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ARGUMENT

I. **RESPONDENT IGNORES THE EXCLUSIVE PROCEDURES OUTLINED IN RCW 71.09.040.**

RCW 71.09 must be strictly construed. *In re Detention of Martin*, 163 Wn.2d 501, 182 P.3d 951 (2008). The statute does not explicitly authorize a trial court to order a pretrial polygraph examination. *See* RCW 71.09.040 (relating to pretrial evaluation). This suggests that trial courts are not empowered to order pretrial polygraph examinations.

By contrast, RCW 71.09.096(4) *does* require adjudicated sexually violent predators to submit to polygraph testing under certain circumstances. The reference to polygraphy in RCW 71.09.096(4) and its absence from RCW 71.09.040 confirms the legislature's intent. *See State v. Costich*, 152 Wn.2d 463 at 475-476, 98 P.3d 795 (2004). Under the maxim *expressio unius est exclusio alterius* (and this Court's duty to strictly construe the statute), RCW 71.09 precludes trial courts from ordering pretrial polygraph testing. *Martin, supra*, at 510.

RCW 71.09.040 is the exclusive source of a trial court's authority to order a pretrial evaluation. *In re Detention of Williams*, 147 Wn.2d 476 at 491, 55 P.3d 597 (2002). Despite this, Respondent relies on CR 26, WAC 388-880, and the standards of the Association for the Treatment of Sexual Abusers. Brief of Respondent, pp. 4-9. In light of *Williams*, this

reliance is misplaced. Accordingly, the Order Compelling Polygraph must be vacated, and the case remanded to the trial court.

II. THE DEPARTMENT EXCEEDED ITS RULEMAKING AUTHORITY BY REQUIRING SOME SVP CANDIDATES TO UNDERGO PRETRIAL POLYGRAPH TESTING.

Mr. Hawkins's "claim of error" is that the trial court should not have ordered him to submit to a polygraph examination. He raised this error below; therefore, RAP 2.5(a) does not bar his appeal, as Respondent suggests. Brief of Respondent, pp. 11-12. Furthermore, by exceeding its statutory authority, the Department (an executive branch agency) has encroached upon the legislature's domain, violating the constitutional separation of powers. *See, e.g., Bauer v. Empl. Sec. Dep't*, 126 Wn. App. 468 at 477, 108 P.3d 1240 (2005). This is a manifest error affecting a constitutional right, and may be raised for the first time on review. RAP 2.5(a)(3). Finally, this Court has discretion to review a claim not raised below. RAP 2.5(a). Review of Mr. Hawkins's argument would conserve judicial resources. If this Court refuses to review the argument, Mr. Hawkins will raise it by motion upon remand, and then appeal any denial, returning the issue to this Court for final resolution. Accordingly, this Court should review the merits of the argument.

Mr. Hawkins does not suggest the WAC requires that "every person being evaluated be subjected to a polygraph test." Brief of

Respondent, p. 13. Instead, Mr. Hawkins argues that the legislature did not authorize the Department to promulgate regulations requiring *any* SVP candidate to submit to a pretrial polygraph. *See* Appellant's Opening Brief, p. 4-5. Respondent's argument on this point is irrelevant. Brief of Respondent, p. 13.

Although administrative agencies possess implied or incidental authority reasonably necessary to carry out powers expressly granted by statute, courts have been reluctant to find implied authority unless "clearly set forth in the statutory language or its broad implication." *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542 at 565, 958 P.2d 962 (1998). Furthermore, RCW 71.09 is a statute that must be strictly, rather than liberally, interpreted. *Martin, supra*. Because of this, the Department's powers should not be interpreted broadly. *See Skagit Surveyors, supra*, at 565 ("[T]he statute carefully limits the boards' authority... Additionally, the statute does not contain the requirement that it be liberally construed.")

The grant of rulemaking authority contained in RCW 71.09.040(4) does not extend to the conduct of SVP evaluations, other than to determine the qualifications of evaluators. The relevant language reads as follows:

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.

In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections.

RCW 71.09.040(4).

The logical interpretation of this section applies the phrase “pursuant to rules developed by the department” to the phrase “deemed to be professionally qualified” and requires the Department to promulgate rules relating to the qualifications of evaluator. Once the qualifications of the evaluator are established by rule, the evaluation process can be directed by the evaluator (within the limits imposed by the statute). An alternate interpretation—apparently adopted by Respondent—applies the phrase “pursuant to rules developed by the department” to the word “examination,” and leaves the Department without explicit authority to establish the professional qualifications of evaluators. This is nonsensical. Under this interpretation, evaluations could only be conducted by those “deemed” qualified, but the Department would not have authority to establish qualifications.

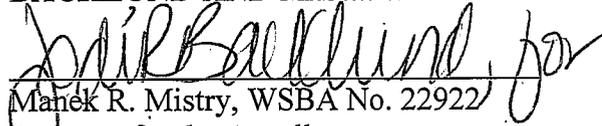
The legislature did not grant the Department authority to promulgate regulations requiring any SVP respondents to submit to polygraphs. WAC 388-088-034 exceeds the Department’s authority under RCW 71.09.040(4), and cannot provide a basis for the trial court’s order in this case.

CONCLUSION

The trial court's Order Compelling Polygraph Examination must
be vacated, and the case remanded.

Respectfully submitted on July 31, 2008.

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CERTIFICATE OF MAILING

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

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

All postage prepaid, on July 31, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 31, 2008.



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