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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 28417-4-III

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

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In re Detention of Shawn Botner,

STATE OF WASHINGTON,

Respondent,

v.

SHAWN BOTNER,

Appellant.

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

The Honorable Annette S. Plese, Judge

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REPLY BRIEF OF APPELLANT

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JENNIFER J. SWEIGERT  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT EXCEEDED ITS AUTHORITY IN ORDERING PENILE PLETHYSMOGRAPH TESTING.

RCW 71.09.040(4) “prohibits polygraph examinations.” In re Detention of Hawkins, 169 Wn.2d 796, 238 P.3d 1175 (2010). The Washington Supreme Court’s reasoning and interpretation of the statute lead to the same conclusion regarding penile plethysmograph (PPG) testing. Civil commitment under chapter 71.09 RCW is strictly governed by statute. In re Detention of Martin, 163 Wn.2d 501, 508, 182 P.3d 951 (2008). Thus, whether RCW 71.09.040(4) prohibits compulsory penile plethysmograph as part of the requisite evaluation is a question not of discretionary civil discovery, but of statutory interpretation. Hawkins, 169 Wn.2d at 801. Therefore, this Court’s review is de novo. Id.

At issue in Hawkins was an order requiring Hawkins to participate in polygraph testing as part of the pre-trial examination required under RCW 71.09.040(4). 169 Wn.2d at 799-800. The court first noted that the statutory framework for civil commitment under RCW chapter 71.09 constitutes a “massive curtailment of liberty.” Hawkins, 169 Wn.2d at 801 (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)). The statute must, therefore, be narrowly and strictly construed. Id. At this stage of the analysis, Hawkins is indistinguishable from this case.

The same statutory provision, RCW 71.09.040(4) is at issue and it must be narrowly and strictly construed in this case as well.

The remainder of the court's analysis was aimed at divining legislative intent. Three factors played into the court's conclusion that the statute prohibits compulsory polygraph testing: 1) the Legislature was undoubtedly aware the polygraph presents unique difficulties of reliability and admissibility; 2) the Legislature was aware polygraphs are an invasion of privacy; and 3) polygraphs are expressly permitted elsewhere in chapter 71.09, indicating the Legislature could and likely would have expressly authorized them if it intended to do so. Hawkins, 169 Wn.2d at 802-03. Each of these factors is also true with regards to PPG testing.

a. PPG Testing Presents Unique Difficulties with Regards to Reliability.

In determining that the Legislature intended to prohibit PPG testing, the Hawkins court first reasoned the Legislature "is undoubtedly aware of the unique difficulties posed by polygraph examinations." 169 Wn.2d at 802. The court went on to note that polygraph examinations are unreliable and inadmissible absent stipulation. Id. Although PPG tests have been admitted in Washington courts, they also present "unique difficulties" that the Legislature is no doubt aware of. Federal courts have "uniformly declared that the results of such tests are 'inadmissible as evidence because

there are no accepted standards for this test in the scientific community.”

United States v. Weber, 451 F.3d 552, 565 n. 15 (9th Cir. 2006) (citing Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir. 2000) and United States v. Powers, 59 F.3d 1460, 1470-71 (4th Cir. 1995)); see also United States v. Rhodes, 552 F.3d 624, 626 (7th Cir. 2009). The Diagnostic and Statistical Manual of Mental Disorders also recognizes the dubious reliability of phallometric testing: “The reliability and validity of this procedure in clinical assessment have not been well established, and clinical experience suggests that subjects can simulate response by manipulating mental images.” Am. Psychiatric Ass’n., Diagnostic and Statistical Manual of Mental Disorders 567 (4th ed., text revision 2000).

The State argues the Association for the Treatment of Sexual Abusers (ATSA) endorses use of PPG testing. Brief of Respondent at 29. However, ATSA also endorses use of polygraphs. Seto, et al., ATSA Practice Standards and Guidelines (2001). This endorsement does not negate the Legislature’s presumptive awareness of the unique problems presented by a test which requires a mercury strain gauge be placed around a man’s penis while he is presented with various types of sexual images. But even more problematic than the unreliability of the testing is its unparalleled invasion into basic privacy.

b. PPG Testing Is Even More Invasive than the Polygraph Testing at Issue in *Hawkins*.

The Hawkins court next concluded that polygraph testing is “invasive, both physically and of one’s private affairs.” 169 Wn.2d at 802. The PPG testing at issue here is far more invasive. See Weber, 451 F.3d at 568. The Weber court held that under the federal statute at issue, PPG testing could not occur without specific findings that it was no more invasive than reasonably necessary to achieve the state’s legitimate goal. 451 F.3d at 568-69. The court found the evidentiary record insufficient to justify PPG testing, because “less-intrusive alternatives” were available. Id. at 568. Those “less-intrusive alternatives” included the polygraph testing that the Hawkins court found so invasive. Weber, 451 F.3d at 568; Hawkins, 169 Wn.2d at 802. Washington courts have also deemed PPG testing “bodily manipulation of the most intimate sort.” In re Marriage of Ricketts, 111 Wn. App. 168, 172, 43 P.3d 1258 (2002); In re Marriage of Parker, 91 Wn. App. 219, 225, 957 P.2d 256 (1998). Just as the Legislature was presumably aware of the intrusive nature of polygraph testing, the even greater intrusion into one’s person and private affairs of PPG testing was presumably known to the Legislature as well.

c. Like Polygraph Testing, PPG Testing Is Specifically Authorized Elsewhere in the Statutory Framework.

The Hawkins court concluded that, since the Legislature was undoubtedly aware polygraphs are both unreliable and extremely intrusive into privacy, it was “fair to infer that the legislature intends to prohibit compulsory polygraph examinations unless it expressly allows for their use.” Hawkins, 169 Wn.2d at 803. The court went on to note this inference was confirmed because the legislature expressly permits polygraph testing elsewhere in chapter 71.09. Hawkins, 169 Wn.2d at 803. The court concluded, “because the legislature declined to specifically permit compelled polygraph examinations in RCW 71.09.040(4), the statute prohibits such examinations.” Hawkins, 169 Wn.2d at 803.

The statutory framework pertaining to PPG testing is identical. Like polygraphs, PPG tests are permitted expressly in RCW 71.09.096 relating to conditions upon release, but are not mentioned in relation to the examination authorized under RCW 71.09.040(4). Under Hawkins, they are also prohibited.

The Hawkins court’s analysis applies equally to PPG testing. Like the polygraph, PPG testing is unreliable, exceedingly invasive, and expressly authorized elsewhere in the statute. Any minimal indication of reliability because PPG tests (unlike polygraphs) have been found admissible is more

than offset by the Orwellian intrusion into the most private areas of body and mind that PPG testing represents. PPG testing is “more intrusive and degrading, and not demonstrably more reliable than the polygraph.” Jason R. Odeshoo, Of Penology And Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 43 (2004). Therefore, it can be inferred the Legislature intended to prohibit its use unless expressly authorized. Hawkins, 169 Wn.2d at 803. Because RCW 71.09.040(4) does not expressly authorize PPG testing, it is prohibited. See id.

2. THE DEPARTMENT’S REGULATIONS DO NOT AND CANNOT AUTHORIZE PPG TESTING IN CONTRAVENTION OF THE STATUTE.

The Hawkins court did not address arguments relating to WAC 388.880.034 because it concluded that even if the regulation were construed as authorizing polygraph testing, it could not do so in violation of RCW 71.09.040. Hawkins, 169 Wn.2d at 804. Similarly, even if the WAC is construed as authorizing PPG testing, it cannot do so in contravention of the statute. However, even so, the State’s arguments regarding interpretation of the WAC and the Department’s authority to issue regulations regarding the examination should be rejected for the reasons discussed below.

The State argues the Department may create rules not only regarding the examiner’s qualifications but also for the conduct of the examination

itself because otherwise the “to conduct” language in the statute would be rendered meaningless. Brief of Respondent at 21-22. That is simply not true. The “to conduct” language describes what the evaluator may be qualified to do under the rules prescribed. See RCW 71.09.040(4) (“The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services.”).

The State sets up a parade of horrors that if the PPG is not permitted under the statute and the WAC, then no psychological testing would be allowed. Brief of Respondent at 24. Hawkins shows the error of this argument. The fact that one specific, extremely invasive test may not be permitted without statutory authorization does not mean that other procedures cannot be used. Hawkins, 169 Wn.2d at 803-04. Nor would prohibiting compulsory PPG testing would unduly impact the State’s ability to conduct the requisite evaluations. As the court notes in Hawkins, the State may still make use of voluntary or previous PPG testing. Id. at 804. Additionally, other testing methods, such as the Abel length of view test may be employed. Weber, 451 F.3d at 568.

3. COMPULSORY PPG TESTING VIOLATES BOTNER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO PRIVACY.

As discussed in the opening brief, interference with Botner's fundamental right to privacy in sexual conduct requires application of strict scrutiny to his constitutional claim. The State has made no attempt to argue PPG testing is narrowly tailored to the State's goal. It clearly is not, since other, less-invasive means such as length of view testing, are available for use in the authorized evaluations. United States v. Cope, 527 F.3d 944, 949 n.1 (9th cir. 2008); United States v. Stoterau, 524 F.3d 988, 1006 (9th cir. 2008); Weber, 451 F.3d at 568. Thus, the compulsory PPG testing fails a strict scrutiny analysis. In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998) aff'd sub nom Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

However, some courts appear to treat the question as one of procedural due process, weighing the individual's interest against the state's to determine reasonableness. Parker, 91 Wn. App. at 224-25. Botner does not concede that a mere balancing test is appropriate to this violation of his fundamental right to privacy. However, even under such a balancing test, compulsory PPG testing is an unreasonable intrusion into a person's private affairs because it is not necessary to the State's goals and amounts to forced sexual conduct.

The State's discussion of State v. Ward, 123 Wn.2d 488, 502, 869 P.2d 1062 (1994) and In re Detention of Campbell, 139 Wn.2d 341, 355-56, 986 P.2d 771 (1999) is inapposite. Those cases involved privacy only as it relates to the public nature of the proceedings. Campbell specifically stated that the limited privacy interest at issue in that case was not a fundamental right. 139 Wn.2d at 355.

The State additionally argues Botner does not claim the PPG testing threatens his health or safety. Brief of Respondent at 33. But this is not the test. Even persons detained for commitment proceedings under chapter 71.09 RCW retain some privacy rights. Campbell, 139 Wn.2d at 355-56. The State cites no authority for the implication that any invasion up to the point of threats to health and safety is permissible in pursuit of its goals.

4. A RECENT OVERT ACT IS NOT A CONTINUING COURSE OF CONDUCT; UNANIMITY IS REQUIRED.

Proof of a recent overt act is required to establish current dangerousness when a person is not confined at the time of the commitment petition. RCW 71.09.020 (7); In re Young, 122 Wn.2d 1, 41, 857 P.2d 989 (1993). The statutory definition of a recent overt act is plain. It requires an "act, threat, or combination thereof" that either caused sexually violent harm or a reasonable apprehension of such harm. RCW 71.09.020(12). This

definition does not mean that everything the person does is encompassed in one long continuing course of conduct.

This is a multiple acts case because the State relied on various separate acts to argue Botner committed a recent overt act. See RP 1080. First, the prosecutor mentioned potential recent overt acts and appeared to argue Botner's character is a recent overt act:

So it's not just the note. It's not just the duffle bags. It's not just being stopped on the bicycle. It's everything about him. It's his constant refusal to comply with supervision, his failure to register, his use of drugs in the community. All of those things play into it. It's his continuing and acknowledged engagement in bondage situations with his girlfriends. All of these things play into who he is.

RP 1080. Ultimately, the prosecutor told the jury, "you have to identify which of those things constitute risk factors for Mr. Botner to start going down that offense cycle." RP 1080.

The individual acts relied upon by the State are not alternatives presented in the statutory language like the alternative means of "mental abnormality or personality disorder" discussed in In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006) and In re Detention of Sease, 149 Wn. App. 66, 201 P.3d 1078 (2009). The situation in this case is much more analogous to the multiple acts that potentially formed the basis for criminal liability in State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) and State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Moreover, in

this case, at least some of the acts the state relied on (such as poor compliance with release conditions) are legally insufficient to constitute a recent overt act. In re Detention of Albrecht, 147 Wn.2d 1, 11, 51 P.3d 73 (2002); In re Detention of Froats, 134 Wn. App. 420, 433, 140 P.3d 622 (2006). The prosecutor told the jury Botner's failure to comply with conditions of supervision could be a recent overt act. RP 1080. There is no way to tell which act or acts or thoughts or fantasies the jury actually relied on, and reversal is required under a multiple acts analysis. State v. King, 75 Wn. App. 899, 900, 878 P.2d 466 (1994).

When multiple acts are separated by time, place and other circumstances, there is no "continuing course of conduct" for purposes of a unanimity instruction. King, 75 Wn. App. at 902. King was charged with one count of possession of cocaine after cocaine was found in the car he was riding in. Id. at 901. The State also presented evidence of cocaine found in King's backpack. Id. The State failed to elect which cocaine it relied on to support the possession charge, and the jury was not instructed it must be unanimous. Id. at 903. The court rejected the State's argument that the possession of the two amounts of cocaine was a continuing course of conduct excusing the need for an election or unanimity instruction. Id. at 903. The court reasoned there were two distinct instances of possession

occurring at different times, in different places, and involving different containers. Id. at 903.

Similarly, the numerous acts the State points to in this case as a recent overt act occurred in different places, at different times. As in King, these acts were not a “continuing course of conduct” and either an election or unanimity instruction was required. 75 Wn. App. at 903. Given the numerous different acts and possible combinations thereof, it is more than possible jurors were not unanimous as to which act or acts satisfied the necessary element of a “recent overt act.” Therefore, the lack of a unanimity instruction or an election undermined the verdict and violated Botner’s right to due process of law. Kitchen, 110 Wn.2d at 409; Petrich, 101 Wn.2d at 571.

Now, on appeal, the State argues the definition of recent overt act “encompasses all behavior as a single act.” Brief of Respondent at 37. The plain language of the statute is not nearly so broad. RCW 71.09.020(12). The definition includes any “act, threat, or combination thereof.” Id. Thus, it presents three possible alternatives: one singular act, one singular threat, or one combination of one of each. The newest version of the statute merely added a third option (the combination) to the two possibilities (an act or a threat) presented in the prior version of the statute. See former RCW

71.09.020 (2008). It does not permit a jury to rely on "all behavior" as a recent overt act.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Botner requests this Court reverse his commitment.

DATED this 27<sup>th</sup> day of April, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

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

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**DECLARATION OF SERVICE**

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

THAT ON THE 28<sup>TH</sup> DAY OF APRIL, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JANNA HARTMAN  
ATTORNEY GENERAL'S OFFICE  
800 5TH AVENUE  
SUITE 2000  
SEATTLE, WA 98104
  
- [X] SHAWN BOTNER  
SPECIAL COMMITMENT CENTER  
P.O. BOX 88600  
STEILACOOM, WA 98388

**SIGNED** IN SEATTLE WASHINGTON, THE 28<sup>TH</sup> DAY OF APRIL, 2011.

x *Patrick Mayovsky*