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**STATE OF WASHINGTON
WALLA WALLA COUNTY SUPERIOR COURT**

In re the Detention of:

MAVERICK LANNING,

Respondent.

NO. 10-2-00169-8

PETITIONER'S TRIAL
MEMORANDUM

COMES NOW the Petitioner, State of Washington, by and through Attorney General ROBERT W. FERGUSON and Assistant Attorney General JAMES BUDER and hereby submits its trial memorandum to the Court. Trial by jury of this sexually violent predator (SVP) involuntary civil commitment action is scheduled to begin on October 7, 2014.

I. PROCEDURAL HISTORY

On February 19, 2010, the State filed a petition alleging that the Respondent, Maverick Lanning, is a sexually violent predator as defined in RCW 71.09.020(18). The Court found probable cause to support the petition and Respondent was detained pending trial. Respondent has been totally confined at the Special Commitment Center (SCC) since the State filed the petition in this matter.

II. STATEMENT OF ANTICIPATED FACTS

Respondent was born on June 15, 1980, and is now 34 years old. He has been convicted of at least two sexually violent offenses as that term is defined in RCW 71.09.020(17). Specifically, on or about December 11, 1995, in Walla Walla County Superior Court, Cause No. 95-8-00150-8, Respondent was convicted of Child Molestation in the

1 First Degree, in violation of RCW 9A.44.083. Also, on or about September 6, 1996, in
2 Walla Walla County Superior Court, Cause No. 96-8-00165-4, Respondent was convicted of
3 Child Molestation in the First Degree, in violation of RCW 9A.44.083.

4 The State intends to call approximately twelve witnesses during its case-in-chief via
5 live testimony, video deposition, or read deposition:

6 **A. Maverick Lanning**

7 The State intends to present the testimony of Respondent. He will testify to the facts
8 and circumstances surrounding the commission of his various offenses, violations, and
9 infractions. He will also testify about topics, including his personal history, current sexual
10 arousal, plans for unconditional release, and any sex offender treatment he has completed to
11 date.

12 **B. S.L. (minor victim)**

13 S.L. was a victim involved in Respondent's 1995 and 1996 convictions for Child
14 Molestation in the First Degree. She will testify as to her relationship, observations, and
15 interactions with Respondent. She will also testify to the facts and circumstances of the
16 offenses committed by Respondent to which she was a victim.

17 **C. M. M. (minor victim)**

18 M.M. was a victim involved in a Communicating with a Minor for Immoral Purposes
19 conviction Respondent received in 2006. She will testify as to her relationship, observations,
20 and interactions with Respondent. She will also testify to the facts and circumstances of the
21 offenses committed by Respondent that she observed and to which she was a victim.

22 **D. Kelly Van Buren**

23 Ms. Van Buren is an employee of the Washington State Juvenile Rehabilitation
24 Administration (JRA). She worked for JRA during the years 1998-2001, when Respondent
25 was under JRA supervision. She served as Respondent's Juvenile Parole Officer during this
26 time. Ms. Van Buren will testify as to her supervision, observations, and interactions with or

1 concerning the Respondent. She will also testify as to communications with the Court and
2 other professionals involved with Respondent's case that impacted her supervision of
3 Respondent.

4 **E. Kevin Vogeler**

5 Mr. Vogeler is an employee of the Washington State Department of Corrections
6 (DOC). He worked for DOC during the years 2003-2005, when Respondent was under
7 community custody for a Failure to Register as a Sex Offender conviction. He served as
8 Respondent's Community Custody Officer during this time. Mr. Vogeler will testify as to his
9 supervision, observations, and interactions with or concerning the Respondent. He will also
10 testify as to communications with the Court and other professionals involved with
11 Respondent's case that impacted her supervision of Respondent.

12 **F. DOC Custodian**

13 An individual representing DOC will be called to testify as to the authenticity of certain
14 DOC records the State intends to offer as evidence at trial.

15 **G. Richard Peregrin**

16 Mr. Peregrin is a professional polygrapher. He will testify as to admissions and
17 statements Mr. Lanning made and observations he had during an April 1997 examination he
18 conducted. Mr. Peregrin will not be testifying as to the results from the polygraph
19 examination.

20 **H. Roy Massey**

21 Mr. Massey was a DOC employee who conducted a Presentence Investigation of
22 Respondent pursuant to a 2006 conviction for Communicating with a Minor for Immoral
23 Purposes. He will testify as to his investigation, observations, and interactions with or
24 concerning the Respondent.

1 **I. Dr. John Hupka**

2 Dr. Hupka was the psychologist hired by the Washington State End of Sentence
3 Review Committee (ESRC) to conduct a sexually violent predator evaluation of Mr. Lanning,
4 pursuant to RCW 71.09.025. While he formulated and rendered opinions for purposes of his
5 evaluation, Dr. Hupka's testimony at trial will be limited to factual matters. Dr. Hupka will
6 testify as to his observations of and interactions with Respondent for the 2009 evaluation he
7 authored for ESRC. Dr. Hupka's testimony will be presented via videotaped deposition.

8 **J. Scott Jones**

9 Mr. Jones is a treatment provider at the Special Commitment Center (SCC), where the
10 Respondent is currently housed. Mr. Jones has served as one of the Respondent's treatment
11 advisors at SCC. He will testify as to his observations of and interactions with Respondent at
12 the SCC.

13 **K. Christine Gomes**

14 Ms. Gomes is a treatment provider at the Special Commitment Center (SCC), where the
15 Respondent is currently housed. Ms. Gomes has served as one of the Respondent's treatment
16 advisors at SCC. She will testify as to his observations of and interactions with Respondent at
17 the SCC.

18 **L. Henry Richards, Ph.D.**

19 Dr. Henry Richards is the State's expert forensic psychologist in this matter. He
20 evaluated Mr. Lanning to determine whether Mr. Lanning appears to meet the statutory
21 definition of an SVP. Dr. Richards is a licensed psychologist who specializes in the evaluation
22 of sex offenders. He is familiar with RCW 71.09, the Washington State SVP civil commitment
23 statute. He has conducted multiple SVP evaluations in Washington, and has testified as an
24 expert witness in SVP matters. Dr. Richards is also a former superintendent of the SCC, and
25 has very unique and specialized experience with the SVP population.
26

1 Based on his evaluation of the Respondent, Dr. Richards will testify that, in his
2 professional opinion, Respondent meets the statutory criteria for civil commitment as a
3 sexually violent predator. Specifically, Respondent has been convicted of a crime of sexual
4 violence, and suffers from a mental abnormality or personality disorder which make him likely
5 to engage in predatory acts of sexual violence if not confined in a secure facility.

6 Dr. Richards diagnosed Respondent with several mental disorders. Dr. Richards made
7 each of these diagnoses using criteria found in the Diagnostic and Statistical Manual of Mental
8 Disorders, Fifth Edition (DSM-V). These disorders include: (1) Pedophilic Disorder;
9 (2) Other Specified Paraphilic Disorder (OSPD); (3) Borderline Personality Disorder;
10 (4) Antisocial Personality Disorder (ASPD); (5) Cyclothymic Disorder; and (6) Substance use
11 disorders involving amphetamines and cannabis.

12 Pedophilic Disorder involves a deviant sexual arousal to prepubescent children. Mr.
13 Lanning's OSPD is characterized by an arousal to developmentally disabled females, with
14 algolagnic (coercive) arousal. Borderline Personality Disorder involves profound instability in
15 interpersonal relationships; and, for Mr. Lanning, incorporates several narcissistic personality
16 features. ASPD is characterized by a disregard for rules and the rights of others; and, in Mr.
17 Lanning's case, involves a high degree of psychopathic traits. Cyclothymic disorder is a mood
18 disorder.

19 Dr. Richards believes that these conditions constitute a mental abnormality for
20 Respondent. This condition: (1) meets the statutory definition of mental abnormality;
21 (2) causes Respondent to have serious difficulty controlling his sexually violent behavior; and
22 (3) makes him likely to engage in predatory acts of sexual violence if not confined to a secure
23 facility.

24 Dr. Richards' risk assessment of Mr. Lanning involved an approach generally accepted
25 in the field of SVP forensic evaluators. This risk assessment includes consideration of
26 actuarial instruments, dynamic risk factors, the diagnostic profile, and factors associated with

1 mitigated risk for reoffense.

2 The actuarial instruments used by Dr. Richards to assess Mr. Lanning’s likelihood of
3 recidivism are called the Static-99R and the Static-2002R. These instruments are all
4 constructed in the same general manner. Groups of sex offenders are studied to determine
5 which reoffended after their release from custody. Using statistics, the factors most associated
6 with an increased risk to reoffend are identified and weighted. The instruments allow persons
7 such as Dr. Richards to determine which group of offenders in each study Mr. Lanning most
8 closely resembles, and the recidivism rate for that group.

9 In addition to the actuarial risk assessment tools, Dr. Richards assessed Respondent’s
10 risk by analyzing empirically-derived dynamic risk factors. Dynamic factors, unlike static
11 factors, have the capacity to change over time and are addressed in sex offender treatment.
12 Therefore use of these factors allows an assessor, such as Dr. Richards, to evaluate
13 Mr. Lanning’s current risk. To assess Mr. Lanning’s dynamic risk, Dr. Richards employed
14 several structured instruments, including the PCL-R, which measures an individual’s
15 psychopathy, and the Stable 2007, which is a list of dynamic factors greatly correlated with
16 increased recidivism risk.

17 Dr. Richards also considered factors that can mitigate risk, including Mr. Lanning’s
18 age, his health, his participation in sex offender treatment, and release plans. These factors,
19 combined with the dynamic risk assessment, analysis of Mr. Lanning’s mental health, and the
20 actuarial data, have led Dr. Richards to conclude that Mr. Lanning’s risk of committing a
21 predatory act of sexual violence unless he is confined in a secure facility is greater than the
22 statutory threshold of “more likely than not” to commit a predatory act of sexual violence if
23 unconditionally released.

1 **III. LEGAL AND EVIDENTIARY ISSUES**

2 **A. Requisites of Commitment as a Sexually Violent Predator**

3 In order to involuntarily civilly commit Respondent under RCW 71.09, the State must
4 prove beyond a reasonable doubt that he is a sexually violent predator. RCW 71.09.060(1).
5 The term “sexually violent predator” is defined in RCW 71.09.020(18). According to that
6 definition, and a decision of the Washington Supreme Court, the Respondent must be civilly
7 committed if the State proves beyond a reasonable doubt that:

- 8 1) The Respondent has been convicted of or charged with a crime of
9 sexual violence; and
- 10 2) The Respondent suffers from a mental abnormality or personality
11 disorder which causes him serious difficulty controlling his dangerous
12 behavior; and
- 13 3) That such mental abnormality or personality disorder makes the
14 Respondent likely to engage in predatory acts of sexual violence if not
15 confined in a secure facility.

16 RCW 71.09.020(18); *In re Detention of Thorell*, 149 Wn.2d 724, 745, fn. 8; 72 P.3d 708
17 (2003).

18 **1. SVP Definitions**

19 Several terms in the definition of sexually violent predator are themselves further
20 defined by statute. The list of those crimes that constitute “crimes of sexual violence” are
21 found at RCW 71.09.020(17). The term “mental abnormality” is defined as a “congenital or
22 acquired condition affecting the emotional or volitional capacity which predisposes the person
23 to the commission of criminal sexual acts in a degree constituting such person a menace to the
24 health and safety of others.” RCW 71.09.020(8).

25 The term “personality disorder” is defined as “an enduring pattern of inner experience
26 and behavior that deviates markedly from the expectations of the individual's culture, is
pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and
leads to distress or impairment.” RCW 71.09.020(9).

The degree to which a person must be “likely” to reoffend requires the State to prove

1 that Respondent “more probably than not will engage in such acts if released unconditionally
2 from detention” in the SVP action. RCW 71.09.020(7). Those future acts must be
3 “predatory.” That is, they must be acts directed towards strangers, persons with whom a
4 relationship has been established or promoted for the primary purpose of victimization, or
5 persons of casual acquaintance with whom no substantial personal relationship exists.
6 RCW 71.09.020(10).

7 **2. Serious Difficulty Controlling Behavior**

8 In *Thorell*, the Washington State Supreme Court (“WSSC”) specifically rejected
9 appellants’ contention that the U.S. Supreme Court in *Kansas v. Crane*, 543 U.S. 407,
10 122 S. Ct. 867 (2002), created a new element, necessitating a separate finding of “serious
11 difficulty in controlling behavior.” *Thorell*, 149 Wn.2d at 737-738. The WSSC held that
12 *Crane* required only that the State demonstrate a link between the mental disorder and an
13 alleged SVP’s ability to control his behavior. *Id.* As such, serious difficulty controlling
14 behavior is added to the language in the second element in SVP cases, which becomes:

15 “Respondent suffers from a mental abnormality or personality disorder *which causes*
16 *him serious difficulty controlling his behavior.*”

17 As noted above, in *Thorell*, the WSSC, in analyzing *Kansas v. Crane*, determined that
18 the State must provide some evidence that an alleged SVP has serious difficulty controlling his
19 behavior. *Thorell*, 149 Wn.2d at 737. The Court made clear however that serious difficulty
20 controlling behavior does not mean a person lacks all control:

21 Applying the United States Supreme Court’s reasoning to the Washington
22 SVPA, we hold that proof that a person facing commitment under chapter 71.09
23 RCW lacks behavioral control is not a new element of the SVP commitment
24 and a jury need not make a separate finding regarding ‘lack of control.’
25 However, the jury’s finding that an SVP suffers from a mental illness, defined
26 under our statute as a ‘mental abnormality’ or ‘personality disorder,’ coupled
with the person’s history of sexually predatory acts, must support the conclusion
that the person has serious difficulty controlling behavior, although *this*

1 *evidence need not rise to the level of demonstrating the person is completely*
2 *unable to control his or her behavior.*

3 *Id.* at 742 (emphasis added).

4 As the U.S. Supreme Court acknowledged in *Crane*, even the most severely mentally ill
5 individuals retain some ability to control their behavior. *Crane*, 543 U.S. at 412. “The word
6 ‘difficult’ indicates that the lack of control to which this Court referred was not absolute.”
7 *Id.* at 411. “Insistence upon absolute lack of control would risk barring the civil commitment
8 of highly dangerous persons suffering severe mental abnormalities.” *Id.* at 412. Thus, the
9 State will ask the Court in pretrial motions to preclude any argument in this case that serious
10 difficulty controlling behavior means a person lacks all control of their behavior, as this
11 standard is a clear misstatement of the law set forth in *Thorell* and *Crane*.

12 **B. An SVP Trial is Civil in Nature and Criminal Rights Do Not Apply**

13 While the State has the burden of proving that Lanning is a sexually violent predator
14 beyond a reasonable doubt, Washington’s sexually violent predator statute is civil in nature.
15 *In re Personal Restrain of Young* 122 Wn.2d 1, 23, 857 P.2d 989 (1993). As such, courts
16 have determined that most criminal protections, other than those set forth in RCW 71.09, do
17 not apply. *In re Detention of Petersen*, 138 Wn.2d 70, 91, 980 P.2d 1204 (1999). For
18 example, Lanning does not have a Fifth Amendment right against self-incrimination in an
19 SVP case. *Young*, 122 Wn.2d at 23. Lanning does not have a Sixth Amendment right to
20 confront witnesses or to be present at a deposition. *In re Detention of Stout*, 159 Wn.2d 357,
21 374, 150 P.3d 86 (2007). However, the court’s statutory contempt authority set forth in
22 RCW 7.21 *et seq.* governs in SVP cases. *In re Detention of Young*, 163 Wn.2d 684, 693, 185
23 P.3d 1180 (2008).

24 **C. Testimony of Lanning’s Prior Sexual History is Relevant and Admissible**

25 The State intends to present testimony relating to Lanning’s sexual history, including
26 the testimony of some of Lanning’s victims. Testimony of Lanning’s sexual history, including
by prior victims, is an integral part of the State’s proof in SVP cases, and the WSSC has

1 repeatedly recognized the importance of such evidence and held it admissible in SVP cases.
2 *Young, supra*, 122 Wn.2d 1.

3 “In assessing whether an individual is a sexually violent predator, prior sexual history is
4 highly probative of his or her propensity for future violence.” *Young*, 122 Wn.2d at 53.
5 In *Young*, the trial court permitted Young’s victims to testify about the facts surrounding
6 Young’s sexual assault of them. The trial court overruled Young’s objection that such
7 evidence was irrelevant and unfairly prejudicial. On appeal, the WSSC held that testimony by
8 Young’s victims regarding the sexual assaults perpetrated by him was properly admitted.
9 *Id.* at 53. The Court reasoned that, “the manner in which the previous crimes were committed
10 has some bearing on the motivations and mental states of [Young], and is pertinent to the
11 ultimate question here.” *Id.*

12 The holding in *Young* was later reaffirmed in *In re Detention of Turay*, 139 Wn.2d 379,
13 986 P.2d 790 (1999). In *Turay*, the trial court refused to order the State to accept Turay’s offer
14 to stipulate to his convictions and preclude his victims from testifying. 139 Wn.2d at 400.
15 Instead, the trial court permitted Turay’s victims to testify about the facts of the offenses. *Id.*

16 The WSSC held that Turay’s victims were properly permitted to testify. *Id.* at 402.
17 The Court rejected Turay’s claim that such testimony was unfairly prejudicial and prohibited
18 by ER 403. *Id.* at 400-02. In doing so, the Court focused on the highly probative nature of the
19 evidence and the materiality of the issues which such evidence illuminated. *Id.* at 401. The
20 WSSC held that prior sexual history is admissible to assist the trier-of-fact in assessing the
21 mental state of an alleged SVP, the nature of his sexual deviancy, and the likelihood that he
22 will commit a crime involving sexual violence in the future. *Id.* As such, the State will offer
23 the testimony of Lanning’s victims, as well as testimony relating to his sexual history.
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1 **D. Experts in SVP Cases May Testify About the Factual Bases of Their Opinions So**
2 **Long as Those Facts are of a Type Reasonably Relied Upon by Other Experts in**
3 **the Field**

4 The State's expert witness, Dr. Richards, may relate to the jury otherwise inadmissible
5 evidence in the course of explaining to the jury the factual bases of his various opinions. This
6 practice is expressly permitted by the evidence rules and appellate authority and should be
7 permitted after a cautionary instruction is given to the jury.

8 The factual bases of an expert's opinion may be composed of information which is
9 either: 1) In the trial record, or 2) not in the trial record, but of a type reasonably relied upon
10 by other experts in the pertinent field in rendering opinions on the subject matter at issue.
11 ER 703¹; *Riccobono v. Pierce County*, 92 Wn. App. 254, 267, 966 P.2d 327 (1998).
12 The provision of ER 703 which permits an expert to rely upon information provided to him
13 prior to trial, and which is not in the trial record, was designed to bring courtroom practice
14 into line with the practice of the experts themselves when they are not in court.
15 *Riccobono*, 92 Wn. App. at 267-68 (citing the Federal Advisory Committee comments on the
16 identical federal rule, FRE 703).

17 ER 705 provides that an expert may give the reasons underlying his or her opinion.
18 ER 705, when read together with ER 703, permits the "admission of otherwise hearsay
19 evidence and inadmissible facts for the purpose of showing the basis of the expert's opinion."
20 *Group Health Co-op. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 399,
21 722 P.2d 787 (1986). In this situation, of course, the extra-record and sometimes inadmissible
22 evidence is not substantive evidence in the case, but is admitted for the limited purpose of
23 explaining the expert's opinion. The State proposes that the following limiting instruction be
24 read at the outset of all experts' discussion of the factual bases of their respective opinions:

25 ¹ ER 703 provides "[t]he facts or data in the particular case upon which an expert bases an opinion or
26 inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably
relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data
need not be admissible in evidence."

1 Generally, witnesses testify only to things they observe. However,
2 some witnesses are permitted to give their opinions in addition to their
3 observations. In order to assist you in evaluating an opinion, a witness may be
4 allowed to give the basis for the opinion. In some circumstances, testimony
5 about the basis for an opinion is not appropriate for you to consider for other
6 purposes. In that instance, I will call to your attention the limited purpose for
7 which the evidence may properly be considered.

8 (Name of witness) is about to testify regarding the factual bases of
9 his/his opinions. You may consider this testimony only in deciding what
10 credibility and weight should be given to the opinions of (name of witness).
11 You may not consider it as evidence that the information relied upon by the
12 witness is true or that the events described actually occurred.

13 WPI 365.03 (modified).

14 The Washington State Supreme Court has upheld the admission of this type of
15 testimony. *In re Detention of Marshall*, 156 Wn.2d 150, 125 P.2d 111 (2005). In *Marshall*,
16 the State's expert testified to her opinions regarding Marshall and provided the factual bases
17 of those opinions, which included otherwise inadmissible hearsay. *Id.* at 162. On appeal,
18 Marshall argued this was error.

19 The Supreme Court rejected Marshall's claim. In doing so, the court noted that
20 although the evidence rules do not provide carte blanche for an expert to relate all
21 inadmissible evidence to the jury in the court of his or her testimony, "the trial court may
22 allow the admission of otherwise hearsay evidence and inadmissible facts for the purpose of
23 showing the basis of the expert's opinion." *Id.*, quoting, *Group Health Co-op. of Puget
24 Sound, Inc. v. Dept. of Revenue*, 106 Wn.2d 391, 399, 722 P.2d 787 (1986). The court
25 concluded, "we find no error in allowing [the expert witness] to relate otherwise inadmissible
26 hearsay to explain the basis for his expert opinion." *Id.* at 163.

E. An Expert May Testify About Opinions That Embrace Ultimate Issues to be Decided by the Trier of Fact

An expert in an SVP case cannot opine that an individual meets the definition of a sexually violent predator. *In re Detention of Aqui*, 84 Wn. App. 88, 100, 929 P.2d 436 (1996). The State does not intend to elicit testimony from Dr. Richards that Mr. Lanning is a sexually violent predator and will object if Lanning's expert testifies that Lanning is *not* a sexually

1 violent predator.

2 However, the State does intend to elicit testimony from Dr. Richards that Lanning
3 suffers from a mental abnormality and that because of that mental abnormality, he is more
4 likely than not to commit predatory acts of sexual violence unless he is confined in a secure
5 facility. Such testimony, although it touches on ultimate issues of fact to be determined by the
6 fact-finder, is admissible pursuant to ER 704, which provides:

7 Testimony in the form of an opinion or inferences otherwise admissible is not
8 objectionable because it embraces an ultimate issue to be decided by the trier of
9 fact.

10 ER 704. Testimony on these issues has been endorsed by Washington appellate courts.
11 In *In re Detention of Bedker*, 134 Wn. App. 775, 777, 146 P.3d 442 (2006), an SVP case,
12 Bedker argued that the trial court erred in permitting the State’s expert to testify that he suffers
13 from the Pedophilia, which the expert opined was a mental abnormality. *Bedker*,
14 134 Wn. App. at 777. Bedker claimed that this was an inadmissible legal conclusion that was
15 analogous to an expert opining in a criminal case that the defendant is guilty. *Id.* The Court of
16 Appeals rejected Bedker’s argument and held that this was proper expert opinion testimony.
17 The Court explained that while it would be improper for an expert to express an opinion that
18 Bedker met the statutory definition of an SVP because that is the ultimate legal question in an
19 SVP case, it would not be improper for an expert to opine that Bedker suffered from a mental
20 abnormality within the meaning of the statute because that is a necessary element of the
21 determination that he is a sexual predator. *Id.* at 778.

22 “Expert opinion testimony, however, is not objectionable simply because it ‘embraces
23 an ultimate issue to be decided by the trier of fact.’” *Id.*, quoting ER 704. Expert opinion
24 testimony may encompass ultimate issues of fact if it meets the requirements of ER 702 and
25 ER 403. *Id.* Whether a person suffers from a mental abnormality “is based upon the
26 complicated science of human psychology and is beyond the ken of the average juror.”
Id. at 779. In addition, the Court noted that Bedker was free to challenge the opinion of the

1 State's expert, and did so. Bedker also presented testimony from his own expert that he did not
2 suffer from a mental abnormality. *Id.*

3 Similarly, in *In re Detention of Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999), the
4 WSSC rejected Campbell's challenges to the testimony of the State's expert who testified that
5 Campbell suffered from a paraphilia and opined that the paraphilia made Campbell likely to
6 reoffend if not confined in a secure facility. 139 Wn.2d at 356-58. Campbell questioned the
7 ability of anyone to predict future dangerousness and argued that the expert should have relied
8 on actuarial instruments rather than a clinical risk assessment. *Id.* The WSSC rejected
9 Campbell's claims, holding that his arguments go the weight of the evidence and not its
10 admissibility. *Id.* at 358. Thus, such evidence is routinely admitted in SVP cases.

11 **F. Expert Opinion on Risk Assessment**

12 RCW 71.09 requires that the State prove that Lanning's mental abnormality or
13 personality disorder makes him likely to engage in predatory acts of sexual violence if he is not
14 confined in a secure facility. RCW 71.09.060. Courts have repeatedly held that predictions of
15 future dangerousness are admissible in SVP cases. *Young, supra*, 122 Wn.2d at 56;
16 *Thorell, supra*, 149 Wn.2d at 756; *Campbell, supra*, 139 Wn.2d at 357-58; *In re Detention*
17 *of Post*, 145 Wn. App. 728, 759, 187 P.3d 803 (2008) (In SVP cases, "both sides are properly
18 allowed to present expert witnesses who make risk predictions based on various tests and
19 factors.").

20 Further, the WSSC has repeatedly held that risk assessments based on both clinical and
21 actuarial determinations of future dangerousness are admissible and satisfy the *Frye* standard.
22 *Thorell*, 149 Wn.2d at 156. The *Thorell* Court recognized that a pure actuarial assessment
23 evaluates only a limited set of predictors and does not include important factors not included in
24 actuarial measures. *Id.* at 753. Additionally, the *Thorell* Court acknowledged that evaluators
25 often use actuarial instruments to "anchor" their risk assessments in SVP cases. *Id.* at 754.
26 The WSSC noted in *Thorell* that they had previously rejected arguments that an expert was

1 required to rely solely on an actuarial assessment for predictions of future dangerousness,
2 finding that such arguments go to the weight of the evidence not its admissibility. *Id.* at 755.

3 Actuarial risk assessment involves the use of actuarial tools that incorporate statistical
4 analysis to determine the relative weight to be given to various risk factors empirically
5 associated with sexual and violent recidivism. Some commonly used actuarial instruments
6 used in SVP cases include the Static-99R and Static-2002R. These actuarial instruments
7 consist of numerous items, each of which has been linked through extensive research to sexual
8 or violent recidivism. The evaluator must consider the entire record to determine how to score
9 an individual on each item. For example, an individual receives points based on the number of
10 sexual convictions he has had, whether he has a male victim or a stranger victim. To ensure
11 consistent scoring, the developers of each instrument have published coding rules to explain
12 how each item should be scored – for example, the meaning of “stranger” victim. The expert
13 then adds the points to reach a total score. The total score is associated with empirical data
14 identifying the offender’s statistical risk of reoffense, including a risk category (e.g. low,
15 moderate, or high), an absolute risk estimate and relative risk compared to other offenders
16 studied.

17 It is critical to note that actuarial instruments do not tell the evaluator that the person
18 being assessed will, in fact, reoffend. Rather, actuarial instruments tell the evaluator the
19 percentage of individuals who were charged or convicted of a new offense in the group of
20 offenders that scored the same as the person being assessed. In other words, it is a group risk
21 estimate, not an estimate of the likelihood that the individual being assessed will be charged or
22 convicted of a new offense.

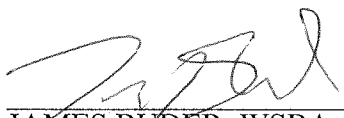
23 A “guided” or “structured” clinical assessment incorporates risk factors not included in
24 actuarial instruments. As stated in *Thorell*, while actuarial instruments typically “anchor” an
25 evaluator’s risk assessment, evaluators consider risk factors outside of actuarial tools, as well.
26 Because actuarial instruments are limited to a specific set of “static” or unchanging risk factors,

1 evaluators often consider “dynamic” or changeable risk factors, “protective” or mitigating
2 factors, and other more individualized clinical factors. Like actuarials, there are a variety of
3 instruments that include empirically-studied dynamic risk factors, such as sexual
4 preoccupation, sexual interest in children, impulsiveness, and lack of cooperation with
5 supervision. Protective factors include empirically-studied factors, such as the amount of time
6 an individual was in the community between sexual offenses, having less than fifteen years left
7 at risk due to age or health status, and completion of a sex offender treatment program.
8 Clinical factors include an assessment of how an individual’s mental health status and
9 diagnostic profile impacts their risk.

10 Dr. Richards conducted a comprehensive risk assessment in this case, relying in part
11 upon actuarial tools, dynamic risk factors, protective factors, as well as Lanning’s clinical
12 status in determining whether Lanning is likely to engage in predatory acts of sexual violence
13 if he is not confined in a secure facility. The State will elicit testimony from Dr. Richards that,
14 after considering all of this information in his risk assessment, it is his opinion that Lanning is
15 likely to reoffend if not confined in a secure facility.

16
17 DATED this 6th day of October, 2014.

18 ROBERT W. FERGUSON
19 Attorney General

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22 _____
23 JAMES BUDER, WSBA #36659
24 Assistant Attorney General
25 Attorney for Petitioner
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**STATE OF WASHINGTON
WALLA WALLA COUNTY SUPERIOR COURT**

In re the Detention of:

NO. 10-2-00169-8

MAVERICK LANNING,

DECLARATION OF SERVICE

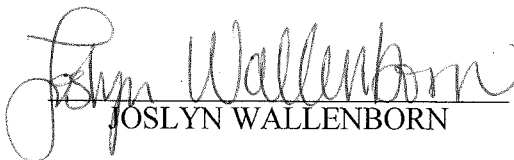
Respondent.

On the 10th day of October, 2014, I sent via electronic mail, true and correct cop(ies) of Petitioner's Trial Memorandum, Juror Questionnaire and Declaration of Service, addressed as follows:

ROBERT THOMPSON AND PETER CONNICK
RTHOMPSON@CLEARWIRE.NET
PETERCONNICK@GMAIL.COM

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

DATED this 10th day of October, 2014, at Seattle, Washington.


JOSLYN WALLENBORN