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MAR 31 2011

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DIVISION III
STATE OF WASHINGTON
By _____

NO. 28417-4

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OF THE STATE OF WASHINGTON**

In re the Detention of:

SHAWN BOTNER,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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I. ISSUES PRESENTED

- A. **Where both the statute and relevant administrative regulations authorize a psychological evaluation prior to trial, was the trial court's order requiring Botner to participate in a penile plethysmograph proper?**
- B. **Where the instruction regarding a recent overt act precisely mirrors the statutory language, and where the current recent overt act definition encompasses all behavior as a single act, did the trial court err in failing to issue a unanimity instruction that Botner did not request?**
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- E. **Where the trial court did not commit error, should this Court require reversal based on Botner's assertion of cumulative error?**

II. STATEMENT OF THE CASE

A. Procedural History

This Sexually Violent Predator (SVP) civil commitment action was initiated on December 4, 2006. CP at 1-3. At the time of filing, Botner was incarcerated for Failure to Register as a Sex Offender. *Id.* His commitment trial began on August 10, 2009. 1RP at 4.

At trial, the State presented the lay testimony of three of Botner's sexual assault victims, H.B., G.P., and C.W.; Botner's sex offender

treatment provider Maia Christopher; Gonzaga University security officer Barry Matthews; Spokane Police Department Officer Jay Kernkamp; and Botner's Community Corrections Officer (CCO), Robert Bromps. The State also presented the testimony of Botner. Finally, the State presented the expert testimony of Dr. Harry Hoberman, Ph.D. 2RP at 232-5RP at 768.

In his defense, Botner testified and presented the testimony of his mother, brother, and Dr. Theodore Donaldson. 5RP at 769-6RP at 1000. On August 26, 2009, the jury unanimously agreed that the State had proven beyond a reasonable doubt that Botner was an SVP. CP at 514. Botner was committed to the SCC where he remains today. CP at 348-49. This appeal follows. CP at 352.

B. Substantive History

1. Botner's Criminal Sexual History

Botner has been convicted of three sexual assaults. From approximately September through December 1987, 14-year-old Botner had sexual contact with H.B., his female cousin. 2RP at 232-36. H.B. testified that, when she was seven years old, Botner lay on the ground, placed her on his waist and moved her body in a circular motion. *Id.* at 235-36. H.B. also testified that, when she was eight years old, she awoke to find Botner lying next to her in her room, fondling her and penetrating

her vagina with his hand. *Id.* at 234. Botner was convicted of Indecent Liberties Against A Child Under The Age of 14 and was sentenced to 21-28 weeks in Juvenile Detention. 3RP at 342.

On May 31, 1991, Botner, 18, assaulted G.P., a stranger. 2RP at 241-47. On that day, G.P. was taking her lunch break on a bench in Riverfront Park in Spokane when she noticed a young man (later identified as Botner) sitting on the grass nearby. *Id.* G.P. went into the women's public restroom, and when she came out from the stall, Botner grabbed her from behind, placed his hands around her throat, and began to choke her. *Id.* G.P. held her purse out to Botner, hoping that he only wanted to rob her, but he ignored the purse and continued to choke her. *Id.* As she continued trying to break away, Botner told her to "shut up" and tried to put his hand over her mouth. *Id.* As G.P. continued to scream, Botner fled the bathroom. *Id.* G.P. later identified Botner in a photo line-up. *Id.* Botner testified at trial that he followed G.P. into the bathroom with the intent of raping her. 3RP at 351. Botner was convicted of Unlawful Imprisonment and was sentenced to six months in Spokane County Jail. *Id.* at 352.

Less than nine months later, 18-year-old Botner attempted to have sexual contact with C.W., a stranger. CP 358-63. On February 6, 1992, C.W., an adult female, was leaving the women's restroom of the Adult

Education Center in Spokane. She noticed a young man with long blond hair (later identified as Botner) at the drinking fountain when she entered the restroom, and she saw that he was still there when she came out. *Id.* As C.W. walked by Botner, he grabbed her from behind and put an electrical cord around her neck. *Id.* He dragged C.W. backward into the women's restroom and into a rear stall. *Id.* C.W. lost consciousness and, when she awoke, her pants and underwear were around her ankles. *Id.* As a result of the assault, C.W. suffered injuries to her face and neck. *Id.*

Botner was identified by fingerprints and a composite sketch. *Id.* at 355. At the criminal trial, he testified that, prior to his assault on C.W. as well as his previous two sexual offenses, he had been using drugs and was likely under the influence of drugs at the time of the assaults. 3RP at 357. He also testified that, prior to the assault on C.W., he had been actively looking for a victim to rape. 3RP at 353. Botner was convicted of Attempted Rape in the First Degree and was sentenced to 110 months in prison. *Id.*

2. Recent Overt Act

On July 7, 2006, Spokane police responded to a call from Gonzaga University campus security. Campus Security Officer Barry Matthews had found a duffle bag labeled "Shawn B" on campus, stashed along the Centennial Trail. The bag contained women's clothing, pornography,

wigs, sex toys, and an envelope addressed to Shawn Bower. 2RP at 274, State's Exs. 50, 54, 56, 58, 91, 93, 95, 110. The bag also contained a note which listed eight sexual items, and a narrative that read,

Go in dressed as a woman, get all the items you wish, smash clerk in head with blackjack and lock the door, tie clerck [sic] up and tape mouth shut. Get all money and novelty items that you desire. Get clerks [sic] keys and load all items into car. Load clerk last. Take car and go to park and have your way with the whore. Mags, novelties, sexy clothing, whole maniquin [sic], take clerk to river and continue to have way with [sic] take car to remote area and compeltly [sic] douse inside with gas and set on fire, wipe down outside of car for fingerprints. Dismember body with a saw, go buy cheap saw.

State's Ex. 60, 91. At trial, Botner admitted to having written the note.

3RP at 371-72.

Following the report by campus security, Botner was identified as a person of interest by Spokane police. 2RP at 273. Botner's CCO, Robert Bromps, was supervising Botner at the time and had filed frequent violation reports on Botner since his release from prison in January, 2005.¹ *Id.* at 266-71. Many of those violations were for consuming drugs and alcohol. *Id.*

At two o'clock a.m. on July 30, 2006, Spokane Police Officer Jay Kernkamp stopped Botner while Botner was riding a bicycle with no

¹ Botner had been serving time on a previous conviction for theft. 2RP at 263.

headlight or rear reflector. 3RP at 318. As the police approached him, they saw that Botner was wearing a bra stuffed to give the appearance of breasts. *Id.* He also had a stockinet over his hair. *Id.* Police took possession of a backpack Botner was carrying with him, inside of which they found an unopened package containing a dildo, a black and white French maid costume, new and used women's underwear, a blond wig, and a folder of pornographic pictures. *Id.* at 321-22. There was also a glass case containing a rope, rubber gloves, and condoms. *Id.* 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. Botner was subsequently arrested following this police contact. *Id.* at 284.

3. Expert Opinion Evidence: Dr. Harry Hoberman

At trial, the State offered the expert opinion testimony of forensic psychologist Dr. Harry Hoberman, Ph.D. Dr. Hoberman has considerable experience in the evaluation, diagnosis, and risk assessment of sex offenders. 3RP at 381-95. Dr. Hoberman is licensed to practice in Washington (*Id.* at 387) and has conducted approximately 25 evaluations to determine whether an individual meets or continues to meet the statutory criteria for civil commitment pursuant to RCW 71.09. *Id.* at 392.

As part of his evaluation, Dr. Hoberman reviewed court documents, police reports, criminal history information and DOC records.

3RP at at 394. Dr. Hoberman testified that the records he reviewed were of the type that he and other mental health professionals commonly rely upon when evaluating sex offenders. *Id.* at 395.

Dr. Hoberman testified that, in his professional opinion, Botner currently suffers from a mental abnormality, specifically Sexual Sadism. 3RP at at 431. Dr. Hoberman also diagnosed Botner with Pedophilia, an Antisocial Personality Disorder and Psychopathy. *Id.* at 437-61. In diagnosing those conditions, Dr. Hoberman relied upon a classification system that is used universally by mental health workers, and is found in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). *Id.* at 416-17.

Dr. Hoberman also conducted a risk assessment to determine whether Botner was more likely than not, as a result of his mental abnormality, to commit a predatory sex offense if he were released to the community. 3RP at at 462. The risk assessment involved actuarial instruments, which are a list of factors associated with sexual reoffense. *Id.* at 463-65. When administered, an offender receives a score which is statistically associated with a likelihood of committing a future sex offense. *Id.*

Dr. Hoberman employed the use of four actuarial instruments in his risk assessment of Botner: the Static-99, the Static-2002, the

Minnesota Sex Offender Screening Tool Revised (MnSOST-R), and the Sex Offender Screening Tool Revised (SORAG). 3RP at at 466. Dr. Hoberman testified that his risk of assessment of Botner indicated that Botner is likely to engage in predatory acts of sexual violence if not confined to a secure facility. 4RP at 508, 539-40.

Dr. Hoberman also scored Botner on the Hare Psychopathy Checklist – Revised (PCL-R). 3RP at 456-61. The PCL-R measures an individual's psychopathy, or level of criminal orientation, and a score in Botner's range is statistically associated with a high probability of violent recidivism, including sexual recidivism. *Id.* Dr. Hoberman testified that Botner's high degree of psychopathy was not only related to his risk of reoffense, but also caused him serious difficulty controlling his behavior such that it could be considered a personality disorder under the statute. *Id.* at 461.

Based upon his education and experience and his review of the records, Dr. Hoberman testified that it was his professional opinion that Botner currently has a mental abnormality and personality disorder that causes him serious difficulty controlling his behavior and makes him more likely than not to commit predatory acts of sexual violence if he is not confined in a secure facility. 4RP at 540.

III. ARGUMENT

Botner makes five arguments on appeal, none of which have merit. This court should affirm his civil commitment as a sexually violent predator. The trial court's order requiring Botner to participate in a polygraph examination as part of the psychological evaluation required by RCW 71.09.040 was proper and consistent with both the statute and the constitution. Nor did the trial court err by not giving a unanimity instruction where no such instruction was requested or required: The current recent overt act definition encompasses all behavior as a single act, therefore does not require unanimity on individual component acts. The trial court did not abuse its discretion when it allowed Dr. Hoberman to testify about Botner's sexual history and a research article upon which he relied in forming his opinions. Finally, Botner's due process rights were not violated when the jury found he was likely to commit future acts of sexual violence.

A. The Trial Court's Order Requiring Botner To Participate In A Polygraph Examination As Part Of The Psychological Evaluation Required By RCW 71.09.040 Was Proper

Under RCW 71.09.040(4), the State has the right to conduct a mental health examination of the individual following the probable cause hearing. *In re the Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002). Botner claims that this required examination cannot include a

sexual history polygraph examination, a test that is routinely utilized during sex offender evaluations and was requested by the State's expert. This argument is without merit because the statutory scheme allows for such decisions to be made on a case by case basis, and the trial court's order in this case was not an abuse of discretion. Botner's argument would effectively preclude an evaluator from exercising professional judgment as to what procedures and/or testing are appropriate in the particular case, an interpretation of the rule leads to absurd results and thwarts purposes of the statute. Further, Botner's references to other portions of RCW 71.09 are misplaced because the cited provisions were not intended to address the "precommitment" portion of an SVP proceeding. Nor did the trial court's order violate the constitution. For these reasons, the trial court's order to compel Botner's participation in a sexual history polygraph exam should be affirmed.

1. Facts

After probable cause was established, the State moved to required Botner to submit to an evaluation under RCW 71.09.040(4) by the State's expert, Dr. Harry Hoberman. CP at 520-558. This evaluation was to include a clinical interview, a penile plethysmograph examination and a specific issue polygraph addressing the results of the plethysmograph. In his supporting declaration, Dr. Hoberman indicated that he had attempted

to interview Botner before the case had been filed, but that Botner had refused. CP at 534. He stated that the information requested was designed to provide “necessary, relevant, and current information” related to the question of whether Botner meets the statutory criteria of an SVP, specifically, 1) whether Botner currently suffers from a mental abnormality or personality disorder; 2) whether these conditions cause him serious difficulty controlling his sexually violent behavior; and 3) whether these conditions make him more likely than not to commit predatory acts of sexual violence if not confined in a secure facility. *Id.*; RCW 71.09.020(18). Dr. Hoberman stated that the results of the interview, PPG and polygraph examinations “are routinely used by mental health professionals in conducting sex offender and sexually violent predator evaluations,” and would result in a more comprehensive evaluation. CP at 535. The trial court granted the State’s motion and ordered Botner to participate in the evaluation. CP at 570-73. When Botner subsequently refused to participate in the testing, the State asked that he be held in contempt and place in the county jail until he complied. CP at 574, 576-92. In order to avoid being jailed for contempt, Botner stipulated to a jury instruction allowing the jury to “infer from Mr. Botner’s refusal [to submit to a PPG] that he is deviantly aroused by

forcible, non-consensual sexual contact with females.” CP at 314-15, 319-20;1RP at 27.

2. Standard of Review

"SVP proceedings are not governed by the civil rules, where the rules conflict with statutory provisions governing SVP proceedings." *In re Detention of Young*, 163 Wn.2d 684, 693, 185 P.3d 1180 (2008). However, where the statutory provisions are consistent with the civil rules or are silent, the civil rules will apply. *Id.*; see also *In re Estate of Kordon*, 157 Wn.2d 206, 213, 137 P.3d 16, 19 (2006). Here, the trial court entered a discovery order concerning a portion of the psychological evaluation mandated by RCW 71.09.040(4). While that evaluation is required by the statute, the statute is silent regarding the parameters of the evaluation. In such a case, the trial court will rely on the rules of pretrial discovery to define the parameters of the event in question for purposes of applying the statute. See *In re the Detention of Petersen*, 145 Wn.2d 789, 801, 42 P.3d 952, 959 (2002) ("Even assuming former RCW 71.09.090(2)² probable cause hearings were special proceedings, nothing in that statute is inconsistent with the civil discovery rules." Thus,

² RCW 71.09.090(2) provides the mechanism through which persons civilly committed as SVPs may have a hearing on whether probable cause exists to warrant a hearing on whether the person's condition has so changed that: (i) he or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

the statute did not prevent the parties from deposing witnesses and conducting such discovery as is permitted by the civil rules.). *See also Limstrom v. Ladenburg*, 136 Wn.2d 595, 605, 963 P.2d 869, 874 (1998).

A trial court is afforded broad discretion to implement controls on the discovery process to permit full disclosure of relevant information while guarding against harmful side effects. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 232, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Such discovery orders are reviewed for abuse of discretion that results in prejudice to a party or person. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991).

An appellate court will find an abuse of discretion only "on a clear showing" that the court's exercise of discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court's discretionary decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A court's exercise of discretion is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Id.* (quoting *State v. Lewis*,

115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

3. The Controlling Washington Statutory and Administrative Code Sections.

Botner argues that RCW 71.09.040 does not authorize the trial court to require him to submit to PPG testing. App. Br. At 18. He is incorrect. The statute requires a comprehensive post-probable cause psychological evaluation be conducted by a qualified expert. The components of that evaluation are set forth in the applicable regulations, and include a forensic interview, a medical examination, if necessary, and a review of records, tests or reports, including plethysmograph testing. The trial court's order was proper.

When an offender is referred to the appropriate prosecuting authority as a potential SVP, the referring agency is required to provide a current mental health evaluation or mental health records review of the offender. RCW 71.09.025(1)(b)(v). The use of the terms "evaluation" and "records review" in the statute is a tacit acknowledgement that, prior to the initiation of formal commitment proceedings, the State has no ability to require an offender to participate in a mental health evaluation. If an offender refuses to participate in an evaluation, a records review will be conducted pursuant to RCW 71.09.025 to assist the prosecutor in determining whether to initiate the SVP action.

Once an SVP action is filed and a court determines there is probable cause to believe the offender meets the definition of an SVP, “the judge *shall* direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. 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 [DSHS].” RCW 71.09.040(4) (emphasis added).

DSHS has promulgated rules designed to effectuate the statute’s requirement that a comprehensive post-probable cause psychological evaluation be conducted by a qualified expert. *See generally*, WAC 388-880 *et seq.* The evaluation mandated by RCW 71.09.090(4) must be done by a “professionally qualified person.” WAC 388-880-010. A professionally qualified person includes a licensed psychologist who has expertise in conducting evaluations of sex offenders (including diagnosis and assessment of re-offense risk) and providing expert testimony relating to sex offenders. WAC 388-880-010, -033.

The evaluation itself *must* consist of the following components:

- (1) Examination of the resident, including a forensic interview and a medical examination, if necessary;
- (2) Review of the following records, tests or reports relating to the person:

(a) All available criminal records, to include arrests and convictions, and records of institutional custody, including city, county, state and federal jails or institutions, with any records and notes of statements made by the person regarding criminal offenses, whether or not the person was charged with or convicted of the offense;

(b) All necessary and relevant court documents;

(c) Sex offender treatment records and, when permitted by law, substance abuse treatment program records, including group notes, autobiographical notes, progress notes, psycho-social reports and other material relating to the person's participation in treatment;

(d) Psychological and psychiatric testing, diagnosis and treatment, and other clinical examinations, including records of custody in a mental health treatment hospital or other facility;

(e) Medical and physiological testing, including plethysmography and polygraphy;

(f) Any end of sentence review report, with information for all prior commitments upon which the report or reports were made;

(g) All other relevant and necessary records, evaluations, reports and other documents from state or local agencies;

(h) Pertinent contacts with collateral informants;

(i) Other relevant and appropriate tests that are industry standard practices;

(j) All evaluations, treatment plans, examinations, forensic measures, charts, files,

reports and other information made for or prepared by the SCC which relate to the resident's care, control, observation, and treatment.

WAC 388-880-034.

If a respondent in an SVP action refuses to participate in examinations, forensic interviews, psychological testing or any other interviews necessary as part of the RCW 71.09.040(4) evaluation, the State has the ability to ask the court to compel his compliance. WAC 388-880-035.

Botner may argue that the supreme court's recent decision in *In re Hawkins*, 169 Wn. 2d 796, 238 P. 3d 1175 (2010), requires a different result. This is not correct. In *Hawkins*, the court considered the question of whether the statute permitted the trial court to order a sexual history polygraph, and determined that the trial court had exceeded its statutory authority in requiring Hawkins to submit to that test. Repeatedly noting the "unique" nature of polygraph examination, the court noted that "the courts have consistently recognized [polygraphs] as unreliable and, unless stipulated to by all parties, inadmissible." *Id.* at 800. In holding that the trial court was not empowered to order a polygraph examination, the court emphasized that "[t]his conclusion, as the foregoing analysis makes clear, ***applies only to polygraph examinations***: the failure of the statute to enumerate other methods of conducting an examination does not

necessarily preclude their use.” *Id.*, 169 Wn. 2d at 799 (emphasis added). Hawkins does not preclude the trial court from ordering Botner to participate in a PPG.

4. The Department of Social and Health Services Did Not Exceed its Authority in Adopting WAC 388-880-034

Botner claims that DSHS exceeded its authority in adopting WAC 388-880-034, the provision outlining the minimum requirements of the RCW 71.09.040 evaluation. App. Br. at 25-27. Because RCW 71.09.040(4) specifically authorizes DSHS to adopt rules governing evaluations conducted pursuant to RCW 71.09.040, this claim fails.

a. Standard of Review

The extent of DSHS’ rule-making authority is a question of law, which is reviewed *de novo*. *Washington Public Ports Ass’n*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). The regulation is presumed valid, and its challenger bears the burden of overcoming this presumption. RCW 34.05.570(1)(a); *Association of Washington Business v. Dep’t of Revenue*, 121 Wn. App. 766, 770, 90 P.3d 1128, 1130 (2004). This Court may declare an agency rule invalid if it: (1) violates constitutional provisions; (2) exceeds statutory authority of the agency; (3) was adopted without compliance with statutory rule-making procedures; or (4) is arbitrary and capricious. RCW 34.05.570(2)(c). Despite the plain

language of the statute granting DSHS the authority to adopt rules governing the evaluations, Botner asserts WAC 388-880-034 is invalid because the DSHS exceeded its statutory authority in promulgating the rule.

Like all state agencies, DSHS possesses those powers either expressly granted or necessarily implied from statutory grants of authority. *Washington Public Ports Ass'n.*, 148 Wn.2d at 646; *Green River Cmty. Coll. v. Higher Educ. Pers. Bd.*, 95 Wn.2d 108, 112, 622 P.2d 826 (1980). Agency rules may be used to "fill in the gaps" in legislation if such rules are "necessary to the effectuation of a general statutory scheme." *Washington Public Ports Ass'n.*, 148 Wn.2d at 645-46 (quoting *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975)). Such administrative rules adopted pursuant to a legislative grant of authority are presumed valid, and are upheld if they are reasonably consistent with the controlling statute. *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004); *Green River Cmty. Coll.*, 95 Wn.2d at 112.

In addition, the rules of statutory construction apply to administrative rules and regulations, particularly where they are adopted pursuant to express legislative authority. *Department of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627, 636 (2002); *City of Kent v.*

Beigh, 145 Wn.2d 33, 45, 32 P.3d 258 (2001). The primary objective of any statutory construction inquiry "is to ascertain and carry out the intent of the Legislature." *In re the Detention of Strand*, 167 Wn. 2d 180,183, 217 P.3d 1159 (2009), citing *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). To determine that intent, the court looks first to the language of the provision. "Plain meaning is 'discerned from the 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.'" *Id.* (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007) (quoting *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007))).

b. Since WAC 388-880-034 is Consistent With RCW 71.09.040, Botner's Claim is Without Merit

WAC 388-880-034 sets forth the minimum requirements for the RCW 71.09.040(4) pretrial SVP psychological evaluation. Botner argues that RCW 71.09.040 does not authorize DSHS to develop rules regarding the conduct of pretrial evaluations. App. Br. at 25. However, great deference is afforded to an agency's interpretation of a statute "when the statute is within the agency's field of expertise." *Inland Empire Distribution Sys., Inc. v. Utilities & Transp. Commission*, 112 Wn.2d 278, 282, 770 P.2d 624 (1989); *see also Youngberg v. Romeo*, 457 U.S. 307,

322-23, 102 S.Ct. 2452, 2461-62 (1982) (In determining what is "reasonable" in any case involving treatment by the state of an involuntarily committed individual, courts must show deference to the judgment exercised by a qualified professional, whose decision is presumptively valid.) Also, where the Legislature has specifically delegated rulemaking power to an agency, its regulations are presumed valid. *Anderson, Leech & Morse, Inc. v. Washington State Liquor Control Bd.*, 89 Wn.2d 688, 695, 575 P.2d 221 (1978). "One asserting invalidity has the burden of proof, and the challenged regulations need only be reasonably consistent with the statutes they implement." *Id.*, 89 Wn.2d at 695. Only compelling reasons demonstrating that the regulation is in conflict with the intent and purpose of the legislation warrant striking down a challenged regulation. *Id.*

Here, within RCW 71.09.040(4), the Legislature expressly granted DSHS the authority to make rules governing the pretrial SVP evaluation. The plain language of the statute states 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.*" RCW 71.09.040(4). DSHS complied with the statutory grant by implementing the relevant rules.

Nonetheless, Botner argues that the Legislature only intended

DSHS adopt rules regarding the qualifications of the evaluator, not the substance of the evaluation itself. App. Br. at 26. Such an argument renders the "to conduct" language of the RCW 71.09.040(4) either inoperative or superfluous. Under rules of statutory construction "no part of a statute should be deemed inoperative or superfluous unless it is the result of obvious mistake or error." *Strand*, 167 Wn. 2d at 184 (citing *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 13, 810 P.2d 917, 817 P.2d 1359 (1991)).

No such obvious mistake or error can be found within the test of RCW 71.09.040(4). Thus, DSHS has, by administrative code provision, set forth the minimum requirements that a pretrial SVP evaluation must meet. One of those requirements is that an "examination" of the alleged SVP be conducted. WAC 388-880-034(1). The mechanics of the examination are left to the discretion of a professional psychologist with expertise in the field of assessing and evaluating sex offenders. Such a course is logical, and is indicative of consideration for the obvious individualized and case specific nature of psychological examinations, and the expertise of the evaluators involved.

On its face, WAC 388-880-034 does not expressly or impliedly require a plethysmograph examination be conducted during the course of **every** pretrial SVP evaluation. The power to determine the specifics

involved in conducting each pretrial evaluation pursuant to WAC 388-880-034 is properly exercised by the professionally qualified person assigned by DSHS, who has expertise to conduct SVP evaluations. WAC 388-880-010, -033. Physiological tests such as the PPG can provide information that is relevant to the questions posed to an SVP evaluator. *See e.g. In re the Detention of Halgren*, 156 Wn.2d 795, 806, 132 P.3d 714 (2006). However, a requirement that the person being evaluated *must* undergo a new PPG in every evaluation pursuant to RCW 71.09.040(4) would be unwarranted, especially if the individual has undergone such testing numerous times previously. The question of whether it is appropriate in a given case to order a PPG is a decision that should be left to the evaluator on a case-by-case basis. This is, indeed, precisely what the Legislature has done: Rather than making rules that would deny the complexity of psychological assessment, the Legislature has properly deferred to those with the expertise to ensure complete results with only the necessary amount of intrusion upon the person being evaluated. Thus, redundant physiological examinations can be avoided in a case where there are existing test results and the expert does not require a new one.

While this delegation permits some essential flexibility in evaluation procedure, it also operates to give the trial court oversight and allows an opportunity for any proposed evaluation procedure to be

challenged. Such was the case here. Thus, the statutory scheme, and corresponding administrative code provisions, appropriately enabled the particulars of Botner's case to be considered, and an informed decision to be made regarding the parameters of his pretrial evaluation.

Botner argues that WAC 388-880-034 provides only that a polygraph and plethysmograph results may be reviewed if already in existence prior to the RCW 71.09.040(4) evaluation. App. Br. at 24. Botner's argument, however, leads to absurd results. Under his theory, a qualified professional would be prohibited from doing anything not explicitly listed in WAC 388-880-034(1), that is, "a forensic interview and a medical examination, if necessary." Thus, not only would the evaluator be precluded from obtaining a plethysmograph exam, but any "psychological and psychiatric testing" (WAC 388-880-034(d)), "medical and physiological testing" (WAC 388-880-034(e)), and "other relevant and appropriate tests that are industry standard practices." WAC 388-880-034(i).

If Botner's logic is followed, the evaluator would be effectively prohibited from exercising professional judgment as to what procedures and/or testing are appropriate in the particular case, an interpretation of the rule leads to absurd results and thwarts purposes of the statute. WAC 388-880-035 allows the court to compel the respondent's

compliance in examinations, forensic interviews, psychological testing or any other interviews necessary as part of the RCW 71.09.040(4). It would be unreasonable and inconsistent to read WAC 388-880-034(2)(e) as allowing an evaluator to review existing plethysmograph and polygraph testing records but not allowing the trial court to order the examination under WAC 388-880-035.

Botner relies on *In re Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002), as authority for the proposition that, because RCW 71.09.040 is silent regarding whether current PPG testing should be conducted, it means it was intentionally excluded, is incorrect. App. Br. at 20. This reliance is misplaced. In *Williams*, the State sought a physical and mental examination of Williams under CR 35. *Williams* holds that the State is not entitled to an **additional** forensic interview, beyond that provided for in RCW 71.09.040(4) and WAC 388-880-030, -034, 035, and .036. Here, however, the State did not seek to compel Botner undergo a CR 35 mental examination. Rather, it asked only that the trial court enforce the statute and compel him to participate in the one comprehensive evaluation required by the statute, to include plethysmograph testing.

The statutory provision, and corresponding administrative rules, are reasonably consistent, and assist in achieving the stated goals of RCW

71.09. Botner has failed to meet his burden to show otherwise. For these reasons, his claim should be denied.

5. Botner's References to RCW 71.09.096 Are Irrelevant to His Claim on Appeal

Botner references RCW 71.09.096(4), arguing that, the Legislature having used different language in the same statute, it must have intended different meanings. App. Br. at 21. RCW 71.09.096(4) sets forth the monitoring requirements for persons who have already been determined to meet the SVP definition and are released into a "less restrictive alternative" form of confinement. The released person must participate "in a specific course of inpatient or outpatient treatment that may include monitoring by the use of polygraph or plethysmograph." RCW 71.09.096(4). This provision is specific to individuals who have been committed to the care and custody of DSHS and who will be living in the community on conditional release. Obviously, there are legitimate and compelling reasons to require plethysmograph exams to assist in the supervision of these conditionally released individuals. This differs from the pretrial evaluation stage of SVP proceedings where the use of plethysmograph is best determined by the professionally qualified person conducting the evaluation on a case by case basis.

Botner's analogy to RCW 71.09.096 is misplaced. Not only is he

referencing a statutory provision that addresses an entirely different stage of the proceedings, but he also implies that any potential part of the RCW 71.09.040(4) evaluation that is not specifically included in the statute is barred. As discussed above, his argument is impractical given the Legislature's inherent inability to foresee the case-specific complexities that may be presented to the psychologist who is tasked with performing the evaluation. Rather than reading RCW 71.09.040(4) as embodying a supposed legislative intent to limit the tools available to the evaluator, it should be read as written – as requiring a psychological evaluation without attempting to micromanage the designated evaluator. For these reasons, Botner's claim should be denied

6. Plethysmograph Testing is Accepted by the Relevant Scientific Community and the Washington State Supreme Court

There is substantial support in the scientific literature for the use of a plethysmograph as part of a sex offender evaluation.³ The psychological

³ See e.g., G. Woodworth & J. Kadane, *Expert Testimony Supporting Post-Sentence Civil Incarceration of Violent Sexual Offenders*, 3 *Law, Probability, & Risk* 211, 229 (2004) (“The single best predictor [of risk] was phallometric assessment of deviant sexual preference.”); M. Carter, K. Bumby & T. Talbot, *Promoting Offender Accountability and Community Safety through the Comprehensive Approach to Sex Offender Management*, 34 *Seton Hall L.Rev.* 1273, 1285 (2004) (“psychosexual assessments may incorporate the use of psychophysiological measures (e.g., penile plethysmography, viewing time) to assess objectively the presence of deviant sexual arousal, preference, and interest.”); D. Doren, *Evaluating Sex Offenders* at 46 (2002) (“The potential utility of PPG results is in both the diagnostic and risk assessment portions of the evaluation. Deviant sexual interests can be interpreted as clear support for a paraphilic diagnosis. Likewise . . . there seems significant reason to believe that deviant PPG results

community agrees that PPG examinations are an important part of the sex offender evaluation process. While Botner argues that the trial court in his SVP case cannot legally order him to participate in a polygraph examination, he does not allege that conducting a PPG exam during his evaluation would have been improper practice. The reason is because the use of such examinations during sex offender evaluations is a routine and accepted practice.

Therapists evaluating and/or treating sexual assaulters need valid, reliable information from the sex offender... Since much valuable information is frequently unobservable by

are meaningful when assessing the risk for sexual recidivism.”); R. Hamill, *Recidivism of Sex Offenders: What You Need to Know*, 15 Criminal Justice 24, 29 (ABA 2001) (citing 1996 and 1998 studies by R. Hanson and M. Bussiere that showed “plethysmographic preference for children” as having the strongest predictive value among 21 factors for predicting sexual recidivism.); R. Schopp, M. Scalora & M. Pearce, *Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator after Hendricks*, 5 Psychology, Public Policy & Law 120, 135 (1999) (“Deviant sexual preferences, as measured through plethysmographic assessment, increase the probability of recidivism.”); J. Bailey & A. Greenburg, *The Science and Ethics of Castration: Lessons from the Morse Case*, 92 Nw. U.L.Rev. 1225, 1226 (1998) (“Paraphilias can often be assessed via penile plethysmography.”); G. Harris, M. Rice & V. Quinsey, *The Science in Phallometric Measurement of Male Sexual Interest*, 5 Current Directions in Psychological Science 156-160, 159 (1996) (“Phallometry is the best available scientific measure of men's sexual preferences. . . .”); R. Langevin & R.J. Watson, *Major Factors in the Assessment of Paraphilics and Sex Offenders*, in *Sex Offender Treatment: Biological Dysfunction, Intrapsychic Conflict, Interpersonal Violence* 42 (1996) (“plethysmography is one of the most reliable and valid physiological measures available. . . . [and is] in a league of its own.”); W. Pithers & D. Laws, *Phallometric Assessment in the Sex Offender: Collections, Treatment and Legal Practice*, 12-2 (1995) (“Phallometry is an essential technology in the assessment and treatment of the sexual aggressor. . . . [A]ny restrictions imposed on a specially trained clinician’s ability to employ phallometry in assessing and treating sex offenders would be analogous to depriving a physician the right to obtain x-rays in cases of bone injuries.” [internal citation omitted]); R. Wettstein, *A Psychiatric Perspective on Washington’s Sexually Violent Predator Statute*, 15 U. Puget Sound L. Rev. 597, 610 (1992) (recommending plethysmography as part of the evaluation of sex offenders); and B. Maletzky, *Treating the Sexual Offender* at 31 (1991) (“erectile responses via the penile plethysmograph have assumed the leading if not definitive role in present-day assessment of deviant sexual arousal.”).

the therapist, steps must be taken to insure valid, reliable offender reports.

Abel, G. and Rouleau, J. L. (1990), "The Nature And Extent Of Sexual Assault." In W. L. Marshall, D. R. Laws, and H. E. Barbaree (Eds.), *Handbook of Sexual Assault: Issues, Theories, and Treatment of the Offender*, New York: Plenum Press, 10 (1990).

Consequently, the use of a PPG as part of a sex offender evaluation is endorsed by the Association for the Treatment of Sexual Abusers (ATSA). ATSA is an international organization consisting of mental health professionals who engage in evaluating and treating sex offenders. See <http://www.atsa.com> (last visited March 25, 2011). It has issued standards for evaluating sex offenders, which provide that an evaluation may include physiological assessments, including a PPG that has been conducted according to generally accepted standards. Seto, et al., *ATSA Practice Standards and Guidelines* (2001).

Those standards include recommended procedures for use during sex offender evaluations such as the following passage:

Members **should** use phallometric testing to corroborate the self-report of male clients regarding their sexual arousal patterns and sexual interests; polygraphy to corroborate client self-report regarding their sexual offenses, sexual histories, and compliance with treatment and supervision requirements; and viewing time measures to corroborate client self-report their sexual interests in children when phallometric testing is unavailable.

Id. at 13 (emphasis in original).

In addition, Washington courts have endorsed the use of plethysmograph results in general, and in SVP cases in particular. In *State v. Riles*, 135 Wn.2d 326, 343-44, 957 P.2d 655 (1998), the supreme court held that “plethysmograph testing is regarded as an effective method for diagnosing and treating sex offenders.” Our state supreme court has, as well, recognized the value of PPG testing in the context of an SVP evaluation. In *In re the Detention of Petersen*, 145 Wn.2d 789, 802, 42 P.3d 952, 960 (2002), the court noted that the positive effect sex offender treatment had on appellant was confirmed by, *inter alia*, plethysmograph tests. Likewise, our supreme court has held that the results of a plethysmograph are admissible as part of an expert’s opinion in SVP proceedings. In *In re Halgren*, Dr. Wheeler, as the State’s expert, relied upon the results of a plethysmograph done by another expert. 156 Wn.2d at 805-07. The plethysmograph results showed that Halgren “was twice as aroused by depictions of violent rape than by depictions of adults engaged in consensual sexual behavior.” *Id.* Dr. Wheeler was allowed to tell the jury at the commitment trial that the plethysmograph results formed part of the basis of his opinion that Halgren suffered from a mental abnormality. *Id.* at 806.

On appeal, Halgren argued that Dr. Wheeler's testimony regarding the plethysmograph violated Frye, ER 403, and ER 702. The supreme court rejected these arguments, holding that plethysmograph results were not subject to a *Frye* analysis because the plethysmograph has been accepted for purposes of diagnosis and no new method of proof or scientific evidence is at issue. *Id.* 156 Wn.2d at 807. The court rejected the ER 702 and 403 challenges as well, finding that the plethysmograph "could be helpful to the jury under ER 702 by assisting the jurors in understanding Dr. Wheeler's sexual deviancy diagnosis. . . . [A]ny potential prejudice to Halgren was outweighed by the relevance of the evidence and because Halgren had an opportunity to attack the weight of this evidence through cross-examination." *Id.* The court commented that criticism from some quarters regarding the PPG, much like that made by Botner, go to the weight, and not the admissibility, of the evidence. *Id.*

The relevant WAC provisions, the declaration of Dr. Hoberman, and relevant professional standards all support the conclusion that a plethysmograph examination is part of a comprehensive sex offender evaluation. In addition, the trial court also had the opportunity to consider argument and opposing evidence regarding whether or not Botner's participation in the exam should be ordered. Ample authority permitted the trial court to order Botner to participate in the PPG as part of

Dr. Hoberman's evaluation, and the trial court did not abuse its discretion in issuing that order.

7. A Plethysmograph Ordered as Part of a Comprehensive SVP Evaluation and Conducted by a Qualified Technician Does Not Violate the Constitution

Botner argues that plethysmograph testing violates substantive due process, as well as his rights to privacy. App. Br. at 27. A court-ordered plethysmograph conducted by a qualified technician, however, does not violate the constitution.

Washington courts have repeatedly emphasized the compelling nature of the community's interest in accurately identifying sexual predators and detaining them in a secure facility for treatment, thereby ensuring public safety. *See e.g., In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993):

The problems associated with the treatment of sex offenders are well documented, and have continued to confound mental health professionals and legislators. The mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent. Thus, ***their cooperation with the diagnosis and treatment procedures is essential.***

Id., 122 Wn. 2d at 52 (emphasis added). Likewise, Washington courts have repeatedly held that convicted sex offenders like Botner have a reduced expectation of privacy: "Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's

interest in public safety and in the effective operation of government.” *State v. Ward*, 123 Wn.2d 488, 502, 869 P.2d 1062 (1994) (quoting Laws of 1990, Ch. 3, § 116). This general principle has been reiterated within the context of the privacy expectations of those who have been determined to be sexually violent predators. In *In re Campbell*, 139 Wn. 2d 341, 355-56, 986 P.2d 771 (1999), the supreme court held that a convicted sex offender's right to privacy at commitment proceedings is not fundamental and thus, under the rational basis test, the offender's privacy rights are far outweighed by the State's substantial interest in educating the public about the potential risks sex offenders pose to the community. Likewise, the court held, *In re Detention of Turay*, 139 Wn. 2d 379, 414-15, 986 P.2d 790 (1999), that open proceedings do not violate principles of equal protection because respondents under RCW 71.09 are not similarly situated to the respondents entitled to closed proceedings under RCW 71.05, reasoning that sex offenders present unique dangers to society that persons committed under RCW 71.05 do not. *See also In re Paschke*, 80 Wn. App. 439, 447, 909 P.2d 1328 (1996) remanded on other grounds, 156 Wn. 2d 1030, 131 P.3d 905 (2006).

Botner made no allegation, much less presented any evidence, demonstrating that a plethysmograph would threaten his safety or health. While the plethysmograph constitutes an intrusion into his personal

privacy, that intrusion is outweighed by the community's interest in obtaining information that the plethysmograph can provide. The plethysmograph, by indicating whether Botner is aroused by sexually deviant stimuli such as rape scenarios or sex with children, would have assisted Dr. Hoberman in determining whether Botner suffers from a mental abnormality and, ultimately, whether he meets the definition of an SVP.

Other courts that have considered the issue of whether plethysmograph testing violates the Fourth Amendment right to privacy have concluded it does not. *See e.g., Lile v. McKune*, 24 F.Supp.2d 1152 (D.Kan. 1998), *rev'd on other grounds by, McKune v. Lile*, 536 U.S. 24, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002) (finding that, while the PPG testing in a prison sex offender program intrudes upon the prisoner's constitutional right to privacy and bodily integrity, the government's interest in rehabilitation outweighs plaintiff's right to be free from such intrusion); *Walrath v. U.S.*, 830 F.Supp. 444, 447-8 (N.D.Ill. 1993) (rejecting inmate's claim that requiring a PPG as a condition of parole violated his rights under the Fourth Amendment, and finding that "the plethysmograph is not exceptionally more intrusive than other physical or mental examinations. Ordinary physical examinations, which may involve full nudity and internal probes, are certainly as physically intrusive as a

plethysmograph.”); *Pool v. McCune*, 987 P.2d 1073, 1080 (Kan.S.Ct.1999) (finding that compelled PPG testing of inmates in a prison sex offender treatment program raised issues of constitutionally protected rights to privacy, but holding that, given both the manner in which the testing was conducted, and the societal interests in rehabilitation of the inmates, the requirement was not unconstitutional). Indeed, the State has been unable to find a case in any jurisdiction in which a court order requiring participation in a plethysmograph was determined to violate the Fourth Amendment’s right to privacy. Botner’s argument must be rejected.

B. The Jury Unanimously Found That Botner Had Committed a Recent Overt Act

1. Botner Waived Objection by Having Failed to Request a Unanimity Instruction

Botner argues that his right to a unanimous jury was violated by the failure of the jury to unanimously agree which “act, threat or combination thereof” constituted a recent overt act. App. Br. at 34. Botner waived this issue by not proposing a unanimity instruction at trial. Nor would such an instruction have been appropriate even if requested. The current recent overt act definition encompasses all behavior as a

single act, therefore does not require unanimity on individual component acts.

An appellant must take exception to a jury instruction at trial to preserve the issue for appeal. *State v. Salas*, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995); CR 51(f); CrR 6.15(c); RAP 2.5(a). The objection “must apprise the trial judge of the precise points of law involved and when it does not, those points will not be considered on appeal.” *Salas*, 127 Wn. 2d at 181 (quoting *State v. Bailey*, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990)). Without an objection, the instructions normally become the law of the case. *Id.* at 182 (quoting *State v. Hardwick*, 74 Wn.2d 828, 831, 447 P.2d 80 (1968)). Opposing parties should have an opportunity at trial to respond to allegations of error “rather than facing newly asserted errors or new theories and issues for the first time on appeal.” *In re Detention of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006). Having failed to bring this concern to the attention of the trial court and the State, Botner cannot raise it now for the first time.

2. The Current Recent Overt Act Definition Encompasses All Behavior as a Single Act, Therefore Does Not Require Unanimity on Individual Component Acts

Even if permitted to raise this issue for the first time on appeal, Botner's argument fails. Botner argues that he was entitled to a *Petrich*⁴ instruction requiring jury unanimity on the specific action that constituted a "recent overt act" in his case. App. Br. at 35. In making this argument, Botner ignores the importance of the current statutory definition, which directs the finder of fact to any "act, threat, or combination thereof." The statute does not require unanimity on a specific action because the focus is on Botner's entire conduct during his conditional release period. It was his acts, threats and combinations thereof in light of his serious history of sexual assault that supported a "reasonable apprehension" of sexually violent harm.

As amended in 2009 by the Legislature, a "recent overt act" means "any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors." RCW 71.09.020(12). The trial court instructed the jury regarding the need to determine whether Botner had committed a "recent overt act" (CP at

⁴ *State v. Petrich*, 101 Wn.2d 566, 569, 583 P.2d 173 (1984).

473) and instructed the jury as to the definition of that term. CP at 479.⁵ That definition mirrored the statutory definition.

Although there are certain statutory rights to unanimity in SVP actions (*see* RCW 71.09.060(1)), the Washington State Supreme Court has determined that the SVP statute supports the alternative means analysis of *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976), rather than the broader analysis of *Petrich* -- at least as it pertains to the "mental abnormality or personality disorder" requirement. *Halgren*, 156 Wn.2d at 809. As *Halgren* notes, "[a]lternative means statutes identify a single crime and provide more than one means of committing the crime." *Id.*

Nevertheless, the fact that the statutory requirement of a "mental abnormality or personality disorder" supports an alternative means analysis does not mean that such an analysis is appropriate under the recent overt act inquiry. The "[l]egislative intent determines whether this court should analyze a statute under the alternative means framework." *In re Sease*, 149 Wn. App. 66, 77, 201 P.3d 1078, 1083 (2009). As the *Halgren* Court explained:

Legislative intent determines whether this court should analyze a statute under the alternative means framework. *Id.* at 378, 553 P.2d 1328. In *Arndt* and *State v. Berlin*, 133 Wash.2d 541, 947 P.2d 700

⁵ Instruction No. 8 read: "'Recent overt act' means any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors." CP at 479.

(1997), we determined legislative intent by considering “(1) the title of the act; (2) whether there is a readily perceivable connection between the various acts set forth; (3) whether the acts are consistent with and not repugnant to each other; and (4) whether the acts may inhere in the same transaction.” *Berlin*, 133 Wash.2d at 553, 947 P.2d 700 (citing *Arndt*, 87 Wash.2d at 379, 553 P.2d 1328). Applying these factors, the *Berlin* court held that second degree murder was an alternative means crime. *Id.* In reaching this conclusion, it considered the fact that both means for committing second degree murder-intentional murder under RCW 9A.32.050(1)(a) and felony murder under RCW 9A.32.050(1)(b)-existed under the same title of “Murder in the Second Degree.” *Id.* In addition, the *Berlin* court noted that “ ‘[t]he readily perceivable connection between the acts set forth is a common object: causing the death of another person’ ” and that “ ‘proof of an offense under one subsection does not disprove an offense under the other subsection.’ ” *Id.* (quoting *State v. Russell*, 33 Wash.App. 579, 586, 657 P.2d 338 (1983), *rev'd on other grounds*, 101 Wash.2d 349, 678 P.2d 332 (1984)). Finally, the *Berlin* court noted that “ ‘[t]he prohibited acts may inhere in the same transaction’ ” since one may simultaneously satisfy the elements of felony murder and intentional murder. *Id.*

156 Wn.2d at 809-810.

Even if the pre-2009 statute might arguably have supported an alternative means analysis, the current statute does not. Prior to the 2009 amendments to the recent overt act definition in RCW 71.09.020, the term was defined to mean an "act or threat." Because this language created an often artificial distinction between actions (“act”) and words (“threat”), the Legislature amended the definition in 2009 to define a recent overt act as anything consisting of an "act, threat, *or combination thereof*" (emphasis added). This amendment removes the definition from any possible *Arndt* or *Petrich* unanimity requirement.

The current definition changes the focus from a series of acts (viewed in light of the person's history, including each preceding act) to a single "act, threat, or combination thereof" that causes reasonable apprehension. The question for the jury in the current case therefore focused on the totality of Botner's actions -- his acts, threats, or combination thereof -- to determine if he committed *a* recent overt act during his recent period of community supervision. In this way, the 2009 amendment better reflects the reality the fact that mental health professionals not with than a discreet action or particular action, but with a course of conduct. *E.g. In re Brown*, 154 Wn. App. 116, 128, 225 P.3d 1028, 1034 (2010)(noting the role of an "offense cycle" in determining whether behavior by sex offenders raises concerns for community safety); *In re Broten*, 130 Wn.App. 326, 335, 122 P.3d 942 (2005) (noting testimony regarding offender's "offense cycle" in support of sufficient evidence proving recent overt act). Because the statute was amended to allow any ***combination*** of acts or threats to constitute a recent overt act, it is clear that the Legislature did not intend to focus on discreet acts, or to require the jury to be unanimous on discreet acts. Under the current definition, a recent overt act is the totality of behavior, not its individual component parts.

Alternatively, unanimity on the particular act or threat was not required under the "means within a means" analysis that was explained in *In re Sease*. There, the State presented proof of two possible personality disorders from which Sease suffered for purposes of proving an SVP diagnosis. Sease argued that the jury needed to be unanimous as to *which* personality disorder caused him to be a sexually violent predator. Thus, even though the statute required proof of a "mental abnormality or personality disorder," Sease argued that the jury must also be unanimous on the particular personality disorder that supported his civil commitment.

The Court of Appeals rejected Sease's argument under the "means within a means" analysis. Quoting *In re Pers. Restraint of Jeffries*, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988), the *Sease* Court pointed out that "where a disputed instruction involves alternatives that may be characterized as a 'means within [a] means,' the constitutional right to a unanimous jury verdict is not implicated and the alternative means doctrine does not apply." 149 Wn. App. at 77. Because the SVP statute delineates two alternatives for establishing a qualifying mental condition - - mental abnormality *or* personality disorder -- requiring unanimity on the particular personality disorder would represent a "means within a means." The *Sease* Court explained that:

As in *Jeffries*, the jury here need only have unanimously found that the State proved that Sease suffered from a personality disorder that made it more likely that he would engage in acts of sexual violence if not confined to a secure facility. The jury need not have unanimously decided whether Sease suffered from borderline personality disorder or antisocial personality disorder. Therefore, the trial court did not err in failing to give a unanimity instruction and it is not an error that Sease can raise for the first time on appeal.

Id. at 78-79.

In the current case, the SVP statute provides only one means of proving a recent overt act by allowing proof based on an "act, threat, or combination thereof." RCW 71.09.020(12). Botner is essentially arguing that this court should impose an additional means within this single means to prove a recent overt act. The *Sease* opinion does not support this effort and here is no constitutional basis for Botner's requested relief.

C. The Trial Court Did Not Err When it Allowed Dr. Hoberman to Testify About Botner's Sexual History and a Research Article Upon Which He Relied in Forming His Opinions

Botner argues that the trial court abused its discretion by permitting the State's expert, Dr. Hoberman, to testify as to his diagnosis of pedophilia, and regarding a 2007 study regarding recidivism by sex offenders. App. Br. At 38-39. Botner's arguments go to the weight rather than the admissibility of this evidence, and the trial court did not abuse its discretion in permitting the testimony.

Pedophilia is a disorder that is characterized by recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children that last for a period of at least six months. 3 RP at 433-437; Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) at 571-2. Further, the person must have either acted on these sexual urges, or the sexual urges or fantasies must have caused marked distress or interpersonal difficulty for the person. *Id.* The final requirement is that the person being diagnosed is at least 16 years old and at least five years older than the children involved in the other criteria. *Id.*

At trial, Dr. Hoberman testified at length regarding the basis of his opinion that Botner suffered from pedophilia. 3RP at 433-442. In explaining his diagnosis, he indicated that he had considered both Botner's sexual offending against his eight-year-old cousin, H.B., in 1987-1988, and the fact that, in a subsequent plethysmograph administered in 2000 as part of a treatment program in which Botner was involved when Botner was 27, he had shown greater arousal to minor females between the ages of 10 and 17 than to adult females. 3RP at 433; 437. In addition, he was cross-examined at length both as to why he had assigned the diagnosis of pedophilia despite the fact that Botner was not yet 16 years of age when he had offended against eight-year-old H.B. (*see p. 2, infra*; 4RP at 590-602)

as well as regarding Dr. Hoberman's use of available PPG data upon which he relied, in part, to support that diagnosis. 4RP at 602-617.

In determining whether Botner met criteria for commitment, all of his sexual history was relevant and appropriately considered by the jury. The trial court did not abuse its discretion in permitting a qualified expert with extensive experience in the diagnosis and assessment of persons under the SVP law to refer to and explain his diagnosis.

Botner also argues that the trial court abused its discretion in permitting Dr. Hoberman to refer to a 2007 study upon which he relied in forming his opinion. This study,⁶ published by the Washington State Institute for Public Policy (WSIPP), shows that offenders referred for commitment as SVPs, but against whom the State declines to file an SVP petition, have a high sexual recidivism rate. 4RP 509-11. Such information would clearly be relevant both to Dr. Hoberman in forming his opinion, and to the jury in determining whether Botner is likely to commit predatory acts of sexual violence if he is not confined to a secure facility. RCW 71.09.060(1). Botner's criticisms of the study go to the weight of the evidence, not to the question of whether Dr. Hoberman, as part of a multi-faceted analysis of Botner's risk, reasonably relied upon it.

⁶ Cheryl Milloy, *Six-Year Follow-Up of 135 Released Sex Offenders Recommended for Commitment Under Washington's Sexually Violent Predator Law, Where No Petition Was Filed*, WSIPP (2007) (found at <http://www.wsipp.wa.gov/pub.asp?docid=07-06-1101>).

D. Botner's Due Process Rights Were Not Violated When the Jury Found He Was Likely to Commit Future Acts of Sexual Violence.

Botner argues that indefinite civil commitment without a finding of current dangerousness and dangerousness in the near future violates due process. App. Br. at 49. Botner concedes that this argument was rejected by the Washington State Supreme Court in *In re Moore*, 167 Wn. 2d 113, 127-29, 216 P. 3d 1015 (2009). The argument is controlled by supreme court precedent and must be rejected.

E. There Was Not Cumulative Error.

Botner correctly notes that, while some errors, standing alone, might not constitute grounds for a new trial, the accumulation of such errors may. App. Br. At 48. The doctrine does not apply, however, where, as here, no trial errors occurred. As such, his argument of cumulative error must be rejected.

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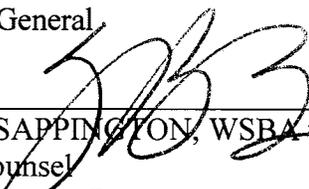
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IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 28th day of March, 2011.

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FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 28417-4-III

WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re the Detention of:

SHAWN BOTNER,

Appellant.

DECLARATION OF
SERVICE

I, Elizabeth Jackson, declare as follows:

On this 20th day of March, 2011, I deposited in the United States mail true and correct cop(ies) of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

Eric Nielsen
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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 20th day of March, 2011, at Seattle, Washington.


ELIZABETH JACKSON

ORIGINAL