) 408.

Dr. Donaldson testified that Mr. Davis did not qualify for a pedophilia diagnosis because (1) he was under 16 when he committed his last sex offense, (2) it was unclear that he had experienced intense and recurring fantasies after age 16, (3) he had not acted on any fantasies arising after his 16<sup>th</sup> birthday, and (4) he was not distressed or suffering any difficulty in interpersonal relationships as a result of intense and recurring fantasies. RP (1/13/09) 622-625, 627-628, 680, 686. Dr. Donaldson also testified that a diagnosis of antisocial personality disorder cannot by itself support commitment under RCW 71.09, because personality disorders do not cause volitional impairment. RP (1/13/09) 631-634.

Dr. Wollert testified that Mr. Davis didn't meet the criteria for commitment under RCW 71.09 because pedophilia does not qualify as a "mental abnormality" under the legal definition of that phrase. RP (1/12/09) 492. He also opined that Mr. Davis was not likely to reoffend, because offenders in Mr. Davis's category have a recidivism rate of only 7%. RP (1/12/09) 497. Dr. Wollert said that the adult risk assessment tools used by the Department's expert witness could not be applied to Mr. Davis because juvenile sex offenders are fundamentally different than adults. RP (1/12/09) 499-501. He described brain development in adolescents and young adults, and testified about studies showing that professionals routinely and grossly over-estimate sex offense recidivism risks. RP (1/12/09) 503-518. Dr. Wollert also reviewed the actuarial instruments used by the Department's expert and explained that the creators of the instruments all warn against their use with juveniles. RP (1/12/09) 516-528.

C. The trial court admitted evidence that Mr. Davis declined to participate in voluntary pre-commitment treatment, but prevented Mr. Davis from fully explaining the reasons for his refusal.

The Department asked permission to introduce Mr. Davis's refusal to participate in voluntary pre-commitment treatment, and to prevent Mr. Davis from fully explaining his decision. RP (12/29/08) 18, 19, 21. Mr. Davis countered that his refusal should be excluded unless he was allowed

to fully explain his reasons—that the treatment was substandard, as evidenced by the federal injunction in effect at the time the Petition was filed (and during his first two months of confinement at the SCC) and by the fact that (as far as he knew) no one had graduated from the program during the five years he'd been there awaiting trial. RP (12/29/08) 18-19; RP (12/30/08) 30, 32-37; RP (1/5/09) 43-45; RP (1/6/09) 208. The court admitted evidence of Mr. Davis's refusal, but did not allow him to explain why he thought the treatment was substandard. RP (12/29/08) 19-21; RP (12/30/08) 30-33; RP (1/5/09) 43-45, 119; RP (1/6/09) 97-99, 104, 111, 208.

The Department also offered the testimony of a former employee of the SCC, Gianna Fleming (AKA Gianna Leoncavallo). RP (1/5/09) 95. She said that she met with Mr. Davis in 2004, to encourage him to do treatment even though he had not been committed to the SCC. RP (1/5/09) 97-98. She told the jury that Mr. Davis refused to do treatment unless he was committed. RP (1/5/09) 99. Mr. Davis objected, and argued that the testimony implied that if the jury committed him, he would do treatment. RP (1/5/09) 99-100. The court instructed the jury to disregard the testimony. RP (1/5/09) 104. Ms. Fleming testified that Mr. Davis had declined treatment, and that he had admitted to her that he had urges toward minors but could control them. RP (1/5/09) 104-105. She further

opined that Mr. Davis lacked remorse, insight, and empathy, and that he definitely needed more treatment. RP (1/5/09) 107, 109, 111.

Mr. Davis testified that he participated in five years of sex-offender treatment: two years in the community, followed by treatment at JRA facilities. RP (1/6/09) 124-128, 183. He denied current fantasies about young children. The Department's attorney asked him if Ms. Fleming's testimony that he'd admitted having fantasies was "incorrect." RP (1/6/09) 141. A defense objection was overruled, and Mr. Davis answered "I couldn't say, sir." RP (1/6/09) 141. He said that he had not done treatment since being moved to the SCC, because the available treatment was inadequate. RP (1/6/09) 142-144, 172.

A juror submitted a question asking why Mr. Davis thought treatment at the SCC was inadequate. RP (1/6/09) 208. Outside the presence of the jury, Mr. Davis told the court that he's been at the SCC for five years and no one has ever graduated from the program. RP (1/6/09) 208. The Department objected, and the court declined to permit the juror's question. RP (1/6/09) 208-211.

Mr. Davis testified that he planned to move to California when his sentence was completed, and that he would seek treatment there. RP (1/6/09) 149, 152. While maintaining that he did not require additional treatment to avoid reoffense, Mr. Davis repeatedly stated that he would do

treatment upon release. RP (1/6/09) 152, 167, 183. When his attorney asked (on cross-examination) if the SCC staff had assisted him in his search for a treatment provider in California, the Department objected. RP (1/6/09) 187. The Department argued that it was not obligated to assist Mr. Davis, and the court ruled that whether Mr. Davis had located a treatment provider in California was not relevant. RP (1/6/09) 188-189.

D. The court overruled numerous evidentiary objections raised by Mr. Davis at trial.

The Department offered documents from Mr. Davis's juvenile convictions. One of them, Exhibit 9, was admitted over Mr. Davis's objection. The unredacted document indicated that Mr. Davis's 1999 juvenile conviction warranted a manifest injustice disposition based on the court's findings: "rape/kidnap is heinous, 4 yr old victim particularly vulnerable, violation of SSODA sentence conditions, sexual [sic] motivated offenses, standard range is inadequate." Exhibit 9, Supp. CP; RP (1/5/09) 121.

Richard Peregrin interviewed Mr. Davis in 1999. RP (1/5/09) 69. He told the jury about statements Mr. Davis had made during the interview. RP (1/5/09) 69-78. Over objection, he was permitted to testify that Mr. Davis had disclosed several instances of animal abuse. RP (1/5/09) 75. Mr. Peregrin told the jury that Mr. Davis admitted that he had

trapped a dog and kicked it, that he broke bird eggs at the age of 5, that he threw rocks at birds, and that he killed insects that his sister had collected. RP (1/5/09) 75-76.

The Department offered evidence that Mr. Davis had been the subject of a sex offender notification campaign prior to his release from his first sex offense charge in 1996. RP (1/5/09) 52. Mr. Davis's objection to the testimony was over-ruled. RP (1/5/09) 52. The notification included posters, flyers, and a newspaper notice. RP (1/5/09) 52.

E. The jury found that Mr. Davis qualified for indefinite civil commitment under RCW 71.09.

The parties agreed on a set of jury instructions. RP (1/14/09) 755, *see* Court's Instructions to the Jury, CP 21-47, Appendix. Instruction No. 3 described the elements as follows:

To establish that Johnny Davis is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt;

- (1) That Johnny Davis has been convicted of a crime of sexual violence, namely, Rape of a Child in the First Degree, Child Molestation in the first Degree or Kidnapping in the First Degree with Sexual Motivation;
- (2) That Johnny Davis suffers from a mental abnormality and/or personality disorder which causes him serious difficulty in controlling his sexually violent behavior; and
- (3) That this mental abnormality and/or personality disorder makes Johnny Davis likely to engage in predatory acts of sexual violence if not confined to a secure facility.

Instruction No. 3, Court's Instructions to the Jury, CP 26,

Appendix. The court also gave the jury separate instructions defining each of the following crimes:

- Rape of a Child in the First Degree
- Rape of a Child in the Second Degree
- Child Molestation in the First Degree
- Child Molestation in the Second Degree
- Indecent Liberties committed by forcible compulsion
- Assault in the Second Degree
- Assault of a Child in the Second Degree
- Kidnapping in the First or Second Degree
- Unlawful Imprisonment

Instruction No. 8, Court's Instructions to the Jury, CP 31-43,

Appendix. The court did not define the phrase "personality disorder" for the jury. Court's Instructions to the Jury, CP 21-47.

The jury found that Mr. Davis met the criteria for commitment under RCW 71.09, and the court entered an Order of Commitment. CP 20, 48-49. This timely appeal followed. CP 19.

## ARGUMENT

**I. THE TRIAL COURT VIOLATED MR. DAVIS’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY COMMENTING ON THE EVIDENCE AND RELIEVING THE DEPARTMENT OF ITS BURDEN TO PROVE THAT MR. DAVIS HAD PREVIOUSLY BEEN CONVICTED OF A “CRIME OF SEXUAL VIOLENCE.”**

A. Introduction: RCW 71.09 must be strictly construed.

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. Freedom from bodily restraint is a fundamental and core liberty interest protected by the due process clause of the Fourteenth Amendment to the United States Constitution. *In re Detention of Thorell*, 149 Wn.2d 724, 732, 72 P.3d 708 (2003); U.S. Const. Amend. XIV. Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 434 (1992).

Involuntary civil commitment involves a “massive curtailment of liberty.” *In re Detention of Anderson*, 166 Wn.2d 543, 556, 211 P.3d 994 (2009) (citations and internal quotation marks omitted). 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). A court construing RCW 71.09 must choose a “narrow,

restrictive construction” over a “broad, more liberal interpretation.”

*Martin*, at 510.

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 \_\_\_. Principles of statutory interpretation require a “comprehensive reading” of RCW 71.09, deriving legislative intent 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). This requires that RCW 71.09 provisions be read in context, with individual words understood in conjunction with 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)).

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).

B. RCW 71.09 differentiates between “sexually violent offenses” and “crimes of sexual violence.”

A person’s prior offenses play a significant role in commitment proceedings under RCW 71.09. The statute uses two different phrases to describe a predicate offense under RCW 71.09: “sexually violent offense” and “crime of sexual violence.” *See* RCW 71.09.020(17) *and* RCW 71.09.020(18). The former (“sexually violent offense”) is used repeatedly throughout the statute; the latter (“crime of sexual violence”) occurs only in the definition of “sexually violent predator.” RCW 71.09.020(18); *see also* RCW 71.09.020(17), RCW 71.09.025; RCW 71.09.030; RCW 71.09.060; RCW 71.09.140.

Since the legislature has used different language in RCW 71.09, different meanings are intended. *Costich*.

The phrase “sexually violent offense” has a specific definition:

“Sexually violent offense” means ... 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; [an equivalent offense under a prior statute, federal law, or from another jurisdiction]; 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 [was done with sexual motivation]; or... an attempt, criminal solicitation, or criminal conspiracy to commit [one of the listed offenses].  
RCW 71.09.020(17).

By contrast, RCW 71.09 does not define the phrase “crime of sexual violence.” Where a statute fails to define a term, rules of statutory construction require that the term be given its plain and ordinary meaning, derived from a standard dictionary if possible. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006). Applying this rule and the requirement that RCW 71.09 be strictly construed, the phrase “crime of sexual violence” must be given the most restrictive meaning derived from the ordinary definition of each word. Assuming a detainee’s predicate offenses qualify as sexual crimes, only the meaning of the word “violence” must be examined. The dictionary definition of violence is “swift and intense force,” or “rough or injurious physical force.” *Dictionary.com, based on the Random House Unabridged Dictionary*, Random House, Inc. 2006.

Examining these phrases in context (as required by the Supreme Court in *Strand*), the reason for the difference becomes apparent. “Screening questions” are made with reference to the list contained in RCW 71.09.020(17) (the definition for “sexually violent offense.”) Thus,

the prosecuting attorney must be notified prior to release of an inmate who has been convicted of a sexually violent offense and who appears to qualify for commitment under RCW 71.09. *See* RCW 71.09.025.

Similarly, the prosecuting attorney may file a petition prior to release of any inmate who has been convicted of a sexually violent offense. *See* RCW 71.09.030; RCW 71.09.060.

Finally, notice must be provided whenever a person committed under RCW 71.09 escapes or is conditionally released; such notice must be provided to the victims of the sexually violent offense and/or the sheriff of the county where the offense was committed. RCW 71.09.140. These provisions, which use the phrase “sexually violent offense,” do not require a factual determination as to whether or not actual violence was used in the commission in the offense. Instead, any decisions can be made simply by referring to the list of offenses contained in the definition of “sexually violent offense.” RCW 71.09.020(17).

By contrast, the jury must determine whether the predicate offense qualifies as a “crime of sexual violence.” RCW 71.09.020(18); RCW 71.09.060(1). The fact-finder must decide whether the predicate offense was in fact accomplished by “swift and intense force,” or “rough or injurious physical force.” RCW 71.09.020(18); *Dictionary.com*. The jury may not rely on a list of offenses, but must examine the underlying facts

and determine whether actual violence was employed in the predicate offense under consideration.<sup>3</sup> This is consistent with the statute’s purpose: to address the risks posed by the “small but extremely dangerous group of sexually violent predators”—those who are likely to engage in “repeat acts of predatory sexual violence”—and not the larger pool of sexual predators who are not violent. *See* RCW 71.09.010.

In this case, the Department introduced evidence that Mr. Davis had been convicted of Rape of a Child in the First Degree, Child Molestation in the First Degree, and Kidnapping in the First Degree with Sexual Motivation. Exhibits 1-9, Supp. CP. Assuming these prior offenses qualified as sexual crimes, the question for the jury was whether or not they were violent in fact—that is, accomplished by physical force that was rough, injurious, swift, and/or intense. RCW 71.09.020(18); *Dictionary.com*.

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<sup>3</sup> Some sexually violent offenses—such as those involving forcible compulsion—will by definition involve actual violence. Others, however—such as Child Molestation or Residential Burglary with Sexual Motivation—might be accomplished without actual violence.

- C. The court's instructions included a comment on the evidence, directing the jury to find that Mr. Davis had been convicted of a "crime of sexual violence."

Under Article IV, Section 16 of the Washington Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. Article IV, Section 16. A jury instruction may constitute a comment on the evidence. *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997); *State v. Eaker*, 113 Wn.App. 111, 53 P.3d 37 (2002). An instruction improperly comments on the evidence if the instruction resolves an issue of fact that should have been left to the jury. *Eaker*, at 118. Whether or not an instruction constitutes an impermissible comment depends on the facts and circumstances of the case. *State v. Jackman*, 125 Wn. App. 552, 558, 104 P.3d 686 (2004).

The instructions did not define the phrase "crime of sexual violence" for the jury. Instead, the court's instructions allowed the jury to return a "yes" verdict if it found that Mr. Davis had been "convicted of a crime of sexual violence, namely Rape of a Child in the First Degree, Child Molestation in the First Degree or Kidnapping in the First Degree with Sexual Motivation." Instruction No. 3, Court's Instructions to the Jury, CP 26, Appendix.

This was an unconstitutional comment on the evidence. The jury was required to determine if the predicate offenses qualified as crimes of sexual violence; this required a factual determination regarding the physical force used to accomplish the prior offenses. RCW 71.09.020(18). Under Instruction No. 3, the jury was directed to return a “yes” verdict if it found he’d been convicted of a listed offense, regardless of whether or not the offense involved actual violence. The instruction was “tantamount to directing a verdict.” *Jackman, supra*, at 560; *see also State v. Primrose*, 32 Wn. App. 1, 645 P.2d 714 (1982) (improper for judge to instruct the jury in a bail jumping case that defendant had not, as a matter of law, introduced evidence of a lawful excuse for his failure to appear).

A comment of this sort is “structural error [which] infects the entire trial process,” and is not subject to harmless error analysis. *Jackman*, at 560. In addition, by failing to strictly follow the requirements of RCW 71.09, the trial court violated Mr. Davis’s Fourteenth Amendment right to due process. *Martin, supra*. Accordingly, the commitment order must be vacated and the case remanded for a new trial. *Jackman, supra*.

- D. The court's instructions relieved the Department of its burden to prove that Mr. Davis had previously been convicted of a "crime of sexual violence."

An omission or misstatement from jury instructions that relieves the state of its burden to prove all elements violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). A jury instruction that misstates an element is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) ("Brown II").

Jury instructions are sufficient if they allow each party to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). Jury instructions must be "manifestly clear," since juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

Here, the court's instructions relieved the Department of its burden to prove beyond a reasonable doubt that Mr. Davis had been convicted of "crime of sexual violence," as required by RCW 71.09.020(18). Instead of defining that phrase with reference to the physical force used to accomplish the prior offense, the court's instructions allowed the jury to return a "yes" verdict based solely on the

fact of conviction. *See* Instruction No. 3, CP 26. This did not make the relevant standard manifestly clear; instead, it misled the jury and misstated the applicable law.

The court's failure to strictly comply with the requirements of RCW 71.09 violated Mr. Davis's Fourteenth Amendment right to due process. Accordingly, the commitment order must be vacated and the case remanded for a new trial.

**II. THE COURT'S INSTRUCTIONS VIOLATED MR. DAVIS'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT FAILED TO DEFINE THE PHRASE "PERSONALITY DISORDER" FOR THE JURY.**

Juries must not be allowed to deliberate in ignorance of the law: litigants have the right "to have a jury base its decision on an accurate statement of the law applied to the facts in the case." *State v. Miller*, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997). Because the role of the trial court is to explain the law through jury instructions, "[t]he trial court may not delegate to the jury the task of determining the law." *State v. Huckins*, 66 Wn. App. 213, 217, 836 P.2d 230 (1992). Trial courts must therefore define technical words and expressions used in jury instructions. *State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997) ("Brown I"). The rule is designed to assure that jury verdicts are based on a correct

understanding of the applicable law. *State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988).

Where the legislature defines a particular term, the jury must apply the statutory definition, regardless of “any common understanding or dictionary definitions which might be ascribed” to the term.” *State v. Allen*, 101 Wn.2d 355, 362, 678 P.2d 798 (1984). Failure to provide a statutory definition forces the members of a jury

to find a common denominator among each member’s individual understanding of these terms and to determine on its own just what was their meaning. There is no way to ascertain whether they used the proper, statutory definitions. Although the jury may be able to hammer out a definition... among themselves, it cannot be assumed that these definitions would match those established by the Legislature for use at trial.

*Allen*, at 362. The rule is especially important in cases brought under RCW 71.09, because any deviation from the requirements of the statute violates due process. *Martin, supra*.

Although the necessity of providing definitional instructions is ordinarily a matter of trial court discretion, the issue should be reviewed *de novo* as a matter of law in cases brought under RCW 71.09. This is so because the statute must be strictly construed, and any trial that strays from the statutory requirements violates due process. *Martin, supra*. The legislature has provided specific definitions for certain technical terms;

failure to instruct the jury on those statutory definitions produces verdicts that don't comport with the statute.

To prevail on its Petition, the Department was required to prove that Mr. Davis “suffers from a mental abnormality or personality disorder which makes [him] likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18). The phrase “personality disorder” means “an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment.” RCW 71.09.020(9).

Here, the trial court failed to define the phrase “personality disorder” for the jury,<sup>4</sup> resulting in a manifest error that affected Mr. Davis’s constitutional right to due process.<sup>5</sup> CP 21-47. Because of the court’s failure to define “personality disorder,” the jury was left to decide for itself what the phrase meant. It therefore reached its verdict without a proper understanding of the elements required for civil commitment under the statute. *Allen, supra*. The problem was compounded when the

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<sup>4</sup> The trial court did define the phrase “mental abnormality.” Instruction No. 5, Court’s Instructions to the Jury, CP 28, Appendix.

<sup>5</sup> Such errors may be reviewed for the first time on appeal. RAP 2.5(a).

Department's expert provided a definition that differed from the statutory definition. RP (1/6/09) 280. Because the requirements of RCW 71.09 were not strictly followed, the commitment order violates due process. *Martin, supra*.

Although Divisions I and III have affirmed commitment orders in the absence of instructions defining "personality disorder," Division II should not follow those decisions. *In re Twining*, 77 Wn.App. 882, 894 P.2d 1331 (1995); *In re Detention of Pouncy*, 144 Wn.App. 609, 184 P.3d 651 (2008). In *Twining*, the court applied an abuse of discretion standard, and distinguished *Allen* on the grounds that the phrase "personality disorder" was not defined by the version of RCW 71.09 in effect at that time. *Twining*, at 896 ("In *Allen*, however, the court was talking about statutorily defined terms with specific legal definitions. Here, the definition of personality disorder is not so defined.") In *Pouncy*, the court adhered to *Twining* without further explication.

Since *Twining* was decided, the legislature has amended RCW 71.09 to add a definition for the phrase "personality disorder." RCW 71.09.020(9). It is this statutory definition that must be used at trial. In the absence of an instruction defining "personality disorder," the court cannot guarantee that any verdict will rest on the proper criteria for civil commitment.

The error was not harmless because Mr. Davis's theory of the case was that he has neither a mental abnormality nor a personality disorder that makes him likely to commit predatory acts of sexual violence. Because the jury was free to disregard the Department's expert testimony, there is no way of knowing whether or not the jury based its decision solely on Mr. Davis's personality disorder.

Because the trial judge failed to define "personality disorder" for the jury, the commitment order must be reversed and the case remanded for a new trial, with instructions to properly define all necessary terms and phrases for the jury. *Allen, supra*.

**III. THE COURT VIOLATED MR. DAVIS'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY SUBMITTING AN ALTERNATIVE MEANS TO THE JURY THAT WAS NOT ALLEGED IN THE PETITION.**

A fundamental requirement of due process is that a person "must receive adequate notice of the charges or claims being asserted against him." *United States v. Baker*, 807 F.2d 1315, 1323 (6<sup>th</sup> Cir., 1986). Any "deprivation of life, liberty or property by adjudication [must] be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). In civil commitment proceedings relating to juvenile delinquency, the government is required to provide

notice of the “specific issues” the juvenile (and her or his parents) must meet at trial. *In re Gault*, 387 U.S. 1, 34, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

The *Gault* notice standards apply to adult civil commitment proceedings as well, requiring specification (in advance of trial) of “the alleged factual basis for the proposed commitment; and a statement of the legal standard upon which commitment is authorized.” *Lynch v. Baxley*, 386 F.Supp. 378, 388 (D.C.Ala., 1974) (citing *Gault*). See also *Stamus v. Leonhardt*, 414 F.Supp. 439, 445-447 (D.C.Iowa 1976); *Bell v. Wayne County General Hospital At Eloise* 384 F.Supp. 1085, 1092 (D.C.Mich. 1974).

Our Supreme Court has required the government to provide advance notice of “all alternative grounds” to be established in civil commitment proceedings under RCW 71.05. *In re Cross*, 99 Wn.2d 373, 382-383, 662 P.2d 828 (1983). Although the issue in *Cross* hinged upon the interpretation of the statute (RCW 71.05.340(3)), the Court made clear that notice of “all alternative grounds” was required in order to “avoid [the] constitutionally murky waters” that would result from a less protective construction of the statute. *Cross*, at 382-383 (citing *Suzuki v. Quisenberry*, 411 F.Supp. 1113 (D.Hawaii 1976); *Doremus v. Farrell*, 407 F.Supp. 509 (D.Neb.1975); *Baxley, supra*; *Lessard v. Schmidt*, 349

F.Supp. 1078, 1092 (E.D.Wis.1972), *vacated on other grounds*, 414 U.S. 473, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974), and *Gault, supra*).

The reasoning in *Cross* applies equally to cases brought under RCW 71.09. Accordingly, the Department's Petition must allege all alternative grounds upon which commitment is sought. *Cross, supra*.

Furthermore, in a criminal case it is reversible error to instruct the jury on an uncharged alternative means. *State v. Chino*, 117 Wn.App. 531, 540, 72 P.3d 256 (2003); *State v. Bray*, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988); *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942). Where the Information alleges only one alternative means of committing a crime, the jury may not be instructed on other uncharged alternatives, regardless of the strength of the evidence; this is so because a defendant cannot be tried for an uncharged offense. *Chino*, at 540.

There are two alternate means of qualifying for commitment under RCW 71.09. *In Re Pouncy, supra*. A person may be subject to civil commitment because of a "mental abnormality" or because of a "personality disorder." RCW 71.09.020(18).

Here, the Department's Petition alleged that Mr. Davis met the requirements for commitment under RCW 71.09 because he had a "mental abnormality." CP 4. It did not allege that he had a "personality disorder," and did not outline facts establishing that he had a "personality disorder."

Despite this, the court submitted both alternative means to the jury. Instruction No. 3, Court's Instructions to the Jury, CP 26, Appendix. This violated Mr. Davis's Fourteenth Amendment right to due process. *Gault, supra*. Because of this, the commitment order must be reversed and the case remanded for a new trial. *Gault, supra*.

**IV. THE TRIAL COURT VIOLATED MR. DAVIS'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS DID NOT REQUIRE JURORS TO FIND THAT MR. DAVIS IS CURRENTLY DANGEROUS.**

A statute that infringes a fundamental right—such as freedom from restraint—is constitutional only if it furthers a compelling state interest and is narrowly tailored to further that interest. *In re Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). A statute is narrowly drawn only if it is the least restrictive means of protecting the government interest. *See, e.g., Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1011 (9th Cir. Ariz. 2003). As the U.S. Supreme Court has explained, “[t]he term ‘narrowly tailored’ so frequently used in our cases... 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).

Because involuntary commitment under RCW 71.09 involves a “massive curtailment of liberty,” the statute is unconstitutional unless

narrowly tailored to achieve a compelling government purpose. *Anderson*, at 556; *Albrecht, supra*. The Supreme Court has held that civil commitment violates due process unless it is based on proof that the individual is both mentally ill and dangerous. *Albrecht*, at 7. To satisfy due process, commitment is allowed only when the state establishes that an individual is currently dangerous; “[c]urrent dangerousness is a bedrock principle underlying the SVP commitment statute.” *In re Detention of Paschke*, 121 Wn.App. 614, 622, 90 P.3d 74 (2008); *see also Albrecht*, at 7; *In re Detention of Marshall*, 156 Wn.2d 150, 157, 125 P.3d 113 (2005).

RCW 71.09 does not explicitly require proof of current dangerousness. However, the statute is constitutional because

the “more probably than not” standard in RCW 71.09.020(7) includes a temporal component. For example, if an expert predicts that an alleged SVP will reoffend only in the far distant future, then there is less likelihood that the “more probable than not” standard has been legally satisfied. Whether that standard is satisfied depends on the facts underlying the SVP petition and the expert testimony. It also may depend on the statistical likelihood of reoffending. By properly finding a person to be an SVP, it is implied that the person is currently dangerous.

*In re Detention of Moore*, \_\_\_ Wn.2d \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2009) (footnote omitted).

In *Moore*, the detainee was committed following a bench trial.

In this case, the statute was applied in an unconstitutional manner, because the court’s instructions did not explicitly require the jury to find that Mr. Davis was currently dangerous. In the absence of proper

instructions, the jury was permitted to answer “yes” even if it believed that Mr. Davis is not currently dangerous: the court’s instructions allowed jurors to vote “yes” upon proof of a statistical likelihood of reoffense at some point over the remainder of his lifetime, regardless of the jury’s assessment of his current dangerousness.<sup>6</sup>

Proof of current dangerousness is a critical component of a civil commitment. *Albrecht, supra*. Because the court’s instructions did not require proof of current dangerousness, the constitutionally required standard was not “manifestly clear.” *Harris, supra*. This is in contrast to the bench trial in *Moore*, where the “manifestly clear” standard did not apply. *Moore, supra*.

The court’s instructions permitted confinement even if the jury believed Mr. Davis was not currently dangerous; accordingly, his commitment violated his Fourteenth Amendment right to due process. *Albrecht, supra*. The order must be vacated and the case remanded for a new trial, with directions to instruct the jury that it must find Mr. Davis

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<sup>6</sup> In the absence of an instruction explicitly requiring proof of current dangerousness, a jury might answer “yes” regardless of current dangerousness. For example, if expert testimony establishes that an individual has a 1% likelihood of reoffending over the course of a single year and that the overall likelihood of recidivism increases to 51% over the course of 51 years, the individual could be committed because he more probably than not will reoffend within 51 years—even though he is not currently dangerous.

currently dangerous in order to commit him as a sexually violent predator.

*Albrecht, supra.*

**V. THE COURT’S INSTRUCTIONS VIOLATED MR. DAVIS’S  
FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY PLACING  
UNDUE EMPHASIS ON A SINGLE FACTOR: THE POSSIBILITY OF  
FUTURE PREDATORY ACTS OF SEXUAL VIOLENCE.**

Irrelevant jury instructions may prejudice a litigant. *Vioen v. Cluff*, 69 Wn.2d 306, 418 P.2d 430 (1966). Although the number and specific language of jury instructions is a matter within the trial court’s discretion, there is no need to provide “detailed augmenting instruction[s]” if fewer instructions “permit a party to argue that party’s theory of the case, are not misleading, and when read as a whole properly inform the trier of fact on the applicable law.” *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 165, 876 P.2d 435 (1994). In fact, “repetitive and cumulative” instructions are disfavored. *See Connor v. Skagit Corp.*, 30 Wn. App. 725, 734, 638 P.2d 115 (1981).

Our supreme court has cautioned:

Too many instructions are as dangerous as too few. When the court has once covered the law of the case in plain and simple language, the charge to the jury should be ended, for further instructions in different language have more tendency to confuse than to enlighten.

*Stanhope v. Strang*, 140 Wash. 693, 697, 250 P. 351 (1926).

Furthermore, it is improper for the court's instructions to place undue emphasis on one factor. *State v. Todd*, 78 Wn.2d 362, 376, 474 P.2d 542 (1970). In *Todd*, the Supreme Court reversed a conviction because the trial court's instructions overemphasized the penalty the defendant would receive if not sentenced to death: "By instructing the jury concerning the possible minimum sentence which the defendant might serve, the court suggests to the jury that it should give great weight to that possibility in reaching its verdict." *Todd*, at 376.

In this case, the court's instructions placed undue emphasis upon one factor—the predatory acts of sexual violence that a person might commit if not confined. *Todd*, 376. Mr. Davis did not contest the Department's proof that he had previously been convicted of Rape of a Child in the First Degree, Child Molestation in the First Degree, and Kidnapping in the First Degree with Sexual Motivation. Exhibits 1-9, Supp. CP. The court's instructions defined a series of sexual crimes for the jury. *See* Instructions Nos. 9-21, Court's Instructions to the Jury, CP 32-44, Appendix.

These extraneous jury instructions placed undue emphasis on the many predatory acts of sexual violence that are possible for someone to commit. *Todd, supra*. By improperly focusing the jury on these other

crimes, the trial court prejudiced Mr. Davis. The commitment order must be reversed, and the case remanded for a new trial. *Todd*, at 377.

**VI. THE TRIAL COURT SHOULD HAVE EXCLUDED TESTIMONY THAT MR. DAVIS SUFFERS FROM PEDOPHILIA BECAUSE HE DOES NOT QUALIFY FOR THAT DIAGNOSIS UNDER THE DSM-IV.**

A. The Department's expert applied the DSM-IV in a manner not generally accepted within the scientific community.

In Washington, novel scientific evidence is evaluated using the *Frye* test. *State v. Sipin*, 130 Wn. App. 403, 413, 123 P.3d 862 (2005) (citing *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.<sup>7</sup>

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<sup>7</sup> Furthermore, 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 414.

Here, the Department's expert, relying on the DSM-IV, testified that Mr. Davis suffered from the mental abnormality pedophilia. RP (1/6/09) 295. However, he conceded Mr. Davis did not meet all the criteria for the diagnosis, since Mr. Davis was less than 16 at the time of his last offense. RP (1/6/09) 289-290. He reached his diagnosis by rounding Mr. Davis's age up to 16, because it would have been "absurd" not to diagnose pedophilia, given how close Mr. Davis was to age 16 at the time of his last offense. RP (1/6/09) 290. He also provided an alternate basis for his diagnosis, claiming that Mr. Davis had intense and recurrent fantasies that caused him marked distress or interpersonal difficulty, but was unable to list any actual distress or interpersonal difficulty (other than his continuing incarceration by the state, which stemmed from the pre-age-16 juvenile offenses). RP (1/6/09) 289.

But the Department did not establish that this technique—applying a diagnosis to an individual who does not meet the diagnostic criteria—has achieved general acceptance in the scientific community. Accordingly, the evidence should have been excluded under *Frye*. Mr. Davis's commitment order must be reversed and the case remanded to the trial court for a new trial, with instructions to exclude the testimony. *Sipin, supra*.

- B. If the issue is not preserved for review, Mr. Davis was deprived of the effective assistance of counsel by his attorney's failure to object to the admission of the pedophilia diagnosis.

The standard for evaluating whether or not counsel provided effective assistance in a proceeding under RCW 71.09 is the same standard used in criminal cases. *In re Stout*, 128 Wn.App. 21, 27-28, 114 P.3d 658 (2005).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *see also State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91

Wn.App. 575, 578, 958 P.2d 364 (1998). There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

Mr. Davis's attorney brought a motion for summary judgment, opposing the Department's attempt to commit his client on the basis of a pedophilia diagnosis. Motion for Summary Judgment, Supp CP. However, when the trial court ruled that the issue was for the jury to decide, defense counsel did not raise a *Frye* objection to the expert's testimony. If the *Frye* issue is not preserved for review, then Mr. Davis was denied the effective assistance of counsel. *Reichenbach, supra*. First, there was no reason to withhold an objection: Mr. Davis's strategy included an attack on the pedophilia diagnosis. Second, an objection would likely have been sustained, as the approach taken by the Department's expert is not generally accepted in the scientific community. Third, the verdict would have been different if the evidence had been excluded. The Department

would not have been able to proceed with its primary theory—that Mr. Davis suffered from the mental abnormality of pedophilia.

If the *Frye* issue is not preserved for review, Mr. Davis was denied the effective assistance of counsel. His commitment order must be reversed and the case remanded for a new trial.

**VII. THE TRIAL COURT VIOLATED MR. DAVIS’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY UNFAIRLY PREVENTING MR. DAVIS FROM INTRODUCING RELEVANT AND ADMISSIBLE EVIDENCE.**

The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Post v. City of Tacoma* \_\_\_ Wn.2d \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2009). To determine the appropriate level of process due in civil commitment proceedings under RCW 71.09, the court weighs three factors: the private interest at stake, the risk of erroneous deprivation under a particular procedure, and the government’s interest in maintaining the current procedure. *In re Young*, 122 Wn.2d 1, 43-44, 857 P.2d 989 (1993) (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

Although not explicitly mentioned in RCW 71.09, a person facing civil commitment must be provided an opportunity at trial to present

relevant and admissible evidence.<sup>8</sup> In addition, a person facing civil commitment should be allowed to introduce evidence to explain matters introduced by the Department, even if such evidence wouldn't otherwise be admissible. This is so because “[i]t is not proper to ‘allow[ ] one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.’” *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006) (alteration in original) (quoting *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

The Supreme Court explained the reason for this rule: “To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.” *Gefeller*, at 455. *See also* 5 Wash. Prac., Evidence Law and Practice §103.15 (“In general, once a material issue has been raised by one party, the opposing party will be permitted to explain, clarify, or contradict the evidence.”)

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<sup>8</sup> This is analogous to the right of an accused person in a criminal case to present a defense consisting of relevant and admissible evidence. *See, e.g., State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007).

Where the Department introduces evidence that a detainee has declined treatment, due process requires the court to allow the detainee to explain the reasons for that decision.

First, the private interest at stake—the detainee’s liberty—is “clearly of great importance.” *In re Detention of Brock*, 126 Wn.App. 957, 964, 110 P.3d 791 (2005).

Second, the risk of an erroneous commitment order is increased if a detainee is not allowed to fully explain a refusal to participate in treatment. Given the disturbing subject matter of proceedings under RCW 71.09 and the potential for prejudice against candidates for commitment, a detainee’s unexplained refusal to participate in treatment increases the likelihood that a “yes” verdict will be based on passion and prejudice rather than the requirements of the statute.

Third, the government’s interest in excluding the evidence is minimal, because the Department can decide on a case-by-case basis whether or not to introduce testimony that a person has refused treatment. If the Department believes that a particular detainee’s reasons for refusing treatment are sufficiently damaging, it can elect not to present evidence of the refusal. However, if the Department goes forward with introducing the evidence, it should not be able to escape the consequences of its choice by preventing the detainee from explaining the reasons for the refusal.

In this case, once the Department elected to present evidence that Mr. Davis refused to participate in treatment, the trial court should have allowed Mr. Davis to fully explain the reasons for his decision. This should have included his knowledge about the federal injunction that was in operation when the Petition was filed, his understanding of the success rate for treatment at the S.C.C., and his desire to find a therapist who could help him with treatment. RP (12/29/08) 18-19; RP (12/30/08) 30-37; RP (1/5/09) 97-100; RP (1/6/09) 142-144, 172.

The subject was clearly of interest to the jury. Questions from Jurors, CP 7, 8, 9. Mr. Davis's inability (under the court's ruling) to fully respond to their question left jurors with only a partial understanding of his reasons for refusing treatment. This prejudiced him, and requires reversal of the commitment order.

**VIII. THE TRIAL COURT ERRONEOUSLY ADMITTED IRRELEVANT EVIDENCE THAT PREJUDICED MR. DAVIS.**

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as "evidence having 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." Under ER 403, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 404(b) excludes evidence of prior bad acts, except in certain limited circumstances.

A trial court’s evidentiary rulings are reviewed for an abuse of discretion. *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Hudson*, at 652. An erroneous ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wn.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Asaeli*, at 579.

In this case, the trial court admitted irrelevant evidence on five occasions.

First, the court admitted evidence that Mr. Davis refused to participate in treatment while at the S.C.C. RP (1/5/09) 97-100, 104-105; RP (1/6/09) 142-144, 172. This evidence was irrelevant: it did not relate to any fact of consequence to the action—especially since treatment has been

shown to be of dubious efficacy. Furthermore, the evidence was highly prejudicial because it suggested to the jury that Mr. Davis was unwilling to take actions that might reduce his chances of recidivism. The problem was compounded by the trial judge's refusal to allow Mr. Davis to fully explain why he did not participate in treatment. RP (12/29/08) 21; RP (1/6/09) 119.

Second, the court allowed testimony that Mr. Davis was the subject of a sex offender notification campaign, upon his release from JRA. The notification included posters, flyers, and a newspaper notice. RP (1/5/09) 52-53. This information did not relate to any fact of consequence to the case. Furthermore, it was unfairly prejudicial because it emphasized to the jury that Mr. Davis was considered by some to be a danger to the community.

Third, the Department was allowed to introduce evidence that Mr. Davis had abused animals as a child. RP (1/5/09) 75. This evidence did not relate to any fact of consequence to the case, violated ER 404(b), and was highly prejudicial.

Fourth, the court admitted evidence that Mr. Davis had received a manifest injustice disposition in 1999, based on the juvenile court's determination that "rape/kidnap is heinous, 4 yr old victim particularly vulnerable, violation of SSODA sentence conditions, sexual [sic]

motivated offenses, standard range is inadequate.” Exhibit 9, Supp. CP. These findings were irrelevant to any fact of consequence to the case, and were highly prejudicial.

Fifth, the court allowed the prosecutor to ask Mr. Davis if Gianna Fleming’s testimony was incorrect (as it related to his fantasies regarding young girls.). RP (1/6/09) 141. It is improper to ask a witness to comment on another witness’s accuracy or credibility in this manner. *State v. Walden*, 69 Wn.App. 183, 187, 847 P.2d 956 (1993). Such testimony is irrelevant and has the potential for prejudice. Accordingly, Mr. Davis’s objection should have been sustained.

Reversal may be required due to the cumulative effects of more than one error, even if each error examined on its own would otherwise be considered harmless. *State v. Chamroeum Nam*, 136 Wn. App. 698, 708, 150 P.3d 617 (2007); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). This is especially true in cases brought under RCW 71.09: “in a trial with a subject matter as potentially disturbing to jurors as that presented by a sexually violent predator act proceeding, it is incumbent upon the trial court to carefully circumscribe the issues put to the jury in order for justice to be done.” *In re Detention of Post*, 145 Wn.App. 728, 747, 187 P.3d 803 (2008).

In this case, numerous errors undermined confidence in the outcome of Mr. Davis's trial. *Nam, supra*. The erroneous admission of the evidence prejudiced Mr. Davis, and requires reversal of his commitment order. The case must be remanded for a new trial, with instructions to exclude the irrelevant evidence.

**CONCLUSION**

For the foregoing reasons, Mr. Davis's commitment order must be reversed and the case remanded to the trial court for a new trial.

Respectfully submitted on November 5, 2009.

**BACKLUND AND MISTRY**

  
\_\_\_\_\_  
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# **APPENDIX**

27

FILED  
SUPERIOR COURT  
THURSTON COUNTY WA

'09 JAN 15 P2:21

BY \_\_\_\_\_ DEPT

**SUPERIOR COURT OF WASHINGTON  
THURSTON COUNTY**

In Re the Detention of )  
 )  
JOHNNY DAVIS, )  
 )  
 )  
Respondent. )  
 )  
 )  
\_\_\_\_\_ )

No. 04-2-00645-4

*Court's Instructions To Jury*

Dated this 14th day of January, 2009.

  
\_\_\_\_\_  
Christine A. Pomeroy, Judge

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law that I give you to the facts that you decide have been proved, and in this way decide the case. By applying the law to the facts, you will be able to decide this case. The fact that the State has initiated this proceeding is not to be considered by you as any indication of the truth of the allegations.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In deciding this case, you must consider all of the evidence that I have admitted. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the

witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a party's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another

carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a unanimous verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness's information, together with the factors already given you for evaluating the testimony of any other witness.

When Drs. Hoberman, Wollert, and Donaldson testified, I informed you that some information was admitted as part of the basis for their opinions, but may not be considered for other purposes. You must not consider their testimony as proof that the information relied upon by them is true. You may use their testimony only for the purpose of deciding what credibility or weight to give their opinion.

INSTRUCTION NO. 3

To establish that Johnny Davis is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:

- (1) That Johnny Davis has been convicted of a crime of sexual violence, namely, Rape of a Child in the First Degree, Child Molestation in the First Degree or Kidnapping in the First Degree with Sexual Motivation;
- (2) That Johnny Davis suffers from a mental abnormality and/or personality disorder which causes him serious difficulty in controlling his sexually violent behavior;  
and
- (3) That this mental abnormality and/or personality disorder makes Johnny Davis likely to engage in predatory acts of sexual violence if not confined to a secure facility.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that Johnny Davis is a sexually violent predator.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that Johnny Davis is not a sexually violent predator.

INSTRUCTION NO. 4

The State has the burden of proving beyond a reasonable doubt that Johnny Davis is a sexually violent predator. Johnny Davis has no burden of establishing that a reasonable doubt exists.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 5

“Mental abnormality” means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit criminal sexual acts to a degree that makes the person a menace to the health and safety of others.

“Volitional capacity” means the power or capability to choose or decide.

INSTRUCTION NO. 6

"Predatory" means acts directed toward strangers, or individuals with whom the respondent has established or promoted a relationship for the primary purpose of victimization, or persons of casual acquaintance with whom no substantial personal relationship exists.

INSTRUCTION NO. 7

“Likely to engage in predatory acts of sexual violence if not confined in a secure facility” means that the person more probably than not will engage in such acts if released unconditionally from detention in this proceeding.

In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all evidence that bears on the issue. In considering placement conditions or voluntary treatment options, however, you may consider only placement conditions or voluntary treatment options that would exist if the respondent is unconditionally released from detention in this proceeding.

INSTRUCTION NO. 8

“Sexual violence” or “harm of a sexually violent nature” means:

- Rape of a Child in the First Degree;
- Rape of a Child in the Second Degree;
- Child Molestation in the First Degree;
- Child Molestation in the Second Degree; and
- Indecent Liberties committed by forcible compulsion.

The following defined crimes are also crimes and acts of “sexual violence” or “harm of a sexually violent nature” only if proven beyond a reasonable doubt to have been committed with sexual motivation. Sexual motivation means that one of the purposes for which the respondent committed the crime was for the purpose of his sexual gratification.

- Assault in the Second Degree;
- Assault of a Child in the Second Degree;
- Kidnapping in the First or Second Degree; or
- Unlawful Imprisonment.

Any attempt to commit any of above listed on this page is a crime and act of “sexual violence” or “harm of a sexually violent nature.”

A person attempts to commit a crime when, with intent to commit that crime, he does any act which is a substantial step toward the commission of that crime. A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

All the crimes and acts of sexual violence listed above are felony offenses.

INSTRUCTION NO. 9

A person commits the crime of Rape of a Child in the First Degree when that person has sexual intercourse with another person who is less than twelve years old and who is not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight, or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

INSTRUCTION NO. 10

A person commits the crime of rape of a child in the second degree when the person has sexual intercourse with a child who is at least twelve years old but less than fourteen years old, who is not married to the person, and who is at least thirty-six months younger than the person.

INSTRUCTION NO. 11

A person commits the crime of Child Molestation in the First Degree when that person has sexual contact with another person who is less than twelve years old and who is not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.

INSTRUCTION NO. 12

A person commits the crime of child molestation in the second degree when the person has sexual contact with a child who is at least twelve years old but less than fourteen years old, who is not married to the person, and who is at least thirty-six months younger than the person.

INSTRUCTION NO. 13

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 person by forcible compulsion.

“Forcible compulsion” means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped.

INSTRUCTION NO. 14

A person commits the crime of assault in the second degree when he or she assaults another with intent to commit a felony.

INSTRUCTION NO. 15

An assault is an intentional touching of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive, if the touching would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 16

Rape of a child in the first degree, Rape of a child in the second degree, child molestation in the first degree, child molestation in the second degree, Indecent liberties with forcible compulsion, Kidnapping in the first degree with sexual motivation, kidnapping in the second degree with sexual motivation, and unlawful imprisonment with sexual motivation are all felonies.

INSTRUCTION NO. 17

A person commits the crime of assault of a child in the second degree if the person is eighteen years of age or older and the child is under the age of thirteen and the person commits the crime of assault in the second degree against the child.

INSTRUCTION NO. 18

A person commits the crime of kidnapping in the first degree with sexual motivation when he intentionally abducts another person with intent to inflict bodily injury on the person, and that act is committed with sexual motivation.

INSTRUCTION NO. 19

A person commits the crime of kidnapping in the second degree with sexual motivation when he or she intentionally abducts another person, and that act is committed with sexual motivation.

INSTRUCTION NO. 20

A person commits the crime of unlawful imprisonment with sexual motivation when he knowingly restrains the movements of another person in a manner that substantially interferes with the other person's liberty if the restraint was without legal authority and was without the other person's consent or accomplished by physical force, intimidation, or deception, and that act is committed with sexual motivation.

The offense is committed only if the person acts knowingly in all these regards.

Abduct means to restrain a person by either secreting or holding the person in a place where that person is not likely to be found or using or threatening to use deadly force.

Restraint or restrain means to restrict another person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty. Restraint is without consent if it is accomplished by physical force, intimidation or deception or any means including acquiescence, if the victim is a child less than 16 years old an incompetent person and if the parent guardian or other person or institution having lawful control or custody of the victim has not acquiesced.

INSTRUCTION NO. 21

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.

INSTRUCTION NO. 22

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 23

When you are taken to the jury room to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence, these instructions, and a verdict form, which consists of one question for you to answer. Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the judicial assistant. The court will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, or in any other way express your opinions about the case.

To return a verdict all jurors must agree. When you have reached a verdict, the presiding juror should sign the verdict and announce your agreement to the judicial assistant who will conduct you into court to declare your verdict.

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DIVISION II

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STATE OF WASHINGTON  
BY  \_\_\_\_\_  
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Johnny Davis  
McNeil Island Special Commitment Center  
P. O. Box 88450  
Steilacoom, WA 98388

and to:

Attorney General's Office  
800 5<sup>th</sup> Avenue, Suite 2000  
Seattle, WA 98104-3188

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 5, 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 November 5, 2009.

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