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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28417-4

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

In re the Detention of:

SHAWN BOTNER,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

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2011 OCT 14 PM 5:26

 ORIGINAL

TABLE OF CONTENTS

I. ARGUMENT1

 A. The Trial Court’s Order Requiring Botner’s Participation
 In A Penile Plethysmograph Was Proper.....1

 B. The Jury Unanimously Determined That Botner Had
 Committed A Recent Overt Act.....3

II. CONCLUSION5

TABLE OF AUTHORITIES

Cases

<i>In re Aston</i> , 161 Wn. App. 824, 251 P.3d 917 (2011).....	1, 3, 4
<i>In re Halgren</i> , 156 Wn. 2d 795, 132 P.3d 714 (2006).....	3
<i>In re Sease</i> , 149 Wn. App. 66, 201 P.3d 1078, <i>review denied</i> 166 Wn. 2d 1029, 217 P.3d 337 (2009).....	3
<i>In re Williams</i> , 163 Wn. App. 89, 257 P.3d 671 (2011).....	1, 2
<i>State v. Petrich</i> , 101 Wn. 2d 566, 683 P.2d 173 (1984).....	3

Statutes

RCW 71.09.040	1, 2
RCW 71.09.040(4).....	2
WAC 388-880-034.....	2

The Court has asked the parties to be prepared to discuss two cases that have issued since the submission of briefs in this case, *In re Aston*, 161 Wn. App. 824, 251 P.3d 917 (2011) and *In re Williams*, 163 Wn. App. 89, 257 P.3d 671 (2011), and has offered the parties the opportunity to submit briefing regarding the application of these cases to this case. The State submits the following supplemental argument.

I. ARGUMENT

A. **The Trial Court's Order Requiring Botner's Participation In A Penile Plethysmograph Was Proper**

Botner argues, *inter alia*, that the conduct of a penile plethysmograph ("PPG") as part of an evaluation conducted pursuant to RCW 71.09.040 violates his right to privacy. While the *Williams* Court did not directly address this issue, the case supports the State's position both that a full psychological evaluation is mandated by statute, and that Botner's interests in privacy are reduced because of his status as a convicted sex offender.

In *Williams*, appellant, a committed SVP, argued that a psychological evaluation conducted pursuant to RCW 71.09.040 violated his rights to privacy, and that, under that section, only a records review was permitted. 257 P.3d at 675. Division I, in rejecting this argument, reiterated the longstanding rule in this state that "sex offenders have reduced privacy interests because they threaten public safety." *Id.* This

conclusion is consistent with other case law on this issue cited in the State's Opening Brief.¹ Likewise, the *Williams* court rejected the appellant's attempts to restrict the State's evaluation pursuant to RCW 71.09.040 to a mere records review noting, *inter alia*, that "the plain language of RCW 71.09.040(4) provides authority for a *comprehensive mental evaluation of the offender to determine if he is an SVP...*" *Id.* at 676 (emphasis added). This view, the court held, "finds further support in the administrative rule promulgated to effectuate" RCW 71.09.040(4), which specifically requires that the evaluation of an SVP "must be based on an '[e]xamination of the resident, including a forensic interview and a medical examination, if necessary.'"²

While the *Williams* Court did not have occasion to consider the propriety of a PPG exam, its holdings support the conclusion that the trial court acted within its discretion in ordering that Botner participate in a PPG in order to ensure a complete and thorough assessment.

¹ See pps. 32-35.

² Although WAC 388-880-034 has since been amended, the version of the portion of WAC 388-880-034(1) at issue in this appeal is identical to that at issue in *Williams*.

B. The Jury Unanimously Determined That Botner Had Committed A Recent Overt Act

In *Aston*, Division I rejected Aston's argument that he was denied a unanimous verdict because the jury in his case was not given a *Petrich*³ instruction, instead determining that the case fell within the "alternative means" rule as applied in *In re Halgren*, 156 Wn. 2d 795, 132 P.3d 714 (2006). *Aston*, 161 Wn. App. at 838-43. In addition, the *Aston* Court rejected the State's argument (made in this case as well) that the case should be analyzed under the "means within a means" test as set forth in *In re Sease*, 149 Wn. App. 66, 201 P.3d 1078, *review denied* 166 Wn. 2d 1029, 217 P.3d 337 (2009). *Aston* at 843.

Whether this Court adopts the analysis set forth in *Aston* or that urged in the State's Opening Brief, the commitment in this case must be affirmed. If this Court adopts the approach urged in the State's Opening Brief, the totality of the events of July, 2006 constitute a recent overt act. The same holds true if the *Aston* Court's analysis is adopted. The *Aston* Court views the 2009 definition of "recent overt act" as expressing three "alternative means" by which such an act may be committed --an act, a threat, or a combination thereof. No unanimity instruction is required "so long as there is substantial evidence to support each alternative means."

³ *State v. Petrich*, 101 Wn. 2d 566, 683 P.2d 173 (1984)

Aston at 841. There was substantial evidence of each alternative means presented in this case.

In alleging Botner had committed a recent overt act, the State focused on incidents that came to light on July 7 and July 30, 2006. On July 7, campus security found a duffel bag labeled “Shawn B” on the Gonzaga University campus, stashed along the Centennial Trail. The bag contained women’s clothing, pornography, wigs, sex toys, and an envelope addressed to Shawn Bower, one of the names by which Botner identified himself. 2RP at 274; State’s Exs. 50, 54, 56, 58, 91, 93, 95, 110. Also found in the bag was a note listing eight sexual items, as well as a narrative that described a plan⁴ to assault, abduct, sexually assault, murder and dismember a “clerk” while dressed as a woman. State’s Ex. 60, 91. At trial, Botner did not contest that the duffel bag was his, and admitted to having written the note. 3 RP at 369; 372. This incident would constitute both an “act,” (of assembling and possessing the contents of the duffel bag), a “threat,” (the detailed plan to sexually assault and murder a woman) and a “combination thereof” much like that at issue in *Aston*. Likewise, there was substantial evidence to support the State’s allegation that an additional “act” occurred on July 30, 2006. On that date Botner, wearing a bra stuffed to give the appearance of breasts and wearing a

⁴ Although Botner referred to this note as a “fantasy,” Dr. Hoberman characterized it as a “plan.” 4 RP at 643.

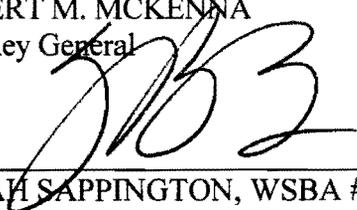
stocking net over his hair, was stopped by Spokane Police. He was found to be carrying a backpack containing a dildo, a French maid costume, new and used women's underwear, a blond wig, a folder of pornographic pictures, a rope, rubber gloves, and condoms. 2RP at 318-22. As police inspected the rubber gloves, Botner commented, "You'd be surprised what could be traced back to you by forensic evidence." *Id.* at 322. At a minimum, this incident constitutes an "act." The events of July, 2006 were, in the view of State's expert Dr. Hoberman, "precursors of committing violent criminal sexual behavior. 3RP at 440. These acts, the threat, and the combination thereof were independently and collectively sufficient for any trier of fact to determine that a recent overt act had been committed.

II. CONCLUSION

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

RESPECTFULLY SUBMITTED this 14th day of October, 2011.

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NO. 28417-4-III

WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re the Detention of:

Shawn D. Botner
A/K/A Shawn Bower

DECLARATION OF
SERVICE

I, Allison Martin, declare as follows:

On October 14, 2011, I sent via email and legal messenger true and correct cop(ies) of Motion for Extension of Time to File Response Brief and Declaration of Service, postage affixed, addressed as follows:

Eric Nielsen
Nielsen Broman & Koch PLLC
1908 E Madison Street
Seattle, WA 98122-2842

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

DATED this 14th day of October, 2011, at Seattle, Washington.


ALLISON MARTIN

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